IN THE COURT OF APPEAL OF NEW ZEALAND

CA233/2012
[2013] NZCA 428

BETWEEN	RAYMOND BRUCE SMITH Appellant
AND	FRANCIS THOMAS DOOLEY First Respondent
AND	MOHAMMED SHAHADAT Second Respondent

Hearing: 3 July 2013

Court: O'Regan P, Stevens and Wild JJ

Counsel: P A McKnight and A J Romanos for Appellant
R K P Stewart and J P M Scott for First Respondent
No appearance for Second Respondent

Judgment: 13 September 2013 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The declaration made by the High Court is set aside.

C The first respondent is to pay the appellant's costs for a standard appeal on a band A basis plus usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

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Introduction

[1] The appellant, Raymond Smith, appeals against a judgment of the High Court declaring that he had defamed the first respondent, Francis Dooley. Mr Dooley cross-appeals.

[2] The judgment was delivered by Lang J in the High Court at Greymouth on 26 March 2012.[1] The Judge gave a judgment on costs on 2 July 2012.[2]

[3] Mr Smith applied on 10 July 2012 to adduce further evidence on his appeal. Then, on 3 May 2013, he applied for leave to file a second amended notice of appeal.

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1 *Dooley v Smith* [2012] NZHC 529 [High Court judgment].
2 *Dooley v Smith* [2012] NZHC 1553 [High Court costs judgment].

The latter application caused Mr Dooley also to apply, on 27 May, for leave to adduce further evidence on the appeal.

[4] In a minute issued on 2 July this Court granted the application further to amend the notice of appeal. It advised counsel that the applications to adduce further evidence would be ruled on in the substantive judgment. We give those rulings in [86] (Mr Smith's application) and [71]–[72] (Mr Dooley's application) below.

[5] We have set out the issues on the appeal and cross-appeal in [36]–[37] below. They are best understood if we first outline the background, and detail the events that led to Mr Dooley suing Mr Smith for defamation.

Background

[6] The case arises out of concerns about the leadership of the Development West Coast trust (DWC). The DWC was established in 2001 to manage the investment and expenditure of the $92 million the Government allocated to the West Coast region to foster economic development, after it terminated the logging of native forests on the West Coast.

[7] The DWC is a registered charitable trust. It had and has 12 trustees who elect one of their number chairman. From 2001 Mr Dooley was chairman. The DWC's performance was of obvious and legitimate public interest on the West Coast. From about April 2006 there was public criticism about the DWC's performance, including in letters written to the three West Coast newspapers and in articles published in those newspapers. Mr Smith was a vocal critic of the DWC, and in particular Mr Dooley's leadership. He wrote a number of letters to the newspapers.

[8] Mr Dooley's term as chairman expired on 10 September 2007. In a vote that

day to elect a new chairman six trustees voted in favour of Mr Dooley continuing as chairman and six, including the second respondent, Mohammed Shahadat,[3] voted for Mr Williams to assume the chair. The DWC's chief executive officer (CEO), Michael Trousselot, told trustees that the legal advice he had obtained from the DWC's solicitors was that Mr Dooley should continue in the chair until that 6:6 deadlock was broken. So Mr Dooley remained chairman until after the imminent triennial election of trustees, in which voting closed on 13 October 2007. Messrs Smith and Dooley were both candidates in that election, Mr Smith for the Westland District, Mr Dooley for Buller. In the result, both men were elected and Mr Dooley remained chairman until March 2008.

Events leading to Mr Dooley suing Mr Smith for defamation

[9] On 7 September 2007 Mr Trousselot sent an email to Anake Goodall, Ngāi Tahu's acting chief operating officer. Ngāi Tahu was entitled to appoint one trustee to the DWC. Its appointee was Barry Wilson. Mr Trousselot's email (we will call this "the CEO email") included the following:

> Was going to ring but heard you have a schedule from hell.
>
> As you may have picked up we have a lot of politics and media stuff going on at the moment. I wanted to warn you about watching out for any back door stuff going on with your appointment to DWC. There is a determined clique wanting to overthrow our chair, and gain control and access to the money. – Does that sound familiar?
>
> One of the channels will be to attempt to manage your appointment, so watch out for googlies.
>
> Also interested in your honest opinion about our organisational performance and our Chair and CEO interaction and performance with Ngai tahu.
>
> If you think we are doing OK, our chair could benefit from some outside support at the moment and it would be great if you or Mark felt OK to drop a note to us along these lines.
>
> Appreciate your consideration of my request, I can elaborate if you want to talk.
>
> …

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[3] Mohammed Shahadat was the second defendant in the proceedings in the High Court. The press release he issued, which is set out in part below at [22], was also found to be defamatory of Mr Dooley. Lang J made a declaration that Mr Shahadat was liable to Mr Dooley in defamation in the High Court judgment, above n 1, at [276]. Mr Shahadat has not appealed that judgment and since the High Court judgment was delivered he has been adjudicated bankrupt.

[10] That email got into the hands of John Clayton, one of the six trustees who, on 10 September, had voted against Mr Dooley continuing as chairman of the DWC.

[11] On 11 September Mr Clayton emailed Mr Dooley asking if he could confirm "that the trust CEO has written a letter on behalf of the trust to Ngai Tahu, lobbying for Barry Wilson to be retained as the Ngai Tahu representative on the trust". Mr Clayton copied his email to the other trustees.

[12] After reading that email on 12 September, Mr Dooley telephoned Mr Trousselot who told him he knew nothing of any letter of the type referred to in Mr Clayton's email. Mr Dooley then telephoned Mr Wilson and asked him to inquire whether Ngāi Tahu had received the letter described by Mr Clayton.

[13] Also on 12 September, before he had heard back from Mr Wilson or Ngāi Tahu, Mr Dooley emailed Mr Clayton stating that no such letter had been written. Mr Dooley copied that response to the other trustees, and also to Mr Trousselot.

[14] On 13 September Mr Goodall emailed Mr Wilson advising "Ngāi Tahu has not received a letter from the Trust on this matter". On arriving at work on 13 September, Mr Dooley found a copy of that in his email inbox. At the same time he also found a second email from Mr Clayton stating:

> Just in case there has been a misunderstanding around terminology, I will rephrase the question.
>
> Has the CEO or Chair written to Ngai Tahu about the Ngai Tahu appointee to the trust.
>
> If so, please supply me with a copy.

Again, Mr Clayton copied that email to the other trustees and to Mr Trousselot.

[15] Without inquiring further, Mr Dooley responded to Mr Clayton by email advising "No such letter has been written".

[16] Later on 13 September, Mr Clayton sent Mr Dooley a third email requesting that he "please double check with Mike [Trousselot], with regard to letters dated the 7th Sept, and advise".

[17] On 14 September Mr Dooley responded to Mr Clayton quoting what Mr Goodall had said in his response of 13 September.

[18] On 16 September Mr Clayton emailed Mr Dooley for a fourth time:

> Frank [Dooley]
>
> I have not asked if the letter was received by Mr Goodall. I have asked for a copy of the letter sent to Ngai Tahu about the Ngai Tahu representation on the Trust, written on Trust letter head, signed by Mike [Trousselot], dated 7th Sept 2007.
>
> Thanks
>
> John [Clayton]

[19] Without reverting to either Mr Trousselot or Mr Goodall, Mr Dooley responded later the same day:

> John [Clayton]
>
> You seem to know more than I on this matter. I have asked both the CEO and Ngai Tahu and provided you with their responses. I'm sorry but I can do no more.
>
> Further, in respect of Barry Wilson's reappointment the letter from Ngai Tahu is dated 6/09 so I cannot see the point of your enquiries. It is also standard practice for most appointing organisations to consult when carrying out performance reviews. Pray tell me what I am missing.
>
> Frank [Dooley]

[20] On or about 28 September Mr Clayton discussed the emails referred to in [11]–[19] above with Mr Shahadat, another of the DWC trustees opposed to Mr Dooley continuing as chairman. Following that discussion Mr Clayton sent Mr Shahadat a copy of the CEO email.

[21] On the morning of 1 October Mr Dooley was in Greymouth, where he was to chair a meeting of the DWC trustees commencing at 11 am. Shortly before the meeting he was telephoned by Mr Bromley, a reporter with the *Greymouth Star*.

Mr Bromley told Mr Dooley that Mr Shahadat had forwarded a press release to the newspaper and began to ask Mr Dooley some questions arising from that. Mr Dooley said he would come across the road to the *Greymouth Star*'s offices to continue the discussion. He did that, and the newspaper's editor, Mr Madgwick, joined the discussion. In the course of the ensuing interview Mr Bromley showed Mr Dooley Mr Shahadat's press release and also a copy of the CEO email. They sought Mr Dooley's comments on both documents.

[22] We need only set out this part of Mr Shahadat's press release:

> I have now received information that there has been interference in the Ngai Tahu trustee appointment process to the Development Westcoast (DWC).
>
> A trustee has for some time been requesting a copy of any correspondence, from the Chair of DWC, in respect of this matter and the Chair has advised that no such correspondence existed.
>
> I have now in my possession an email which casts severe doubts on the integrity of the Chair.
>
> …
>
> I am disappointed that the Chair of DWC continues to deny the existence of any correspondence/communication to Ngai Tahu regarding their appointment to DWC, and runs the trust business without full disclosure to the trustees says trustee Mohammed Shahadat.
>
> As a retiring trustee I believe DWC stands at the cutting edge of the future development for the people of West Coast, and I urge the incoming trustees to make openness, transparency and integrity the most important personal qualities of the next chairman.

[23] Following that interview Mr Dooley returned across the road to the DWC's offices and chaired the trustees' meeting. He was late and apologised to those present, who included Mr Shahadat. He explained he had been delayed by the need to comment to the *Greymouth Star* on a press release Mr Shahadat had sent that newspaper. He said nothing more, and the meeting continued.

[24] Also on 1 October, Mr Bromley faxed Mr Smith copies of Mr Shahadat's press release and the CEO email seeking his comment. It is not clear whether Mr Bromley did that before or after he and Mr Madgwick interviewed Mr Dooley before the DWC trustees' meeting that morning.

[25] After receiving those documents Mr Smith telephoned Mr Shahadat who assured Mr Smith that the facts stated in the press release were accurate. Evidence of that telephone check by Mr Smith with Mr Shahadat was the only evidence before Lang J. Mr Smith then phoned Mr Bromley and made the comments set out at [27] below.

[26] As we noted in [3] above, Mr Smith applied to adduce further evidence in support of his appeal. This evidence was of the following telephone calls he made to Mr Clayton:

Date/time	**Duration**
1 October 2007 at 4.45 pm	28.56 minutes
2 October 2007 at 12.48 pm	24.45 minutes
3 October 2007 at 9.33 am	10.04 minutes
3 October 2007 at 9.46 am	16.59 minutes

In his proposed fresh evidence Mr Smith deposed that he had made these calls to discuss the background to Mr Clayton's request to Mr Dooley for a copy of the CEO email, and to check on the dates and contents of the emails Mr Clayton had sent Mr Dooley. Mr Smith deposed that he had telephoned Mr Bromley following his third telephone call to Mr Clayton, and confirmed that Mr Bromley may use the comments Mr Smith had made to him on 1 October. Mr Smith sought also to adduce evidence from Mr Clayton confirming the timing, duration and subject matter of the telephone calls.

[27] The comments Mr Smith had made to Mr Bromley on 1 October were these:

> *The correspondence amounts to serious interference in the electoral process*
>
> *I find it disturbing that the CEO and Chair denied its existence. Can the (future) trustees have any faith that the CEO or Chair will not be misleading them on matters of importance?*
>
> It is totally unacceptable to have the CEO involved in the political process.
>
> I have never heard of a CEO putting the interests of the Chairman before the interests of the organisation that employs him.
>
> I call for Mr Trousselot to step down from the position [as DWC's CEO] until the issue [can] be independently reviewed.
>
> (Our emphasis.)

It is the two comments that we have emphasised, particularly the second, that Mr Dooley alleged defamed him.

[28] On 3 October the *Greymouth Star* published on its front page an article entitled "Claims fly over trust chief" dealing with the events we have detailed. That article included the comments by Mr Smith set out in the previous paragraph.

[29] Mr Dooley, who lives in Westport, did not see that article. But he did see the same article when it was replicated in the *Westport News* on 4 October. Mr Dooley took immediate umbrage, and contacted the newspaper's owner who told him to take the matter up with Ms Scanlon, the newspaper's chief reporter.

[30] On the morning of 5 October Mr Dooley met Ms Scanlon, and provided her with a handwritten statement setting out his version of events. He provided Ms Scanlon with copies of the email he had received from Mr Clayton on 11 September and that from Mr Goodall on 13 September.

[31] Ms Scanlon sent a copy of Mr Dooley's statement to Mr Smith and invited his response. Mr Smith responded about 10 minutes later:

> The information in relation to the correspondence between the CEO and Ngai Tahu seems to be public. My concerns remain as stated in the Greystar.

[32] Mr Dooley considered he had been defamed by Mr Smith, Mr Shahadat and by the *Greymouth Star*. He instructed solicitors in November 2007.

[33] Approximately two years later, on 18 September 2009, Mr Dooley commenced a proceeding in the High Court at Greymouth. Mr Smith was the first defendant, Mr Shahadat the second and Greymouth Evening Star Co Ltd the third. The comments by Mr Smith alleged to have been defamatory of Mr Dooley were those set out in [27] above. The statement of claim sought only a declaration that each of the defendants "is liable to the defendant in defamation", together with solicitor and client costs, both pursuant to s 24(1) of the Defamation Act 1992 (the Act).

[34] On 21 July 2010, as part of a settlement with Mr Dooley, the *Greymouth Star* published a front page apology to Mr Dooley concerning its role in implying that he had seen the CEO email before it was shown to him by Mr Bromley in the discussion at the newspaper's office on the morning of 1 October.

[35] On 29 October 2010 Mr Dooley filed an amended statement of claim, restricted to Messrs Smith and Shahadat as defendants. This added a second cause of action against Mr Smith alleging that the comment he had made to Ms Scanlon on 5 October 2007 was defamatory. The relief sought was unchanged.

Issues

On Mr Smith's appeal

[36] The five issues are whether Lang J erred in:

(a) *Meanings*: Finding Mr Smith's comments had the meanings alleged?

(b) *Truth*: Holding that Mr Smith did not have the defence of truth under s 8(3)(b) of the Act?

(c) *Qualified privilege*: Finding that ill will and/or recklessness on Mr Smith's part defeated his defence of qualified privilege?

(d) *Discretion*: Exercising his discretion to grant a declaration under s 24 of the Act?

(e) *Second cause of action*: Holding that Mr Dooley succeeded also on this cause of action?

On Mr Dooley's cross-appeal

[37] There are three, whether the Judge erred in:

(a) *Responsibility*: Holding that Mr Dooley should bear some responsibility for what occurred?

(b) *Factual finding*: Finding that Mr Smith telephoned Mr Shahadat before he made his comments to the *Greymouth Star* on 1 October 2007?

(c) *Costs*: Awarding Mr Dooley only 70 per cent of his solicitor and client costs and apportioning liability for those costs 30 per cent to Mr Smith and 70 per cent to Mr Shahadat, and also in directing that the costs be taxed?

ISSUES ON MR SMITH'S APPEAL

The six alleged meanings

[38] Did the Judge err in finding that Mr Smith's comments had six of the meanings alleged by Mr Dooley? Both parties accept as accurate Lang J's statement of the law as to ascertaining the meanings of words alleged to be defamatory.[4] Essentially, Lang J had to decide whether the words used by Mr Smith would convey to an ordinary reasonable person any of the meaning(s) alleged by Mr Dooley.

[39] Of the seven meanings alleged by Mr Dooley, the Judge held that Mr Smith's comments meant that Mr Dooley:[5]

- was aware of the existence of the CEO's email when replying to the Clayton correspondence;
- should have disclosed the CEO's email when replying to the Clayton correspondence;
- deliberately misled the trustees about the existence of the CEO's email by denying its existence;
- would deliberately mislead trustees in the future;

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4 This is at [97]–[99] of the High Court judgment, above n 1, and adopted the summary of Mr Dooley's counsel in his closing submissions.

5 At [103]–[111].

- is untrustworthy; and

- is dishonest.

[40] These meanings tend to build, each upon the previous one(s), and in rising level of seriousness. It emerged clearly at the hearing before us that the alleged meaning which really stung Mr Dooley was the last – that Mr Dooley is dishonest.

[41] Lang J said this:

> [103] Mr Smith's first statement was that he found it "disturbing" that the CEO and Chair denied the existence of the correspondence. Mr Smith could only find such a denial "disturbing" if Mr Dooley was denying that the email existed when he knew that that was not the case. …

[42] That was the basis on which the Judge found established the further meanings that Mr Dooley had deliberately misled the trustees and would do so in the future, was thus not trustworthy, and was also dishonest. For example, when he came to the last, most damaging, meaning the Judge said this:

> [111] The deliberate misleading of trustees about the existence of the CEO's email must also, in my view, imply that the person responsible for such conduct is not only untrustworthy but is also dishonest.

[43] Thus, the connotation the Judge placed on Mr Smith's use of the word "disturbing" was at the root of what he found were the meanings conveyed by Mr Smith's words. We think the Judge drew more out of the word "disturbing" than was in the word in the context Mr Smith used it.

[44] The first point is: what does "disturbing" actually mean? Mr McKnight pointed out that the dictionary meaning of "disturbing" is simply "causing anxiety; worrying".[6] Mr Stewart is of course correct in submitting that the Judge's concern was properly with the meaning Mr Smith's words would convey to an ordinary person, rather than with precise dictionary meanings.[7] But we do not agree with the

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6 Oxford Dictionaries Online <www.oxforddictionaries.com/definition/english/disturbing>.

7 Citing *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA).

Judge that Mr Smith could only have found Mr Dooley's denial "disturbing" if Mr Dooley knew of the CEO email.

[45] What Mr Smith said in evidence at trial about this is, strictly, irrelevant. However, Mr Stewart referred to it in seeking to uphold this part of the judgment. He submitted that Mr Smith had accepted it can only be "disturbing" for someone to deny the existence of something if they know of it and do not come forward. In fact, the exchange in evidence was this:[8]

> Q It can only be disturbing for someone to deny their existence if they know of it and don't come forward, correct?
>
> A Yes, I agree with that.
>
> Q All right. So it does imply, because you were disturbed that the Chair didn't know of its existence –
>
> A Well –
>
> Q – sorry, did know of its existence.
>
> A *Well, it, ah, if he didn't know, Sir, he should have*.
>
> (Our emphasis.)

[46] Further, Mr Stewart pointed out that Mr Smith accepted he would have altered his statement to Mr Bromley if he had known Mr Dooley did not know of the existence of the CEO email. In fact, what Mr Smith said was that he would have adhered to his comment that "its disturbing the CEO and the Chair have denied its existence", but would have added that "its accept[ed] that the Chair had no knowledge that the email had been [sent] albeit that he'd asked for it".[9] Mr Smith also stated that he would have adhered to his comment that Mr Dooley had misled the trustees because he had, but in an accidental way.

[47] We accept Mr McKnight's submission that Mr Smith's comments conveyed that he was disturbed that Mr Dooley denied the existence of the CEO email when he ought to have known about it or ought to have discovered it and therefore should not have been denying its existence. The context in which Mr Smith made his comments to Mr Bromley was political interference in the forthcoming election of

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8 Notes of Evidence at 209/5–12 [NOE]. In this exchange the Judge was asking the questions.

9 NOE at 221/21–25.

trustees of the DWC. Mr Smith's opening remark was that the correspondence amounted to "serious interference in the electoral process". On any view, the CEO email was an attempt by Mr Trousselot to garner Ngāi Tahu's support for Mr Dooley in the forthcoming election. Mr Smith knew of the CEO email, as did Mr Bromley. Likewise several of the other trustees knew of it. And obviously the DWC's CEO, Mr Trousselot, was well aware of the email – he had sent it. Yet, Mr Dooley, the Chairman of the DWC, repeatedly denied the existence of the email: "No such letter has been written". *That* is the situation Mr Smith found disturbing. We do not agree with the Judge that Mr Smith could only comment that he was disturbed if he was conveying that he thought Mr Dooley knew of the email and was thus falsely denying its existence.

[48] As Mr Dooley alleged in his amended statement of claim, Mr Smith "published" his comments to Mr Bromley.[10] But of course he did so knowing that Mr Bromley would likely use them in a newspaper article. Indeed Mr Smith expressly authorised that use, as we have noted in [26] above. We doubt Mr Dooley would have sued Mr Smith but for the inclusion, in the *Greymouth Star* article, of Mr Smith's comments to Mr Bromley. Lang J did not include the 3 October article published by the *Greymouth Star* in his judgment, perhaps because the newspaper had settled Mr Dooley's defamation claim against it.

[49] There are many defamation cases making the obvious point that words must be considered in their context. For example, well over a century ago Lord Halsbury LC observed: " … it is necessary to take into consideration, not only the actual words used, but the context of the words …".[11] Where, as effectively is the position here, the offending words are in a newspaper article, Mr Smith is entitled to have considered as part of Mr Dooley's case against him, the whole of the article in which the allegedly defamatory comments appear.[12]

[50] We therefore think it important to include the article in this judgment, and have annexed it. When Mr Smith's comments are set in their context in the *Greymouth Star* article, we are reinforced in our view that the meanings the Judge

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10 Amended statement of claim, 29 October 2010, at [36].
11 *Nevill v The Fine Art and General Insurance Company Ltd* [1897] AC 68 (HL) at 72.
12 *Polly Peck (Holdings) Plc v Trelford* [1986] QB 1000 (CA) at 1032 per O'Connor LJ.

placed on those comments are not made out. The concern of Messrs Shahadat and Smith was the interference of the DWC's CEO, Mr Trousselot, in the electoral process, and Mr Dooley's response to that interference. We think it significant that the article, at the outset, records Mr Dooley "standing by his man" once he had been shown the CEO email.

[51] The judgment under appeal also dealt with Mr Dooley's defamation claim against Mr Shahadat, based on the latter's press release which we have set out in part in [22] above. Unlike Mr Smith, Mr Shahadat *did* squarely challenge Mr Dooley's integrity: "I have now in my possession an email which casts severe doubts on the integrity of the Chair". Mr Dooley alleged that Mr Shahadat's comments had the meanings that Mr Dooley was aware of the CEO email; should therefore have disclosed it; deliberately misled the trustees about its existence; was untrustworthy and was dishonest. In addition, Mr Dooley alleged that Mr Shahadat's comments meant that Mr Dooley "is a person of doubtful or no integrity". When dealing with the meaning that "Mr Dooley was aware of the existence of the CEO email when replying to the Clayton correspondence", Lang J said this:[13]

> … The reference in the third paragraph [of Mr Shahadat's press release] to Mr Shahadat now having in his possession an email that "casts severe doubts on the integrity of the Chair" is important. It would suggest to any ordinary person that Mr Dooley has denied the existence of the email when he knew that it did in fact exist. That is the only realistic inference to be drawn from Mr Shahadat's assertion that the email "casts severe doubts" on Mr Dooley's integrity. The existence of the email would only cast severe doubts on Mr Dooley's integrity if he had denied its existence in circumstances where he knew that it existed.

[52] The Judge is dealing in that paragraph with a meaning also attributed to the comments made by Mr Smith.[14] In relation to the meaning conveyed by Mr Shahadat's press release, the Judge expressly states that he is influenced by the aspersion Mr Shahadat cast on Mr Dooley's integrity. Although there is no indication of it in the judgment, we are concerned that Mr Shahadat's express challenging of Mr Dooley's integrity influenced the Judge's assessment of the same alleged meaning of Mr Smith's comments to Mr Bromley.

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13 High Court judgment, above n 1, at [231].

14 This is the first meaning set out in [39] above.

[53] Finally, we note that Mr Smith did not plead that Mr Dooley was aware of the CEO's email. He pleaded that he had no sufficient knowledge about that and thus denied it.[15] Mr Stewart emphasised that pleading point in his closing submissions to the Judge, and emphasised also that Mr Smith had conceded that Mr Dooley did not know of the CEO's email until 1 October 2007. Although the pleading position is of peripheral relevance and force, it is consistent with the meaning we consider was conveyed by Mr Smith's comments.

[54] To summarise, we consider Lang J erred in holding that Mr Smith's comments had six of the meanings alleged by Mr Dooley. In our view, the comments had none of those meanings.

[55] We answer this issue "Yes".

[56] Our decision that the Judge erred in holding that Mr Smith's comments bore all but one of the alleged meanings makes a decision on the remaining issues on the appeal and all the issues on the cross-appeal unnecessary. No defamation can be made out where the words at issue do not carry any defamatory meanings. In case our views on these other issues should become relevant, we express them, albeit very briefly.

The defence of truth

[57] Did the Judge err in holding that the defence of truth under s 8(3)(b) of the Act was not available to Mr Smith? Lang J dismissed Mr Smith's defence of truth in this way:

> [118] All of the pleaded meanings that Mr Dooley has established are underpinned by the proposition that he knew of the existence of the CEO email, and that he denied its existence notwithstanding that knowledge. The fact that the defendants now accept that Mr Dooley was not aware of the existence of the CEO email until 1 October 2007 means that Mr Smith cannot rely on the affirmative defence based on truth.

[58] Section 8 of the Act continues the defence of truth (before the Act known as justification). Section 8(3) provides that a defence of truth shall succeed if:

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[15] Amended statement of defence of the first defendant, 15 November 2010, at [27].

> (a) the defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth.

[59] Had we upheld the meanings Lang J placed on Mr Smith's comments, we would have allowed his appeal on the ground that Mr Smith had made out the defence of truth.

[60] We have already made the point that the sting in the defamation was that Mr Dooley was dishonest, in that he deliberately misled the trustees about the existence of the CEO email.[16]

[61] The true position was that Mr Dooley inadvertently misled the trustees until he became aware of the CEO email during his discussion with the *Greymouth Star* editor and reporter on the morning of 1 October 2007. Having told the trustees, twice, that "no such letter has been written", Mr Dooley should promptly have corrected the position. And he had just that opportunity at the trustees' meeting that started at 11 am, immediately following his interview with Messrs Madgwick and Bromley. He did not correct the position at that meeting. Lang J found that Mr Dooley "did not expressly tell anybody that he had seen the CEO email for the first time at the interview on 1 October 2007 until he gave his written statement to Ms Scanlon on 5 October 2007".[17] Although not mentioned in the judgment, Mr McKnight pointed out that Mr Dooley still did not inform the trustees of the true position at their next meeting on 11 October 2007.

[62] We accept Mr McKnight's submission that the real sting of the defamation was the deliberate misleading of the trustees over the CEO email at *any* time, and that Mr Dooley did deliberately mislead the trustees at and following their meeting on 1 October, in that he did not correct his statement that "no such letter has been written" when he knew it had been. And that conscious misleading went on, at least until 5 October.

[63] Mr Stewart argued that Mr Smith was now attempting to allege that his comments had a lesser meaning not pleaded by Mr Dooley, and to plead truth to that

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16 Above at [40].

17 High Court judgment, above n 1, at [69].

lesser meaning. He referred to cases establishing that the defence of truth cannot be used in that way.[18]

[64] Mr Stewart developed this argument by submitting that alleging that Mr Dooley had deliberately misinformed the trustees in relation to his "new found knowledge" that the CEO email did exist – by not mentioning it at the meeting on 1 October 2007 – is substantially less serious than implying Mr Dooley had deliberately misled the trustees about the existence of the CEO email by denying its existence, and does not mean the publication taken as a whole was true.

[65] We do not accept Mr Stewart's argument. Only the first two meanings the Judge upheld are qualified by the words "when replying to the Clayton correspondence".[19] As Mr Stewart accepted, it is the third meaning upheld by the Judge that is relevant to Mr Smith's defence of truth.[20] There was deliberate misleading by Mr Dooley on and from 1 October 2007, in that he failed to correct for the trustees his statement "no such letter has been written", when by then he knew it had been. We accept Mr Stewart's submission that it was "substantially less serious" for Mr Dooley to mislead by failing to correct from 1 October 2007 onward, than it would have been had he deliberately misled the trustees up to his meeting at the offices of the *Greymouth Star*, shortly before the trustees' meeting on the morning of 1 October 2007. We reiterate that the sting or real hurt in Mr Smith's comments was deliberate misleading of the trustees by Mr Dooley, knowing the CEO email had been sent. That was the essence of the allegation Lang J found had been made out.

[66] In *Broadcasting Corporation of New Zealand v Crush*, the first of the cases referred to by Mr Stewart, Cooke P delivering this Court's judgment referred to

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[18] *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA) confirmed in *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) and *Simunovich Fisheries Ltd v Television New Zealand Ltd (No 2)* HC Auckland CIV-2004-404-3903, 14 February 2006.

[19] These are the two meanings pleaded in paragraphs 36.2 and 36.3 of Mr Dooley's amended statement of claim of 29 October 2010. See above at [39].

[20] Submissions of first respondent, 26 June 2013:

> 17.2 The relevant meaning pleaded by the first respondent was that the Words, in their natural and ordinary meaning, meant and were understood to mean that the plaintiff "deliberately mislead the trustees about the existence of the CEO Email by denying its existence".

English Court of Appeal decisions and also (with obvious annoyance) to "a sheaf of unreported cases" cited in argument. He then observed of all these cases:[21]

> … we were referred to no statement in any of them going to the length of saying that a defendant may plead a plainly non-defamatory meaning and then prove its truth. Such a course would seem a pointless exercise or to forecast an attempt to divert the jury from the true issues.

[67] Similarly in *Television New Zealand Ltd v Haines* Robertson J, delivering this Court's judgment, stated:[22]

> … It is insufficient for a defendant at this point to suggest that, even though the words are capable of bearing the defamatory meaning complained of, they also bear a lesser meaning, which may be proven to be true. This is for two reasons [which the Court then set out].

[68] That is not the position here. We have upheld Mr McKnight's argument that the meanings upheld by the Judge that really stung Mr Dooley were substantially true. Mr Stewart has pointed to the less hurtful meanings and argued that they were not true. That is to turn the defence of truth upon its head.

[69] In summary, adopting the meanings the Judge upheld, truth was a defence available to Mr Smith as his comments were substantially true.

[70] We answer this issue "Yes".

[71] Mr Dooley's application to adduce further evidence relates to this issue. The evidence sought to be adduced was an affidavit sworn by Mr Trousselot, who deposed that he was on sick leave on 1 October 2007 and was thus not present at the DWC's offices on that day. That evidence responded to the second amended notice of appeal, which alleged Mr Dooley met with Mr Trousselot on 1 October 2007 and confirmed the existence of the CEO email to him. That meeting was alleged to have taken place before Mr Dooley went into the meeting of the DWC trustees that morning. That fact was alleged to be relevant, amongst other matters, to Mr Smith's defence of truth. In response to Mr Dooley's application, Mr Smith cross-applied seeking leave to adduce evidence in the form of affidavits from Mr Shahadat and

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21 *Broadcasting Corporation of New Zealand*, above n 18, at 237.
22 *Television New Zealand Ltd v Haines*, above n 18, at [57].

another trustee, Coraleen White, to the effect that Mr Dooley had met with Mr Trousselot in the latter's office before the trustees' meeting began.

[72] For two reasons, we decline to admit any of this further evidence. First, short of cross-examination, we cannot resolve the sharp conflict between the deponents. Secondly, because Mr Dooley had been shown the CEO email by Messrs Bromley and Madgwick at the *Greymouth Star* earlier on the morning of 1 October 2007, it is anyway unnecessary to resolve the conflict. Nothing would be added by determining whether or not Mr Dooley met with Mr Trousselot concerning the CEO email before the 11 am meeting of trustees. We therefore decline to admit the evidence on Mr Dooley's application and Mr Smith's cross-application.

The defence of qualified privilege: ill will

[73] Did the Judge err in holding that Mr Smith was predominantly motivated by ill will toward Mr Dooley, defeating any defence of qualified privilege that may have been available to Mr Smith? Section 19 of the Act provides:

> **19 Rebuttal of qualified privilege**
>
> (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
>
> (2) Subject to subsection (1) of this section, a defence of qualified privilege shall not fail because the defendant was motivated by malice.

[74] Because of his findings on this and the next issue, Lang J did not need to decide whether the defence of qualified privilege was available to Mr Smith. He noted that this Court in its second judgment in *Lange v Atkinson* (which the Judge termed *Lange (No 2)*, as will we) emphasised the judgment was "limited to those elected or seeking election to Parliament".[23] As the Judge had not heard full argument on the question whether the privilege should be available in the present

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[23] *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at [10] [*Lange (No 2)*], quoting from *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 468.

situation, he rightly left that question undecided. We do likewise, confining our judgment to the issues specifically put to us.

[75] In finding that ill will on Mr Smith's part defeated any defence of qualified privilege that may have been available to Mr Smith, Lang J relied on two aspects of the notice dated 15 December 2009 Mr Dooley had served under ss 19 and 41 of the Act. The first was letters Mr Smith had written to the West Coast newspapers in the period leading up to 1 October 2007; the second the timing of Mr Smith's statements to Mr Bromley.

[76] The Judge set out several of the letters Mr Smith had written to the newspapers. Some of these were stipulated in Mr Dooley's notice, some were not. After setting out the letters the Judge said this:

> [197] Although Mr Smith's letters deal with different subjects and undoubtedly reflect his genuine and honestly held views, I consider that they also show a developing trend of strong personal antipathy towards Mr Dooley. The letters that he wrote on 12 and 17 September 2007 are particularly significant. I have no doubt that by 1 October 2007 Mr Smith held very strong feelings of hostility towards Mr Dooley.

[77] Mr Smith's 17 September letter to the *Westport News* (which was not one of those relied upon by Mr Dooley in his s 41 notice) was in these terms:

> The letter in Thursday's *Westport News* attributed to Frank Dooley is a further unprofessional response from an acting chairman who has had a vote of no confidence from his fellow trustees.
>
> When Frank Dooley called me six years ago to seek my help in promoting him to Westland Trustees I did so believing he would be good for the Coast.
>
> His actions in the last 18 months based on the divide and rule strategy has made the trust dysfunctional and it is clear my decision to support him was wrong.
>
> To clarify some points raised in his response to John Clayton who has represented Buller now for close to 20 years and a person I have immense respect for.
>
> I have been a critic of the Trust (illegible) since the 7th of May 07.
>
> Yes I have been privy to a lot of Trust information none of which has come from Shahadat.
>
> It is the information I am privy to which greatly concerns me.

> Finally as a person who has lived half his life in the Buller I will in the event of being elected in Westland not be involved in any way in anything that disadvantages one part of the Coast over another.

[78] We do not agree with the Judge's assessment that "strong personal antipathy towards Mr Dooley" emerges from that letter. What does is strident criticism of Mr Dooley as Chairman of the DWC.

[79] Mr McKnight also pointed out that Mr Stewart, in cross-examining Mr Smith, had put to him that his "primary motive for … making these statements to the *Greymouth Star* was to increase [his] prospects of getting elected, the current election and decreasing the prospects of [Mr Dooley]". Mr Smith did not accept that.[24] However, Mr McKnight's further point was that it was not put to Mr Smith that he was predominantly motivated by ill will, spite or personal animosity toward Mr Dooley.

[80] On our reading of the notes of evidence that is correct. It was also not put to Mr Smith that the letters on which the Judge based his finding of ill will in fact demonstrated that. Indeed, in opening Mr Dooley's case in the High Court, Mr Stewart accepted that there were governance problems in the DWC at the relevant time. He stated to the Judge:[25]

> By September 2007 DWC was dysfunctional at a governance level. In essence, three of the four trustees appointed by the local authorities and three other elected trustees had become dissatisfied with the way DWC was being governed and managed. DWC effectively became "deadlocked" with six trustees supporting the plaintiff as chairman and management and six trustees openly opposed. The second defendant was one of the trustees that aligned himself with the local authority trustees opposed to the plaintiff.

[81] In summary, we accept Mr McKnight's submission that Mr Smith's comments to Mr Bromley on 1 October were primarily motivated by his concerns about the governance of the DWC, as were his letters to the West Coast newspapers. As we pointed out, the Judge found that motivation to be "undoubtedly … genuinely held".[26] Certainly, Mr Smith may have been motivated by a desire to enhance his own prospects in the forthcoming election, but it was his concerns about the

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[24] NOE at 215/30–216/2.
[25] Plaintiff's opening submissions at [15].
[26] At [198].

governance of the DWC that had caused him to stand. Mr Smith's predominant motivation in making the comments was not ill will, and thus any available defence of qualified privilege would not have been rebutted by virtue of s 19 of the Act.

[82] We answer this issue "Yes".

Improper advantage: recklessness

[83] Did the Judge err in holding that Mr Smith took improper advantage of the occasion of publication in as much as he was reckless in terms of s 19 of the Act?

[84] Lang J began by citing at some length from this Court's judgment in *Lange (No 2)*. The Judge fastened particularly on this Court's explanation for the rationale for s 19: "There is no public interest in allowing defamatory statements to be made irresponsibly – recklessly – under the banner of freedom of expression".[27] This Court then explained that what amounts to a reckless statement will be circumstances dependent, and "may in some circumstances come close to a need for the taking of reasonable care".[28]

[85] In the application mentioned in [3] above, Mr Smith applied to adduce further evidence on this aspect of the appeal. The nub of that evidence is that he made the telephone calls to Mr Clayton detailed in [26] above.

[86] Our decision is to admit that evidence. We do so because Mr Stewart very properly conceded that Mr Dooley had not in his s 41 notice given particulars of recklessness on Mr Smith's part.[29] Mr Stewart pointed out that he had opened to the Judge on recklessness. Notwithstanding that, there is force in Mr McKnight's submission that Mr Smith was not properly, and certainly not formally, put on notice of Mr Dooley's allegation that Mr Smith had made his comments recklessly. It is difficult to gainsay Mr McKnight's submission that proper notice may well have

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27 *Lange (No 2)*, above n 23, at [48].

28 At [48].

29 Section 41 of the Act deals with particulars of ill will. Where a defendant has relied on a defence of qualified privilege, and the plaintiff intends to allege that the defendant was predominantly motivated by ill will or otherwise took improper advantage of the occasion of publication, it requires the plaintiff to serve on the defendant a notice specifying particulars of the facts and circumstances relied on.

caused Mr Smith to check his telephone records, as he did subsequent to the High Court's judgment.

[87] In *Alexander v Clegg* this Court held that recklessness, as a jurisprudential concept, "has the implication of not knowing whether a fact be true or false and not caring. A genuine belief that facts are true may reflect carelessness but not recklessness".[30]

[88] In *Lange (No 2)*, this Court concluded: "In essence the privilege may well be lost if the defendant takes what in all the circumstances can fairly be described as a cavalier approach to the truth of the statement".[31]

[89] Certainly Mr Smith did not view for himself the emails that had passed between Mr Clayton and Mr Dooley, as the Judge considered was necessary. But the further evidence we have admitted on this appeal establishes that Mr Smith discussed the dates and contents of those emails in detail – or certainly at length – with Mr Clayton. Mr Clayton had either sent or received all the relevant emails. He was a trustee known to and respected by Mr Smith. In the light of that evidence, the Judge's finding that Mr Smith was reckless cannot stand. It cannot be said that Mr Smith neither knew nor cared whether Mr Dooley knew of the existence of the CEO email. Nor can Mr Smith's approach be described as "cavalier". Had the Judge heard the further evidence adduced for the first time on this appeal, we are confident he would not have found that Mr Smith had been reckless.

[90] To summarise, we hold that any available defence of qualified privilege would not have been defeated by recklessness on Mr Smith's part.

[91] We answer this issue "Yes". We add that this answer does not indicate error by the Judge on the evidence he heard. Rather, it reflects the fact that the Judge did not hear the evidence adduced to us supporting Mr Smith's claim that he had taken care to check the facts before authorising the *Greymouth Star* to publish his comments.

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30 *Alexander v Clegg* [2004] 3 NZLR 586 (CA) at [68].
31 *Lange (No 2)*, above n 23, at [47].

Discretion to grant a declaration

[92] Did the Judge err in exercising his discretion to grant a declaration under s 24 of the Act? Section 24 provides:

> **24 Declarations**
>
> (1) In any proceedings for defamation, the plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation.
>
> (2) Where, in any proceedings for defamation,—
>
> (a) the plaintiff seeks only a declaration and costs; and
>
> (b) the court makes the declaration sought,—
>
> the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the court orders otherwise.

[93] Lang J dealt with relief in this way:

> **Result**
>
> [275] Mr Dooley has established his claim against both Mr Smith and Mr Shahadat. They have not been able to establish any of the affirmative defences upon which they rely.
>
> **Declaration**
>
> [276] I make a declaration under s 24(1) of the Act that Mr Smith and Mr Shahadat are liable to Mr Dooley in defamation.

[94] Lang J clearly thought a declaration followed as a matter of course from his upholding of Mr Dooley's claims. Because he did not view the granting of relief as a discretionary decision, he did not weigh up the relevant considerations.

[95] Declaratory relief is always discretionary. In the defamation context this Court held in *Salmon v McKinnon*: "Section 24 does not give a successful plaintiff an entitlement to a declaration. Such relief is discretionary".[32]

[96] It follows that the Judge erred in that he did not exercise his discretion. Was the Judge's decision to make a declaration nevertheless correct?

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[32] *Salmon v McKinnon* [2007] NZCA 516 at [47].

[97] Mr McKnight listed 16 reasons why the Judge should have exercised his discretion by declining to make a declaration. Without suggesting that the other reasons lack merit, we need refer only to Mr McKnight's 13th and 14th reasons:

- Mr Dooley issued his proceeding on the eve of the two year limitation period. As that delay would have been relevant under s 29 had Mr Dooley sought damages, the Judge should have taken it into account when deciding whether to make a declaration.

- Mr Dooley first pleaded his second cause of action against Mr Smith some three years after he settled with the *Greymouth Star*.

[98] Although Mr Stewart accepted that delay was relevant to damages, had Mr Dooley sought them, he submitted it was not relevant to the issue of relief when only a declaration was sought.

[99] A chronology of events is a necessary basis for the exercise of the s 24 discretion. It is:

Date	**Event**
3 October 2007	Article in the *Greymouth Star* containing the allegedly defamatory comments by Mr Smith.
14 November 2007	Letter from Mr Dooley's solicitors (Izard Weston) to Mr Smith complaining that the comments attributed to Mr Smith in the *Greymouth Star* article defamed Mr Dooley, by questioning Mr Dooley's honesty and integrity. Seeks "a full and unequivocal public retraction and apology in terms to be approved by us".
4 September 2009	Letter from Izard Weston to Mr Smith's then solicitors (Duncan Cotterill). Refers to terms of settlement agreed in February 2008 but not honoured by Mr Smith. Advises proceedings will issue unless terms of settlement are carried out within seven days.
18 September 2009	Mr Dooley files proceeding in the High Court at Greymouth.
21 July 2010	Correction and apology published on front page of *Greymouth Star*, as part of settlement between the newspaper company and Mr Dooley.
29 October 2010	Mr Dooley files amended statement of claim adding a second cause of action alleging that Mr Smith's response to Ms Scanlon on 5 October 2007 (set out in [31] above) was a republication of his defamatory comments.

November 2010	Proceeding set down for hearing.
27 February– 5 March 2012	Trial before Lang J in the High Court at Greymouth.

[100] Thus, just under two years elapsed from the alleged defamation to the filing of the proceeding, and just over three years before the proceeding was set down for hearing. Mr Dooley is not to blame for the regrettable further 14 or so months delay before the proceeding was tried.

[101] Section 24 was included in the Act upon the recommendation of the Committee on Defamation (the so-called McKay Committee). The Committee pointed out that a plaintiff who sought only a declaration to clear his name could avoid allegations that his claim "was simply a gold-digging one".[33] The Committee explained that it was recommending the s 24(2)(b) entitlement to solicitor and client costs "to further enhance the attractiveness of this avenue for plaintiffs who are not particularly interested in damages".[34] But the important point was the Committee's comment:

> 403. The efficacy of this remedy is dependent to some extent on the speed with which it can be heard in court. …

[102] Mr Geoffrey Palmer MP, who had been a member of the McKay Committee, gathered those comments together when introducing the Defamation Bill:[35]

> Part III deals with remedies. Clause 17 is a new clause that provides that a plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation. To encourage plaintiffs to take advantage of that provision, the Bill provides that the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings unless the court orders differently if the plaintiff seeks only a declaration and costs and the court makes the declaration. *That clause will suit persons who are more interested in clearing their name quickly than in obtaining damages.*
>
> (Our emphasis.)

[103] There is considerable force in Mr Stewart's submission that it would be unjust for the Court to exercise its s 24 discretion to deprive Mr Dooley of a declaration where defamation had been established and all affirmative defences

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33 Committee on Defamation *Recommendations on the Law of Defamation* (1977) at [401].
34 At [402].
35 (25 August 1988) 491 NZPD 6370.

defeated. Mr Stewart also pointed out that Mr Smith made a conscious decision in 2008 not to apologise to Mr Dooley.

[104] On the other hand, the s 24 declaration was designed for plaintiffs interested in clearing their name quickly. It follows that inexplicable delay must count against a declaration. Mr Dooley has not advanced any adequate explanation for not suing until the two year limitation period was about to expire. Nor has he adequately explained the further one year delay before the proceeding was set down for trial. When the newspaper's July 2010 correction and apology to Mr Dooley is factored in, we think, years after the event, the Court should have declined Mr Dooley declaratory relief.

[105] We answer this issue "Yes".

Second cause of action

[106] Did the Judge err in holding that Mr Dooley succeeded also on his second cause of action? The second cause of action alleged that Mr Smith defamed Mr Dooley in his comment to Ms Scanlon of the *Westport News* on 5 October 2007.[36] It was added when Mr Dooley filed his amended statement of claim on 29 October 2010.

[107] By that stage that second cause of action was more than two years old, so leave under s 4(6B) of the Limitation Act 1950 was required. Such leave was not obtained. However, Mr Smith did not take the point, either before or at trial, that this second cause of action was statute-barred. Unsurprisingly, Lang J therefore did not rule on that. The Judge held that Mr Dooley succeeded on his second cause of action, for the reasons he had given in relation to the first.[37]

[108] The limitation point was taken by Mr Smith for the first time on 12 June 2012 – after Lang J had given judgment on 26 March 2012. Mr Dooley promptly, on 26 June, applied for (retrospective) leave to file the amended statement of claim of 29 October 2010. In a supporting affidavit he deposed that he had not become aware

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[36] See above at [31].
[37] High Court judgment, above n 1, at [219].

of Mr Smith's 5 October 2007 email to Ms Scanlon of the *Westport News* until it was discovered by the Greymouth Evening Star Co Ltd in its affidavit of documents of 11 March 2010. He pointed out that Mr Smith had not discovered the email. Mr Smith opposed leave. In his affidavit in opposition he pointed out that his statement had been reported in an article in the *Westport News* on 5 October 2007: "Mr Smith today stood by his comments to the *Star*". He deposed that he had not become aware that the second cause of action was statute-barred until Mr McKnight, retained by Mr Smith to argue this appeal, raised the point with him in June 2012.

[109] That opposed application was not ruled upon by Lang J. By the time it was filed the substantive judgment was under appeal.

[110] Mr Dooley was not entitled to plead his second cause of action without the Court's leave under s 4(6B) of the Limitation Act. That allowed the Court to grant leave: "… where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law … or by any other reasonable cause".

[111] Mr Smith's point that the *Westport News* article of 5 October 2007 informed Mr Dooley of Mr Smith's republication that day of his earlier comments to the *Greymouth Star* is unassailable. Mr Dooley could not bring himself within s 4(6B), and should be denied leave.

[112] We answer this issue "Yes".

ISSUES ON MR DOOLEY'S CROSS-APPEAL

Mr Dooley bearing some responsibility

[113] Did the Judge err in holding that Mr Dooley should bear some responsibility for what occurred? This ground of cross-appeal primarily challenges these findings by Lang J:

> [68] Had Mr Dooley raised the issue at the meeting of trustees [on the morning of 1 October 2007], and had he pointed out that he had only just seen the CEO email for the first time, subsequent events would undoubtedly have taken a very different turn. In particular, Mr Shahadat confirmed in evidence that he would have told the *Greymouth Star* not to publish the press

> release. Had that occurred, it is unlikely that Mr Bromley would have contacted Mr Smith for his comments in relation to it.
>
> …
>
> [70] Mr Dooley's failure to appreciate the changing nature of Mr Clayton's enquiries, coupled with his failure to expressly state at an early stage that he had not seen the CEO email until 1 October 2007, were major contributors to everything that followed. Mr Dooley must therefore, in my view, bear some responsibility for subsequent events.

[114] Mr Dooley challenged these findings on two grounds. The first was that the evidence established that Mr Smith must have made his comments to the *Greymouth Star* before the meeting of the DWC trustees on 1 October 2007, and therefore his defamation of Mr Dooley was also complete before the meeting commenced. Assuming that is the correct position on the evidence, we do not consider it detracts at all from Lang J's findings. As we have pointed out, it was the inclusion of Mr Smith's comments in the *Greymouth Star* article on 3 October that was Mr Dooley's real concern. Mr Stewart's point does not meet this.

[115] Secondly, Mr Stewart reiterated that Mr Smith had not before the trial accepted that Mr Dooley was unaware of the CEO email until 5 October, and had declined to retract his comments or apologise. Again, this point is no answer to the Judge's findings that the defamatory newspaper publications would not have occurred, had Mr Dooley explained to the DWC trustees at their meeting on the morning of 1 October, that he had seen the CEO email for the first time a few minutes before at the *Greymouth Star*'s offices across the road.

[116] We consider the findings Lang J made in [68] and [70] of his judgment, and indeed his entire summation of Mr Dooley's evidence at [46]–[70], well justified.

[117] Accordingly we answer this issue "No".

Finding about a telephone call

[118] Did the Judge err in finding that Mr Smith telephoned Mr Shahadat before he made his comments to the *Greymouth Star* on 1 October 2007? In his judgment Lang J found:

> [204] The only step that Mr Smith took to achieve this end [of ensuring that his statements were based on facts that were correct] was his telephone call to Mr Shahadat on 1 October 2007. He telephoned Mr Shahadat in order to obtain confirmation that Mr Dooley knew of the existence of the CEO email at the time he responded to Mr Clayton's emails. That fact formed the basis for the statements that Mr Smith proposed to make to the newspaper.

[119] This issue is a challenge to that finding, on three grounds. The first is that Mr Smith first claimed he had made that telephone call in an amended brief of evidence he handed Mr Stewart on the second day of the trial. The second ground is that cross-examination of Mr Smith revealed his evidence about the telephone call to be unconvincing. The third ground is that Lang J made no finding of credibility on this point.

[120] This Court is in no position to disturb the Judge's finding of fact. Unlike the Judge, we have not heard the evidence on which the finding was based, nor seen the witnesses who gave it.

[121] In any event, we regard this issue as substantially overtaken by the further evidence we have admitted from Mr Smith of the telephone calls he made to Mr Clayton. That is the evidence detailed in [26] above.

[122] We answer this issue "No".

Award of solicitor and client costs

[123] Did the Judge err in awarding Mr Dooley only 70 per cent of his solicitor and client costs and apportioning liability for those costs 30 per cent to Mr Smith and 70 per cent to Mr Shahadat, and also in directing that the costs be taxed?

Only 70 per cent?

[124] Lang J recognised that any departure from Mr Dooley's s 24(2) entitlement to solicitor and client costs must be on a principled basis.

[125] He was satisfied that he needed to make some allowance for the fact that "Mr Dooley was responsible to a significant extent for producing the circumstances

in which both defendants made their defamatory statements".[38] He reiterated his view that Mr Dooley could have taken steps that avoided "all that followed".[39]

[126] In allowing Mr Dooley 70 per cent of his solicitor and client costs the Judge attempted to strike a balance between Mr Dooley's own responsibility on the one hand, and his right to be indemnified for his costs and the fact that Messrs Smith and Shahadat had defended the proceeding on the other hand.

[127] Mr Stewart challenged the 70 per cent because it reflected Mr Dooley's "pre-proceeding conduct". He submitted that the High Court Rules provide the appropriate principles for the exercise of the Court's discretion under s 24(2), and relied on this Court's judgment in *Paper Reclaim Ltd v Aotearoa International Ltd* where this Court held that costs are to reflect how parties acted during litigation, not before it.[40]

[128] Section 24(2) is a special costs provision. The general principles, including that laid down in *Paper Reclaim*, which guide the application of the costs provisions in the High Court Rules are not to guide exercise of the s 24(2) discretion.

[129] Lang J held that publication of the defamatory remarks in the newspapers could and would have been avoided had Mr Dooley taken the steps the Judge outlined. We have already indicated our view that Mr Dooley needed to take those steps to correct his misleading advice to the other trustees, and promptly. That situation well justifies the Judge's 70 per cent. If anything it was generous to allow Mr Dooley 70 per cent of his actual legal costs of establishing defamations that he could very simply have avoided.

Joint and several liability for costs?

[130] Mr Dooley chose to sue Mr Smith, Mr Shahadat and Greymouth Evening Star Co Ltd separately, making different allegations against each. Each defended

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38 High Court costs judgment, above n 2, at [10].
39 At [10].
40 *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at [160].

separately.[41] In that situation, we can see no error in Lang J ordering that liability for costs be several.

[131] Mr Stewart's reliance on this Court's decision in *Narayan v Arranmore Developments Ltd* is misplaced.[42] The proceedings there, though not consolidated, were heard together and the defendants were represented by the same counsel. That was not the position here.

[132] We can see no basis at all for an order that Mr Smith rather than Mr Dooley bear the risk of Mr Shahadat defaulting on the costs order against him. That risk has materialised, because Mr Shahadat is bankrupt.

30 per cent of the costs awarded apportioned to Mr Smith?

[133] Again, Mr Stewart submitted Lang J had erred by taking pre-proceeding conduct into account in apportioning costs. He also submitted that the Judge had failed to take account of a number of matters, for example Mr Smith's administering of interrogatories that he did not rely on at trial, and his introduction of amended briefs of evidence during the trial.

[134] Mr Stewart has not satisfied us that the Judge's apportionment was wrong. It does not greatly differ from the 65/35 apportionment put forward by Mr Stewart as more appropriate.

Taxation of costs?

[135] Given that the Judge awarded solicitor and client costs against Mr Smith who was self-represented, we regard the direction that the costs be taxed as a proper protection for Mr Smith. The nub of Mr Stewart's complaint here was that taxation is an onerous and therefore costly procedure. We think that is an exaggeration. Certainly, taxation would have necessitated Mr Stewart preparing an itemised bill of his firm's costs, so that the Registrar could see readily how the bill was made up. And generally the Registrar requires the parties to attend for the taxation. But we

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41 As has been noted, Mr Dooley settled with the Greymouth Evening Star Co Ltd before the matter went to trial.

42 *Narayan v Arranmore Developments Ltd* [2011] NZCA 681.

anticipate that could be by AVL link, avoiding the need for Mr Stewart (who is Wellington based) to travel to Greymouth or Christchurch.

[136] We answer each of these four costs issues "No".

Result

[137] For the reasons we have given, the appeal is allowed.

[138] The declaration made by the High Court is set aside.

[139] The cross-appeal is dismissed.

Costs

[140] In oral submissions, Mr McKnight abandoned the submission made in his written submissions that solicitor and clients costs should be awarded if the appeal succeeded.

[141] Mr Dooley is to pay Mr Smith's costs for a standard appeal on a band A basis plus usual disbursements.

[142] Costs in the High Court are for that Court, in the light of this judgment. However, as Mr Smith represented himself he would be entitled only to reasonable disbursements necessarily incurred in defending the proceeding. There is no need to trouble the Judge about those: failing agreement, the Registrar at Greymouth should fix them.

Solicitors:
Langford Law, Wellington for Appellant
Izard Weston, Wellington for First Respondent

APPENDIX

Claims fly over trust chief

Grey Star 3/10/07

E-mail solicits support for Dooley

By TUI BROMLEY

Development West Coast chairman Frank Dooley is standing by his man amid claims the chief executive Mike Trousselot attempted to manipulate the election process.

At the crux of the alleged interference is an e-mail Mr Trousellot sent to Ngai Tahu on September 7, telling them to beware of "back door stuff" and "googlies" from a "clique wanting to overthrow the chair and gain access to the money".

Seeking Ngai Tahu support for Mr Dooley, Mr Trousselot wrote: "If you think we are doing OK, our chair could benefit from some outside support at the moment and it would be great if you or Mark (Solomon) felt it OK to drop a note to us along those lines".

The e-mail was stamped with the Development West Coast logo.

Until yesterday, the trust denied the correspondence.

The six trustees who have been trying to depose Mr Dooley as chairman asked several times about a letter to Ngai Tahu but were twice informed "no such letter has been written". The trust was never asked about an e-mail.

Mr Dooley said in reply to the trustees that his inquiries of Ngai Tahu and Mr Trousselot showed there was no such letter.

Mr Trousselot has been on sick leave and did not take up an offer from the Greymouth Star to respond to the criticism.

After sighting the document on Monday, Mr Dooley said it was "inappropriate" of his chief executive to have asked support for him as chairman, but played down his other comments.

"There is probably one error that the chief executive has made and that is when he has said 'if you think we are doing okay, our chair could benefit from some outside support at the moment'. That is probably an inappropriate comment for the chief executive to have made, particularly at this point in time when there is an election process," Mr Dooley said.

"But the balance of the e-mail is fair and reasonable because what the chief executive is saying is 'watch out for googlies'. That is a fair comment, particularly given the fact that the disaffected trustees also tried to influence the appointment of the independent trustee who is appointed by the presidents on the New Zealand Institute of Chartered Accountants and the Law Society".

But retiring trustee Mohammed Shahadat and Hokitika candidate Bruce Smith say the correspondence amounts to serious interference in the electoral process.

Mr Shahadat said he and other trustees had repeatedly asked whether the correspondence existed and had been assured it did not.

Mr Smith said: "I find it disturbing the the CEO and chair denied its existence. Can the (future) trustees have any faith that the CEO or chair will not be misleading them on matters of importance?

"It's totally unacceptable to have a CEO involved in the political process. I have never heard of a CEO putting the interests of the chairman before those of the organisation that employs him."

With the election now in full swing, Mr Smith called for Mr Trousselot to step down from the position until the issue could be independently reviewed.

A bundle of leaked documents from Development West Coast are now with the Office of the Auditor-General, who has been asked to inquire into the trust's affairs.

Mr Dooley said on Monday he would welcome an inquiry to clear his name.

"I want a full inquiry by the Auditor-General because I am very, very confident that over six and a half years I have never done anything which is in breach of the conflict of interest or the requirements of the trust deed or confidentiality requirements."

"I want my credibility cleared and I'm happy to stand on my integrity."