IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2016-485-414
[2017] NZHC 813

BETWEEN	EARL RAYMOND HAGAMAN AND LIANNA-MERIE HAGAMAN Plaintiffs
AND	ANDREW JAMES LITTLE Defendant

Hearing: 3–10 April 2017

Appearances: R J B Fowler QC and B K Ferguson for Plaintiffs
J W Tizard for Defendant

Judgment: 28 April 2017

REASONS FOR JUDGMENT OF CLARK J

I direct that the delivery time of this judgment is
4:45 pm on the 28th day of April 2017

Introduction

[1] Mr ER Hagaman, the first-named plaintiff, is a company director of a number of companies within the Scenic Hotel Group of companies. Together with his wife, Mrs L Hagaman the second-named plaintiff, he holds a controlling interest in the shareholdings of those companies through trusts of which they are trustees or beneficiaries. The defendant, Mr A J Little, is a Member of Parliament and Leader of the Opposition.

[2] In April 2016, on six occasions, Mr Little commented critically on the award of a hotel management contract to the Scenic Hotel Group following the donation by Mr Hagaman of more than $100,000 to the National Party. The plaintiffs filed proceedings based on statements made by Mr Little on those six occasions and claimed damages for defamation.

[3] In the course of the trial I ruled that the six occasions on which the publications were made were occasions of qualified privilege. My reasons were to follow and are now provided in this judgment.

The trial

[4] The proceeding was filed in June 2016. In August 2016 Mrs Hagaman sought an urgent hearing because of her husband's age and frail health. Medical advice was that he could die at any time and it was important to Mr and Mrs Hagaman that his name be cleared during his lifetime. The defendant cooperated in expediting the hearing.

[5] The trial commenced on 3 April 2017. On the fourth day when the evidence had concluded I was asked to rule on three matters including the availability of the qualified privilege defence which the defendant pleads. Before counsel presented their closing arguments to the jury I ruled that the six occasions during which Mr Little published various statements relied on by the plaintiffs were occasions of qualified privilege.[1]

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1 *Hagaman v Little* HC Wellington CIV-2016-485-414, 6 April 2017.

[6] It was then for the jury to determine whether the plaintiffs had established that the defence failed. The jury returned its verdicts at the end of the day on 10 April 2017. In accordance with the jury's verdicts judgment was entered for the defendant in respect of all causes of action pleaded by Mrs Hagaman. Regarding one of Mr Hagaman's six causes of action, by a majority, the jury answered "yes" to the question whether one of the pleaded meanings was defamatory but was unable to reach a verdict on the question of whether the occasion of qualified privilege had been lost.

[7] The question which this judgment concerns is conceptually distinct from the issues which the jury was required to decide. I am concerned only with the availability of the defence of qualified privilege in the circumstances of this case. I am not concerned with the separate jury question whether the defence failed on the facts.[2] That said, although the two questions are conceptually and analytically separate they will be viewed together when determining whether a proper balance is struck between the competing interests of freedom of expression and protection of reputation.[3]

Statement of claim

[8] The plaintiffs rely on 17 statements made by Mr Little when he gave five media interviews and issued a media statement on 18 and 19 April 2016. The statements relied on by the plaintiffs and the six occasions on which they were made, are:

> *Media Statement published on 18 April 2016*
>
> 1 Today's revelations about the Scenic Hotel Group and its resort contract in Niue stink to high heaven following its dodgy deals with SkyCity and the Saudi sheep deal.
>
> 2 It is why I have today written to the Auditor-General asking her to investigate whether Earl Hagaman – who was the largest living financial donor to the National Party – giving money to the party at the same time his company was tendering for the Niue contract was above board.

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2 In other words, whether the plaintiff proved that the defendant was predominantly motivated by ill will towards the plaintiff or otherwise took improper advantage of the occasion of publication: Defamation Act 1992, s 19(1).

3 *Lange v Atkinson* [2000] 3 NZLR 385 (CA) **[*Lange (No 2)*]** at [6].

3 New Zealand money, which was earmarked as aid for the island nation, has instead been given to upgrade a resort run by a National Party donor. That's not what Kiwi families want their hard-earned money going to.

4 It was Murray McCully's personal appointees on the Niue Tourism Property Trust which awarded this contract ...

5 This looks like the latest in a line of questionable deals from John Key's government, which has seen New Zealand slide down the international corruption rankings ...

6 John Key must come clean on how a donor who gave more than $100,000 to his party during a tender process, won a hotel management contract which led to a government-funded, $7.5m upgrade to the resort, Leader of the Opposition Andrew Little says.

Television One News interview on 18 April 2016

7 There's just something about this whole deal that really stinks.

8 There's just like too many coincidences to be explained as just sheer good luck on the part of the National Party donor, so New Zealanders must have an assurance that the Auditor-General is the best person to give that.

Radio New Zealand interview on 18 April 2016

9 There is a real issue when you look at the timing of events, so, the donations to the National Party, the awarding of the contract and then some months later, a further contribution from the government to upgrade the hotel. It looks murky from the outside, it looks shady, and I just think we need some answers and some assurance that there isn't anything untoward here.

Television One Breakfast interview on 19 April 2016

10 Interviewer: So the founder of this company gives the National Party a donation, then the company wins the contract.

Defendant: That's correct.

11 Interviewer: Do you have proof that the two are connected, or are you just suspicious?

Defendant: Well they were a month apart, and the donation was one of the biggest political donations ever given, over $100,000. A month later the company then gets the contract to run the Matavai Hotel. A few months later they then get a grant of another $7.5m from the government to upgrade the hotel. And so I just think there's something – and these decisions are made by a trust, all of whom are appointed by the government. I just think there's something here that just doesn't look quite – you know, just doesn't look good, and I think we need a bit of transparency. I think the Auditor-General is

the person just to open it up and tell us who knew what when, and just look at the timing of these things.

12 Interviewer: If I was to play devil's advocate though ...

Defendant: The timing of this just doesn't look good.

13 Interviewer: Yeah the timing doesn't, but the donation was so large that it had to be disclosed. So if the National Party was going to give them favours, wouldn't they want to not make it so obvious?

Defendant: Well I ... the point is we know there's a significant donation and then the person who made the donation, the company that they are involved in, then gets this contract to run this hotel, followed by this other significant grant to upgrade the hotel. So I just think there's too much going on here; it looks too cosy, it doesn't look right to me and we should find out, and the Auditor-General should be the one to tell us.

BFM Breakfast interview on 19 April 2016

14 It is the timing of all these things. The large donation, that's the granting of the management contract, then the granting of the further sum of money, the $7.5m for the upgrade ... this is public money, and if it is going to people that the National Party kind of is trying to get close to, well then that is totally unacceptable. ... I just think we need to have some answers in the face of some obvious and I think perfectly justifiable suspicions about what is going on here. …

15 Well no, well the problem here is that you've got the … the Niue government that is trying to build its tourism industry is dependent on an overseas or New Zealand owned management group to do it. The – all of those decisions are made by a trust that is appointed by the New Zealand government, so it does look like it's all about kind of keeping it in-house. There just – when you look at the timing of those decisions, and who was involved, it just raises an obvious suspicion.

16 There is an obvious set of facts here out in the public now. Massive donation to the National Party, awarding of the management contract a month later, awarding yet another $7.5m to upgrade the hotel, all by a government that has a track record in shady deals.

Television One News Interview on 19 April 2016

17 I don't care about the trustees. What I care about is the fact that somebody who donated over $100,000 to the National Party one month later gets the contracts to run a hotel.

[9] Mr Hagaman pleads six causes of action each based on one of the six media publications.[4] General and exemplary damages are sought in respect of each. Mrs Hagaman's claim mirrors her husband's claim. Thus the statement of claim pleads 12 causes of action in total and an overall sum of $2.3 million in damages is sought.

[10] The statement of claim particularises every meaning the plaintiffs allege is borne by each of the 17 statements. It is not necessary that I set out the meanings that are pleaded. The general thrust of the plaintiffs' claims is that the defendant's statements meant, and were understood to mean, that Mr Hagaman corruptly secured a hotel management contract for the Scenic Hotel Group by making a donation of more than $100,000 to the National Party at the same time that the Scenic Hotel Group was tendering for that contract. Further, that by making the donation Mr Hagaman facilitated a $7.5 million upgrade to the resort to which the hotel management contract related. Mr Hagaman also pleaded that the published words meant that by making a donation to the National Party at the time it was made Mr Hagaman sought to influence the Government's appointees on the Niue Tourism Property Trust.

Statement of defence

[11] Mr Little denies that any of the 17 statements bear any of the meanings set out in the statement of claim and he denies that the meanings are defamatory. In addition Mr Little pleads a defence of qualified privilege:

> QUALIFIED PRIVILEGE
>
> 10. If the words complained of … bear … the meanings set out in … the Statement of Claim … they were published in good faith on a matter of public interest, namely the award in 2014 of a contract to the Scenic Hotel Group for the management of a hotel Niue Island and the expenditure of $7,500,000 on improvements thereto financed by a grant from the New Zealand government and donation to the New Zealand National Party in September 2014 of $101,000 by the first named Plaintiff, the founder and a director of a number of companies in the Scenic Hotel Group and were therefore published

[4] Section 7 of the Defamation Act provides that proceedings for defamation based on a single publication constitute one cause of action, no matter how many imputations the published matter contains.

on an occasion of qualified privilege in that the Defendant, as Leader of the Opposition, had a social or moral duty to respond to questions raised by members of the public who had a corresponding interest in knowing his response.

Particulars

10.1 In 2012, following requests by Opposition parties (including the Labour Party) and public criticisms, the Auditor-General conducted an inquiry into the Government's decision to negotiate with SkyCity Entertainment Group Limited for the construction of an international convention centre following the revelation that SkyCity agreed to enter into the contract in exchange for gambling concessions granted by the Government without public consultation or through a competitive tender. The Auditor General reported that SkyCity was treated "very differently" to others who would have tendered for the contract.

10.2 In 2013 to settle a long running dispute with a Saudi Arabian businessman, the Government established a Saudi Arabia Food Security Partnership. Following revelations in the media in 2015 that the Government had spent more than $11.5m on the partnership, including a $4m cash payment to the trading company of Mr Hmood Al Ali Al Khalaf as a contract for his services, the Minister of Foreign Affairs, Murray McCully claimed the payment had been made on legal advice but he failed to produce any written such advice either to the Cabinet or the Auditor-General.

10.3. The Matavai Resort in Niue is that island's only tourist hotel accommodation.

10.4. In July 2012, a delegation from New Zealand, which included the Minister of Foreign Affairs, Murray McCully, visited Tonga where the Minister opened the Scenic Circle Hotel Tonga.

10.5. At the opening the Minister commented *"It will also require more investment from long sighted companies like Scenic that can clearly see the opportunities presented by Pacific tourism".*

10.6. On 25 July 2012, the delegation then visited the Matavai Resort.

10.7. Discussions took place with the Scenic Circle Hotel Group (**Scenic**) in 2010 and subsequently as to how it could assist the owners of the Matavai Resort and Scenic.

10.8. In June 2013, Scenic visited the Matavai Resort and subsequently provided proposals for assistance.

10.9. In June 2013, the Minister was presented with a request for additional funding for the Matavai Resort.

10.10. In July 2013, Scenic contacted Horwarth HTL, who had been appointed by the Ministry of Foreign Affairs and Trade (the Ministry) to advise it on the Matavai Resort.

10.11 In September 2013, Scenic expressed interest in entering into a management contract for the Matavai Resort.

10.12. In February 2014, the Minister intimated New Zealand Government funds might be available for the expansion on the Matavai Resort.

10.13. In May 2014, Scenic was identified as the preferred operator of the Matavai Resort.

10.14. On 5 June 2014, the Prime Minister (of New Zealand) announced an investment of $1.25 million to support tourism and renewable energy in Niue.

10.15. On 8 September 2014, the first named Plaintiff donated $1,000 to the New Zealand National Party and on 18 September [2014] a further $100,000, declared to the Electoral Commission on 23 September [2014].

10.16. On 8 October 2014, Scenic was awarded the management contract for the Matavai resort and commenced its duties on 1 December [2014].

10.17. Between February and September 2015, Scenic collaborated with the owner of the Matavai Resort and the government of Niue to seek funding from the New Zealand government for the expansion of the Matavai Resort.

10.18. In October 2015, the Minister approved and the investment of $7,500,000 to expand the Matavai Resort.

10.19. On 18 April 2016 on *Morning Repor*t, Radio New Zealand broadcast an item reporting that one month before the Scenic Hotel Group announced it had won the contract to manage the Matavai Resort, its founder and executive chairman, the First Plaintiff, had made a donation of $101,000 to the National Party.

10.20 Following the broadcast of that report, a [Radio New Zealand reporter] sought comment from the Defendant on the report.

[12] The defence is pleaded in the same terms in response to each of the 12 causes of action.

Availability of qualified privilege – Submissions

Plaintiffs' position

[13] Mr Fowler characterised the following final lines of paragraph 10 of the statement of defence[5] as being the important element of the qualified privilege pleading:

> …the words … were therefore published on an occasion of qualified privilege in that the Defendant, as Leader of the Opposition, had a social or moral duty to respond to questions raised by members of the public who had a corresponding interest in knowing his response.

[14] Mr Fowler's concise submission highlighted three aspects of the pleading:

(a) The pleading is a conventional qualified privilege pleading in the sense that it pleads a reciprocal duty and interest. It is not a *Lange* v *Atkinson* type of qualified privilege.[6] (I discuss this decision later in the judgment. For the moment it is sufficient to note that, following the lead of the Court of Appeal in *Vickery v McLean*,[7] when I refer in this judgment to the "*Lange* privilege" I am referring to the privilege at issue in *Lange v Atkinson*.)

(b) In any event the defendant in this proceeding is not a media defendant but an individual.

(c) The particular qualified privilege pleaded is unknown to the law of New Zealand.

[15] Mr Fowler submitted it could not possibly be the case that privilege could be justified merely because members of the public are asked questions on a matter of public interest. Were that the case a person only needs to be asked a question on a matter of public interest and he or she would be protected if the answer is defamatory of another. Such a protection does not exist and it could not be available to the Leader of the Opposition yet not to other members of the public.

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5 See [11] above which sets out the defendant's pleaded qualified privilege defence.
6 Referring to *Lange (No 2)*, above n 3.
7 *Vickery v McLean* [2006] NZAR 481 (CA) at [15].

Defendant's position

[16] Mr Tizard was likewise succinct. His first point was that the privilege claimed "would be novel". As had Mr Fowler, Mr Tizard disavowed any similarity with *Lange v Atkinson.*

[17] Mr Tizard emphasised two aspects of the privilege pleaded by Mr Little:

(a) The matters upon which Mr Little commented were matters already in the public arena.

(b) Mr Little does not contend for a privilege arising from a personal sense of moral responsibility but from his position as Leader of the Opposition responding to questions about Government's conduct. Once the issue of Mr Hagaman's donation to the National Party and the award of a contract to the Scenic Hotel Group had become the subject of media attention the question is whether the Leader of the Opposition had a duty to comment and respond to questions about the government's conduct.

The applicable principles

[18] I take as my starting point the observation of Elias J (as she then was) concerning the values of freedom of speech and the protection of individual dignity which the law of defamation seeks to balance:[8]

> The modern law of defamation represents compromises which seek to achieve balance between protection of reputation and freedom of speech. Both values are important. Both are public interests based on fundamental human rights.
>
> Freedom of speech has long been recognised at common law as essential to liberty and representative government.

[19] Defences of "truth", "honest opinion" and "privilege" may be available to a defendant in a defamation action. Privilege may be absolute or qualified. The Defamation Act 1992 confers privileges to protect different types of publications but

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[8] *Lange v Atkinson* [1997] 2 NZLR 22 (HC) **[*Lange* HC]** at 30.

qualified privilege may also arise at common law. This proceeding is not concerned with any of the statutory privileges.

[20] Statements published on an occasion of qualified privilege are protected "for the common convenience and welfare of society".[9]

[21] The unifying principle around which the common law has developed the concept of qualified privilege is the duty–interest test. Two formulations of the law in this area have been described as "almost canonical".[10] The "first classic exposition"[11] of the principle is the dictum of Baron Parke in *Toogood v Spyring*:[12]

> In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, … and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

[22] The celebrated passage emphasises that the protection of such communications is for the "general interest of society"[13] not the convenience of individuals or the convenience of a class.

[23] Lord Atkinson's briefer formulation is equally famed:[14]

> A privileged occasion is … an occasion where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[24] The reciprocity which Lord Atkinson regarded as essential is not supported in New Zealand. In addressing the emphasis which some commentators and judges

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9 *Toogood v Spyring* (1834) 1 CM & R 181 at 193.
10 Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th, ed, Sweet & Maxwell, London, 2013) at 549.
11 *Watts v Times Newspapers Ltd* [1997] QB 650 CA at 659 cited in *Gatley*, above n 10, at 546.
12 *Toogood v Spyring*, above n 9, at 193–194.
13 *Lange* HC, above n 8, at 35.
14 *Adam v Ward* [1917] AC 309 (HL) at 334.

have placed on the requirement for reciprocity the Court of Appeal explained that the need to avoid a strict concept of reciprocity is supported by:[15]

(a) the broad principle of the 'common convenience and welfare of society' which underpins qualified privilege;

(b) the "infinitely various combinations of circumstances" in which the privilege might arise and "the absence in many of them of [the] particular bilateral relationship [found for instance when a confidential reference is given by one employer to a potential future employer]";

(c) the words "interest" and "duty", themselves indicating the relationship without any requirement for reciprocity. Additionally, "duty" may be moral or social not necessarily legal.

[25] *Gatley on Libel and Slander* summarises the position in this way:[16]

> The duty or interest may be common to both parties, but this is not essential. It is enough if there is a duty or interest on one side, and a duty or interest, or interest or duty (whether common or corresponding or not) on the other.

[26] No exhaustive list of the circumstances giving rise to the privilege has been attempted. Indeed, it has been said that the privilege might be invoked in an "infinite variety" of circumstances.[17] The key point is that the categories of qualified privilege are not closed.[18]

[27] While the Defamation Act 1992 introduced significant reforms it did not codify common law privilege. It has been left for the courts to continue to develop the common law in this area in light of each jurisdiction's evolving political, social and economic conditions.[19] In the words of Elias J:[20]

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15 *Lange v Atkinson* [1998] 3 NZLR 424 [***Lange (No 1)***] at 441.
16 *Gatley on Libel and Slander*, above n 10 at 549.
17 *Lange (No 1)*, above n 15, at 441.
18 At 437.
19 *Lange (No 2)*, above n 3, at [40].
20 *Lange* HC, above n 8, at 34. See also *Lange (No 1)*, above n 15, at 443.

> [the common law has been left] to develop in accordance with the principles upon which it is based:
>
> > The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals (*Henwood v Harrison* (1872) LR 7 CP 606, 622 per Willes J).

[28] Thus, the development and application of common law qualified privilege is guided by principle rather than precise rules:[21]

> The rule being founded upon the general welfare of society, new occasions for its application will necessarily arise with continually changing conditions.

[29] Qualified privilege is vulnerable to being defeated. The defence will fail if a plaintiff can prove the defendant was predominantly motivated by ill will towards the plaintiff in making the publication or otherwise took improper advantage of the occasion of publication.[22] As I have already mentioned[23] I am not concerned in this judgment with any issue bearing on whether Mr Little's defence fails for misuse of the occasion of qualified privilege those questions having been left to the jury to decide.

Is qualified privilege available in this case?

[30] The essence of the defendant's qualified privilege claim is in his asserted social or moral duty to respond to questions raised by members of the public who had a corresponding interest in knowing his response.[24] It is incumbent on the defendant to establish this duty. Mr Little's evidence that he felt he had such an obligation is not, of itself, determinative.

[31] Whether Mr Little had a duty to communicate, recognised by the law as creating a privileged occasion, depends on all the circumstances including Mr Little's position, his relationship to the audience to whom he was

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21 *Howe & McColough v Lees* (1910) 11 CLR 361 at 368–369 cited in *Lange (No 1)*, above n 15, at 439–440.

22 Defamation Act, s 19.

23 At [7] above.

24 Amended statement of defence set out at [11] above.

communicating, the nature and importance of the subject matter and the relationship of the allegedly defamatory matter to those matters.

A duty arising from role as Leader of the Opposition?

[32] What is a "Leader of the Opposition"? In New Zealand the Standing Orders of the House of Representatives provide for recognition of Leader of the Opposition:[25]

> The leader of the largest party in terms of its parliamentary membership that is not in Government or in coalition with a Government party is entitled to be recognised as Leader of the Opposition.

[33] Professor Jeremy Waldron has written on the "Principle of Loyal Opposition".[26] In this extensive and scholarly paper Professor Waldron writes that parliamentary systems throughout the English-speaking world do not just tolerate opposition "they institutionalize it in the structure of the constitution".[27] With the best will in the world "focused resolutely and honestly on the common good" people disagree and take different positions on what members of a community should do together.[28]

[34] These "burdens of judgment"[29] apply beyond religion and ethics to issues of justice and social policy. Modern democracies pride themselves on preserving rights of robust dissent and tolerating "as a matter of routine normality the free expression of oppositional views".[30] Historically, it became desirable to distinguish "party opposition from sedition, treason, and a prelude to civil war".[31] Faction became institutionalised and a settled part of the political landscape. Rotation in office became more than "business as usual … something more or less institutionalized".[32]

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25 Standing Orders of the House of Representatives 2014, SO 36.

26 Jeremy Waldron "The Principle of Loyal Opposition" (paper presented to NYU Politics Workshop, New York, 16 October 2011). The latter part of Professor Waldron's paper addresses his question: 'Loyal to what?' I touch on the essence of his answer below, at n 39.

27 At 9.

28 At 1–2.

29 John Rawls *Political Liberalism* (Columbia University Press, New York, 2005) as cited in Waldron, above n 26, at 2.

30 At 6.

31 Nancy Rosenblum *On the Side of Angels: An Appreciation of Parties and Partisanship* (Princeton University Press, Princeton, 2010) at 11 and 105 as cited in Waldron, above n 26, at 8.

32 Waldron, above n 26, at 8.

The achievement was to bring opposition "into the frame of government, regularise it, eventually legalise it, and make it politically mundane".[33]

[35] In developing the theme that loyal opposition "is a matter of constitutional empowerment"[34] Professor Waldron refers to observations over time which I have found to be relevant and helpful to my consideration of Mr Little's position as Leader of the Opposition and his plea of qualified privilege.

(a) The Leader of the Opposition has a "definite and distinct part to play in constitutional government".[35]

(b) Sir Ivor Jennings remarked on the apparent oddity of the government funding its principal opponent to criticise the government. He then acknowledged that "in truth opposition is an essential part of democratic government".[36]

(c) Beyond matters of institutional responsibility[37] the important thing is:[38]

> … for the opposition party to oppose, to "scrutinise the government," to "hold them accountable for their decisions," "to limit the extremity of the Government's action, to arouse public criticism of any dangerous policy, and to make the Government behave reasonably"– in short, it is the duty of the opposition to serve … as a "vigilant watchman over those in power."

(d) The main role of the official opposition is to prepare for government. The constitution assumes that at any moment an alternative government can be formed from the opposition. "…this duty–to

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33 Rosenblum, above n 31, at 121 as cited in Waldron, above n 26, at 8.

34 Waldron, above n 26, at 8.

35 Viscount Hailsham in the House of Lords, debating the Ministers of the Crown Act 1937 (UK), cited in Waldron, above n 26, at 9.

36 Ivor Jennings *Parliament* (2nd ed, Cambridge University Press, Cambridge, 1970) at 82 cited in Waldron, above n 26, at 9.

37 For example, in New Zealand the Leader of the Opposition is an *ex officio* Member of the Parliamentary Service Commission and is accorded a special status in regard to intelligence and security matters.

38 Waldron, above n 26, at 12 (citations omitted).

provide a government-in-waiting–affects the way in which the duty to criticize is performed."[39]

[36] Although Professor Waldron's observations are made in the context of the British Parliament the constitutionally important theme is reflected in the work of David McGee, former Clerk of the House of Representatives in New Zealand and author of *Parliamentary Practice in New Zealand*:[40]

> *Leader of the Opposition is a most important constitutional office*, marked at the State Opening of Parliament, where the Leader of the Opposition and the Prime Minister flank the Governor-General as the Governor-General reads the Speech from the Throne. In no other instance is the peculiar strength of the parliamentary system of government so vividly demonstrated that in its recognition of the office of Leader of Opposition. *By this means the opposition is enlisted as an official Government-in-waiting*.

[37] While New Zealand is a constitutional monarchy it is the people, that is the citizens of New Zealand who, through periodic elections, have ultimate power. And, as the Court of Appeal observed in *Lange (No 1)*:[41]

> The electoral system now recognises more directly the competition organised by and through political parties for the power of the state exercised through Parliament and the ministry. *The role of party leaders in that competition is of course critical–as it has been for the last century*.

[38] There can be no question that the Leader of the Opposition plays a vital role in New Zealand's political and constitutional setting and the successful performance of that role will be judged by the effectiveness by which he or she – in the words of Professor Waldron – scrutinises the government, holds it to account, arouses public criticism of dangerous policy and makes it behave reasonably.[42]

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39 At 13. And it is to this notion of a government-in-waiting that Professor Waldron ties the word "loyal" in "Loyal Opposition". At 41, he states … the opposition is "assumed to be loyal … in the sense that none of their criticism is to be a reason for regarding [them] as a subversive. They are assured to be loyal in the sense that the prospect of their becoming a government is constitutionally and politically thinkable and respected, no matter what the nature of their program."

40 David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at 85 (emphasis added).

41 *Lange (No 1)*, above n 15, at 463 (emphasis added).

42 Waldron, above n 26, at 12 as set out at [35](c) above.

[39] When the Leader of the Opposition scrutinises and criticises government and holds it to account what is at play is the very freedom of expression which the common law recognises "as essential to liberty and representative government".[43]

[40] The public, to whom it may be assumed Mr Little's statements were ultimately addressed, has a corresponding interest in receiving, in fact a right to receive, communications emanating from the Leader of the Opposition in the discharge of that role. On that basis alone the duty–interest test may be regarded as satisfied in the circumstances of this proceeding. In the event that I am wrong about that I turn to the subject matter of Mr Little's statements.

The occasions of publication and the subject matter

[41] I have set out in chronological order (rather than the order in which they were pleaded in the statement of claim) the six occasions during which Mr Little made the statements which are the subject of the proceeding:

(a) RNZ interview on 18 April 2016 12:00 pm;

(b) Media Statement released on 18 April 2016 at 12:20 pm;

(c) TV One News interview on 18 April 2016 at 6:08 pm;

(d) TV One Breakfast interview on 19 April 2016 at 7:12 am;

(e) BFM Breakfast interview on 19 April 2016 at 7:48 am; and

(f) TV One News Interview on 19 April 2016 6:03 pm.

[42] As the statement of defence pleads the broad subject matter concerned the award in September 2014 of a hotel management contract for the operation of the Matavai Resort in Niue to the Scenic Hotel Group. Mr Hagaman, the founder and director of a number of companies in the Scenic Hotel Group had, approximately one month earlier, donated $100,000 to the National Party. Then in October 2015

[43] *Lange* HC, above n 8, at 30.

the Minister of Foreign Affairs and Trade approved an investment of $7,500,000 to expand the Matavai Resort.

[43] Mr Little's evidence was that his interest was "piqued" by an item which he heard on Radio New Zealand's (RNZ) Morning Report as he was preparing to leave for work on 18 April 2016. An audio recording of the broadcast, which lasted approximately three minutes, was played during the trial. The following matters were amongst those reported during the three minute broadcast:

(a) In October 2014 the Scenic Hotel Group announced it had secured the Matavai Resort in Niue. The Niue Tourism Property Trust whose trustees are appointed by the Minister carried out what the Minister said was a "fully commercial process" to find a company to manage the resort. That contract was won by the Scenic Hotel Group.

(b) "Just weeks earlier Earl Hagaman, the company's founder, donated $101,000 to the National Party making him National's biggest living financial donor in 2014." The Minister of Foreign Affairs and Trade, Mr McCully, said there was no link between a businessman's donation to the National Party and his company winning a contract to manage a resort in Niue.

(c) In 2015 the government announced a further $7.5 million in funding to expand the Scenic Matavai Resort to help grow tourism. It had spent more than $10 million over previous years developing the resort but Mr McCully was adamant there was no link between the winning of the contract, the new aid funding and the donation to the National Party.

(d) Mr McCully was asked whether he had any concern about perceptions that financial donors are the recipient of New Zealand aid.

(e) An excerpt from an interview with the person who runs an organisation which analyses and critiques New Zealand's aid

programme and whose view was that the funding was likely to benefit the Scenic Hotel Group more than the people of Niue.

(f) Records show that Mrs Hagaman "also donates to the government's support partner, ACT" and was that party's largest donor in 2013.

[44] Mr Little's interest was "piqued" by the report against what he described as a range of other concerning matters involving the government at around about that time: the SkyCity controversy, the Saudi sheep deal and the Panama Papers. Mr Little gave evidence about the particular aspects of these public matters which he found concerning. It is not necessary to recount that evidence. The relevant point is that, from Mr Little's point of view, the events "pointed to a failure of this Government to manage conflicts of interest".

[45] The steps Mr Little took in the hours immediately following the Morning Report item are an important aspect of the overall context in which his publications were made. When Mr Little arrived at work he was told that RNZ had been in touch and was interested in speaking to him about the story concerning the donation to the National Party and the award of the hotel management contract to the Scenic Hotel Group. After consulting with his senior staff as to what action was appropriate beyond commenting in the media, Mr Little requested his staff to check a number of facts: to check with the Electoral Commission as to whether the donations had been disclosed; to check whether there had been any publicity about the award of the Matavai Hotel contract and generally to be sure that what had been reported on RNZ was accurate and reliable. That having been done the judgement Mr Little then made was to refer the matter to the Auditor-General. A letter was accordingly prepared.

[46] As these preparations were underway it occurred to Mr Little that the issue was likely to be of interest to media outlets beyond RNZ and that therefore a media release should be prepared confirming that he had referred the matter to the Auditor-General. Mr Little's evidence was that he was more likely to make a media statement when an issue of wider interest and importance arose. Referring a matter to the Auditor-General was just such an occasion.

[47] Having made the decision to refer the matter to the Auditor-General Mr Little decided to give the interview with RNZ but first he required confirmation the letter to the Auditor-General had been sent. Mr Little's recollection was that the letter was sent between 11:45am and midday.

[48] Because RNZ had made the first request for an interview and because RNZ had run the story throughout the morning Mr Little agreed to speak to RNZ at about the time his letter had been transmitted to the Auditor-General. Shortly afterwards the media statement was issued by his office.

[49] That then is the immediate backdrop to the first and second publications. I turn now to the third occasion which was the TV One interview broadcast at 6:08pm on 18 April 2016. That week Parliament was in recess. Mr Little was due to speak to GreyPower Christchurch in Christchurch on the 18th. In accordance with a prior arrangement with TVNZ Mr Little gave the TV One interview once he arrived at his hotel and before his speaking engagement. He recalled the interview lasted for five to seven minutes. Several questions were asked over that period of time but only a small fraction of the whole interview was used. The broadcast itself contained two quotes from Mr Little or, as they are called in the industry, "grabs" from the interview.

[50] The fourth, fifth and sixth occasions were on 19 April 2016. Three interviews were scheduled: two with TVNZ and one with BFM. The fourth publication was an interview with TV One Breakfast. Usually a list of topics to be covered is provided the previous evening. Mr Little could not recall precisely but considered it more likely than not that he knew in advance of the Breakfast interview that he was to be asked about his referral to the Auditor-General. Normally the interview will cover three or four topics. Mr Little said it was unusual to simply focus on one topic but he confirmed that the transcript in evidence was a full transcript of the interview on the specific topic of his referral to the Auditor-General.

[51] Similarly, the transcript of the interview of the BFM Breakfast interview started with the words "let's move our attention to Niue now" suggesting that more

was discussed than the award of the Scenic Hotel contract. This interview was conducted at the University Student's Association Building in Auckland.

[52] The sixth, and final, publication was the interview broadcast on TV One News at 6:03 pm. That interview was conducted outside the Auckland Airport. Mr Little's recollection was that it lasted 10 to 12 minutes. The actual broadcast included four excerpts, or grabs, from the interview.

[53] Several points emerged in the course of Mr Little's evidence that are pertinent to all six occasions of publication. The first is that Mr Little's comments were sought on a matter already in the public arena. The Morning Report item referred to the fact of the award of the contract to the Scenic Hotel Group and the fact of a $101,000 donation by the "company's founder … making him the longest living donor in 2014." Beyond the reporting of those facts the item included questions of the Minister regarding concerns about the perception of a political party financial donor being the recipient of New Zealand aid.[44]

[54] The second point is that Mr Little's criticisms were not directed towards Mr and Mrs Hagaman but at the government because of its "record in the SkyCity Convention deal, the Saudi sheep deal and more recently over Panama Papers". Mr Little had never met Mr or Mrs Hagaman. He was aware of Mr Hagaman without being clear about what Mr Hagaman did until the hotel management contract issue emerged. He certainly knew nothing about Mr Hagaman's ownership interests in Scenic Circle. It was not the fact of Mr Hagaman's donation that prompted his media release but the fact there had been a significant donation to the National Party within a month of what Mr Little described as a government contract, going to the donor. That was the issue for Mr Little and in the context of a government that had, to his mind, "a very strong widely known track record of managing conflicts of interest poorly".

[55] Thirdly, the reason Mr Little took the actions he took and made the comments he made was because of the suspicion aroused by one of the largest political donations being made to the governing party in close proximity to the award

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[44] See [42] above.

of a contract to the donor – again at a time when the government had a demonstrated track record of poorly managing conflicts of interest. Mr Little felt the right thing to do was to refer the matter for inquiry and reassurance that there was nothing untoward.

[56] The fourth point is that Mr Little was emphatic about what his role as Leader of the Opposition entailed. He was to call, or hold, the Government to account. Throughout his evidence-in-chief and under cross-examination Mr Little emphasised this aspect of his role as Leader of the Opposition – his obligation:

> in public office to call the government to account, to take appropriate steps to ensure the public can be reassured that this government is acting properly and in accordance with widely accepted rules of conduct.

[57] In that role Mr Little considered he had to be sure "that the government, that its ministers and ministries and agencies act with due probity and propriety manage their conflicts of interests properly".

[58] To that end Mr Little said it would have been improper, to accept as reassurance, the assertion of an interested party in the very matter that was putting the Government under suspicion.

[59] Finally, Mr Little acknowledged that sometimes "calling the government to account" will reflect on others but he could not be deterred or dissuaded from fulfilling his moral obligation by accepting unquestioningly the assertions of an interested party. Mr Little considered that to do so would be a failure, indeed a dereliction, of his duty.

[60] Mr Little's statements were made in pursuance of his duty as Leader of the Opposition and were made about matters bearing on the propriety of the government's approach to funding ostensibly private interests. Assuming a spectrum of political topics ranging from the mundane (perhaps political gossip) to matters of demonstrable public interest, questions of transparency in the award of contracts by government to private interests who happen also to be significant donees to the party in government are matters of demonstrable public interest. That view takes some

support from the Auditor-General's decision to inquire into the matters referred to her (to the extent of her jurisdiction).[45]

Qualified privilege conclusion

[61] The common law in this area is to be developed in light of New Zealand's evolving political, social and economic conditions.[46] Key to that context is New Zealand's system of representative democracy in which:[47]

> the transcendent public interest in the development and encouragement of political discussion extends to every member of the community. … Comment upon the official conduct and suitability for office of those exercising the powers of government is essential to the proper operation of a representative democracy. Political discussion in a democracy inevitably on occasion will entail the making of statements which are likely to injure the reputation of others.

[62] On all six occasions the subject-matter of Mr Little's communications concerned the tender process by which the hotel management contract had been awarded and whether due process had been followed. What Mr Little characterised as the government's poor track record of managing conflicts of interest was to the fore when he raised questions about the links between the donation and any influence of the donation on the tendering decisions. These concerns, as well as disquiet about the $7.5 million being prioritised to develop the resort and the extent to which benefit would accrue to the Niue people, were all questions which Mr Little not only raised publicly but framed for the Auditor-General.

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45 The Auditor-General characterised the issues which Mr Little raised as presenting a complex set of circumstances in terms of her jurisdiction in Niue which was derived from her role as auditor of the Niue Government. Her limited mandate under the Constitution of Niue and its legislation meant she could not inquire into Mr Little's question about any links between the donation and the tender and what influence, if any the donations may have had on the tendering decisions. Specifically the Auditor-General stated: "I do not have the mandate to inquire into political donations in these circumstances." :Letter from Lyn Provast (Controller and Auditor-General) to Andrew Little (Leader of the Opposition) regarding a response to request for inquiry into awarding a management contract for a hotel in Niue (7 September 2016).

46 *Lange (No 2)*, above n 3, at [40].

47 *Lange* HC, above n 8, at 46.

[63] The Leader of the Opposition has a duty to criticise and to call the government to account.[48] In that context freedom of expression becomes acutely relevant. Effective opposition, and thus the public interest, would be compromised if scrutiny, challenge, criticism and comment were confined to debate in the House. By exercising his or freedom of speech the Leader of the Opposition makes information bearing on responsible government accessible to the public. In New Zealand's political and constitutional setting in which the Leader of the Opposition has a duty, and the public have a right, to call the government to account the free flow of information and opinion such as that published by Mr Little attracts qualified privilege because protection in this context advances the "common convenience and welfare of society".

[64] Two final observations: first, to the extent that my assessment represents an expansion of common law privilege the expansion is "matched" by the check on misuse of the occasion which s 19 of the Defamation Act effects. The expansive approach which the courts take to what constitutes misuse of an occasion of privilege results in a proper overall balance. Those who do not "exhibit the necessary responsibility" when speaking on a privileged occasion thereby may lose the protection of the privilege.[49]

[65] The second point is that in the course of public debate on matters of public concern individuals may be "swept involuntarily into political controversy".[50] But while private interests and reputation are also entitled to the law's safe-guard ultimately the common law defence of qualified privilege recognises that it is for "the general good that individuals should occasionally suffer than that freedom of communications between persons in certain relations should be in any way impeded."[51]

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48 See the discussion at [35] above.
49 *Lange (No 2)*, above n 3, at [39].
50 *Lange* HC, above n 8, at 46.
51 *Bowen v Hall* (1881) 6 QBD 333 at 343 per Lord Coleridge CJ.

Lange defence

[66] My analysis and conclusion have proceeded on the basis of the defendant's pleading and by reference to first principles.[52] That is, Mr Little has established his duty to make the communications he made to an audience who had an interest in receiving those communications and he has shown that it is in the public interest that his freedom of expression should prevail over protection of reputation. The further observations I make do not arise from the pleadings, nor from any argument advanced on behalf of either party, but given the political context in which this proceeding is brought I believe them to be apt.

[67] Mr Little did not plead a defence of qualified privilege based on "political discussion" but in my view there is an equivalence between the qualified privilege in this case and the *Lange* privilege which protects political discussion.

[68] In *Lange* HC Elias J reached this conclusion:[53]

> Qualified privilege attaches to political discussion communicated to the general public. "Political discussion" is discussion which, by developing and encouraging views upon government, bears upon the function of electors in a representative democracy. … The defence is available equally to individuals and the news media.

[69] Elias J's decision was upheld by the Court of Appeal whose consideration of the development of the law led it to reach five conclusions about the defence of qualified privilege as it applies to political statements which are published generally.[54] That decision, *Lange (No 1)*, was appealed to the Privy Council. Their Lordships thought it appropriate to give the New Zealand Court of Appeal the opportunity to reconsider the issue in light of a recent decision of the House of Lords on a virtually identical issue.[55] Accordingly the matter was remitted to the Court of Appeal.

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52 *Vickery v McLean*, above n 7, at [18].
53 *Lange* HC, above n 8 at 51.
54 *Lange (No 1)* at 467.
55 *Lange v Atkinson* [2000] 1 NZLR 257 (PC) referring to *Reynold v Times Newspapers Ltd* [2001] 2 AC 127 (HL) which was delivered on the same day and by the same Judges as those who sat in the Privy Council on the appeal of *Lange (No 1*).

[70] The Court of Appeal in *Lange (No 2)* decided to adhere to its previous conclusion and in particular to confirm the five-point summary in *Lange (No 1)* to which it added a sixth point to ensure that what was previously implicit was now made explicit.[56]

[71] The Court of Appeal's summary of conclusions is to be read as a whole. The conclusions proceed from the Court of Appeal's first point which is that the general publication of a statement does not of itself defeat the defence of qualified privilege:[57]

> (1) The defence of qualified privilege may be available in respect of a statement which is published generally.
>
> (2) The nature of New Zealand's democracy means that the wider public may have a proper interest – supporting the defence – in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.
>
> (3) In particular, a proper interest does exist in respect of the statements made about the actions and qualities of those currently or formerly elected to Parliament and of those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities. In amplifying this passage the Court of Appeal stated:[58]
>
> > [this third conclusion] is to be read in the context of the previous two. The proper interest does exist and the defence is accordingly capable of applying to the statements identified in that conclusion so long as those statements directly concern the functioning of representative and responsible government.
>
> (4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.[59]
>
> > The fourth conclusion is a further essential element. It is only those matters which are properly of public concern that are protected. The assessment of the occasion to see whether it establishes the privilege must address that issue,

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56 *Lange (No 2)*, above n 3, at [41].
57 At [12].
58 At [12].
59 At [12].

along with the contextual elements indicated in the second conclusion.

(5) The width of the identified public concern justifies the extent of the publication.

(6) To attract privilege the statement must be published on a qualifying occasion.

[72] Mr Little's statements were made in a constitutional and political setting in which the role of party leaders is critical.[60]

> Not only that, *members of the population* of New Zealand who through the electoral system give public power to those who are elected and who through other proper processes of debate and participation attempt to influence their exercise of that power and call them to account, *have a proper interest in having access to information* which directly affects their capacities to carry out their public responsibilities.[61]

[73] Thus the matters on which Mr Little communicated were not just matters of mere interest to the public but concerned the functioning of representative and responsible government in which the wider public can be assumed to have a proper interest.

[74] Mr Little's statements may be regarded as being in the nature of political discussion in that they were communications "[bearing] upon the function of electors in a representative democracy by developing and encouraging views upon government."[62] And the public which Mr Little addressed through various media outlets had not only a (relevant) interest in receiving the communications but a right to receive them.

Summary

[75] Opposition is an essential part of democratic government. The Leader of the Opposition has a duty to hold the government to account for the decisions it takes. By exercising his or her freedom of speech the Leader of the Opposition makes information bearing on responsible government accessible to the public. The public has a proper interest in receiving this information. In New Zealand's system of

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60 *Lange (No 1)*, above n 15, at 464; See also [38] above.
61 At 464 (emphasis added).
62 *Lange* HC, above n 8 at 46.

representative democracy protection of communications about matters of proper public concern facilitates discussion and comment about official conduct and the exercise of powers of government.

[76] Mr Little's communications followed a nationwide broadcast of a report on a matter of public interest. They were communications made in pursuance of his role as Leader of the Opposition and on a matter of public interest. The communications attract qualified privilege because protection in the contexts in which they were made advances the "common convenience and welfare of society".

Karen Clark J

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