IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY

CIV-2009-418-125
[2012] NZHC 529

BETWEEN	FRANCIS THOMAS DOOLEY Plaintiff
AND	RAYMOND BRUCE SMITH First Defendant
AND	MOHAMMED SHAHADAT Second Defendant

Hearing: 27-29 February - 1,2,5 March 2012

Counsel: R K P Stewart and J P M Scott for plaintiff
R B Smith in person
M Shahadat in person

Judgment: 26 March 2012

JUDGMENT OF LANG J
[on application for declaration under s 24(1) Defamation Act 1992]

This judgment was delivered by me on 26 March 2012 at 4 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

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[1] In this proceeding Mr Dooley sues Mr Smith and Mr Shahadat in defamation. He contends that each made defamatory statements about him to journalists employed by two West Coast newspapers in early October 2007. As a consequence, he seeks a declaration under s 24(1) of the Defamation Act 1992 ("the Act") that each defendant is liable to him in defamation.

[2] Mr Smith and Mr Shahadat accept that they made the statements in question, and they also accept that the statements referred to Mr Dooley. They deny, however, that the statements have the defamatory meanings alleged by Mr Dooley. They also say that they are entitled to rely on the affirmative defences of truth, honest opinion and qualified privilege.

[3] In order to understand the issues that the proceeding raises, it is necessary to set out the factual background in some detail. Very little of that background is in dispute.

Factual background

[4] In September 2007 Mr Dooley was an elected trustee of Development West Coast ("DWC"), a registered charitable trust. He was also DWC's Chairman.

[5] DWC was established in 2001 to manage the investment and expenditure of a funding package of $92 million that the Government made available to the wider West Coast region for the purpose of fostering regional economic development in the region. The Government made that package available after it decided to end the logging of indigenous forests on the West Coast. That decision had major economic ramifications for the West Coast region.

[6] DWC's affairs were managed by a board comprising 12 trustees. The Buller, Grey and Westland District Councils each appointed one trustee, as did the West Coast Regional Council. Voters in each of the Buller, Grey and Westland districts elected two trustees at triennial elections. Ngai Tahu was entitled to appoint one

trustee, and the New Zealand Law Society and the New Zealand Institute of Chartered Accountants jointly appointed an independent trustee.

[7] Voters in the Buller district elected Mr Dooley as a trustee in March 2001, and he has remained one of the elected trustees from that district since that time.

[8] Mr Shahadat was an elected trustee for the Westland district for the period between April 2004 and October 2007. He did not seek re-election at the triennial elections that closed on 13 October 2007.

[9] Mr Smith was a candidate in that election, and was elected trustee for the Westland district for the period from October 2007 until October 2010.

[10] The trustees of DWC elect a Chairman from within their number in September each year, and at the first meeting of trustees after each triennial election. Mr Dooley was elected as Chairman of DWC in April 2001, and he remained in that role until March 2008.

[11] Not surprisingly, the news media on the West Coast paid close attention to DWC's activities. The manner in which DWC managed its affairs also attracted the attention of residents and ratepayers in the various communities that make up the West Coast region. They contributed to the debate by regularly writing letters to the editors of the local daily newspapers published in Westport, Greymouth and Hokitika.

[12] Mr Smith was one of the persons who contributed to this debate by writing numerous letters to the editors of local newspapers. Many of these were critical of aspects of DWC's management, and Mr Dooley's leadership style in particular.

[13] The evidence establishes beyond any doubt that, by September 2007, considerable discord also existed between two factions of trustees on the Board. Mr Dooley was in one faction and Mr Shahadat was in the other. The split between the two factions spilled over into the public domain, and was the subject of discussion in numerous articles by, and letters to the editor of, the *Greymouth Star*, *Westport News*

and *Hokitika News* newspapers. Many of these criticised Mr Dooley's leadership style. They also called for DWC to be more transparent and accountable to the residents and ratepayers of the West Coast in relation to the lending and investment decisions that it made.

[14] Matters came to a head on 10 September 2007, when Mr Dooley's three year term as Chairman expired. It was therefore necessary for the Board to elect a new Chairman. The resulting vote produced a deadlock, with six trustees voting in favour of Mr Dooley remaining as Chairman and six voting in favour of another trustee, Mr Williams. Mr Shahadat was one of the six trustees who were opposed to Mr Dooley continuing as Chairman of DWC.

[15] Mr Trousselot, the Chief Executive Officer ("CEO") of DWC, had anticipated that the vote might produce a deadlock. For that reason he had obtained legal advice from DWC's solicitors as to the legal consequences of any deadlock in the vote for Chairman. This was to the effect that the existing Chairman should continue to act as Chairman until the deadlock was broken. As a result, Mr Dooley continued to act as Chairman of the Board until after the elections that closed on 13 October 2007.

[16] The important events for present purposes began on 11 September 2007, when Mr John Clayton, another of the trustees who had voted against Mr Dooley continuing to act as Chairman the previous day, sent Mr Dooley the following email:

> **Sent:** 11 September 2007 11:20 p.m.
> **To:** Frank Dooley
> **Subject:** DWC – Ngai Tahu
>
> Frank
>
> I have been advised that the trust CEO has written a letter on behalf of the trust to Ngai Tahu, lobbing [sic] for Barry Wilson to be retained as the Ngai Tahu representative on the trust.
>
> Can you confirm if such a letter has been written, and if so please supply me with a copy.
>
> Thank you.
> John Clayton
> Trustee

Mr Clayton copied the email to all other trustees.

[17] Mr Dooley says that he telephoned Mr Trousselot after he read Mr Clayton's email on the morning of 12 September 2007. Mr Dooley asked Mr Trousselot whether he knew of the existence of any letter of the type referred to in Mr Clayton's email, but Mr Trousselot told him that he did not. Mr Dooley then telephoned the Ngai Tahu appointee to DWC, Mr Barry Wilson, and asked him to enquire whether Ngai Tahu had received a letter of the type to which Mr Clayton referred in his email.

[18] Later the same morning, after Mr Dooley had talked to Mr Trousselot but before he had received any reply from Mr Wilson or Ngai Tahu, Mr Dooley sent an email to Mr Clayton stating that no such letter had been written. Like Mr Clayton, Mr Dooley copied his response to all other trustees. He also sent Mr Trousselot a copy of his response.

[19] When Mr Dooley arrived at work on 13 September 2007, he found two emails in his inbox. The first of these was from Mr Anake Goodall, Ngai Tahu's Acting Chief Operating Officer at that time. This email read as follows:

> **From:** Anake Goodall [mailto:Anake.Goodall@ngaitahu.iwi.nz]
> **Sent:** 13 September 2007 2:02 a.m.
> **To:** Hokitika Glass Studio [Barry Wilson]
> **Cc:** Mark Solomon; Frank Dooley; Mike Trousselot; a.g.williams@xtra.co.nz
> **Subject:** RE: DWC – Ngai Tahu
>
> Tx for this email Barry
>
> Te Rūnanga o Ngāi Tahu has not received a letter from the Trust on this matter.
>
> In my view discussing these issues by broadcast email does not do the Trust or the trustees any favours.
>
> We are currently running our internal nominations process with our constituents and will notify the Trust of our confirmed appointee as soon as that has been determined.
>
> Until that time we have no view to offer on particular trustees, a preferred chairperson or any other governance matter that is properly the business of the trustees.
>
> Ngā mihi ki a koutou.

Anake

[20] The second email was from Mr Clayton, and it read:

> **From:** John and Margaret Clayton [mailto: jclayton@xtra.co.nz]
> **Sent:** 13 September 2007 7:50 a.m.
> **To:** Frank Dooley
> **Subject:** RE DWC – Ngai Tahu
>
> Thanks Frank
>
> 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.
>
> Thanks
>
> John

Mr Clayton copied this email to all other trustees, and also to Mr Trousselot.

[21] Mr Dooley did not make any further enquiries of either Mr Trousselot or Ngai Tahu after he read Mr Clayton's second email. Instead, he relied on his earlier discussion with Mr Trousselot and the letter he had just received from Mr Goodall to provide the following response:

> No such letter has been written.

[22] Mr Clayton responded at 5.02 pm on the same date by sending Mr Dooley an email saying:

> Frank
>
> Please double check with Mike, with regard to letters dated the 7th Sept, and advise.
>
> John

[23] Mr Dooley responded to this email at 10.03 am on 14 September 2007 by saying:

> John,

> I have an email from Anake Goodall dated 13/09/07 which states: "Te Runanga o Ngai Tahu has not received a letter from the Trust on this matter".
>
> Frank.

[24] Mr Dooley's response did not satisfy Mr Clayton. Two days later, on 16 September 2007, Mr Clayton sent the following email to Mr Dooley:

> Frank
>
> 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, dated 7th Sept 2007.
>
> Thanks
>
> John

[25] Mr Dooley did not go back to either Mr Trousselot or Mr Goodall when he received this email. Instead, he responded later the same day as follows:

> John,
>
> 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.

Mr Clayton did not respond to Mr Dooley's email.

[26] On or about 28 September 2007, however, Mr Clayton had a telephone conversation with Mr Shahadat. During this, he and Mr Shahadat discussed the series of emails that had passed between Mr Dooley and Mr Clayton. Mr Shahadat had been copied into the emails that Mr Dooley and Mr Clayton sent on 11, 12 and 13 September 2007, but he had not seen the emails that passed between Mr Clayton and Mr Dooley on 16 September 2007. Mr Clayton subsequently sent Mr Shahadat copies of those emails at some stage between 16 and 28 September 2007.

[27] Following the telephone discussion on 28 September, Mr Clayton also forwarded Mr Shahadat a copy of an email message that Mr Trousselot had sent to Mr Goodall on DWC letterhead on 7 September 2011 ("the CEO email"). This read as follows:

> Hi Anake
>
> 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 those lines.
>
> Appreciate your consideration of my request, I can elaborate if you want to talk.
>
> Hope all is going well with you, Warren briefed me on your meeting.
>
> I suspect the Ngai Tahu CEO role is one of the few similar to my own, so I can empathise with the pressure.
>
> Cheers.

[28] During the last week of September 2007, Mr Dooley was dealing with several significant issues relating to DWC. One of these arose from the fact that Mr Smith had obtained confidential DWC documents, and had provided copies of those to the *Greymouth Star*, together with a letter to the editor. He had also sent copies of the documents to the Auditor-General. This prompted DWC to commence proceedings in this Court against Mr Smith seeking the return of the documents. This issue was widely reported by the media on the West Coast.

[29] The next relevant event for present purposes occurred on 1 October 2007. On that date Mr Dooley was in Greymouth, where he was to attend a DWC committee meeting followed by a meeting of trustees. Before the meeting of trustees

began, Mr Dooley received a telephone call from Mr Tui Bromley, a reporter at the *Greymouth Star*. Mr Bromley told Mr Dooley that Mr Shahadat had forwarded a press release to the newspaper, and he began to ask Mr Dooley questions about matters raised in the press release. Mr Dooley then walked across the road to the offices of the *Greymouth Star* to continue the discussion.

[30] Mr Dooley was then interviewed by Mr Bromley and by Mr Paul Madgwick, the editor of the newspaper. Most of the interview was recorded, and the recorded interview was played during the hearing before me. The interview has also been transcribed, and a copy of the transcript was produced in evidence.

[31] During the interview, Mr Bromley showed Mr Dooley the press release that the newspaper had received from Mr Shahadat. The press release was in the following terms:

> **Trustees Misled**
>
> 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.
>
> It is ironic that previously the Chair of DWC has criticised the appointment process undertaken by Westland District Council and the Westcoast Regional Council, in respect of their appointment processes to DWC, however in this case DWC has openly lobbied to retain the current Ngai Tahu appointment.
>
> Further, DWC has requested Ngai Tahu support in retaining the current Chair of DWC and in doing so has made the following remarks;
>
> ….. 'there is a determined clique wanting to overthrow our Chair and gain control and access to the money – does that sound familiar'. The email goes on to say ….. "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 those lines".
>
> I note with concern that the Chairman of DWC told the Westport News on Friday the 28th September that "Mr Trousselot's new contract was being updated and took effect from Monday". This is news to me and to other trustees says Mohammed Shahadat. The appointment and review of chief executive's performance lies with the **Trustees** as a whole and not the Chair. This is explicit in the Trust Deed (schedule 2 paragraph 2 and Policy Manual

> (page 12). I have not seen any delegations to the chair by the trustees in this respect, and if there was one it would be contrary to the Trust Deed and the policy document. I have no personal agendas against the Chief Executive and say that Mike has done a good job in the period I have been a trustee. My concern is that this is another example of the Chair riding rapshody over the Trustees which has led to disharmony between the trustees.
>
> 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 trustee 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.

[32] The journalists also showed Mr Dooley a copy of the email that Mr Trousselot had sent to Mr Goodall on 7 September 2007. They had received this document from an unknown source some days earlier. The journalists sought Mr Dooley's comments in respect of both documents.

[33] After the interview, Mr Dooley returned to DWC's offices and the meeting of trustees commenced. Mr Dooley apologised to those present, including Mr Shahadat, for the delay in starting the meeting. He said that the delay had been caused by the need for him to make comments to the *Greymouth Star* regarding a press release that Mr Shahadat had sent to the newspaper. He did not, however, say any more than this. The meeting then continued.

[34] On the following day, Mr Dooley forwarded Mr Madgwick the original email that he had received from Mr Clayton on 11 September 2007, together with a copy of the email that he had received from Mr Goodall on 13 September 2007. He did not, however, send Mr Madgwick a copy of the email that he had received from Mr Clayton on 16 September 2007, or his response to that email.

[35] Mr Shahadat's press release had prompted Mr Bromley to begin preparing an article for publication in the *Greymouth Star* on 3 October 2007. On 1 October 2007 he sent a copy of the press release, together with a copy of the CEO email dated 7 September 2007, to Mr Smith by facsimile for comment. It is not clear whether he

did this before or after he and Mr Madgwick interviewed Mr Dooley at the offices of the newspaper.

[36] After he received the documents, Mr Smith telephoned Mr Shahadat in order to check that Mr Shahadat was sure that the facts underpinning his press release were accurate. After receiving an assurance from Mr Shahadat that they were, Mr Smith telephoned Mr Bromley and made the following statements:

> The correspondence amounts to serious interference in the electoral process.
>
> I find it disturbing 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.

[37] The *Greymouth Star* published a large front page article dealing with these issues on the afternoon of 3 October 2007. The article quoted extensively from the interview that Mr Dooley had held with Mr Madgwick and Mr Bromley on 1 October 2007. It also contained material derived from Mr Shahadat's press release, and it included the statements that Mr Smith had made to Mr Bromley two days earlier.

[38] Mr Dooley says that he did not read this article, because the *Greymouth Star* does not have a wide circulation in Westport, where he lives. On the afternoon of 4 October 2007, however, the *Westport News* reproduced the article in its entirety. When Mr Dooley read the article, he took immediate umbrage at it. He then contacted the owner of the *Westport News*, who told him to take the matter up with Ms Lee Scanlon, the Chief Reporter for the *Westport News*.

[39] Mr Dooley visited Ms Scanlon on the morning of 5 October 2007 and provided her with a hand written statement setting out his version of events. Included in this was information about litigation in which Mr Smith had earlier been involved with the liquidators of a company called Westland Machinery Traders

Limited. Mr Dooley also provided Ms Scanlon with copies of the email he had received from Mr Clayton on 11 September 2007 and the email he had received from Mr Goodall on 13 September 2007.

[40] After Ms Scanlon had considered the statement that she had received from Mr Dooley, she decided to seek comments on it from Mr Madgwick, Mr Smith and Mr Shahadat. She sent the following email to Mr Smith:

> Hi Bruce
>
> Frank Dooley says your claim he misled trustees over correspondence to Ngai Tahu is incorrect. He's produced an email to him from a trustee (dated September 11) which says: "I have been advised 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. Can you confirm if such a letter has been written, and if so please supply me with a copy."
>
> Mr Dooley said he confirmed the email referred to did not exist. It was not the same email referred to in Wednesday's Grey Star, over which you allege he misled trustees. He was not aware of the existence of that email.
>
> Would you like to respond?
>
> He also said your reputation was known to everyone on the West Coast. He referred to a High Court hearing in Christchurch on August 29 last year, at which the liquidator for Westland Machinery Traders had claims against yourself, John Rathgen and Michael Tucker concerning inter company dealings between Westland and other companies in which the three of you had an interest. As a result of those dealings, the liquidator said, the assets of Westland were transferred to those other companies for inadequate consideration, and therefore Westland suffered losses. The liquidator asserted: negligence, reckless trading, a failure to act in good faith/best interest, failure to exercise reasonable care, diligence and skill, failure to keep proper accounting records and failure to act bona fide in the interests of the company or use powers for proper purposes and to avoid conflicts of interest in the management of Westland.
>
> We understand there was a confidential settlement on August 17 this year.
>
> Would you like to comment?
>
> Our deadline is 1 pm.
>
> Thanks
>
> Lee Scanlon.

[41] Mr Smith responded ten minutes later as follows:

> Lee,
>
> Thanks for your email.
>
> 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.**
>
> Mr Dooley's claims in relation to my reputation are defamatory.
>
> His comments in relation to WMT [Westland Machinery Traders] have been passed by Mr Dooley to the Press and Greystar some weeks ago. The statement made to them was:
>
> The claim that was made was settled with a no liability to either side clause.
>
> The claims made were untrue and are defamatory.
>
> Should you require further information let me know.
>
> Kind regards
>
> Bruce Smith. (Emphasis added)

[42] Ms Scanlon was unable to reach Mr Shahadat to obtain his comments, but she obtained comments from Mr Madgwick to the effect that he stood by the story that the *Greymouth Star* had run on 3 October 2007. Mr Madgwick also considered that Mr Dooley was "splitting hairs" in the issues that he had raised in his written statement.

[43] On the afternoon of 5 October 2007 the *Westport News* published a front page article that included material provided by Mr Dooley, Mr Smith and Mr Madgwick.

[44] Mr Dooley considered that several comments in the statements that Mr Smith and Mr Shahadat had made to the two newspapers were defamatory of him. In November 2007 he instructed solicitors to act on his behalf to pursue the issue, but did not issue the present proceeding until November 2009.

Some observations about aspects of the evidence

[45] Before turning to the discrete issues that the proceeding raises, it is appropriate to make some observations about aspects of the evidence. Some of these

are directly relevant to the issues that I am required to decide. Although others may not be directly relevant to those issues, nevertheless they were the subject of considerable attention during the trial, and the parties should have the benefit of the Court's views in relation to them.

Mr Dooley's evidence

[46] Mr Dooley's evidence satisfies me that he did not become aware of the CEO email until Mr Madgwick and Mr Bromley showed it to him during the interview at the offices of the *Greymouth Star* on 1 October 2007. Indeed, at the end of the hearing both Mr Smith and Mr Shahadat accepted the truth of Mr Dooley's evidence on this point.

[47] Mr Dooley's evidence on this point is supported by the evidence given by Mr Trousselot. Mr Trousselot confirmed that he never told Mr Dooley about the existence of the CEO email, and that the two men discussed it for the first time on 4 October 2007.

[48] It is also supported by the manner in which Mr Dooley framed his response to Mr Clayton's email on 16 September 2007.[1] He began that response by saying "You seem to know more about this than I do" and ended it by saying "Pray tell me what I am missing". Both of those comments would have alerted an objective reader to the possibility that Mr Dooley genuinely did not know what Mr Clayton was referring to.

[49] The information that Mr Clayton had given Mr Dooley in his email dated 16 September 2007 makes it clear that Mr Clayton was asking Mr Dooley to confirm the existence of the CEO email dated 7 September 2007. In his response, however, Mr Dooley referred to a letter dated 6 September 2007 that DWC had received from Ngai Tahu in relation to Mr Wilson's reappointment. This letter had nothing to do with the CEO email dated 7 September 2007. This, too, suggests that Mr Dooley had completely misconstrued what Mr Clayton was seeking.

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[1] Set out at [25].

[50] I consider, however, that I need to make two points about Mr Dooley's actions during the period between 11 September and 1 October 2007. The first relates to the manner in which Mr Dooley responded to the emails that he received from Mr Clayton between 11 and 16 September 2007.

[51] There can be no criticism of the manner in which Mr Dooley responded to the original email that he received from Mr Clayton on 11 September 2007. Once he read Mr Clayton's email he immediately made the appropriate enquiries with both Mr Trousselot and Ngai Tahu. He then communicated the results of those enquiries to Mr Clayton.

[52] An issue arises, however, as to the adequacy of the steps that Mr Dooley took after he received further emails from Mr Clayton over the next five days. They show that the focus of Mr Clayton's subsequent enquiries was considerably different to that contained in his original request on 11 September 2007.

[53] The original email sought confirmation about the existence of a letter written by the CEO on behalf of the trust "lobbying for Barry Wilson to be retained as Ngai Tahu's representative on the trust". The email that Mr Clayton sent on 13 September widened that enquiry significantly. It asked whether the CEO or Chair had written to Ngai Tahu "about the Ngai Tahu appointee to the trust". Mr Dooley does not seem to have appreciated that Mr Clayton had modified his request, because he made no further enquiries of either Mr Trousselot or Mr Wilson before advising Mr Clayton that "no such letter has been written".

[54] When Mr Clayton responded to this email on the same day, he asked Mr Dooley to "double check" with Mr Trousselot, and also asked Mr Dooley to check specifically for "letters dated the 7th Sept". This was the first occasion on which a specific date had been mentioned. This ought to have alerted Mr Dooley to the likelihood that Mr Clayton was aware of the existence of a specific letter written by Mr Trousselot and dated 7 September 2007. It should therefore have prompted Mr Dooley to ask Mr Trousselot whether he had written a letter to Ngai Tahu on 7 September.

[55] The email that Mr Clayton sent to Mr Dooley on 16 September 2007 was even more specific. It ought to have alerted Mr Dooley to the fact that Mr Clayton knew of the existence of a letter dated 7 September 2007 that was on DWC letterhead and signed by Mr Trousselot. Mr Dooley's response on the same date is understandable at one level, because it demonstrates that he did not know what Mr Clayton was talking about. It does not explain, however, why Mr Dooley did not immediately contact Mr Trousselot and ask him whether he had written to Ngai Tahu on 7 September 2007.

[56] Counsel for Mr Dooley submits that Mr Dooley was justified in not taking any further steps to ascertain whether Mr Trousselot had written such a letter. He points out that Mr Trousselot had received copies of all of the emails that passed between Mr Dooley and Mr Clayton between 11 and 16 September 2007. He contends that Mr Dooley was entitled to rely upon Mr Trousselot coming forward if he had anything material to say about the issues being discussed in the email correspondence.

[57] I accept this submission as far as it goes, but it does not provide a complete answer for Mr Dooley's failure to take further steps to discuss the issue with Mr Trousselot between 11 and 16 September 2007. In particular, it does not explain why Mr Dooley did not raise the issue with Mr Trousselot again once Mr Clayton modified his original request and provided Mr Dooley with specific information about the letter he was seeking. All human beings are fallible, and Mr Dooley ought to have appreciated the possibility that Mr Trousselot was keeping information from him.

[58] Even now, Mr Dooley justifies his failure to discuss the matter further with Mr Trousselot because of Mr Dooley's understanding of the nature of Mr Clayton's original request for information. He says that he still does not see any link between Mr Clayton's subsequent requests and the CEO email. This is because he does not consider that the CEO email amounted to lobbying in the manner suggested by Mr Clayton's original email. Mr Dooley takes the view that Mr Clayton's original request must relate to a document other than the CEO email.

[59] This approach demonstrates that Mr Dooley had, and still has, no real appreciation of the fact that Mr Clayton altered the nature of his enquiry significantly between 12 and 16 September 2007.

[60] I also have no doubt that, had Mr Dooley raised the issue directly with Mr Trousselot at any stage prior to 1 October 2007, Mr Trousselot would immediately have told him of the existence of the email that he had sent to Mr Goodall on 7 September 2007.

[61] The second point relates to the adequacy of the steps that Mr Dooley took to advise others that he had seen the CEO email for the first time during the interview with Mr Madgwick and Mr Bromley on 1 October 2007.

[62] I am satisfied that Mr Dooley did not expressly tell Mr Madgwick and Mr Bromley during the interview that this was the first occasion on which he had seen the CEO email. He confirmed this in his evidence, and it is also borne out by the transcript of the interview. The only possible reference in the transcript to this issue comes late in the interview, where the transcript records Mr Dooley as saying:

> And you know, if you think that question is fine Tui, what I say if there had been any information that had not been brought to my attention, there is an appropriate process to go through. I cannot conduct a proper enquiry if I don't have the information. If I had had that information then I would have gone back to [Anake] and I would have gone back to Mike and said please explain. That is just bullshit.

[63] These comments do not amount to a clear statement that Mr Dooley had never seen the CEO email before. Mr Dooley's focus throughout the interview with the two journalists appears to have been on the interpretation to be given to, and the appropriateness of the comments made in, the CEO email. The fact that he had never seen it before does not seem to have been an issue for him during the interview.

[64] Similarly, Mr Dooley accepts that he did not tell those attending the meeting of trustees on 1 October 2007 that he had just seen the CEO email for the first time. He told them only that the meeting had been delayed by virtue of his need to comment to the *Greymouth Star* on Mr Shahadat's press release.

[65] Mr Dooley explained his failure to take the matter further at this stage by saying that he believed that Mr Shahadat's press release was a personal attack on him. He did not consider that it related directly to DWC's affairs. For that reason he did not feel it appropriate to take the issue further at the meeting of trustees.

[66] Mr Dooley also said that he was under the impression that he had satisfactorily answered all of the questions that Mr Bromley and Mr Madgwick had put to him, so there was no need to discuss the issue further with either Mr Shahadat or the other trustees.

[67] I have no doubt that Mr Dooley genuinely held these views. I consider, however, that Mr Shahadat's press release related directly to the affairs of DWC generally, and to Mr Dooley's actions as DWC's Chairman in particular. Mr Dooley would therefore have been entirely justified in advising the trustees of the existence and contents of Mr Shahadat's press release, together with his response to the matters that it raised.

[68] Had Mr Dooley raised the issue at the meeting of trustees, 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.

[69] 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. This is evident from the fact that, in the email that Ms Scanlon sent Mr Smith on the same date, she told Mr Smith that Mr Dooley "was not aware of the existence" of the CEO email.

[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.

Mr Trousselot's evidence

[71] Mr Trousselot had been DWC's CEO since October 2001. He struck me as an honest witness, who candidly accepted responsibility for his part in the sequence of events that has given rise to this proceeding. I accept his evidence that he never consulted Mr Dooley before he sent the email to Mr Goodall on 7 September 2007.

[72] I also accept that Mr Trousselot never advised Mr Dooley of the existence of the email until Mr Dooley spoke to him on 4 October 2007. This was three days after Mr Dooley had seen the email for the first time at the offices of the *Greymouth Star*. The fact that Mr Dooley was not able to speak to Mr Trousselot about the email during the period between 1 and 4 October 2007 appears to be explained by the fact that Mr Trousselot was on sick leave for at least some of that period. Mr Trousselot said that Mr Dooley was "steaming" when he confronted Mr Trousselot about the email.

[73] Mr Trousselot conceded that, when Mr Dooley first approached him about Mr Clayton's request on 11 September 2007, he gave some thought to the possibility that Mr Clayton may have been referring to the email that he had sent to Mr Goodall on 7 September 2007. He did not, however, consider that he had lobbied in that email for Mr Wilson to be retained as the Ngai Tahu representative on the trust. For that reason, he told Mr Dooley that he had not written any letter to Ngai Tahu concerning the issue referred to in Mr Clayton's original email.

[74] Mr Trousselot acknowledged that he subsequently received copies of the emails that passed between Mr Clayton and Mr Dooley. As these progressed, he realised that it was probable that Mr Clayton was referring to the email that he had sent to Mr Goodall on 7 September 2007. He considered, however, that he had been boxed into a corner by his initial denial of any correspondence relating to Ngai Tahu. In his words, it was a situation where "you've put yourself on a peak, … the wrong

one, so it's just difficult to get off." He therefore elected not to advise Mr Dooley of the existence of the CEO email.

[75] Mr Trousselot's silence regarding the existence of the CEO email was undoubtedly a major contributor to the events that subsequently occurred. Mr Trousselot had an obvious duty to advise his Chairman of the existence of the CEO email and he failed in that duty. Had he alerted Mr Dooley to the existence of the letter at any stage prior to 3 October 2007, Mr Dooley could have averted subsequent events.

Mr Clayton's evidence

[76] Mr Clayton was one of the six trustees who voted against Mr Dooley continuing to act as Chairman of the trust at the election on 10 September 2007. In an article published in the *Greymouth Evening Star* on the following day, Mr Clayton is reported to have accused Mr Dooley of "arrogance and desperation". The article also attributed the following comments to Mr Clayton:

> Before the meeting [on 10 September 2007] was even finished, Mr Dooley's attack was in the media. For him to use a staff member to make a media release containing such biased information demonstrates to me just how much out of control the organisation is …
>
> He [Mr Dooley] has shown no respect for the organisation or his fellow trustees with such an inappropriate outburst and once again, unfortunately, demonstrates his disruptive manner.
>
> After six years at the head of the trust he has the support of only five other trustees out of 12. The trust is desperately in need of a leader with a moderate, inclusive style …

[77] It may also be significant that Mr Clayton sent his first email to Mr Dooley just one day after the tied vote at the election for Chairman on 10 September 2007. This suggested that Mr Clayton was privy to information suggesting that DWC's CEO had written a letter on behalf of the trust to Ngai Tahu. Mr Clayton was extraordinarily vague about the source of that information. He thinks the information may have come from discussions he held with a person who had some association with Ngai Tahu. He cannot now be sure who that person was.

[78] By 16 September 2007, however, Mr Clayton accepts that he was in possession of the CEO email. He was also vague, indeed I would say evasive, about the source from which he obtained a copy of that letter. The closest that he came to providing a positive answer to this question is when he said he had spoken to somebody who had contacts with Ngai Tahu. I accept that the email exchange between Mr Clayton and Mr Dooley may have formed a very small part of the overall picture in September 2007. I still find it difficult to accept, however, that Mr Clayton now has no recollection at all regarding the identity of the persons with whom he discussed this issue, or of the person who provided him with a copy of the CEO email.

[79] Mr Clayton said at one stage in his evidence that he thought he may have obtained the CEO letter from the *Greymouth Star*. He was very unsure about that, however, and I consider it to be inherently unlikely. There is certainly no other evidence to suggest that the *Greymouth Star* was responsible for providing Mr Clayton with a copy of the email. It is not necessary for present purposes to reach any conclusion regarding the source of the CEO email that found its way into Mr Clayton's possession. I consider it likely, however, that Mr Clayton received that document from the same source as he had received the information that prompted him to send his original email to Mr Dooley on 11 September 2007.

[80] It is also difficult to find a ready explanation for the fact that Mr Clayton took matters no further after he received Mr Dooley's response on 16 September 2007. As I have already observed, the fact that Mr Dooley's response referred to a letter from Ngai Tahu dated 6 September 2007 suggested that Mr Dooley may have been confused about the request that Mr Clayton had been making. At the very least, however, Mr Dooley's opening and closing comments ought to have alerted Mr Clayton to the possibility that Mr Dooley was genuinely ignorant of the existence of the CEO email.

[81] Mr Clayton said in evidence that he did not respond to Mr Dooley's email because he was frustrated and felt he had "hit a brick wall" in terms of getting a response. I do not accept that explanation. Rather, I think it more likely that Mr

Clayton decided that he would use the CEO email and the email chain to his own political advantage. He did this by providing the information to Mr Shahadat.

[82] I interpolate to say that it is not at all clear how the *Greymouth Star* came into possession of the material that Mr Madgwick and Mr Bromley showed to Mr Dooley on 1 October 2007. Neither journalist could say where it came from, although Mr Bromley thought that Mr Madgwick may have received it through his relationship with Ngai Tahu. There is some confirmation for that, given that Mr Madgwick and Mr Bromley also showed Mr Dooley an internal Ngai Tahu memorandum written by Mr Goodall's secretary, Ms Jeanette Hurunui. On the other hand, it is difficult to see how Ngai Tahu could have come into possession of the emails that passed between Mr Dooley and Mr Clayton after 11 September 2007. When I asked Mr Clayton whether he had passed the emails on to the newspaper, he said he did not remember doing that.

[83] As I said to Mr Clayton when he gave evidence, it would have been a very simple matter for him to have confronted Mr Dooley with the fact that the CEO email existed. Had he taken that step in response to Mr Dooley's request for further information on 16 September 2007, the events that have given rise to this proceeding would never have occurred. For this reason Mr Clayton, too, must bear considerable responsibility for those events.

Mr Bromley and Mr Madgwick's evidence

[84] Nothing really turns on the evidence given by Mr Bromley and Mr Madgwick. For the most part they merely acted as a conduit through which others passed information. It is nevertheless appropriate to comment on three aspects of their evidence.

[85] First, there is a conflict between their evidence and that of Mr Dooley relating to the events that took place when Mr Dooley first arrived at the offices of the *Greymouth Star* on 1 October 2007. Both Mr Madgwick and Mr Bromley say that Mr Dooley opened the conversation by asking them to publish information about the earlier litigation involving Mr Smith and the liquidators of Westland

Machinery Traders Limited. They also say that he had brought with him some written material relating to that issue. Mr Madgwick and Mr Bromley say that Mr Madgwick told Mr Dooley that they had no interest in discussing that issue. Rather, they wanted to talk to him about the press release that the newspaper had just received from Mr Shahadat.

[86] Mr Dooley contends that he took nothing with him when he went to the newspaper's offices that day, and that no such discussion occurred. He believes that the two men may have confused this meeting with an earlier occasion on which he had provided the newspaper with material relating to the litigation involving Mr Smith and the liquidators.

[87] There is some support for both versions of events. In particular, Mr Dooley used exactly the same modus operandi when he provided Ms Scanlon with his written statement on 5 October 2007. In the email that Ms Scanlon sent to Mr Smith after she had read Mr Dooley's written statement, she referred to the litigation between Mr Smith and the liquidators of WMT. That information obviously came from the written statement that Mr Dooley had given Ms Scanlon on the morning of 5 October. Mr Dooley clearly sought to use that material to discredit Mr Smith's earlier comments to the *Greymouth Star*. This supports the proposition that he sought to use the same tactic at the interview on 1 October 2007.

[88] It is difficult to see, however, why Mr Dooley would have taken material relating to Mr Smith to the interview at the office of the *Greymouth Star* on 1 October 2007 when that interview was to be about Mr Shahadat's press release. At that stage Mr Dooley did not know that Mr Smith had become involved in the issue. Moreover, in the email that Mr Smith sent to Ms Scanlon on 5 October 2007 he told her that Mr Dooley had passed his comments regarding Westland Machinery Traders to the *Christchurch Press* and *Greymouth Star* "some weeks ago". This suggests that Mr Dooley is correct in his claim that he had provided material relating to the earlier litigation to the newspaper on an earlier occasion. Although nothing really turns on it, I prefer the evidence of Mr Dooley on this point.

[89] Secondly, I am satisfied that Mr Bromley had come into possession of all the emails that passed between Mr Clayton and Mr Dooley at some stage prior to 3 October 2007. I draw this conclusion from the fact that the article that the *Greymouth Star* published on 3 October 2007 contained the following passage:

> 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.

[90] Mr Dooley had sent Mr Madgwick some of the emails that had passed between himself and Mr Clayton on 2 October 2007, but he did not send him all of them. Mr Bromley could only have known the details contained in the passage set out above if he was in possession of the entire email correspondence. As noted above, it is likely that Mr Clayton sent copies of his emails to and from Mr Dooley to the *Greymouth Star* on or about 28 September 2007.

[91] Thirdly, I am satisfied that Mr Bromley and Mr Madgwick did not refer Mr Dooley to the email correspondence during the interview on 1 October 2007. The transcript of the interview makes it clear that they only showed three documents to him at that time. These were Mr Shahadat's press release, the CEO email and an internal Ngai Tahu memorandum that was irrelevant to the issues the three men were discussing.

Defamation: General principles

[92] There is no dispute regarding the principles that apply to a claim in defamation. Underpinning the law relating to defamation is the principle that all persons have a right to claim that their reputation should not be disparaged by defamatory statements made about them to third persons without lawful justification or excuse.[2] A person's reputation extends to the person's trade, business or profession. Words will be defamatory if they impute lack of qualification,

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[2] *Laws of New Zealand* Defamation (online ed) at [1].

knowledge, skill, capacity, judgment, or efficiency in the conduct of the person's trade, business or professional activity.[3]

[93] In the present context, a defamatory statement is a statement that tends to lower a person in the estimation of right thinking members of society generally,[4] or which is a false statement about a person to his or her discredit.[5]

Issues

[94] Mr Smith and Mr Shahadat accept that they made the statements that are the subject of Mr Dooley's claims, and that they published those statements to journalists employed by the *Greymouth Star* and *Westport News* newspapers. They also accept that references in their statements to "the Chair" are references to Mr Dooley.

[95] Mr Shahadat and Mr Smith contend, however, that their statements do not have the defamatory meanings pleaded by Mr Dooley. If they do, they contend that they have established the affirmative defences of truth, honest opinion and qualified privilege. The issues in relation to each cause of action are therefore as follows:

1. Do the words that the defendants used have any of the meanings pleaded by Mr Dooley?

2. If so, are any of those meanings defamatory of Mr Dooley?

3. If so, has either of the defendants established one or more of the affirmative defences of truth, honest opinion and qualified privilege?

4. In relation to the defences based on honest opinion, can the defendants (or either of them) establish that they genuinely held the opinions in question?

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[3] *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688 at 699 (CA).
[4] *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkin (HL).
[5] *Scott v Sampson* (1882) 8 QBD 491 at 503; *Youssoupoff v Metro-Goldwyn-Mayer* (1934) 50 TLR 581 at 584 (CA).

5. If either defendant establishes the defence of qualified privilege, is that defence defeated by Mr Dooley establishing that the defendant in question was predominantly motivated by ill will towards him, or that he otherwise took improper advantage of the occasion of publication?

A. First cause of action – the statements made by Mr Smith to the *Greymouth Star* newspaper on 1 October 2007

[96] For convenience, I set out again the statements that Mr Smith made to Mr Bromley of the *Greymouth Star* newspaper on 1 October 2007. The statements that form the basis of Mr Dooley's claim are highlighted in bold:

> **The correspondence amounts to serious interference in the electoral process.**
>
> **I find it disturbing 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 could be independently reviewed.

Do the statements have any of the meanings pleaded by Mr Dooley?

[97] In considering this issue it is first necessary to consider the meaning that the words would convey to the ordinary person. Thereafter, the test is whether, in the circumstances in which the words were published, a reasonable person to whom the publication was made would be likely to understand them in a defamatory sense.

[98] In determining the meaning of the words, the words must be considered in their context, and the publication viewed as a whole. Both the literal and inferential meaning of the words must be considered. Together, those meanings comprise their natural and ordinary meaning.

[99] Counsel for Mr Dooley summarised the approach that the Court must take in this context in the following passage in his closing submissions:

> The meaning of words for the purpose of the law of defamation is not a question of legal construction, since the layperson will read an implication into words more freely than a lawyer.[6] The relevant meaning is that which the words would convey to ordinary persons.[7] The ordinary person reads between the lines in the light of general knowledge and experience of worldly affairs.[8] As a result, the interpretation of words may vary infinitely, and the meaning they bear is a question of fact.[9] However, words may be understood by one person in a different way from that in which they are understood by another.[10] Ordinary men and women have different temperaments and outlooks, some being unusually suspicious, some being unusually naïve; one must try to envisage people between those two extremes and determine what is the most damaging meaning they would put on the words in question.[11]

[100] Mr Dooley's amended statement of claim avers that Mr Smith's statements in their natural and ordinary meaning meant, and were understood to mean, that Mr Dooley:

> Deliberately attempted to interfere with the elections held on 13 October 2007;
>
> Was aware of the existence of 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;
>
> Is untrustworthy; and
>
> Is dishonest.

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[6] *Richards v Sun Newspapers Ltd (No 2)* [1931] NZLR 631 at 637 and 638; [1931] GLR 329, *Lewis Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 at 277; [1963] 2 All ER 151 at 169; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 171; [1968] 1 All ER 497 at 503 (CA).
[7] *Daily Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 at 258 and 284; [1963] 2 All ER 151 at 154 and 173; see also *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 at 772; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157; [1968] 1 All ER 497 (CA).
[8] *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234 at 258; [1963] 2 All ER 151 at 154. See also *Hornsby v Warren* (1883) NZLR 2 (SC) 236.
[9] *Slim v Daily Telegraph* [1968] 2 QB 157 at 172; [1968] 1 All ER 497 (CA) at 504.
[10] Idem.
[11] *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 259; [1963] 2 All ER 151 at 155.

[Mr Dooley] deliberately attempted to interfere with the elections held on 13 October 2007

[101] Mr Smith did not make any statement that could be taken to infer that Mr Dooley had attempted to interfere with the electoral process. All of his statements relating to that issue related to the actions of the CEO, Mr Trousselot.

[102] For that reason I do not consider that the ordinary person would take any of Mr Smith's statements to mean that Mr Dooley deliberately attempted to interfere with the elections for trustees that were held on 13 October 2007. This meaning has not been established.

[Mr Dooley] was aware of the existence of the CEO's email when replying to the Clayton correspondence

[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. As a consequence, I take the natural and ordinary meaning of Mr Smith's first statement to be that Mr Dooley was aware of the existence of the CEO's letter when replying to Mr Clayton's email correspondence.

[Mr Dooley] should have disclosed the CEO's email when replying to the Clayton correspondence

[104] Read together, I am satisfied that Mr Smith's statements infer that Mr Dooley ought to have disclosed the existence of the CEO email when replying to the correspondence. That is the only reasonable inference to be drawn from Mr Smith's statement that he found it "disturbing" that Mr Dooley had denied the existence of the correspondence. Mr Smith could only have found the denial of the correspondence disturbing if he also believed that Mr Dooley ought to have disclosed the existence of the CEO email when Mr Clayton asked if it existed.

[105] Mr Smith's concern about trustees being misled on important matters in the future gives rise to the same inference. Although it is couched as a rhetorical

question, the statement actually amounts to an assertion that trustees will in the future be unable to have any faith that the Chair will not mislead them on matters of importance. The inference to be drawn from this assertion is that Mr Dooley has misled trustees in the past. He has done this by failing to disclose the existence of an important matter, namely the existence of the CEO email, when replying to Mr Clayton's emails. An allegation that Mr Dooley has failed to disclose important information in the past must be based on the unstated premise that he had an obligation to disclose material in the past and he failed to meet that obligation.

[106] I find this pleaded meaning to be established as well.

[Mr Dooley] deliberately misled the trustees about the existence of the CEO's email by denying its existence

[107] The wording of the second statement similarly leads me to conclude that this meaning has been established. The second statement is based upon the unstated premise that Mr Dooley knowingly and deliberately misled trustees when he responded to Mr Clayton's emails by denying the existence of the CEO email.

[Mr Dooley] would deliberately mislead trustees in the future

[108] I reach the same conclusion, and essentially for the same reason, in relation to this pleaded meaning.

[109] The reference to "(future) trustees" is a clear reference to the manner in which Mr Dooley is likely to deal with trustees in the future. The second statement amounts to an assertion that Mr Dooley is likely to mislead trustees in the future.

[Mr Dooley] is untrustworthy

[110] A representation that Mr Dooley has deliberately misled trustees in the past by denying the existence of the correspondence must give rise to an inference that he is not trustworthy. The rhetorical question contained in the second statement must similarly imply that Mr Dooley is untrustworthy.

[Mr Dooley] is dishonest

[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.

Conclusion

[112] It follows that Mr Dooley has established all of the pleaded meanings other than that relating to Mr Dooley deliberately attempting to interfere in the elections held on 13 October 2007.

Are the established meanings defamatory of Mr Dooley?

[113] There can be no doubt that the established meanings are defamatory of Mr Dooley. They call into question the manner in which he has dealt with his fellow trustees regarding the existence of the CEO email. By suggesting that Mr Dooley has deliberately misled the trustees the statements question both his honesty and his integrity as a Chairman.

[114] In so doing, the statements tend to lower Mr Dooley in the estimation of right thinking people generally, and they also amount to false statements about Mr Dooley to his discredit.

[115] It is therefore now necessary to consider whether Mr Smith is entitled to rely upon the affirmative defences of truth, honest opinion and qualified privilege.

Is Mr Smith entitled to rely upon any of the affirmative defences based on truth, honest opinion and qualified privilege?

Truth

[116] The affirmative defence based on truth is contained in s 8 of the Act, which provides:

> **8 Truth**
>
> (1) In proceedings for defamation, the defence known before the commencement of this Act as the defence of justification shall, after the commencement of this Act, be known as the defence of truth.
>
> (2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.
>
> (3) In proceedings for defamation, a defence of truth shall succeed if—
>
> > (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; or
> >
> > (b) Where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

[117] Whilst the onus is on the plaintiff to show that the words used bear one or more of the pleaded meanings, the defendant has the onus of showing that those meanings are true or not materially different from the truth.

[118] All of the pleading 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.

Honest opinion

[119] Sections 9, 10 and 11 of the Act provide for the affirmative defence of honest opinion. This defence has replaced the earlier defence of fair comment. Sections 9, 10 and 11 relevantly provide:

> **9 Honest opinion**
>
> In proceedings for defamation, the defence known before the commencement of this Act as the defence of fair comment shall, after the commencement of this Act, be known as the defence of honest opinion.
>
> **10 Opinion must be genuine**

> (1) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is the author of the matter containing the opinion shall fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion.
>
> …
>
> (3) A defence of honest opinion shall not fail because the defendant was motivated by malice.
>
> **11 Defendant not required to prove truth of every statement of fact**
>
> In proceedings for defamation in respect of matter that consists partly of statements of fact and partly of statements of opinion, a defence of honest opinion shall not fail merely because the defendant does not prove the truth of every statement of fact if the opinion is shown to be genuine opinion having regard to—
>
> (a) Those facts (being facts that are alleged or referred to in the publication containing the matter that is the subject of the proceedings) that are proved to be true, or not materially different from the truth; or
>
> (b) Any other facts that were generally known at the time of the publication and are proved to be true.

[120] In order to advance this defence, a defendant must obviously first establish that the statement in question was a statement of his or her opinion.

[121] In the present case, I consider that two of Mr Smith's statements qualify as opinions. The first statement was an exposition of his opinion that he found it disturbing that the CEO and Chair had denied the existence of the CEO email. The second was that it was likely that Mr Dooley would mislead his fellow trustees about important matters in the future.

[122] Critically, however, the maker of the defamatory statement must plead, and establish, the essential facts upon which the opinion is based. Those facts must obviously be known to the maker of the statement at the time he or she publishes the statement. If the maker of the statement is not aware of them at that time, they cannot logically form the basis of a defence based on honest opinion.

[123] Virtually all of the particulars that Mr Smith has pleaded in relation to this defence relate to facts that must have come to his knowledge after 1 October 2007.

By way of example, his statement of defence avers that he relies upon "the recorded statements of the plaintiff made to two journalists employed by the *Greymouth [Star]* on 1 October 2007." Mr Smith was not present when Mr Dooley was interviewed by Mr Bromley and Mr Madgwick on 1 October 2007, and he did not receive a transcript of the interview until many months later. Mr Smith therefore had no knowledge of the matters discussed in the interview when he made his statements to Mr Bromley on 1 October 2007. For that reason he cannot rely upon the recorded interview as a fact underpinning his opinion.

[124] Similarly, Mr Smith cites statements that Mr Dooley made in some of the emails that he sent in response to the queries that he received from Mr Clayton. Mr Smith had not seen those emails when he made his statements to Mr Bromley on 1 October 2007, so he cannot rely upon them either.

[125] Mr Smith had no knowledge of any of the material events that had occurred prior to the point at which Mr Bromley contacted him for his comments on 1 October 2007. The only facts upon which Mr Smith could rely for the opinions contained in his statements were those contained in the CEO email and Mr Shahadat's press release. Those are the only documents that Mr Bromley sent him when he sought Mr Smith's opinion. In addition, although Mr Smith has not pleaded it, he had the additional information he gained when he telephoned Mr Shahadat after receiving the documents from Mr Bromley.

[126] A defendant who seeks to rely upon the defence of honest opinion must establish that the essential facts upon which the opinion is based are correct. The learned authors of *The Law of Torts* put the matter this way:

> The defence of honest opinion will not protect a defendant if he or she is commenting on things which never happened or which he or she has got wrong. One cannot legitimately criticise a public figure for something that person never did. As Lord Ackner once said: "It is of course well established that a writer may not suggest or invent facts and then comment upon them... The commentator must get his basic facts right."[12]

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[12] Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers Ltd, Wellington, 2009) at 779.

[127] The essential fact that Mr Smith had to get right in the present case was that Mr Dooley knew about the existence of the CEO email when he denied its existence to Mr Clayton. That fact underpinned all of the statements that are the subject of Mr Dooley's claims. Neither of the documents that Mr Smith had in his possession established that fact. Nor, for that matter, could his telephone discussion with Mr Shahadat have provided him with actual confirmation of that fact. The most that Mr Shahadat was able to tell him was that Mr Clayton had given Mr Dooley details that clearly alerted him to the existence of the CEO email, and Mr Dooley consistently denied that the document existed.

[128] This fundamental defect in Mr Smith's case means that he cannot rely upon the affirmative defence of honest opinion in respect of the statements that he made to Mr Bromley on 1 October 2007. He was not entitled to cast aspersions on Mr Dooley's character based on an act or omission for which Mr Dooley was not responsible.

Did Mr Smith genuinely hold the opinions?

[129] This conclusion means that it is not strictly necessary for me to consider the next issue, which is whether Mr Smith genuinely held the opinions that he expressed in his statements to Mr Bromley. In case I am wrong in my earlier conclusion, however, I propose to briefly consider that issue.

[130] Section 10(1) of the Act provides that, where the defendant is the author of a defamatory statement, the defence of honest opinion shall fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion. Mr Smith therefore bears the onus of establishing that he genuinely held the opinions that he expressed in his statements to Mr Bromley.

[131] Mr Dooley has given notice that he intends to allege that Mr Smith did not genuinely hold his opinions. In that notice he has specified several facts that he relies upon in support of his allegation. I now deal with each of these matters, although I do not lose sight of the fact that the onus is on Mr Smith to prove that he

genuinely held his opinions. Mr Dooley does not bear the onus of proving that he did not.

[132] First, Mr Dooley relies upon the fact that he and Mr Smith had a "poor relationship" during 2007.

[133] The evidence does not, however, establish that the two men had any form of direct relationship during 2007. Mr Smith was not a trustee of DWC at this time, and there is nothing to suggest that he ever attended Board meetings or annual general meetings to which members of the public were invited. Moreover, Mr Smith lived and worked in Hokitika, whilst Mr Dooley lived and worked in Westport.

[134] It is clear that Mr Smith was a vocal critic of both DWC and Mr Dooley from the sidelines. Mr Dooley also undoubtedly held strong feelings about the fact that in September 2007 Mr Smith had obtained confidential DWC documents and passed them on to the Auditor-General and the *Greymouth Star*. I do not consider, however, that the evidence establishes that the two men had a poor personal relationship during 2007.

[135] Next, Mr Dooley makes several assertions regarding the state of Mr Smith's knowledge at the time he made his statements to Mr Bromley. Mr Dooley asserts that at that time Mr Smith:

1. Was aware of the Clayton correspondence;

2. Was aware of the press release;

3. Was aware that the first occasion on which Mr Dooley saw the CEO's email was at the interview he had with journalists employed by the third defendant;

4. Was aware that Mr Dooley's responses to Mr Clayton's requests for the CEO's email were consistent with his state of knowledge at the time those requests were made;

5. Was not aware of Mr Dooley being involved in any interference with the DWC's Ngai Tahu representative appointment process; and

6. Was not aware of Mr Dooley misleading DWC trustees.

[136] These assertions need to be viewed in light of the evidence given at trial regarding the circumstances in which Mr Smith came to make his statements to Mr Bromley on 1 October 2007. This established that Mr Smith knew about Mr Shahadat's press release, because Mr Bromley had forwarded him a copy of it. He also knew of the existence of the Clayton emails, mainly as a result of his telephone discussion with Mr Shahadat on the morning of 1 October 2007. At that stage he did not, however, have a copy of the Clayton emails, and he only knew of their contents in general terms.

[137] Importantly, I am satisfied that Mr Smith was not at that stage aware that Mr Dooley had only seen the CEO email for the first time during the meeting with Mr Bromley and Mr Madgwick earlier the same day. Rather, I have no doubt that Mr Smith was under the mistaken impression, gained from the terms of the press release and his telephone conversation with Mr Shahadat, that Mr Dooley must have known about the existence of the CEO email much earlier in the piece.

[138] For this reason I also conclude that Mr Smith was not aware that Mr Dooley's responses to Mr Clayton's requests were consistent with the state of his knowledge at the time he received those requests. Instead, Mr Smith was under the mistaken impression that Mr Dooley was denying that the CEO email existed in circumstances where he knew of its existence.

[139] It is not necessary to deal with the assertion relating to interference in the Ngai Tahu process, because I have found that Mr Smith's statement regarding this issue was not defamatory.

[140] The next assertion is that Mr Smith was not aware of Mr Dooley misleading DWC trustees. This assertion needs to be considered in light of the information that Mr Smith had gained from the CEO email, from Mr Shahadat's press release and his

telephone conversation with Mr Shahadat. Mr Smith knew that the CEO email existed because he had received a copy of it from Mr Bromley. He was also aware of the statement in the press release regarding Mr Dooley's response to requests that a trustee had made to him for a copy of correspondence relating to the Ngai Tahu matter. In addition, he had spoken to Mr Shahadat regarding that issue. These factors had persuaded Mr Smith, wrongly as it turned out, that Mr Dooley had told a trustee that the CEO email did not exist when he knew that it did. In those circumstances the evidence does not establish that Mr Smith "was not aware of Mr Dooley misleading trustees" as Mr Dooley alleges.

[141] Next, Mr Dooley points to the numerous occasions prior to October 2007 on which Mr Smith wrote letters to the editor of local newspapers in which he strongly criticised DWC's activities in general, and Mr Dooley's chairmanship in particular. The evidence establishes beyond any doubt that this occurred. It also shows, however, that Mr Smith's letters related to a wide range of subjects. Many of the letters were highly critical of Mr Dooley's style of governance and of other discrete issues such as DWC's investment and lending policies. Importantly, however, Mr Smith had never previously accused Mr Dooley of having misled his fellow trustees. There is therefore nothing in those letters to persuade me that Mr Smith was incapable as at 1 October 2007 of forming a genuine opinion regarding the matters that were the subject of his statements.

[142] Finally, Mr Dooley points to the timing of Mr Smith's statements. Mr Smith made his statements during the period leading up to the trustee elections, and at a time when he had announced his candidacy for election in the Westland district. Mr Dooley contends out that it was very much in Mr Smith's interests to generate publicity at this time, because it assisted him to remain in the public eye.

[143] I accept that this assertion has some force. Mr Smith also frankly conceded that he viewed writing letters to the editor as a valid form of campaigning for election. Having said that, Mr Smith points out that he has always been a prolific writer of letters to the editor. He also points out that the fact that he was involved in an election campaign did not alter the frequency or intensity of his letters to the editor during this period.

[144] Mr Smith undoubtedly saw this issue as being one that would generate considerable publicity, and it was also publicity at the expense of Mr Dooley. His statements to Mr Bromley therefore stood to provide him with considerable benefits. Of itself, however, I do not consider the timing of the statements to be determinative of the issue of whether or not Mr Smith genuinely held his opinions. It also needs to be remembered that Mr Smith did not instigate the publicity that surrounded this issue. He was not even aware of it until Mr Bromley called him on the morning of 1 October 2007 seeking his comments. Moreover, I have no doubt that Mr Smith would have responded to Mr Bromley's request even if he had not been a candidate in an impending election. Mr Smith had shown on numerous occasions in the past that he had a keen interest in commenting on the affairs of DWC and its chairman.

[145] In the end, it is necessary for me to make my own assessment of Mr Smith's evidence in order to determine whether he genuinely held the opinions that he expressed. The strongest factors telling against Mr Smith in this context are the strong views about Mr Dooley that he had previously expressed in the letters he had written to the editor, coupled with the fact that he was standing as a candidate in the forthcoming election. This gave him a strong motive to generate publicity in order to raise his profile further with voters.

[146] I acknowledge the force of those factors, but they do not overcome my perception that Mr Smith honestly held the opinions that he expressed. As I have already observed, Mr Smith had written to the newspapers on many previous occasions making his views about DWC and its Chair known. He had done so in relation to a wide variety of issues. He is clearly a person who cares deeply about the West Coast region and its future. He views the manner in which DWC manages the funds under its control as being vital for the future wellbeing of West Coast communities. He obviously believed in September and October 2007 that DWC was not being properly managed and that its beneficiaries, the residents of the West Coast region, were likely to be the losers as a result. Mr Smith's past commitment to these issues persuades me that he also genuinely held the opinions that he expressed to Mr Bromley on 1 October 2007.

[147] My finding that Mr Smith genuinely held his opinions does not, however, ultimately assist him. My earlier conclusion that he based his opinions on an erroneous fact means that he cannot rely upon the defence of honest opinion.

Qualified Privilege

[148] Section 16 of the Act specifies matters that may attract qualified privilege, but it does not limit any other rule of law relating to qualified privilege. For that reason the pre-existing law relating to the affirmative defence of qualified privilege essentially remains intact.

[149] At common law, the defence of qualified privileged could be defeated if the plaintiff established that, in making the defamatory statement, the defendant was motivated by malice. Section 19 of the Act has altered this principle to some extent. It 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.

[150] In *Adam v Ward*, the House of Lords described the circumstances in which the defence of qualified privilege may be available as follows:[13]

> "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 made has a corresponding interest or duty to receive it."

[151] The essence of this type of privilege has been said to be "the reciprocity between maker and recipient of the statement constituted by the duty or interest in

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[13] *Adam v Ward* [1917] AC 309 at 334 (HL).

question".[14] In this context the term "duty" is wider than a legal duty that might be enforceable through the Courts. As the passage cited above makes clear, it can encompass a moral, ethical or social duty to make and receive the statement.

[152] In *Stuart v Bell* Lindley J said:[15]

> The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal.

[153] It has also been said that the duty will arise if "all or, at all events, the great mass of right-minded men in the position of the defendant would have considered it their duty under the circumstances" to communicate the information in question.[16] In order to determine whether Mr Smith made his statements on an occasion to which privilege attaches, it is therefore necessary to have regard to the circumstances in which he made them.

[154] The most recent appellate authorities on qualified privilege in New Zealand are the two judgements of the Court of Appeal and the advice of the Privy Council in *Lange v Atkinson*,[17] and the judgment of the Court of Appeal in *Vickery v McLean*.[18] In *Lange*, albeit in the context of statements published in respect of persons holding elected Parliamentary office, the Court of Appeal held that the defence of qualified privilege may apply to otherwise defamatory statements where those statements are made in the course of political discussion. The defence will apply even though the statements are published to the world at large.

[155] In *Lange (No 2)*, the Court of Appeal noted that its earlier decision limited the application of the defence to those elected or seeking to be elected to Parliament. In *Vickery v McLean,* the only other case since *Lange* in which the Court of Appeal has

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[14] Idem.
[15] *Stuart v Bell* [1891] 2 QB 341 at 350 (CA).
[16] Idem.
[17] *Lange v Atkinson* [1998] 3 NZLR 424 (CA); *Lange v Atkinson* [2000] 1 NZLR 257 (PC); *Lange v Atkinson* [2000] 3 NZLR 385 (CA).
[18] *Vickery v McLean* [2006] NZAR 481.

been required to consider the application of the principles enunciated in the *Lange* judgments, the Court did not deal with the issue of whether those principles might apply to elected officials other than members of Parliament.

[156] Neither of the defendants referred to *Lange* or *Vickery* in submissions. Perhaps for that reason, counsel for Mr Dooley did not refer to it in this context either. With the benefit of hindsight, it is regrettable that they did not, because I consider that the pleadings and the facts of this case potentially raise the issue of whether the privilege identified in *Lange* may be available to Mr Smith and Mr Shahadat.

[157] In *Lange (No 2)*, the Court of Appeal said that the subject matter of the privilege is "tightly defined",[19] and emphasised that it was "limited to those elected or seeking election to Parliament".[20] For that reason I would be reluctant to decide whether the privilege may extend to the circumstances of the present case without hearing full argument on the point. It is not necessary to decide that issue, however, because, for reasons that I shall shortly outline, the defence of qualified privilege is not available to Mr Smith and Mr Shahadat regardless of how it might arise.

[158] In case I am wrong regarding those issues, however, I propose to briefly outline why I consider that the defence identified in *Lange* may potentially have been available to both defendants.

[159] In *Lange (No. 1)*, the Court of Appeal held that the following five principles need to be considered when determining whether qualified privilege may be available in respect of defamatory statements made in the course of what has come to be called political discussion:[21]

> 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 in respect of generally-published statements which directly concern the functioning of representative

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[19] *Lange v Atkinson* [2000] 3 NZLR 385 at 390 (CA).
[20] Ibid at 391.
[21] *Lange v Atkinson* [1998] 3 NZLR 424 at 467-468 (CA).

> 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 statements made about the actions and qualities of those currently or formerly elected to parliament and 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.
>
> 4) The determination of 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.
>
> 5) The width of the identified public concern justifies the extent of the publication.

[160] The majority of the Court of Appeal[22] declined to require the maker of the statement to have acted reasonably when making it. They considered the essential question to be whether the recipient had a legitimate interest in receiving the information.[23] Tipping J, however, considered that the issue of reasonableness could be relevant when deciding whether the defendant had taken improper advantage of the occasion of publication.[24]

[161] Tipping J also said:[25]

> There can be little doubt that ... electors have a proper interest in being informed about the activities of their elected representatives when those activities are relevant to their performance as such and their fitness to hold their representative office. That being so, members of the news media and others have a proper interest, some would say duty, in informing electors as a whole of relevant activities of individual politicians.

[162] On appeal, the Privy Council remitted the case back to the Court of Appeal.[26] It did so to provide the Court of Appeal in New Zealand with an opportunity to consider whether the law in this country should follow the approach taken in England by the House of Lords in *Reynolds v Times Newspapers Limited.*[27] The

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[22] Richardson P, Henry, Keith and Blanchard JJ.
[23] *Lange v Atkinson,* n 21 at 469-470.
[24] Ibid at 477.
[25] Ibid at 472.
[26] *Lange v Atkinson* [2000] 1 NZLR 257 (PC).
[27] *Reynolds v Times Newspapers* [2001] 2 AC 127.

speeches in *Reynolds* were delivered on the same day as the Privy Council delivered its advice in *Lange*.

[163] In *Reynolds*, the House of Lords declined to recognise a generic privilege extending to publication of political information to the public at large. Their Lordships held that it was still necessary, on a case-by-case basis, to examine the circumstances of publication before determining whether the public interest was served by treating the occasion as one of qualified privilege.[28] They differed to some extent, however, on the circumstances that might be relevant in determining that issue. By way of contrast, the High Court of Australia in *Lange v Australian Broadcasting Corporation*[29] had incorporated a requirement that the maker of a defamatory statement in the course of political discussion must act reasonably.

[164] In *Lange (No 2)*, the Court of Appeal declined to adopt the approach taken by the House of Lords in *Reynolds*.[30] It reaffirmed the approach it had adopted in *Lange (No 1)*, but added to the five principles identified in its earlier judgment.[31] The Court noted that not every published statement about a politician will be privileged. It therefore added a requirement that, even if the subject matter is of a type that would ordinarily attract privilege, the statement must still be made on an occasion of privilege.[32]

[165] The Court acknowledged that, if the subject matter is of a type that attracts privilege, publication of that subject matter is likely to occur on an occasion that will also be an occasion of privilege. That will not, however, necessarily be the case. Whether an occasion is privileged will therefore depend on the circumstances and context of the publication.[33] In this context the Court said:[34]

> Those circumstances will include matters such as the identity of the publisher, the context in which the publication occurs, and the likely audience, as well as the actual content of the information. As an example of

[28] Idem.
[29] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[30] *Lange v Atkinson* [2000] 3 NZLR 385 at 399 (CA).
[31] Set out above at [159].
[32] *Lange v Atkinson,* n 29 at 400.
[33] Ibid at 391.
[34] Idem.

> circumstances where the subject matter may not be determinative, it is questionable whether a one-line reference to alleged misconduct of a grave nature on the part of a parliamentary candidate reflecting on his or her suitability, appearing in an article in a motoring magazine about that person's activities in motor sport, should receive protection. By contrast, the inclusion of such material in the course of a lengthy serious article on a coming election may justifiably attract the protection.

[166] In *Vickery v McLean*,[35] three senior employees of a local authority successfully sued a ratepayer in respect of defamatory statements he had made in letters sent to the editor of several newspapers. These alleged that the plaintiffs had been involved in "criminal irregularities". On appeal, the appellant sought unsuccessfully to argue that his comments amounted to political discussion, and were therefore protected by qualified privilege in terms of the principles enunciated in *Lange*.

[167] The Court of Appeal observed that the appellant's argument faced an immediate difficulty in that he had made the statements about persons who were not politicians, whether national or local. Although the plaintiffs may have contributed to policy making, they were not the ultimate policy makers.[36]

[168] The Court also held that the subject matter of the appellant's statement could not sensibly be regarded as political discussion, much less political discussion of the kind contemplated by *Lange (No. 2)* or any rational extension of that decision. The Court then went on to say:[37]

> [17] … What is more, the subject matter, even if capable of being regarded as political discussion, involves an allegation of serious criminality. The law has been clear for many years that such allegations or complaints, provided they are bona fide, may be made to the appropriate authorities under qualified privilege. But the privilege is lost if the allegations are disseminated beyond those whose proper function it is to investigate and, if appropriate, to act upon them: see *Gatley on Libel and Slander* (9th edition 1998) at para 14.55; *Truth (New Zealand) Ltd v Holloway* [1960] NZLR 69 (CA); and *Blackshaw v Lord* [1984] QB 1 (CA). Thus, even if this case could be brought within the first five of the six *Lange* criteria, it does not satisfy the sixth, as we will shortly indicate. This is because publications which are disseminated too widely are not made on a qualifying occasion (*Lange No. 2* at paras [21] and [22]).

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[35] *Vickery v McLean*, above n 18.
[36] Ibid at [17].
[37] Idem.

[169] The outcome in *Vickery* was obviously influenced significantly by the fact that the appellant had made his defamatory statements about persons who were not elected officials who were required to determine matters of policy. The appellant had also made serious allegations of criminal wrongdoing on the part of the plaintiffs. It was not in the public interest for such allegations, even if genuinely and responsibly made, to be ventilated in the media.[38] Rather, the appellant ought to have directed his concerns to the police, who have the responsibility for investigating criminal wrongdoing.[39] In those circumstances it is not surprising that the Court of Appeal held that the statements were not covered by qualified privilege. The factual matrix in *Vickery* was therefore very different to that in the present case.

[170] Importantly, however, the Court of Appeal did not take the opportunity in *Vickery* to say that qualified privilege of the type identified in *Lange* was restricted exclusively to defamatory statements made in respect of elected members of Parliament. It appears to have left open the possibility that the defence might extend to other elected officials in circumstances where the principles that the Court identified indicate that it should apply. That is not surprising, because the circumstances in which qualified privilege may apply can never be closed.[40]

[171] I see no logical reason why the principles enunciated in *Lange* should be restricted exclusively to statements made about the performance of elected members of Parliament. Members of the public may have an equally legitimate interest in being informed about the performance of persons who hold, or may in the future hold, elected positions of responsibility in other public institutions. That is particularly so where the institution in question is responsible for managing, and/or developing policy in respect of assets or activities that are publicly owned or funded. The public has a right to be informed when a person who has been, or may be, elected to such a position has acted in a manner that may call into question his or her suitability to hold that position. For that reason I see no logical impediment to the extension of the *Lange* principles into other analogous areas.

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[38] Ibid at [19].
[39] Idem.
[40] As noted by Lord Buckmaster in *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 (HC) at 22: “The circumstances that constitute a privileged occasion can then themselves never be catalogued and rendered exact”.

[172] It is therefore worthwhile considering whether the principles identified in the *Lange* judgments may have permitted Mr Smith and Mr Shahadat to rely upon the defence of qualified privilege.

Application of the Lange *principles to the present case*

1) The defence of qualified privilege may be available in respect of a statement that is published generally

[173] If the privilege is available, it will apply in respect of a statement that is published generally. The fact that Mr Smith and Mr Shahadat made their statements to newspaper journalists in the knowledge that they were likely to be published in newspapers circulating throughout the West Coast region would therefore not be fatal to the defence.

2) The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally published statements that 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 statements made about the actions and qualities of those currently or formerly elected to Parliament and 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.

[174] DWC is undoubtedly an institution that has an extremely important role to play in the future economic wellbeing of the entire West Coast region. Mr Smith said in evidence that it is one of the largest public organisations in that region. Moreover, DWC is responsible for managing a very substantial sum of money that Parliament has entrusted to it to foster the development of economic activity within the region. In doing so it must necessarily develop strategies and policies designed to ensure the achievement of that object. Its activities are also audited by the office of the Auditor-General.

[175] DWC is also a form of representative and responsible government. Its governance is provided, in part at least, by trustees who are elected from different West Coast communities. They therefore hold elected public office. The trustees are responsible primarily for ensuring that DWC is managed in accordance with the terms of the trust deed under which it was constituted. They remain, nevertheless, the elected representatives of their communities. They are responsible to their communities for the way in which DWC conducts its affairs. Residents in those communities have the ability to voice their approval or disapproval of how a trustee has performed when they vote at the triennial election of trustees.

[176] The communities on the West Coast therefore have a very real interest in ensuring that those who are elected (or for that matter appointed) as trustees of DWC have the necessary personal attributes to hold that position. For the same reason, those communities have a vital interest in the integrity of the processes by which trustees are both elected and appointed. If an issue arises that questions the integrity of either process, they have a legitimate interest in knowing about it. All of these factors suggest that the defence may extend to statements made about persons who are elected or appointed as trustees of DWC.

[177] Mr Smith's statements to Mr Bromley raised concerns about three matters. His statement that "the correspondence amounts to serious interference in the electoral process" related clearly to a concern about the integrity of the process by which trustees are elected. Mr Smith's remaining statements related to his concern about Mr Dooley and the CEO having denied the existence of the email correspondence, and the possibility that they might mislead trustees about important matters in the future.

[178] Those statements obviously related directly to the manner in which Mr Dooley and the CEO had performed their official duties in the past, and were likely to perform those duties in the future. Both matters related directly, in my view, to Mr Dooley's fitness to hold his elected office as a trustee and Chairman of DWC. The communities on the West Coast therefore arguably had a legitimate interest in being informed about those issues.

[179] Mr Shahadat's statements also related to those issues.

4) The determination of 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

[180] None of the statements that Mr Smith and Mr Shahadat made related to actions that Mr Dooley had taken in his private capacity. All of their concerns related to steps that Mr Dooley had taken, or was likely to take in the future, in his capacity as a trustee and Chairman of DWC. For that reason the issues that they raised were properly matters of public concern rather than private concern.

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

[181] Counsel for Mr Dooley pointed out that Mr Dooley was standing for election as a trustee in the Buller district. For that reason, he argued that Mr Smith and Mr Shahadat should have ensured that their concerns were only published in that district, and that they could not justify publication of their concerns in a wider area.

[182] I do not accept this submission. All of the communities on the West Coast have an obvious interest in the integrity of the processes by which DWC's trustees are elected and appointed. They also have an interest in the manner in which all trustees, including the Chairman, perform their official duties. The identified public concerns therefore arguably justified publication throughout the West Coast region.

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

[183] Mr Shahadat was an elected trustee at the time that he issued his press release. He therefore had a very real interest in maintaining the integrity of the electoral and appointment processes, and in ensuring that DWC's Chairman dealt fairly and honestly with his fellow trustees.

[184] Mr Smith made his statement to Mr Bromley in circumstances where he had already demonstrated a very real interest in the governance of DWC. He also had an interest in these issues because he was a candidate in the trustee elections that were shortly to close. Moreover, he was being asked to comment on a press release that Mr Shahadat, a sitting trustee, had already provided to the *Greymouth Star*. That information, in Mr Smith's view, called into question the manner in which Mr Dooley had performed his official duties in the past and was likely to carry them out in the future.

[185] Taken together, I consider that these circumstances were arguably sufficient to give rise to a qualifying occasion in respect of both defendants.

Conclusion

[186] For these reasons I have concluded that the statements that Mr Smith made to Mr Bromley had the potential to attract qualified privilege in terms of the *Lange* judgments. That is not, however, sufficient for the defence to succeed. The defence will fail if Mr Dooley can establish that in making the statements Mr Smith and/or Mr Shahadat were predominantly motivated by ill will towards Mr Dooley, or he took improper advantage of the occasion of privilege. I therefore turn to consider those issues.

Were Mr Smith's statements predominantly motivated by ill will towards Mr Dooley?

[187] The fact that the maker of a defamatory statement was motivated in part by ill will is not sufficient for the defence to fail. It will only fail where ill will is the predominant motive for making the statement.[41] Where a motive other than ill will is the predominant motive, the defence will be available.

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[41] See Defamation Act 1992, s 19(1).

[188] Mr Dooley has served a notice on Mr Smith[42] signalling his intention to allege that ill will formed Mr Smith's predominant motive for making his statements. He relies upon the same facts and particulars in this context as those he relied upon in alleging that Mr Smith did not genuinely hold his opinions.

[189] In this context, two of the matters that Mr Dooley relies upon in his notice are of particular relevance. They are the letters that Mr Smith wrote to the editors of newspapers in the West Coast region during the period leading up to 1 October 2007 and the timing of his statements to Mr Bromley.

[190] The letters that Mr Smith wrote to the editors of local newspapers are of considerable assistance in determining how Mr Smith felt personally towards Mr Dooley. The first of these is a letter that Mr Smith wrote to the editor of the *Greymouth Star* on 14 May 2007. That letter contained the following passages:

> The article in the Greymouth Star on Saturday is just another example of the wheels coming [off] our West Coast Development Trust.
>
> ...
>
> The trustees of the trust have a limited role to play. Their first job was to put in place a set of rules to enable the professional running of trust meetings and processes.
>
> Five years later and still no Standing Orders. The failure to produce Standing Orders. after five years can only mean there is no intention to do so. This leaves the total interpretation of what happens, and when, at the chairman's whim.
>
> Can you tell me one other professional organisation in New Zealand that operates like this?
>
> I guess I am not alone in thinking all is not well with this organisation, which is responsible to its beneficiaries, who are the residents of the West Coast.
>
> Starting to feel very concerned.

[191] Mr Smith then wrote a letter to the editor of the *West Coast Times* newspaper in Hokitika on 15 June 2007 containing the following passages (emphasis added):

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[42] Under s 41 of the Defamation Act 1992.

> *The chairman of the trust has attacked Mr Clayton. He has attacked Westland. He has attacked the Westland mayor.*
>
> The confidentiality contracts forced on trustees have threatened the very existence of the trust as future events will show.
>
> We can't work for the objectives of transparency and then silence via a contract that is aimed to ensure no trustee gets to report to the people that elect him or her.
>
> *I hope when the damage inflicted by the chairman and chief executive is exposed they will both tender their resignations immediately.*
>
> *The trustees who have been appointed to the trust's subsidiary company boards need to remember who they answer to, and it's not the chairman and executives of the West Coast Development Trust.*

[192] Then, on 17 July 2007 in a letter to the *Greymouth Star* (emphasis added):

> The West Coast Development Trust has under its trust deed a trustee appointed by, quote "The president of the New Zealand Law Society and the president of the New Zealand Institute of Chartered Accountants) together the appointers)."
>
> According to the trust, the current trustee Mark Lockington was appointed by the appointer. *Mr Lockington worked in the offices of the trust chairman, Frank Dooley for the West Coast Development Trust upon its formation and was subsequently appointed a trustee.*
>
> The local branch of the Institute of Chartered Accountants know nothing of the appointment. E-mails to the appointers are being referred to the development trust for comment.
>
> ...
>
> *The house of arrogance at the trust is built of straw and investigations under way at present are pointing to severe rot in the foundations.*
>
> To those who do not know, it is about to change its name to Development West Coast. I am not surprised they want to drop the word "trust".
>
> Can you believe that we, as beneficiaries, are to pay a PR spin doctor to change the name to help its public image? *If it walks like a pig, smells like a pig and eats like a pig, chances are 99% it is a pig.*

[193] Similarly, on 14 August 2007 in a letter to the same newspaper (emphasis added):

> *Treasury points out that the West Coast Development Trust leadership has some responsibility in the dysfunctional way the West Coast Development Trust is now trying to be run.*
>
> *Do not forget, the chairman only has one vote.*

> *I see John Clayton and Tony Williams will not vote 'yes' when the puppeteer pulls the string, what about the others? There are six trustees who have voted on every one of the problem investments the trust has.*
>
> There are six trustees who have voted against every move to bring Standing Orders to the table.
>
> There are six trustees who voted to proceed with the Scenic Circle fiasco.
>
> ...
>
> I wonder if the Institute of Chartered Accounts – who failed to consult our very capable West Coast accountants on the appointment of the independent trustee – think we are silly? Sure, they have 27,000 members, sure they had a choice of professionals from throughout New Zealand. *But hey, the man they chose used to work for the trust in the office next to the trust chairman. This one goes in for the Tui ad awards – Yea, right.*

[194] Then, on 7 September 2007 in a letter to the *Greymouth* Star (emphasis added):

> It was good to finally get some feedback from Brian Wilkinson (Greymouth Star, September 5) – it has been a long time coming. I for one would never question Brian's honesty or integrity.
>
> *But has Brian's unwavering support for his chairman, through thick and thin, been good for the trust and the West Coast community (the beneficiaries)? My view is it has split the councils that represent us and the attacks on residents has given the business community plenty of reasons for keeping well away.*
>
> ...
>
> The problems with the trust are simple. Transparency, governance and investments, and loans being carried at values that have no resemblance to reality.
>
> As to why I never attended the trust's annual general meeting, it is simple. *The debate and disclosure of the trust's affairs should be an ongoing thing that occurs every day, not at a staged meeting to engage in attacks on those who seek transparency and honest accounting to be a minimum standard.*

[195] Two days after the meeting of trustees at which the votes to elect a new chairman were tied at six all, Mr Smith sent a letter to the editor of the *Greymouth Star* saying (emphasis added):

> *The Development West Coast saga continues. So the chairman does not have the support of his trustees as he has been claiming. How could they all support him when he personally attacks them, and anyone that looks like they may have a contrary view on transparency and governance?*

> *His personal attacks will no doubt haunt him after the election as some of those he attacks now will be elected and be across the table from him.*
>
> *He retains the loyal support of one Hokitika elected trustee, Brian Wilkinson.*
>
> *What is governance? The chairman's term expired at the last meeting. He vacated the seat and retired as required. The trust deed determines that in his absence the deputy chair or another trustee takes the chair.*
>
> *So who takes the chair? Chief executive Mike Trousselot, and when the vote is split, Mr Trousselot calls the former chairman back to the chair and declares that he carries on as chairman.*
>
> *This is despite the fact that his status at this time is the same as every other trustee around the table.*
>
> Well the above is not governance, however the information supplied in my letter is transparency.

[196] Mr Smith followed this up by writing the following letter to the editor of the *Westport News* on 17 September 2007 (emphasis added):

> *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.

[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.

[198] When Mr Bromley contacted Mr Smith on 1 October 2007, Mr Smith had no hesitation in providing him with the benefit of his views. Part of Mr Smith's motivation was undoubtedly to express his genuinely held views regarding the manner in which Mr Dooley had acted as Chairman of DWC. He may also have been motivated to some extent by a desire to enhance his bid to be elected as a trustee for the Westland district.

[199] The manner in which Mr Smith couched his letters to the editor persuades me, however, that Mr Smith was predominantly motivated by personal animosity and hostility towards Mr Dooley when he made his statements to Mr Bromley. That constitutes ill will for the purposes of s 19 of the Act. As a consequence, the defence of qualified privilege is not available to him.

Did Mr Smith take improper advantage of the occasion of privilege?

[200] In case I am wrong in reaching this conclusion, I go on to consider whether Mr Smith took improper advantage of the occasion of privilege.

[201] In *Lange (No 2)*, the Court of Appeal held that the concept of taking improper advantage of a privileged occasion for the purposes of s 19(1) is wider than malice under the common law. It may occur if the statement is made recklessly, or if it displays a cavalier approach to the truth.[43] The Court observed that recklessness as to truth has traditionally been treated as equivalent to knowledge of falsity, and that both deprive the defendant of qualified privilege.[44] The Court then went on to say (emphasis added):

> [46] By the same token, it may be said that reckless indifference to truth is almost as blameworthy as deliberately stating falsehoods. Lord Diplock gave a helpful description of recklessness in the present field when he spoke

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[43] *Lange v Atkinson,* above n 19 at 399 and 401.

[44] Ibid at 400.

> of someone who publishes defamatory material "without considering or caring" whether it was true or false. Indifference to truth is, of course, not the same thing conceptually as failing to take reasonable care with the truth but in practical terms they tend to shade into each other. It is useful, when considering whether an occasion of qualified privilege has been misused, to ask whether the defendant has exercised the degree of responsibility which the occasion required.
>
> [47] What constitutes recklessness is something which must take its colour from the nature of the occasion, and the nature of the publication. If it is reckless not "to consider or care" whether a statement be true or false, as Lord Diplock indicated, it must be open to the view that a perfunctory level of consideration (against the substance, gravity and width of the publication) can also be reckless. It is within the concept of misusing the occasion to say that the defendant may be regarded as reckless if there has been a failure to give such responsible consideration to the truth or falsity of the statement as the jury considers should have been given in all the circumstances. 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.
>
> [48] No consideration and insufficient consideration are equally capable of leading to an inference of misuse of the occasion. **The rationale for loss of the privilege in such circumstances is that the privilege is granted on the basis that it will be responsibly used. There is no public interest in allowing defamatory statements to be made irresponsibly – recklessly – under the banner of freedom of expression. What amounts to a reckless statement must depend significantly on what is said and to whom and by whom. It must be accepted that to require the defendant to give such responsible consideration to the truth or falsity of the publication as is required by the nature of the allegation and the width of the intended dissemination, may in some circumstances come close to a need for the taking of reasonable care. In others a genuine belief in truth after relatively hasty and incomplete consideration may be sufficient to satisfy the dictates of the occasion and to avoid any inference of taking improper advantage of the occasion.**
>
> [49] A case at one end of the scale might be a grossly defamatory statement about a Cabinet Minister, broadcast to the world. At the other end might be an uncomplimentary observation about a politician at a private meeting held under Chatham House rules. It is not that the law values reputation more in the one case than the other. It is that in the first case the gravity of the allegation and the width of the publication are apt to cause much more harm if the allegation is false than in the second case. A greater degree of responsibility is therefore required in the first case than in the second, if recklessness is not to be inferred. Responsible journalists in whatever medium ought not to have any concerns about such an approach. It is only those who act irresponsibly in the jury's eyes by being cavalier about the truth who will lose the privilege. Such an approach reflects the fact that qualified privilege is not a licence to be irresponsible: see McKay J in *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 at p 45.

[202] Mr Smith's statements to Mr Bromley insinuated that Mr Dooley knew of the existence of the CEO email, and that he had deliberately misled his fellow trustees

by denying its existence. Mr Smith knew that his remarks would be reported by the *Greymouth Star* and/or other newspapers circulating in the region. The owner of the *Greymouth Star* also owns at least one other newspaper circulating in the region, and Mr Smith was aware from previous experience that his letters to the editor of one newspaper could be published by another newspaper in the region.

[203] I consider that the damaging nature of the allegations, and the likely breadth of their publication, meant that Mr Smith had an obligation to act in a manner that came close to taking reasonable care if he was not to take improper advantage of the occasion of privilege. This required him, in my view, to take reasonable steps to ensure that his statements were based on facts that were correct.

[204] The only step that Mr Smith took to achieve this end 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.

[205] Mr Smith knew, as a result of his discussions with Mr Shahadat, that Mr Shahadat had not spoken directly to Mr Dooley (or with any person other than Mr Clayton) about this issue. He also knew that Mr Shahadat was basing his conclusion as to the state of Mr Dooley's knowledge entirely on the inferences that he had drawn from the email correspondence between Mr Dooley and Mr Clayton. By taking matters no further, Mr Smith ran the very real risk that Mr Shahadat's conclusion did not have a sound basis.

[206] Given those circumstances, Mr Smith needed at the very least to view the emails himself in order to reach his own conclusion regarding the state of Mr Dooley's knowledge. Had Mr Smith taken that basic step, he would immediately have seen that there was nothing in any of Mr Dooley's responses to suggest that he knew of the existence of the CEO letter. In particular, Mr Dooley's response to Mr Clayton's email on 16 September 2007 would probably have alerted Mr Smith to the very real probability that Mr Dooley was not aware of its existence.

[207] Mr Smith's failure to take that step means, in my view, that he acted recklessly when he made his statements to Mr Bromley. As a result, he took improper advantage of the occasion of privilege. For that reason he cannot avail himself of the defence of qualified privilege.

Result: first cause of action

[208] Mr Dooley has succeeded in establishing that Mr Smith's statements were defamatory, and Mr Smith has not established any of the affirmative defences upon which he relies. Mr Dooley has therefore succeeded in establishing the first cause of action.

B. The second cause of action against Mr Smith - republication of his earlier comments to Ms Scanlon of the *Westport News* on 5 October 2007

[209] This cause of action arises out of the email that Ms Scanlon sent Mr Smith on the morning of 5 October 2007 seeking his response to the material contained in the written statement that Mr Dooley had given Ms Scanlon earlier the same day. Mr Smith responded by saying that his "concerns remain as stated in the *Greystar*".

[210] I can deal with this cause of action relatively briefly, because my conclusions in relation to the first cause of action largely determine it.

[211] The maker of a defamatory statement may be separately liable if he or she repeats the statement again or refers to it on a subsequent occasion. On this point counsel for Mr Dooley referred me to *Jennings v Buchanan*.[45] In that case the defendant, a member of Parliament, had made a defamatory statement about the plaintiff during a Parliamentary debate. That statement was subject to absolute privilege, but the defendant was held to be liable in defamation when he later told a reporter that he "did not resile" from the claim he had made in the House.

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[45] *Jennings v Buchanan* [2002] 3 NZLR 145; *Jennings v Buchanan* [2005] 2 NZLR 577 (PC).

[212] A similar situation has arisen in the present case. When Mr Smith told Ms Scanlon "My concerns remain as stated in the *Greystar*", he effectively reiterated or reconfirmed what he had told Mr Bromley on 1 October 2007. He did so notwithstanding Ms Scanlon's advice that Mr Dooley had not been aware of the existence of the CEO email. That advice ought to have given him pause to consider, because it changed the entire factual basis upon which he had made his earlier statement to Mr Bromley.

[213] My conclusions in relation to the first cause of action mean that Mr Dooley must also succeed in relation to the second. The only point that needs to be reconsidered is whether I should revisit my conclusion regarding the genuineness of Mr Smith's opinions. Counsel for Mr Dooley contends that Mr Smith cannot claim that he genuinely held his opinions when he reconfirmed them to Ms Scanlon. By that stage he was aware of the true position, because Ms Scanlon had told him in her email that Mr Dooley had not known of the existence of the CEO email.

[214] This submission needs to be considered having regard to the circumstances in which Ms Scanlon provided Mr Smith with this advice. Although the primary purpose of Ms Scanlon's email to Mr Smith related to Mr Dooley's comments regarding Mr Shahadat's press release, she also dealt at some length with the information that Mr Dooley had given her regarding the litigation involving Mr Smith and the liquidators of Westland Machinery Traders Limited.

[215] Mr Smith says that he was incensed when he saw that material, because it demonstrated that Mr Dooley was prepared to use completely irrelevant material in order to undermine his credibility. He said that the manner in which Mr Dooley was approaching the issue prompted him to decide not to engage in any further debate. It was for that reason, he said, that he responded as he did to Ms Scanlon. Mr Dooley's reference to the Westland Machinery Traders litigation therefore effectively diverted his attention away from Ms Scanlon's advice that Mr Dooley had not been aware of the existence of the CEO email.

[216] I accept Mr Smith's evidence on this point. It is supported by the fact that he provided his response to Ms Scanlon within just ten minutes. Moreover, the bulk of

his response related to the litigation and not the central issue that the earlier newspaper articles had raised.

[217] Mr Dooley was clearly, and justifiably, upset at the comments attributed to Mr Smith in the *Greymouth Star* article on 3 October 2007. It is unfortunate, however, that he elected to muddy the waters by providing Ms Scanlon with material relating to the Westland Machinery Traders litigation. That information had nothing whatsoever to do with the issues that had been the subject of the newspaper article. Mr Dooley obviously sought to use it to undermine Mr Smith's credibility. I accept, however, that the inclusion of that material also diverted Mr Smith's attention away from Ms Scanlon's advice that Mr Dooley had not been aware of the existence of the CEO email. Mr Dooley must therefore share a significant part of the responsibility for the republication by Mr Smith of his earlier defamatory statement.

[218] For that reason I do not alter my conclusion that Mr Smith genuinely held the opinions that he reiterated or republished to Ms Scanlon on 5 October 2007.

[219] For the reasons given in relation to the first cause of action Mr Dooley must also succeed in relation to the second cause of action.

C. Third cause of action – the claim against Mr Shahadat

[220] For convenience I set out again the whole of Mr Shahadat's press release, with the parts of it that Mr Dooley alleges to be defamatory highlighted in bold:

> **Trustees Misled**
>
> **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 sometime 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.**
>
> It is ironic that previously the Chair of DWC has criticised the appointment process undertaken by Westland District Council and the Westcoast Regional

Council, in respect of their appointment processes to DWC, however in this case DWC has openly lobbied to retain the current Ngai Tahu appointment.

Further, DWC has requested Ngai Tahu support in retaining the current Chair of DWC and in doing so has made the following remarks;

….. 'there is a determined clique wanting to overthrow our Chair and gain control and access to the money – does that sound familiar'. The email goes on to say ….. "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 those lines".

I note with concern that the Chairman of DWC told the Westport news on Friday the 28th September that "Mr Trousselot's new contract was being updated and took effect from Monday". This is news to me and to other trustees says Mohammed Shahadat. The appointment and review of chief executive's performance lies with the **Trustees** as a whole and not the Chair. This is explicit in the Trust Deed (schedule 2 paragraph 2 and Policy Manual (page 12). I have not seen any delegations to the chair by the trustees in this respect, and if there was one it would be contrary to the Trust Deed and the policy document. I have no personal agendas against the Chief Executive and say that Mike has done a good job in the period I have been a trustee. My concern is that this is another example of the Chair riding rapshody over the Trustees which has led to disharmony between the trustees.

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 trustee says trustee Mohammed Shahadat.

As a retiring trustee I believe DWC stands at the cutting edge of the future development for the people of Westcoast, and I urge the incoming trustees to make openness, transparency and integrity the most important personal qualities of the next chairman.

Do the statements have any of the meanings pleaded by Mr Dooley?

[221] In his amended statement of claim Mr Dooley alleges that the natural and ordinary meaning of Mr Shahadat's statements is that Mr Dooley:

1. Deliberately attempted to interfere with:

    1.1 the 2007 Ngai Tahu trustee appointment process;

    1.2 the elections [to be] held on 13 October 2007;

2. Was aware of the existence of the CEO email when replying to the Clayton correspondence;

3. Should have disclosed the CEO's email when replying to the Clayton correspondence;

4. Deliberately misled the trustees about the existence of the CEO's email by denying its existence;

5. Is a person of doubtful or no integrity;

6. Is untrustworthy; and

7. Is dishonest.

[222] In considering whether the statements by Mr Shahadat have the meanings pleaded by Mr Dooley, I adopt the principles and approach I used when determining that issue in relation to the statements made by Mr Smith.[46]

Mr Dooley deliberately attempted to interfere with the 2007 Ngai Tahu appointment process

[223] I consider that the first to fourth paragraphs of the press release are relevant to this issue. The first paragraph of the press release is a statement of fact. It states that Mr Shahadat holds information confirming that there has been interference in the process by which Ngai Tahu appoints a trustee to represent it on the Board of DWC. The paragraph is cast in absolute terms. It does not say that the information held by Mr Shahadat "suggests" or "indicates" that there may have been such interference. It is a positive assertion that there has actually been interference.

[224] The second and third paragraphs then refer to "the Chair". There is no dispute that any reasonable person would immediately take that to be a reference to Mr Dooley.

[225] The fourth paragraph is important for what it both says and leaves unsaid. It begins with a reference to the Chair having previously criticised the trustee appointment processes adopted by the Westland District Council and the West Coast Regional Council. It then goes on to say that "in this case the DWC has openly lobbied to retain the current Ngai Tahu appointment". The important point about this paragraph is that these two statements are linked by the use of the word "ironic". In using that term, the paragraph suggests that Mr Dooley has previously criticised

[46] Set out at [92] and [93].

local authorities in respect of their appointment processes, yet he is prepared to openly lobby Ngai Tahu to retain their existing appointee. This is reinforced in the penultimate paragraph of the press release, in which Mr Shahadat states that he is "disappointed that the Chair of DWC continues to deny the existence of any correspondence/communication to Ngai Tahu regarding their appointment to DWC".

[226] I do not consider that the reference to "DWC", as distinct from "the Chair", having openly lobbied to retain the appointment alters the position. It would not alert the ordinary person to the possibility that somebody other than Mr Dooley may have been responsible for lobbying Ngai Tahu. The reference to "DWC" comes immediately after several references to "the Chair", and the distinction between "the Chair" and "DWC" would be far too subtle in this context for the ordinary person to appreciate.

[227] I therefore accept that the ordinary person reading the article would conclude that Mr Dooley deliberately attempted to interfere in the Ngai Tahu trustee appointment process.

Mr Dooley deliberately attempted to interfere with the elections held on 13 October 2007

[228] The only paragraph relevant to this issue is the fifth paragraph. It refers to "DWC" having requested Ngai Tahu support "in retaining the current Chair of DWC", and then cites a passage from the CEO email.

[229] I do not consider that the ordinary reader would take the statements in this paragraph to mean that Mr Dooley, or any other person for that matter, deliberately attempted to interfere with the trustee elections that closed on 13 October 2007. The statements in the paragraph suggest an attempt to gain Ngai Tahu support for the retention of Mr Dooley as Chair, rather than as an elected trustee. The two are separate issues.

[230] This pleaded meaning has not been established.

Mr Dooley was aware of the existence of the CEO email when replying to the Clayton correspondence

[231] The first, second, third and sixth paragraphs of the press release are relevant to this pleaded meaning. The first two paragraphs set the scene by drawing the reader's attention to the fact that despite repeated requests by a trustee, the Chair has denied the existence of any correspondence in respect of interference in the Ngai Tahu trustee appointment process. The reference in the third paragraph 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.

[232] The sixth paragraph reinforces this impression. Mr Shahadat would only have reason to be "disappointed" that Mr Dooley "continues to deny the existence of any correspondence/communication to Ngai Tahu regarding their appointment to DWC" if Mr Dooley knew of the existence of such material and continued to deny its existence. This paragraph, too, infers that Mr Dooley is continuing to deny the existence of correspondence or communications that he knows to exist.

[233] I find this pleaded meaning to be established.

Mr Dooley should have disclosed the CEO email when replying to the Clayton correspondence

[234] The factors that led to my conclusion in relation to the last pleaded meaning also persuade me that this pleaded meaning has been established.

Mr Dooley deliberately misled the trustees about the existence of the CEO email by denying its existence

[235] The same factors lead to the same conclusion in relation to this pleaded meaning.

[236] In particular, Mr Shahadat's assertion that the existence of the email casts severe doubts on Mr Dooley's integrity is important. That statement created the impression that Mr Dooley had told the trustee who had been enquiring about the existence of the Ngai Tahu correspondence that it did not exist when he knew that statement to be false. That would amount to deliberately misleading that trustee.

[237] The sixth paragraph is also relevant. In saying that he is "disappointed that the Chair of DWC continues to deny the existence" of any correspondence, Mr Shahadat is inferring that Mr Dooley's continuing denials are occurring in circumstances where he knows that they are false. That, too, would amount to misleading his fellow trustees.

Mr Dooley is a person of doubtful or no integrity

[238] Taken together, the statements to which I have already referred give rise to the inference that Mr Dooley is a person of doubtful integrity. Mr Shahadat's statement in the third paragraph that the existence of the email casts "severe doubts" on Mr Dooley's integrity is an express statement to that effect.

[239] I therefore find this pleaded meaning to be established, but only to the extent that the press release created the impression that Mr Dooley was a person of doubtful (as distinct from no) integrity.

Mr Dooley is untrustworthy and/or dishonest

[240] All of the previously established pleaded meanings also establish these pleaded meanings.

[241] Any person who is prepared to mislead others by denying that a document exists in the knowledge that it does exist must be taken to be untrustworthy and/or dishonest. That is particularly the case when the party misled is a fellow trustee. A statement to the effect that severe doubts have been cast on a person's integrity also creates an immediate impression that the person is untrustworthy, if not dishonest.

[242] Furthermore, a person who is prepared to criticise other bodies about their appointment processes and yet is prepared to openly lobby another party in its appointment process might also be characterised as being untrustworthy.

Conclusion

[243] Mr Dooley has established all but one of the pleaded meanings. Each of those meanings is clearly defamatory, in the sense that each of them would tend to lower Mr Dooley in the estimation of right thinking members of society generally. To the extent that Mr Shahadat's statements implied that Mr Dooley had denied the existence of the CEO email when he knew that it existed, they are also false statements about Mr Dooley to his discredit.

[244] It is therefore necessary to consider whether Mr Shahadat has established any of the affirmative defences upon which he relies.

Is Mr Shahadat entitled to rely upon the defences of truth, honest opinion and/or qualified privilege?

Truth

[245] The first established pleaded meaning is that Mr Dooley deliberately attempted to interfere with the 2007 Ngai Tahu trustee appointment process. The defence of truth cannot apply in respect of that pleaded meaning because, regardless of the interpretation to be placed on the CEO email, Mr Dooley did not write it and he had no knowledge of its existence until 1 October 2007. For that reason Mr Shahadat cannot rely on the defence of truth in respect of that statement.

[246] As in the case of Mr Smith, all of the other established meanings are based on the erroneous factual premise that Mr Dooley knew of the existence of the CEO email when he responded to Mr Clayton's requests for information. For the reasons set out earlier when dealing with this defence in relation to Mr Smith, Mr Shahadat cannot rely upon the defence of truth.

Honest opinion

[247] It is not necessary to analyse Mr Shahadat's press release in order to determine which parts of it are statements of fact and which are statements of opinion. As I have already noted when considering the claims against Mr Smith,[47] the defence of honest opinion can only succeed where the opinion is based on facts that are established as being correct or substantially correct.

[248] Mr Shahadat's assertion that Mr Dooley had attempted to interfere in the Ngai Tahu trustee appointment process was based on the premise that Mr Dooley had been complicit in sending the CEO email to Mr Goodall. That premise is false.

[249] All of the other established meanings were also based on another false factual premise, namely that Mr Dooley knew of the existence of the CEO email at the time he responded to Mr Clayton's requests. As a consequence, Mr Shahadat is in the same position as Mr Smith. He is unable to rely upon the defence of honest opinion.

[250] In case I am wrong in that conclusion, I will go on to consider whether Mr Shahadat genuinely held his opinions.

Did Mr Shahadat genuinely hold his opinions?

[251] Mr Shahadat says that at the time he prepared his press release he firmly believed that Mr Dooley knew of the existence of the CEO email, and that Mr Dooley had also known of its existence when he responded to Mr Clayton's requests. Mr Shahadat had reached that conclusion for three reasons.

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[47] At [126].

[252] First, he considered that by 16 September 2007 Mr Clayton's requests had become so specific that Mr Dooley must have been aware that a letter or email existed. Mr Shahadat believed that Mr Dooley was deliberately being evasive when he failed to acknowledge the existence of the CEO email at that point.

[253] Secondly, Mr Shahadat was well aware of the very close relationship that existed between Mr Dooley and Mr Trousselot. He found it inconceivable that Mr Dooley would not know that Mr Trousselot would send the email to Mr Goodall without Mr Dooley knowing about it.

[254] Thirdly, Mr Shahadat was aware that Mr Trousselot was receiving copies of the emails that passed between Mr Dooley and Mr Clayton. He found it difficult to believe that Mr Trousselot would not have advised Mr Dooley of the existence of the CEO email at some point prior to 16 September 2007.

[255] These arguments need to be considered in light of what Mr Shahadat actually knew, as distinct from what he assumed, when Mr Shahadat prepared his press release. By that stage he had received the CEO email from Mr Clayton, together with copies of all the emails that had passed between Mr Dooley and Mr Clayton. Mr Shahadat was therefore in a position to reach his own conclusion regarding the state of Mr Dooley's knowledge.

[256] In that sense, Mr Shahadat was in a significantly different position to that of Mr Smith at the time he made his statements to Mr Bromley. Unlike Mr Smith, Mr Shahadat did not have to rely on another person's conclusion as to the inference to be drawn from the emails regarding the state of Mr Dooley's knowledge.

[257] Mr Shahadat had also spoken to Mr Clayton on one or more occasions before he prepared his press statement. That cannot have produced much in the way of additional information, however, because all of Mr Clayton's dealings with Mr Dooley had been by way of email communications. Mr Clayton had never spoken directly to Mr Dooley regarding the issues raised in the emails.

[258] I have concluded that no reasonable person in Mr Shahadat's position could genuinely have believed that Mr Dooley had actual knowledge of the existence of the CEO email. Mr Dooley's response to Mr Clayton's email dated 16 September 2007 makes it clear to any objective reader that Mr Dooley did not know what Mr Clayton was talking about, and that Mr Dooley wanted Mr Clayton to tell him what he was missing. Mr Shahadat's pre-conceived views about Mr Dooley probably caused him to suspect that Mr Dooley was being evasive about the existence of the CEO email. I do not accept, however, that Mr Shahadat could genuinely have believed that Mr Dooley actually knew that it existed.

Qualified privilege

[259] I have already dealt with the issue of whether or not Mr Shahadat's statements potentially attracted the defence of qualified privilege identified in the *Lange* judgments.

[260] I therefore turn to consider whether the defence fails because Mr Dooley has established that Mr Shahadat was predominantly motivated by ill will, and/or he misused the occasion of privilege when he issued his press release to the newspaper.[48]

Was Mr Shahadat predominantly motivated by ill will towards Mr Dooley when he made the statements?

[261] Mr Dooley relies upon the following matters as providing evidence of the fact that Mr Shahadat was predominantly motivated by ill will:

1. Mr Shahadat had voted against Mr Dooley at previous DWC meetings.

2. Mr Shahadat was one of the six trustees who had voted against Mr Dooley continuing as Chairman of DWC at the election on 10 September 2007.

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[48] See Defamation Act 1992, s 19.

3. Mr Shahadat's relationship with Mr Dooley broke down after mid-2007.

4. Although Mr Shahadat was not seeking re-election as a trustee, he nevertheless deliberately issued the press release in the period leading up to the date when voting was to close in the trustee elections.

5. Mr Shahadat issued proceedings for defamation against Mr Dooley in January 2008.

6. Comments that were critical of DWC governance generally, and Mr Dooley in particular, were attributed to Mr Shahadat in newspaper articles published on 30 August 2007 and 14 September 2007.

[262] Mr Shahadat denies that he was motivated at all by ill will towards Mr Dooley. He points out that, unlike Mr Smith, he had not engaged in writing numerous letters to the editor criticising Mr Dooley's performance as Chairman of DWC. He accepts that he had voted against Mr Dooley continuing as Chairman of DWC at the vote that the trustees held on 7 September 2007, and that he had made comments that were critical of Mr Dooley's style of leadership. He maintains, however, that in doing so he was merely exercising his democratic rights.

[263] I agree that there is little overt evidence to suggest that Mr Shahadat harboured ill will towards Mr Dooley as a result of his earlier dealings with Mr Dooley as a trustee of DWC. In particular, the fact that Mr Shahadat voted against Mr Dooley remaining as Chairman, or in relation to other issues that were the subject of a vote by the trustees, is not sufficient to establish ill will on his part towards Mr Dooley. There is also insufficient evidence to say that the relationship between Mr Shahadat and Mr Dooley had broken down by mid-2007. Mr Shahadat's earlier comments to the newspapers can likewise be viewed as comments legitimately made in the exercise of Mr Shahadat's democratic rights. The defamation proceedings are irrelevant in the present context, because Mr Shahadat did not issue those proceedings until the following year.

[264] The circumstances and manner in which Mr Shahadat issued his press release to the newspaper are, however, relevant in this context.

[265] Mr Clayton and Mr Shahadat were both extremely vague when they gave evidence about their discussions during the period leading up to 1 October 2007. Neither could say how many times they had spoken, or what they had spoken about. The evidence is similarly vague as to how, when and why Mr Shahadat decided to become directly involved in the issue that Mr Clayton had been raising in his emails to Mr Dooley.

[266] Mr Shahadat was not seeking re-election, so he had no real need to become involved in that issue. The fact that he was stepping down as a trustee may, however, have led him to believe that he had nothing to lose by going public about it. If Mr Shahadat was genuinely concerned about whether Mr Dooley had deliberately misled his fellow trustees, he could easily have confronted Mr Dooley in private about it. Alternatively, Mr Shahadat could also have raised his concern formally at a meeting of trustees. Instead of taking either of those options, Mr Shahadat decided to place the issue in the public domain by sending his press release to the *Greymouth Star*. He did so with no prior notice to anybody other than Mr Clayton.

[267] It is also highly relevant, in my view, that Mr Shahadat chose to issue his press release less than two weeks before voting was due to close in the trustee elections. Mr Shahadat must have known and intended that voters throughout the West Coast region, including those in Mr Dooley's electorate of Buller, would read his remarks.

[268] I also consider the manner in which Mr Shahadat worded his press release to be relevant in this context. Mr Shahadat knew, because he had a copy of the CEO email, that Mr Trousselot had made the approach to Ngai Tahu. Mr Dooley had not played any part in that approach. The wording of the third and fourth paragraphs of Mr Shahadat's press release suggests, however, that the Chair of DWC was responsible for initiating contact with Ngai Tahu.

[269] That suggestion arises because, after saying that it is ironic that the Chair of DWC had previously criticised the appointment processes undertaken by two local authorities, Mr Shahadat immediately goes on to say that "DWC" has openly lobbied to retain the current Ngai Tahu appointment and has requested Ngai Tahu support in retaining the current Chair of DWC. The natural inference to be drawn from these statements is that the Chair of DWC was the person responsible for lobbying Ngai Tahu in respect of both issues. It would have been a simple matter for Mr Shahadat to have said that the CEO of DWC had been the person responsible for lobbying Ngai Tahu in respect of these issues. I consider that Mr Shahadat must have deliberately used the word "DWC" in order to lead those who read the newspaper article to conclude that the Chair had been responsible for lobbying Ngai Tahu when he knew that not to be the case. In other words, he deliberately misrepresented the true position.

[270] These factors persuade me that, whether of his own volition or with encouragement from Mr Clayton, Mr Shahadat decided to use the information he had received from Mr Clayton for the purpose of discrediting and embarrassing Mr Dooley publicly. He may have been influenced in his decision to take that step by a desire to reduce popular support for Mr Dooley and to encourage trustees who were elected on 13 October 2007 to vote for a new Chairman. He may also have done it out of sheer frustration after a special meeting that he and others had called on 27 September 2007 to discuss the deadlock that had arisen in relation to the vote for a new Chairman could not proceed for lack of a quorum. The failure to obtain a quorum was caused by the fact that Mr Dooley and others in his faction said they would not be able to attend the meeting. Whatever the ultimate reason, I am satisfied that Mr Shahadat was predominantly motivated by personal hostility towards Mr Dooley when he issued his press release. As a result, he is not entitled to rely upon the defence of qualified privilege.

Did Mr Shahadat take improper advantage of the occasion of privilege?

[271] Like Mr Smith, Mr Shahadat knew that his statements were damaging to Mr Dooley, and that they would also be published widely. Indeed, I have found that his predominant motivation was to achieve both those objects.

[272] In those circumstances I consider that Mr Shahadat, too, was under an obligation to act in a manner that came close to a duty of care. Given that he had seen Mr Dooley's response to Mr Clayton's email on 16 September 2007, I consider that Mr Shahadat had an obligation to take further steps to satisfy himself that Mr Dooley actually knew of the existence of the CEO email before he issued his press release.

[273] In the absence of any other source to obtain that information, Mr Shahadat ought to have approached Mr Dooley directly before placing the information in the public domain. As Mr Shahadat now acknowledges, if he had done that he would immediately have learned that Mr Dooley did not become aware of the existence of the email until Mr Bromley showed it to him on 1 October 2007.

[274] In failing to take that step, and in failing to appreciate the inference naturally to be drawn from Mr Dooley's email on 16 September 2007, Mr Shahadat acted recklessly. He therefore took improper advantage of the occasion of privilege when he issued his press release. For that reason, too, Mr Shahadat is unable to rely upon the defence of qualified privilege.

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.

Costs

[277] In any case where the Court makes a declaration under s 24(1), the defendant must pay the plaintiff's costs on a solicitor-client basis unless the Court orders otherwise.

[278] I have signalled earlier in this judgment that Mr Dooley must bear some of the responsibility for the events that occurred in this case, as must other persons who are not parties to this proceeding. I leave open the possibility that this factor may need to be taken into account when making any order as to costs.

[279] I will leave the parties to endeavour to reach agreement regarding the issue of costs over the next four weeks. If they have been unable to reach agreement by 30 April 2012, counsel for Mr Dooley is to file and serve a memorandum setting out the orders that his client seeks.

[280] Mr Smith and Mr Shahadat will then have 14 days to file and serve memoranda in response, and counsel for Mr Dooley will have a further 7 days thereafter to file and serve a memorandum in reply. I will then deal with the issue of costs on the papers unless any party requests an oral hearing.

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Lang J