IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA52/2023
CA139/2023
[2023] NZCA 579

BETWEEN	GRAHAME DOUGLAS CHRISTIAN Appellant
AND	MURRAY IAN BAIN Respondent

Hearing: 15–16 August 2023

Court: Miller, Brown and Courtney JJ

Counsel: C T Patterson for Appellant
W Akel and J C Dickson for Respondent

Judgment: 17 November 2023 at 2.00 pm

JUDGMENT OF THE COURT

A The appeals from [2022] NZHC 3394 (liability) and [2023] NZHC 424 (costs) are dismissed.

B The cross-appeal from [2022] NZHC 3394 is dismissed.

C The appellant must pay costs in this Court for a complex appeal on a band A basis with usual disbursements as fixed by the Registrar, with provision for second counsel.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] Grahame Christian sued Murray Bain in defamation.[1]

[2] The claim focused on two articles published on 3 August 2019 by NZME Publishing Ltd in the *Weekend Herald*, and republished by other news outlets, about the apparent misuse of local authority dumping facilities by Smart Environmental Ltd. The two articles, which we will call the News Article and the Feature Article, are attached to this judgment.[2] We discuss them at [53] below. The gist of the story was that Smart was engaging in clandestine practices when tipping commercial waste at refuse transfer stations owned by local authorities and was also substantially underpaying, without the local authorities' knowledge, for commercial waste tipped there.

[3] Smart is a large waste management company closely associated with Mr Christian. Mr Bain is a competitor and former employee of Smart who was NZME's initial and principal source for much of the information published. He worked closely with Michael Valintine, a freelance journalist who offered the story to NZME then wrote the articles over a period of about six months. Messrs Christian and Bain were both quoted in the articles, which told readers that they were competitors with bad blood between them.

[4] Mr Bain's liability is not said to rest on specific statements attributed to him in the articles. The alleged defamation of Mr Christian rests on an imputation, drawn from the articles as a whole, that he was knowingly responsible for Smart's underhand conduct. Mr Bain is said to have been liable as a joint tortfeasor, with NZME and Mr Valintine, for everything said in the articles.

[5] NZME later retracted any allegations of wrongdoing and published an apology. It compromised Mr Christian's claim, which went to trial against Mr Bain alone.

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1 *Christian v Bain* [2022] NZHC 3394 [liability judgment].

2 Counsel did not focus on the republications, which were in the *Hawkes Bay Today* and *Bay of Plenty Times* and on the New Zealand Herald website. Republication is said to have increased the injury to Mr Christian but not to affect liability.

[6] Mr Christian lost before Walker J, sitting without a jury.[3] The Judge found that the publications contained imputations defamatory of Mr Christian,[4] and that Mr Bain was responsible for them as a joint tortfeasor.[5] But because NZME and Mr Valintine had made reasonable efforts to verify the allegations and had offered Smart an opportunity to comment on them, Mr Bain succeeded in making out the defence of responsible communication on a matter of public interest.[6]

[7] The Judge later ordered Mr Christian to pay a substantial sum in costs, including an uplift which reflected the impact of his approach to the litigation on costs incurred by Mr Bain.[7]

[8] Mr Christian now appeals the liability and costs judgments. He accepts that the publications concerned matters of public interest but says that, far from acting responsibly, Mr Bain acted from base motives and not enough was done to ensure the publications were accurate.

[9] Mr Bain supports the liability judgment on other grounds. He says the Judge was wrong to find that the articles were defamatory of Mr Christian and wrong to find him responsible for them; he was merely a journalist's source and had no control over the articles or the decision to publish. The Judge also found it unnecessary to decide his alternative honest opinion defence and he invites us to find that it was made out on the facts.

The principal actors

[10] Mr Christian was Smart's main shareholder until mid-2017, when he sold or gifted most of his shares, and he was managing director until shortly before publication of the articles. Walker J described him as a successful and self-made entrepreneur who is also a prominent member of his communities.[8]

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3 Liability judgment, above n 1.
4 At [259] and [273].
5 At [203].
6 At [379]–[381].
7 *Christian v Bain* [2023] NZHC 424 [costs judgment] at [44].
8 Liability judgment, above n 1, at [14].

[11] Mr Bain is a competitor of Smart through his company Coastal Bins Ltd. He worked for Smart between September 2016 and December 2017, when he left after a breakdown in his relationship with Mr Christian. There followed an employment dispute, eventually settled the day before the articles were published, in which they traded allegations of breach of a settlement agreement and breach of a restraint of trade.

[12] Mr Valintine, who wrote the articles, has more than 40-years experience as a journalist. He has known Mr Bain since 2003, when they began working together on an ultimately successful investigation into the shooting death of Mr Bain's brother at the Waiouru Military Camp.

Local authority refuse collection and disposal in the Thames District

[13] The proceeding finds its context in the 2013 Solid Waste Contract between Smart and three local authorities: the Thames-Coromandel District Council (TCDC), the Hauraki District Council and the Matamata-Piako District Council. These local authorities, which we will call the Councils, own some 12 refuse transfer stations and use the Tirohia Landfill under contract with its owner, Waste Management Ltd.

[14] However, the activities and events which concern us focus on dealings among the parties and the TCDC. The articles referred to one of the TCDC's refuse transfer stations at Thames and the Tirohia Landfill. The Tirohia Landfill is about 40 km from Thames. The litigation focuses on those facilities.

[15] Solid waste collection and disposal is a public service performed by local authorities.[9] The Councils offer the service to their ratepayers but deliver it through Smart under the Solid Waste Contract.

[16] Speaking generally, the Councils limit their ratepayer-funded service to normal household refuse which is collected in wheelie bins or refuse bags from houses or

[9] From 2010 until 2019 it was one of a number of a core services on which local authorities were required to focus: Local Government Act 2002, s 11A(c).

commercial premises.[10] Industrial or commercial waste, which typically is collected in large bins, is paid for by the user.[11] Under the Solid Waste Contract, Smart must offer a commercial waste collection service in the districts, but it is not a service provided to the Councils and it is offered in competition with other firms, including Coastal Bins.

[17] Smart operates a dedicated fleet of duo-combi trucks for the collection of household waste and recycling. These trucks are configured for kerbside collection of household rubbish and recycling in separate compartments. Trucks used for the collection of commercial waste are usually set up differently. They generally load from the front or rear into a single compartment.

[18] Again speaking generally, anyone may dump commercial waste at Tirohia or at a refuse transfer station.[12] The price paid depends on who is doing the dumping, and where. We focus here on the TCDC and Tirohia:

(a) The TCDC does not pay to tip household waste at its own refuse transfer stations. Rather, it pays Waste Management when the waste is taken from the refuse transfer station (by a contractor to Smart, after compacting and loading into large bins known as pods) and dumped at Tirohia. There is evidence that the rate paid by the TCDC was approximately $77 per tonne of solid waste.[13]

(b) Anyone other than the TCDC who tips solid waste at a refuse transfer station pays the TCDC Gate Rate, which was $181 per tonne at the material time. This includes any commercial operator, such as Smart or Coastal Bins, which chooses to dump commercial waste at a refuse transfer station.

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10 Household refuse is defined in the Solid Waste Contract as "such of the following or other materials as directed by the Contract Manager from time to time, including, but not limited to, wrapped cold ashes, sweepings, dust, wrapped bones and waste food, cans, cartons, or other food containers, or any other rubbish or refuse arising from domestic housekeeping, sacks and rags".

11 This waste is referred to as "Third Party Collections" in the Solid Waste Contract. We note for completeness that Smart may use equipment that is used to collect household waste for certain Third Party Collections but the Councils are not responsible for paying landfill charges.

12 Some waste cannot be accommodated at a refuse transfer station.

13 This rate is GST inclusive.

(c) Smart pays Waste Management to dump commercial waste which Smart collects and takes to Tirohia without first tipping it at a TCDC refuse transfer station. The rate paid to Waste Management is higher than the rate paid by the TCDC and less than the TCDC Gate Rate, but the evidence does not establish what the rate was. It does indicate that there was a commercially significant difference between the rates paid by the TCDC and by Smart. Mr Christian himself deposed that Smart would have sent commercial waste direct to landfill had it not been able to pay a lower rate that covered the TCDC's costs. Mr Bain deposed that when he worked for Smart (September 2016 to December 2017) the company paid Waste Management around $80 per tonne but the rate paid by his own company, Coastal Bins, from mid-2018 was between $95 and $105 per tonne.

[19] For a commercial operator which has its own contract with Waste Management, such as Smart, the obligation to pay the TCDC Gate Rate creates a substantial disincentive to tip commercial waste at a refuse transfer station. For that reason such tipping occurred only occasionally, usually for logistical reasons and with express permission from a Smart manager, before the events described in the articles.

[20] If Smart were permitted to pay the rate that the TCDC pays at Tirohia at a Council refuse station, it would be commercially advantageous for Smart to tip commercial waste at a Council refuse transfer station then dump it to landfill at Tirohia. However, that practice, which is known as tolling, has at all material times been prohibited under the TCDC's contract with Waste Management. The TCDC also prefers that refuse transfer stations not be used for commercial waste because of increased wear and tear on facilities and equipment.

[21] The Councils have outsourced to Smart not only the collection and disposal of household waste but also the management and operation of refuse transfer stations. Trucks cross weighbridges when entering and leaving the Thames refuse transfer station. The weight is displayed on a screen in a kiosk which is staffed by a Smart employee during public opening hours. The weight is entered into a computer system called Sensortronic and a docket is printed for the driver.

[22] Normal public opening hours at the Thames refuse transfer station are 10 am to 3 pm during Monday to Friday and 10.30 am to 5.30 pm on weekends. The facility must be open during those hours. Outside public opening hours the kiosk is not staffed and the gates are closed and locked. However, the resource consent for the site permits operation between the hours of 8 am and 5 pm during Monday to Saturday and 10 am and 5 pm on Sundays. Drivers who are handling household waste for the Council carry keys to the gates and may enter the refuse transfer station to dump their loads during those hours. The drivers record on paper the weight recorded on the weighbridge screen and provide that record to an administrator at Smart, who enters it manually in Sensortronic as a "super" entry.

[23] Household recycling is handled separately under the Solid Waste Contract. Smart must collect household recycling and the sale and processing of the recyclable material is Smart's sole responsibility. No recyclables may be disposed at a landfill. If that were to happen, the Councils would incur the dumping cost. Smart established a recycling depot to handle the material, which was shipped to China for processing.

[24] Each of the Councils is contracted to pay an annual fee for refuse and recycling collection and management of refuse transfer stations, and a rate per tonne for waste transported to landfill from each area. Smart bills the Councils in monthly claims. The claims must detail the amount of refuse transported to Tirohia, the volumes which originated in the territory of each of the Councils, Smart's performance against key performance indicators, and the amount of the payment claimed. In practice each claim is accompanied by a refuse transfer station transaction report detailing all loads through the stations. The transaction reports allow the Councils to validate the claims. The Contract Manager is also entitled under the Solid Waste Contract to inspect facilities, equipment and records and to audit Smart's records.

The factual context for the publications

[25] The narrative begins with the negotiation of the Solid Waste Contract in 2013. Mr Christian sought the right to toll commercial waste through refuse transfer stations at no cost to the Councils. It is now common ground that the Councils did not agree and no provision was made for tolling in the Solid Waste Contract.

[26] As above, Mr Bain left Smart at the end of 2017, and he soon incorporated Coastal Bins with another former employee of Smart, Michael Barlow. Walker J found that the relationship between Mr Christian and Mr Bain has remained acrimonious since Mr Bain's employment with Smart ended.[14]

[27] On 9 April 2018 Mr Christian emailed Bruce Hinson, a senior manager at the TCDC, advising that Smart planned to commence tolling and claiming that the Councils had agreed to it:

> On reviewing our tender submission, we noted that due to Smart purchasing all of the wheelie bins for the EW contract, it had been agreed that we could put our commercial waste through the transfer stations and go to landfill at Councils rate, Smart would not charge transport for the tonnes that formed part of that arrangement. This is planned for the end of this month. Additional resource will be required to handle these additional tonnes and we will do this at our cost. Full details will be sent shortly.

[28] The following day Mr Christian emailed again, stating that:

> Through [the negotiation] process, Smart and Councils agreed on several concessions in favour of Smart.
>
> 1. It was agreed that Smart could collect private customers at the same time as kerbside collections for both refuse and recycling and we have been doing this since contract inception.
>
> 2. It was agreed that on request Smart could toll its Commercial waste through Council transfer stations. Please see the cut and paste below.
>
> "Thames Coromandel District Council and Matamata Piako District Council will where requested allow Smart Environmental to "toll" Commercial Waste through its Transfer Stations, such that it will be at no cost to Councils".
>
> Accordingly we advise that from May 1, 2018 Smart wishes to exercise this clause to toll Commercial Waste at Transfer Stations.

The "cut and paste" was not an agreement but an extract from a proposal that Smart had made in the 2013 negotiations.

[29] The Council did not respond. Mr Christian asserted in evidence that he took this as acquiescence.

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14 Liability judgment, above n 1, at [16].

[30] On 12 April 2018 a senior manager at Smart sent an email, copied to Mr Hinson, stating that:

> The KRC is no longer operational given the compactor and mule truck have sustained fire damage; the KRC won't come back on line. As per Grahame's email on Monday, we have enacted the agreement to take our commercial waste to the Thames RTS.

The Kopu Refuse Centre (KRC) was an in-house facility that Smart operated at Kopu to hold Council and commercial waste, separately, before it was taken to Tirohia. It was sometimes convenient to tip waste there rather than go direct to landfill. Drivers could use the KRC outside the Tirohia Landfill hours of 6.30 am to 4 pm. The waste would be compacted and loaded into large pods before going to Tirohia. Each pod would be assigned a code indicating whether it was Council or commercial waste so it could be accounted for at Tirohia. The KRC was rendered inoperable by fire on 10 April 2018. However, the evidence is that the decision to tip at Thames was made before the fire at Kopu.

[31] In argument before us, Mr Patterson for Mr Christian acknowledged that the Solid Waste Contract does not permit tolling but maintained that Mr Christian believed that it did. Mr Christian deposed in his evidence in chief that Smart had "specifically negotiated" the right to toll with the Councils, although the records were "slightly challenging". He acknowledged that the TCDC was not happy about the "tolling option", but he attributed its attitude to what he believed was its decision to enter a new contract with Waste Management which prohibited tolling.

[32] This evidence is contradicted by the evidence of David Locke, a former employee of the Matamata-Piako District Council who was involved in the 2013 negotiations. He deposed that the tolling request was declined and Smart was told that the proposal would breach the agreement with the then owner of the Tirohia Landfill. That contract was later assigned to Waste Management. There is also evidence that on three occasions between 2014 and 2017 Mr Christian asked the Councils to permit tolling at cost or with a modest markup. Mr Christian says he did so because the Councils were ambivalent about the right to toll. David Lindsay, a TCDC employee until 2017, says that he told Mr Bain, who was working for Smart at the time and approached him about tolling, that the TCDC could not agree to it without breaching

the contract with Waste Management. As Walker J noted, the minutes of a partner meeting between Smart and the TCDC on 19 April 2018 make no reference to any alleged tolling agreement.[15]

[33] Walker J did not resolve the conflict of fact about what Smart knew or believed, but she stated that she was left with "the distinct impression that Smart's approach and arguments … were no more than a negotiation strategy designed to increase leverage".[16] We record that in early 2020, after the articles had been published, Smart reached an agreement with the TCDC under which, from 1 April 2020, it would pay the Gate Rate for commercial waste tipped at a refuse transfer station.

[34] Importantly, the Judge found that throughout Mr Bain's subsequent investigation the TCDC denied there was any documented tolling agreement.[17] She described the TCDC's stance as unsurprising. The TCDC did not disclose the email of 12 April 2018 to Mr Bain or Mr Valintine prior to publication of the articles.

[35] Following the email of 12 April, Smart began to tip commercial waste at the Thames refuse transfer station. For purposes of dumping at Tirohia, Smart treated this waste as Council waste and paid Waste Management the TCDC rate. Smart had keys cut to the Thames refuse transfer station for its commercial drivers so they could tip waste there outside public opening hours, as was already the case for its Council drivers.

[36] The altered behaviour of Smart's commercial trucks was soon apparent. Mr Barlow observed them tipping waste at Thames outside public opening hours. This behaviour raised a red flag because Mr Barlow knew from his own time at Smart both that commercial drivers would not do that without a very good reason and also that commercial drivers did not have after-hours access. He initially assumed that Smart had found it necessary to do this because of the fire at Kopu. He and Mr Bain began tracking Smart trucks.

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15 Liability judgment, above n 1, at [38].
16 At [38].
17 At [38].

[37] In August 2018 Mr Bain and Mr Barlow took their concerns to the TCDC. The Judge found that:

> [40] In August 2018, Messrs Barlow and Bain met with the Mayor and the then Chief Executive Officer of TCDC. They explained that they had proof that Smart was tipping its Commercial Waste after RTS sites had closed and had reason to believe that some discount arrangement was in place based on discussions with drivers and former Smart managers. They made the point that offloading Commercial Waste at the Thames RTS could not be economic if Smart was paying the full gate rate. They asked whether TCDC was aware of and had approved this. Mr Bain's evidence is that the CEO assured them that no one received a discount on the gate rate and no one was disposing of Commercial Waste after hours when the gate was shut.
>
> [41] On 24 August 2018, Coastal Bins wrote to TCDC. The letter reiterated the belief that Smart had been allowed to dispose of Commercial Waste at the TCDC RTS sites at a reduced disposal charge. It complained this provided a competitive advantage in breach of the Commerce Act 1986. It requested information and documents under the Local Government Official Information Act 1987 (**LGOIMA**). This was to be the first of a series of LGOIMA requests.

[38] The Judge found that at some stage the TCDC engaged PricewaterhouseCoopers (PwC) and Morrison Low to investigate the allegations.[18] Their reports were not received until after the articles had been published.

[39] Mr Bain contacted to Mr Valintine in late 2018 and they met on 1 November in Hamilton, where Mr Valintine attended the hearing of Mr Bain's dispute with Smart in the Employment Relations Authority. Mr Bain explained his suspicions but said he was waiting for information from the TCDC and would not bother Mr Valintine until he had more information.

[40] In December 2018 a Smart driver gave Mr Barlow a video of recycling from Waipa being tipped at the Thames refuse transfer station. It appears that this happened because of mechanical problems with the duo-combi trucks being used to collect household refuse and recycling at Waipa. A rear-loading truck with a single compartment had to be used. It compacted recycling and refuse together. This was done for about a month. Mr Barlow also gave evidence that he saw recycling and refuse being collected in a rear loader on one occasion in April 2019.

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[18] At [45].

[41] The tipping of recyclables assumed significance in the published articles partly because Mr Christian was reported as having complained in August 2018 that recycling, which had previously provided a revenue stream for Smart, had become a liability after the Chinese government had announced that the country would no longer process other countries' recycling. The TCDC was among the local authorities which were said to have refused to compensate Smart for the costs it was now incurring to process recycling.

[42] In early 2019 a memory stick was delivered anonymously to Mr Bain's letterbox. He explained that it contained Smart/TCDC data for the 2018 calendar year, including monthly claims and supporting refuse transfer station reports. Walker J recorded Mr Bain's explanation of what the data comprised:[19]

> (a) The monthly claim is an Excel-based report detailing volumes and costs of Smart's council-related activities including kerbside collections and RTS management.
>
> (b) Revenue rebated from Smart back to TCDC depends on incoming volumes to each RTS. Freight costs of moving waste from the RTS to the landfill was dependent on volumes carted.
>
> (c) Variable costs in the claims included things like removal and destruction of hazardous waste.
>
> (d) The greater financial component to the claim was comprised of the handling of the solid waste.
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> (e) While there will be monthly variances, year on year trends and volumes tend to be remain relatively static. Moderate annual increases would be expected with population growth.
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> (f) The data populating the solid waste component of the claim is taken from the RTS transaction reports.
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> (g) The RTS transaction reports confirm for each load disposed of, the RTS site, volumes of incoming waste and product ID code of that waste.
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> (h) The product ID shows whether the load is revenue to the council.
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> (i) Information from the RTS transaction reports is sourced from the weighbridges. Most of the information comes directly from the RTS but supervisors can manually add, delete or alter entries. The prices charged by TCDC for different types of waste is captured in the RTS transaction reports produced by a programme known as Sensortronics.

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[19] At [49]–[50].

> (j) TCDC pays the costs of all waste sent from the RTS sites to the Tirohia landfill so the make-up of the incoming volumes captured on the RTS transaction report needs to be reconciled against the volume of waste being sent to the landfill as stated in the Tirohia report.
>
> (k) The RTS transaction reports and the Tirohia report are crucial for Smart to accurately assess its claims and for TCDC to validate the claim.
>
> [50] Messrs Bain and Barlow's first impressions were that the Smart/TCDC data lacked transparency in so far as it related to TCDC. There was not enough information to complete a full reconciliation of the payment claims presented by Smart. They also considered that the Smart/TCDC data appeared to show volumes of waste coming into the RTS sites for TCDC which were significantly lower than the volumes entering Tirohia from the same site. It was inexplicable to them that an RTS would be sending out more volume of waste than it was taking in.

[43] Walker J recounted the steps taken by Mr Bain in January and February 2019 to get the TCDC to address his concerns:[20]

> [51] On 8 January 2019, Messrs Bain and Barlow met again with Mr Hinson and another TCDC representative. It is not clear from the evidence whether this was before or after receipt of the anonymously delivered Smart/TCDC data. Coastal Bins followed up the meeting with an email recording what had been discussed and expressing disappointment at the lack of progress.
>
> [52] Mr Bain's habit of following up meetings in writing provided a useful contemporaneous record of what was discussed. No internal TCDC meeting notes or records were produced to the Court. In the absence of correction by TCDC, the Court can infer that these records were generally accurate.
>
> [53] One of the items discussed was the request by Coastal Bins to negotiate commercial tipping to RTS sites at a price that covers the RTS operational costs including disposal at landfill, cartage to landfill, Smart's management fee plus a margin. In short, a form of tolling. TCDC declined to negotiate. Mr Hinson said TCDC could not accept commercial contractors disposing at RTS sites. Mr Bain's summary also records that Mr Hinson advised that the Solid Waste Contract has "grey areas" that TCDC needed to work through with Smart. The letter concluded:
>
> > We are [sic] tried our very best to not only highlight these irregularities to TCDC but to also work with you in giving you time to address these issues. We now have no confidence that TCDC will in fact create a "level playing field" with all local waste contractor[s] and strongly feel that TCDC is creating an anti-competitive environment.
> >
> > We also discussed the various enquiry [sic] we have had from media in recent weeks and our position of "no comment to date". The effect

[20] Footnote omitted.

> of TCDC allowing Smart preferential treatment and at the expense of the ratepayer is beginning to financially impact on our business and we feel compelled to explore other outlets to convince TCDC to create an impartial environment.

[54] On the same date, Mr Bain emailed the CEO reiterating disappointment at TCDC's response. That email closes with a statement that "we are contemplating involving Media to gain public support to get these issues addressed".

[55] TCDC's CEO responded on 9 January 2019 citing the ongoing contractual dispute resolution process with Smart.

[56] A further meeting took place on 10 January 2019. Mr Bain, writing to TCDC afterwards suggested that he was contemplating a complaint to the Office of the Auditor-General but that the meeting had given Coastal Bins some confidence that TCDC is aware and monitoring the cost to TCDC ratepayers. Mr Bain referred to videos of Smart sending TCDC kerbside recycling to waste. More correspondence followed between 13 January 2019 and 23 January 2019, among other things resurrecting the earlier LGOIMA request.

[57] It must have been clear to TCDC by then that Mr Bain's tenacity meant that these issues would not be going away. Mr Bain's own frustration at the TCDC lack of response led him to email the CEO of TCDC on 18 January 2019 saying that "Smart's constant cheating of the Shared Services contract" was bigger than TCDC was aware. He alleged that Smart was tipping Waipa kerbside recycling at the Thames RTS at night, that TCDC staff were aware of Smart's cheating and yet it continued.

[58] Messrs Barlow and Bain met a number of times with in-house legal counsel at TCDC. Among the various concerns Mr Bain raised was that the delay in responding to LGOIMA requests was impeding substantiation of the claims made by Coastal Bins.

[59] Coastal Bins continued to make further LGOIMA requests between 29 January 2019 and 6 February 2019.

[60] On 20 February 2019, following the hearing some months earlier, the ERA determined that Mr Christian had disparaged Mr Bain in breach of the settlement agreement. It rejected a claim by Mr Bain that Smart owed further monies under the settlement agreement but accepted that Mr Bain had not breached any restraint of trade. The Authority awarded damages to Mr Bain. Smart appealed.

[61] On 22 February 2019, TCDC responded to various LGOIMA requests. The most material information in that response was that there was no documented agreement with Smart for the "tolling" of commercial waste at any TCDC RTS site, there is no afterhours access to the RTS unless by prior arrangement with TCDC and that no one other than the RTS operator should be in the RTS afterhours unless they have permission from TCDC. Mr Bain considered the answers evasive. He sent follow-up requests on 22 February 2019.

> [62] Concerned that they were not getting any traction, Mr Bain laid a complaint with the Office of the Auditor-General.

[44] It can be seen that the TCDC was not very forthcoming with information or willing to allow Coastal Bins to tip commercial waste on terms similar to those enjoyed by Smart. But it did confirm that there was no documented tolling arrangement and no after-hours access to the refuse transfer station without permission of the TCDC.

[45] Mr Bain was not told that the TCDC had taken the issue up with Smart, instructing Smart in February 2019 to discontinue tolling and pay the full rate payable under the Solid Waste Contract. The Judge found that:

> [63] In the background, but not known to Mr Bain, TCDC's in-house counsel had written to Smart on 12 February 2019. He pointed out that the concept of Smart paying a lower rate compared to those paid by others for Commercial Waste disposal was never included within the signed Solid Waste Contract. The letter stated that "[o]ur expectation is that Smart will discontinue this practice forthwith and pay the full rate … until further notice". Smart's response was that TCDC's decision was not based on all the facts, which it was currently gathering, and TCDC ought not take any precipitous action. The reply was that it was Smart that had taken precipitous action in unilaterally decid[ing] to grant itself a reduced disposal rate for commercial waste.

[46] Around the same time, Mr Bain contacted Mr Valintine again and met with him in Auckland. Mr Valintine went to Thames to be briefed by Messrs Bain and Barlow and then approached NZME to get an expression of interest in publishing.

[47] The Judge recounted the steps taken by Mr Valintine to verify the story after NZME confirmed its interest. We can adopt the following extract from her judgment because the steps taken are not in dispute. (The stance taken by Mr Patterson rather was that more ought to have been done having regard to what he characterised as vested interests of many of the people to whom Mr Valintine spoke to verify the story.) The Judge's recounting was:[21]

> [65] It was after that briefing session with Messrs Bain and Barlow that Mr Valintine contacted Miriyana Alexander, then Head of Premium Content for the *New Zealand Herald.* On 4 March 2019, Mr Valintine sent through a

21 Footnotes omitted.

rough outline of what he was investigating to get an indication of interest. Ms Alexander responded confirming the *New Zealand Herald's* interest.

[66] Mr Valintine's first step was a LGOIMA request to TCDC. He consulted with Mr Bain about the content and framing of the request to avoid duplication and to get guidance on the most useful information to seek. Mr Valintine specifically advised in the request that he was working on an article to be published in the *New Zealand Herald* and potentially a television documentary.

[67] Mr Valintine coincidentally knew TCDC's communications manager, Laurna White. The first LGOIMA response from TCDC to Mr Valintine was sent by Ms White on 13 March 2019 along with an invitation to call her to discuss further. TCDC's formal response was that it could not disclose the requested documents because TCDC was in commercial negotiations with Smart. However, based on his telephone call with Ms White, Mr Valintine was expecting TCDC to be in a position to provide more information in a couple of weeks. He thought that when this further information arrived it may well avoid any need for a major investigation.

[68] That did not prove to be the case. As the two weeks dragged into further weeks, Mr Valintine spent more time with Messrs Bain and Barlow working through their extrapolation of information from the Smart/TCDC data. At the same time he started interviewing key people face to face. Some of those contacts, such as former Smart drivers and operational personnel were organised by Mr Bain. Others were sourced by Mr Valintine. Many interviewees sought confidentiality protection. Materially, Mr Valintine also established a confidential source within TCDC.

[69] On 27 March 2019, Mr Valintine emailed a story outline to Ms Alexander. He expressed confidence in the story due to the weight of documentation and his "deep throat" within TCDC. He asked for a "ballpark figure" if she was interested. I take this to mean the freelance fee for Mr Valintine. The outline is relatively brief and Mr Valintine includes what he called a "disclaimer" reiterating that there is bad blood between his "initial source and main protagonist" and his former boss at Smart.

[70] [NZME] responded with queries and pointed out a potential fish-hook in respect of the provenance of the documentary material and videos. Mr Valintine suggested that a public interest argument would protect the documents provided by "whistle-blowers". There were further exchanges between NZME and Mr Valintine.

…

[72] By this time, the editor/owner of a local newspaper, the *Informer*, was hovering in the background and also looking to publish a story on these issues. I discern that he was in regular contact with Mr Bain although precisely how that came about was not clear. The editor sent a draft opinion piece to TCDC regarding Smart and copied the draft to both Messrs Valintine and Bain with whom he had been in contact. He asked TCDC for information to verify the information. He specifically queried whether Smart was paying a lower rate for disposing of third-party waste at TCDC's RTS sites.

[73] During this investigative period, Mr Valintine sent to Mr Bain various drafts of the Articles. He asked [Mr] Bain and Mr Barlow to fact check the drafts. He was also communicating with NZME, updating Ms Alexander as he went and providing drafts. A "first draft" was sent to Ms Alexander on 10 April 2019. Mr Valintine described that draft as containing the key information for NZME to begin addressing both editorial and legal issues before he approached Smart and TCDC given the complexity of the subject matter. He pointed out that his contact was willing to meet with her and any experts to discuss questions or challenges, something which he recommended. He explained that, at that stage, he had not broken the story out into a news article and feature because TCDC and the "company CEO" will form a significant part of any feature.

[74] Ms Alexander responded a few days later. She wrote, "Amazing story…looking great, and sounds like you have all the corroboration …". She suggested that she was happy to meet with him and his "contact" and asked Mr Valintine for his view of the optimal timing for publication.

[75] The upshot was that Ms Alexander suggested that Mr Valintine forge on and write it all up without going to Smart or TCDC yet. She added that, at that point, she would put the news and feature stories "in front of our lawyers and tell them what corroboration we had, and get the all-clear from them".

[76] In early May 2019, Mr Valintine reported to NZME that he was restructuring and rewriting following receipt of new documents and other interviews. He set out some of the developments in his investigation. He also reported that his main contact had been in touch with the Auditor-General's office which he described as helpful to a news story should that office begin an investigation.

[77] On 21 May 2019, Mr Valintine emailed Ms Alexander with a further draft feature and news story. He stated:

> Obviously there are a number of legals to consider and I am happy to meet and to provide documentation and sources[.] In all I interviewed over ten people involved mostly existing or former senior managers and staff from both sides. The documentation is literally hundreds of thousands of spreadsheet lines. It would probably be helpful at some stage for you to meet the main source who with, other former staff members took me through the complicated web of documents and extracted the information. He is happy to come up and go through spreadsheets with any expert you can provide.

[78] Mr Valintine added that "we still have to go to the council and the company…".

[79] I pause to interpolate that the various iterative drafts underwent many changes but the key allegations remained substantially the same from the initial stages right through to publication.

[80] On 12 June 2019, Mr Valintine sought comment from Mr Christian. There was a lengthy text exchange in which Mr Christian vigorously denied the allegations. Mr Valintine also emailed Todd McLeay, the new chief executive of Smart. He sent to Mr McLeay a detailed list of questions and factual assertions and sought comment from Smart. Mr McLeay told

Mr Valintine that the Solid Waste Contract prevented him from talking without the approval of TCDC. Mr Valintine's evidence was that Mr McLeay undertook to inquire about a release from TCDC but never came back to him.

[81] Around this time, Mr Valintine approached Ms White expressing concern that TCDC was writing Mr Bain off as a disgruntled former employee and dismissing his claims as baseless. Mr Valintine urged Ms White to arrange a meeting with the CEO and a manager of the Solid Waste Contract so that Mr Bain could present his evidence to TCDC managers. Mr Valintine made it clear that meeting was conditional on the CEO of TCDC attending. He said that he would bring Mr Bain to take people through the spreadsheets and pivot tables.

[82] The meeting was scheduled to take place on 12 June 2019. On the way to the meeting, Ms White contacted Mr Valintine to says that the CEO of TCDC could not and would not meet and that no-one from the Solid Waste Contract would attend either. Instead, the meeting would be with Ms White and newly appointed in-house counsel.

[83] Although the stipulated condition for meeting had not been met, Messrs Bain and Valintine decided to attend anyway. Neither regarded the meeting as in any way successful. However, Ms White wrote to Mr Valintine the following day. She described the meeting as productive. She included in that letter a statement for publication. That statement said, in part:

> Thank you for the meeting to provide us with specific documented information and evidence that raises some very serious allegations, which will help with us now investigate, analyse and take further advice.
>
> We have been working with appropriate authorities for some time to identify and validate any evidence of whether illegal activity has occurred or whether any contractual breaches have become apparent.

[84] Mr Valintine reported developments to NZME. Mr Bain meanwhile also reported on the meeting to Gabrielle Wheddon from the Office of the Auditor-General. He explained that he had taken the TCDC representatives through four months of the Smart/TCDC data to show the disparity between landfill tonnes and RTS incoming tonnes; that Smart had only included a transaction report for November and December and the differences in RTS "captured revenue" and the RTS rebate amount paid back to TCDC by Smart. He had also shown to TCDC what he considered was proof of the Commercial Waste drop off rate at $77.05 per tonne plus GST.

[85] In early July 2019, Mr Bain was contacted by a private investigator engaged by TCDC. He met with the investigator, Michael Campbell, along with Mr Valintine. According to Mr Valintine this was an off-the-record discussion and not attributable although Mr Campbell would be reporting the discussion to TCDC.

[86] Mr Campbell went on to speak with some of the same sources to whom Mr Valintine had spoken. Mr Valintine was present when some of those sources were interviewed by Mr Campbell.

[48] It is apparent that between February and August 2019 Mr Valintine followed a process in which he worked closely with Messrs Bain and Barlow to analyse the data and asked them to fact-check his drafts. We return to the Judge's findings about this at [74] below because they are central to her conclusion that Mr Bain was responsible for the articles as a joint tortfeasor.[22]

[49] The Judge also stated in the above passage that Mr Valintine interviewed other people to verify the story. Later in her judgment the Judge accepted his evidence that he had interviewed 13 others.[23] Some worked for Smart as drivers or managers, or had previously done so. Some had been identified by Messrs Bain and Barlow. Others were identified by Mr Valintine, and one of those was a confidential source within the TCDC. The Judge later found that Mr Valintine also sought to validate the Smart/TCDC data by obtaining a copy from his confidential TCDC source.[24] Mr Valintine and Mr Bain also went to industry experts who generally confirmed the reliability of Mr Bain's findings.[25] Walker J found that Mr Valintine was justified in having confidence that the data had not been tampered with.[26]

[50] It can also be seen from the Judge's recounting that Mr Valintine arranged a meeting between the TCDC and Mr Bain at which it appears Mr Bain took TCDC representatives through the Smart/TCDC data to demonstrate discrepancies in amounts paid. Messrs Bain and Valintine had (separately) made a series of official information requests under the Local Government Official Information and Meetings Act 1987. The Judge later found that the TCDC's responses generally to information requests exhibited two themes: its commercial interests justified withholding information and it would not respond while it was investigating matters itself.[27] She found it unsurprising that Mr Valintine formed the view that it was almost impossible to get any useful information from the TCDC and also that what information it did provide was often ambiguous, confusing and sometimes inaccurate.

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22 At [203].
23 At [296].
24 At [299].
25 At [309].
26 At [318].
27 At [325].

[51] It will also be seen that NZME was kept informed of the efforts being made to verify the story and was made aware that there was bad blood between Mr Bain and Mr Christian. The Judge found that NZME took legal advice.[28] NZME also claimed to have a rigorous process for checking stories submitted by freelance journalists. The Judge found that NZME did not follow the process on this occasion.[29] However, she also found that Mr Bain was given to understand that there would be an independent checking process which included legal advice.[30]

[52] Further, Mr Valintine sought comment from Mr Christian before publication, receiving vigorous denials. He also emailed the new Chief Executive of Smart with a detailed list of questions and factual assertions. Walker J found that Mr Valintine put the substance of the allegations to Mr Christian.[31] Mr Christian responded but when Mr Valintine sought clarification he was directed to Mr McLeay, the Smart Chief Executive. Mr McLeay did not provide any substantive response to the list of questions sent by Mr Valintine, and it appears he assumed the story had gone away until Mr Valintine texted him on the eve of publication to tell him publication was imminent. The Judge found that Smart and Mr Christian had been given a reasonable opportunity to respond.[32]

The Articles

[53] The News Article and the Feature Article were published in the same issue of the *Weekend Herald*, one as a lead story and the other as a more detailed inside story. We summarise them briefly, not to attribute meanings but simply to identify passages which became the subject of the pleadings.

The News Article

[54] The News Article stated that Smart was being investigated for "giving itself a huge discount at council-owned transfer stations it manages". The TCDC was investigating whether the discount was introduced without advising the TCDC. An

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28 At [89].
29 At [358].
30 At [357].
31 At [373].
32 At [372].

unnamed former "member of Christian's team" was quoted as saying that the "discount" was introduced after the company failed to get compensation for the Chinese ban on taking and paying for recycling, and that the TCDC was not consulted or advised but the information was discoverable in monthly claims.

[55] The News Article also stated that Smart was also being probed for "hundreds of tonnes of unaccounted-for waste and allegations of clandestine after-hours dumping". Smart had keys cut for its commercial drivers who, it was claimed, "could access the transfer stations after hours when weighbridges were not staffed".

[56] Mr Bain was identified as a former employee and competitor of Smart and quoted saying that the discounts were a breach of contract and a "rort on ratepayers" which he reckoned had already cost hundreds of thousands of dollars and could ultimately cost as much as a million. He stated that either the TCDC was "utterly incompetent" or "something very underhanded" had gone on. Mr Christian was quoted, denying wrongdoing and accusing Mr Bain of running a gutter campaign. Mr Bain conceded there was "bad blood" but said that all Mr Christian had to do was "open the books to experts and it will be very clear who is right and who is wrong". The article recorded that a detailed list of questions had been sent to Smart's new Chief Executive, who declined to comment.

The Feature Article

[57] The Feature Article began with the topic of clandestine dumping, describing a Smart commercial driver pulling up at the Thames refuse transfer station after hours and unlocking the gate with a key he should not have to tip his load of commercial waste. It quoted a nearby resident to the effect that it was "yet another clandestine after-hours load" and stated that it was just one of "hundreds of loads" that Smart would allegedly dump after hours, avoiding weighbridge systems that are supposed to ensure accurate records and payments. It also noted clear evidence of "trashed recycling" and hundreds of tonnes of unaccounted-for waste. A TCDC source confirmed that by the end of August 2018 Smart had dumped 245 tonnes of commercial waste at Thames. Almost two-thirds of Smart commercial loads were not captured by weighbridge computers. A Smart driver explained that weights would be

recorded by looking at the computer screen through the kiosk window and the weights would later be uploaded manually, but sometimes he could not see the computer screen, or it was too dark and he wouldn't bother. TCDC records showed that, in November 2018, 63 of 80 commercial loads were not captured by kiosk staff but were entered manually afterward without independent verification.

[58] The Feature Article also stated that even during opening hours when loads were recorded by weighbridge computers, Smart commercial trucks were paying less than half the price recorded on printouts. A senior Smart manager at the time (not Mr Bain) confirmed that in May 2018 the company altered spreadsheet data, giving its commercial drivers a large discount, and had not told the TCDC because the information was discoverable in monthly claims.

[59] Mr Bain was quoted saying that Smart "apparently gave itself a huge discount, which breached its contract, and the council was totally unaware it was being ripped off for over a year".

[60] Mr Christian was quoted, denying after-hours dumping and insisting that Smart would not engage in clandestine dumping.

[61] The Feature Article referred to a video taken by a driver showing kerbside recycling from Waipa being tipped at Thames. He stated that he did "30 tonnes in just one month".

[62] The Chinese decision in 2018 to ban other countries' recycling was identified as a motive. Mr Christian was quoted saying at that time that the decision was costing Smart and very few of its client councils were willing to help.

Events after publication

[63] NZME deactivated the online articles on 8 August 2019. Mr Christian brought proceedings a month later.

[64] As noted, the TCDC engaged Morrison Low and PwC to investigate. Morrison Low provided a report dated February 2020. Their conclusions were that:

(a) Smart had not been paying the full commercial rate for commercial dumping at Tirohia. The shortfall for the year from May 2018 was $267,141.03.

(b) Almost 60 per cent of Smart commercial loads at Tirohia in the period January 2018 to May 2019 had been entered manually as "super" entries. No conclusions could be drawn about the accuracy of these entries. Presumably for that reason, Morrison Low recommended that the practice should not continue.

(c) A significant minority — 4,682 or 23.5 per cent — of Smart truck movements between January 2017 and May 2019 had no associated weighbridge dockets and 1,897 of these carried commercial loads.

(d) There was an unexplained variance between tonnes of waste entering the Thames refuse transfer station and tonnes leaving it, indicating that additional tonnes were entering without crossing the weighbridge. Over a 23-month period the difference appeared to be about nine per cent, but this estimate relied on subjective assumptions made by Morrison Low. Rubbish illegally dumped at the refuse transfer station gate after hours would account for only a very small proportion of the discrepancy. But there could also be benign explanations, such as inconsistent recording, loss of weight due to compaction and moisture loss, and separation of green waste or reusable material from the refuse stream at the transfer station. The variance could not be definitively explained. Overall, there was no clear indication that the quantity of unaccounted-for tonnes was significant.

[65] PwC reported on 16 April 2020. It appears that PwC defined their brief as whether it could be shown beyond reasonable doubt that Smart had committed fraud. By reference principally to the emails sent by Smart before tolling began, PwC concluded that Smart could argue that it had an honest belief that it could dump commercial waste at an agreed discount rate. PwC stated that Morrison Low had found there was no significant unaccounted-for waste. That statement was not strictly

accurate. Morrison Low did not find that a variation of 9 per cent was insignificant. They found no clear indication that the quantity of unaccounted-for waste was significant having regard to available explanations that did not implicate Smart in wrongdoing.

[66] Mr Christian settled his claim against NZME and Mr Valintine. On 6 November 2021 NZME published a retraction and apology which included the following statements:

> … NZME has now received documentation which indicates that the Morrison Low and PWC investigative reports concluded (in summary):
>
> a. Smart Environmental Limited engaged in correspondence with the Council in relation to its commercial waste disposal fees from around April 2018;
>
> b. Smart Environmental Limited's tolling fees were charged in reliance on that 2018 correspondence; and
>
> c. While there were discrepancies in relation to the waste tonnages entering the Thames-Coromandel RTS sites, based on the information provided to the investigators, the discrepancies did not appear to be significant. The Council published its findings in response to the allegations in the articles on 11 May 2020.
>
> NZME understands that Mr Christian was not interviewed by Morrison Low, PWC or the private investigator in relation to these matters.
>
> NZME acknowledges that Mr Christian has enjoyed a justifiable and very good reputation in the community including as a result of his success in business. NZME also acknowledges and apologises for any damage to Mr Christian's and Smart's reputation and distress Mr Christian may have suffered through publication of the articles.
>
> NZME will not be republishing the articles and unreservedly withdraws any allegations of wrongdoing against Smart and Mr Christian contained within them.

The issues on appeal

[67] The liability issues before Walker J were whether: Mr Bain was liable in law for the Articles, they conveyed any of the defamatory ordinary and natural meanings pleaded, Mr Bain could make out the defence of responsible communication on a matter of public interest, and he could make out the defence of honest opinion.[33] These

[33] At [97].

issues all remain live on appeal and cross-appeal, along with costs in the High Court, which were the subject of a later judgment.[34]

Mr Bain's liability in law for the Articles

The Judge's reasons

[68] The Judge found, and it is not now in dispute, that the pleaded claim against Mr Bain was that he was responsible not only for quotes attributed to him in the Articles but also for publication of the Articles as a whole.[35] The primary publisher was NZME, which retained control over the content and the act of publication.[36] Mr Christian argued that Mr Bain procured and played a substantial part in having the Articles published.[37] Trial counsel for Mr Bain responded that the Articles overall were not based on statements made by Mr Bain, who was only one of more than 15 sources.[38] Mr Valintine conducted his own investigation and he and/or NZME maintained editorial control. It was Mr Valintine who inserted some of the elements relied on for the defamatory meanings, such as a reference to the television show *The Sopranos*.

[69] Walker J began her analysis by citing *Gatley on Libel and Slander* for the proposition that at common law all those who participated in, secured or authorised a defamatory publication are jointly and severally liable for it.[39] She found support for this proposition in two English decisions, *Bunt v Tilley* and *Bataille v Newland*,[40] and she noted that the same approach had been taken in two recent New Zealand decisions: *Newton v Dunn* and *Sellmann v Slater*.[41] She recognised that most of these decisions were interlocutory and in none of them was the primary publisher an independent

34 Costs judgment, above n 7.
35 Liability judgment, above n 1, at [183] and [200]–[203].
36 At [100].
37 At [115].
38 At [117].
39 At [119] citing Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [6.10] and [6.11].
40 Liability judgment, above n 1, at [121] citing *Bunt v Tilley* [2006] EWHC 407 (QB), [2007] 1 WLR 1234; and *Bataille v Newland* [2002] EWHC 1692 (QB).
41 Liability judgment, above n 1, at [125]–[130] citing *Newton v Dunn* [2017] NZHC 2083, (2017) 14 NZELR 621; and *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218.

media organisation.[42] She found that NZME was not Mr Bain's agent; specifically, he was never able to authorise, instruct or direct NZME.[43]

[70] However, the Judge followed Australian authority to the effect that it was sufficient if Mr Bain approved the final form in which the defamatory statements were published.[44]

[71] The Judge recognised that while a journalist is sufficiently close to dissemination by a commercial publisher to share liability as a joint tortfeasor, the journalist's source is in a different position.[45] Sources are protected by the newspaper rule (a news media organisation which is sued will not be ordered to disclose its sources before trial)[46] and s 68 of the Evidence Act 2006 (protecting, within limits, promises of confidentiality made by journalists to their sources). An overly inclusive approach could deter sources and have a chilling effect on freedom of expression.[47] A mere source is not liable, for they normally lack any control over the final form of the publication.[48] The real question was whether Mr Bain was more than a source.[49]

[72] The Judge surveyed the evidence and answered that question affirmatively. She began by finding that Mr Bain had sought to use the threat of publicity to pressure the TCDC,[50] and when that did not work he tipped off Mr Valintine, seeking to get the story published.[51] However, the tip would not have been enough.[52] Nor was his provision and analysis of the Smart/TCDC data.[53] Nor was his identification of other people whom Mr Valintine might interview and his presence when some of them were

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42 Liability judgment, above n 1, at [131] and [133].
43 At [133].
44 At [134]–[140] citing *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156 (SC); *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27, (2021) 392 ALR 540; *Google LLC v Defteros* [2022] HCA 27, (2022) 403 ALR 434; *Zeccola v Fairfax Media Publications Pty Ltd (No 3)* [2015] NSWSC 1007; and *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550, (2018) 356 ALR 564.
45 Liability judgment, above n 1, at [144]–[145].
46 High Court Rules 2016, r 8.46.
47 Liability judgment, above n 1, at [146].
48 At [147]–[148] citing *Bataille v Newland*, above n 40, at [25].
49 Liability judgment, above n 1, at [149].
50 At [175].
51 At [174].
52 At [176].
53 At [177].

interviewed.[54] She further accepted that Mr Valintine had many other sources for the Articles.[55] Some of the sources gave evidence and, elsewhere in her judgment, she by and large accepted their accounts.[56] But they fulfilled a "secondary role—to corroborate Mr Bain's hypotheses".[57] She found their involvement a neutral factor in her assessment of Mr Bain's responsibility.[58]

[73] The decisive considerations for the Judge were that Mr Bain knew and approved of the entire content of the Articles and actively encouraged Mr Valintine at each step.[59] That sufficed to make him liable as a joint tortfeasor. We set out her findings:[60]

> [184] On 1 March 2019, three days before Mr Valintine pitched a potential story to NZME, he sent an email to Mr Bain. There was an exchange of messages between the pair:
>
> > **Mr Bain**: Lost your call can you email it to me
> >
> > **Mr Valintine**: Will do
> >
> > **Mr Valintine**: Sent
> >
> > **Mr Bain**: You covered it well
> >
> > **Mr Valintine**: What have I missed out…adding trucks over xmas hold putting rubbish and recycled in same truck to the embarrassment of drivers…anything else
>
> [185] Neither Mr Bain nor Mr Valintine have discovered the email referred to in this text exchange. But, on 4 March 2019, Mr Valintine emailed Miriyana Alexander, a senior editor at the Herald to seek an expression of interest in publishing a story. He referred to "early research" and set out a series of alleged wrongdoings by Smart. That outline contained the key allegations of afterhours dumping at transfer stations for no fee; dumping of recycling and TCDC's failure to audit waste management contracts and challenge reporting discrepancies. This was undoubtedly the outline Mr Bain had 'approved' the day before.
>
> [186] Then, on 24 March 2019, after a few weeks of back and forth, Mr Bain messaged Mr Valintine saying, "… I reckon guns loaded with enough ammo now so pull the trigger when you ready". I infer that this means go ahead and write the story.

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54 At [177].
55 At [181].
56 See for example [305]–[309] discussing the evidence of industry expert Mr Lindsay, and [333] discussing the evidence of former Smart employee and current Coastal Bins employee Mr Cox.
57 At [181].
58 At [182].
59 At [183].
60 Footnote omitted.

[187] A few days later, Mr Valintine emailed a story outline to Ms Alexander at the Herald to gauge her level of interest. The brief story outline was headed "A load of Rubbish". It alleged deliberate contamination of recycling and dumping of recycling; dumping after hours at RTS sites leaving TCDC and ratepayers bearing processing costs; issue of keys to Smart drivers for after-hours access; and unexplained massive volume increases in waste from RTS sites to landfill.

[188] On 10 April 2019, Messrs Bain and Valintine exchanged emails with the attachment "Herald draft .docx"… The attachment as discovered by Mr Valintine is headed "Draft Murray". It reads like a very early iteration of the news article. It shows Mr Bain's awareness of the contents of the proposed article and its various iterations but I do not infer that the draft was composed by Mr Bain.

[189] On 12 April 2019, Mr Valintine emailed a draft "feature story" to Mr Bain. This was headed "The Ghost Trucks". The email said "Hi Murray – here is some homework you asked for? Can you go through and fact check the scenarios". Mr Valintine also said in the email he was thinking of doing a "break out" story on Mr Christian to go on the same pages.

[190] On 24 April 2019 Mr Valintine emailed another version of a draft article to Mr Bain and invited his contribution. He wrote:

> Here's the latest draft...remember it will have to include council and smart so it will be a lot different but have a look and see what else you think needs to be included. I have dropped the fire in this draft but i am open to putting it back...in any event it will have to be put to Christian.
>
> Let's discuss when I get down there.

[191] On 11 May 2019, Mr Valintine emailed to Mr Bain a draft of an updated news story which "still needs a bit of polishing" but is close. He asked Messrs Bain and Barlow to "fact check it …and add stronger comments which are more relevant to the new information". He added, "Thankfully we now have enough material to make both sing".

[192] On 17 May 2019, Mr Valintine sent another draft feature article to Mr Bain. He wrote, "Hi Murray…can you throw some quotes in". He indicated with placeholders where he proposed to insert the quotes from Mr Bain. He also indicated the type of comment he was seeking.

[193] On 19 May 2019, Mr Bain sent a text to Mr Valintine saying "I've read your story heaps it is a bloody masterpiece for sure. Can't wait for it to go to print".

[194] In his brief, Mr Valintine explained his request in relation to seeking quotes as follows:

> Murray was at that stage a little impatient with the progress of the stories and asked if he could assist in any way. The quotes were in relation to specific instances in the draft which referred to him only. I wasn't asking him to provide quotes for other witnesses, and neither did he do that.

> My request for Murray to "throw some quotes in" was simply to get an indication of what he would likely say in the master interview that was always planned towards the end of the investigation. The reality was Murray's "quotes" demonstrated he had misunderstood the communication and the quotes supplied were incredibly long, detailed and read like a formal media statement. They did not meet the brief, were unhelpful and were immediately discarded and never resurfaced in any form.

> [195] On 21 May 2019, Mr Valintine emailed a further draft and asked Mr Bain to "…fact check and get back to [him]".

> [196] On 28 June 2019, Mr Bain was asked Mr Valintine to send him "the latest draft" after Mr Valintine told him he had sent them to the *Herald*. Two days before the Articles were published on 1 August 2019, Mr Valintine texted Mr Bain saying he had sent the Articles to him for a "final fact check". When the Articles were published, Mr Bain texted Mr Valintine:
>
> > Mate the praise is all due to you.
> >
> > I was merely the info supplier and you were the guy who sorted it and did the hard yards.

[74] The Judge concluded that the evidence established Messrs Valintine and Bain had worked together with the common aim of having the Articles published.[61] Mr Bain approved the drafts, particularly the final draft on the eve of publication.[62] That being so, it was not necessary to decide whether he might have been able to withdraw or reposition his quotes or influence changes to the Articles. She added that he had played the role of a tactical adviser to Mr Valintine and the comments attributed to him in the Articles implicitly affirmed the sting of the underlying allegations.[63]

Submissions

[75] Mr Akel argued that Mr Bain was merely one of Mr Valintine's sources, albeit one with industry expertise. In the absence of a vicarious relationship such as employment or agency, fact-checking should not lead to liability as a publisher. Lacking control over the content of the Articles or their publication, Mr Bain could not be liable for them.

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61 At [202].
62 At [198].
63 At [199]–[200].

[76] Addressing the facts, counsel pointed out that Mr Bain did not decide what information went into the Articles and did not write a single word of them. Nor did he direct Mr Valintine's investigation. Passages attributed to Mr Bain, as opposed to other sources, took up a small part of the text. He did not see or ratify the final form of the Articles as published and was not involved in the layout or placement or selection of photographs and headlines, he did not determine the editorial stance or "spin", and he did not decide what references would be made to Mr Christian. Contrary to the Judge's findings, Mr Bain was not invited to give feedback on the entire content of the drafts, but rather to check waste industry methodology and terminology, nor did his review amount to active encouragement and involvement in publication. Mr Bain was not involved in parts of the News and Feature Articles that were pleaded as the most directly relevant sources of meanings defamatory of Mr Christian; those parts recorded Mr Christian's denials and set them against information obtained from other sources. Further, Mr Valintine and NZME assumed responsibility for ensuring the Articles were not defamatory.

[77] Before this Court, Mr Akel argued that the authorities, when properly understood, locate Mr Bain at the no liability end of the spectrum, citing *Thiess v TCN Channel Nine Pty Ltd (No 5)*, *Zeccola v Fairfax Media Publications Pty Ltd (No 3)* and *Rush v Nationwide News Pty Ltd (No 2)*.[64]

[78] Turning to policy considerations, Mr Akel listed three reasons why a source's liability should be confined to what they actually said:

(a) extending liability to a source for the words of other sources (whether quoted or not) and the journalist would have a chilling effect on free speech;

(b) holding a source liable as a publisher leads to an unacceptably large circle of liability, encompassing anyone who might have had some involvement without any control over the final product; and

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[64] *Thiess v TCN Channel Nine*, above n 44; *Zeccola v Fairfax*, above n 44; and *Rush v Nationwide News*, above n 44.

(c) holding a source liable creates tension with the public interest defence, which places the onus on the journalist to check facts and test the credibility of sources.

The authorities

[79] The general rule is that all those who participate in a defamatory publication are jointly liable as principals:[65]

> Liability as a principal for publication of defamatory material depends upon participation… All who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication: thus if one suggests illegal matter in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication when it has been so effected…

[80] The examples given in this passage address the liability of participants in a chain of publication of the same defamatory material: one suggesting it, a second writing it and a third publishing it. We are here concerned with liability when there is said to be something different about the material for which each link in the chain is responsible. Mr Bain says he is liable only for words specifically attributed to him in the Articles written by Mr Valintine and published by NZME. Mr Christian says Mr Bain is a joint tortfeasor, responsible for all the defamatory meanings to be found in the Articles.

[81] The question in such a case is whether the defendant assumed some responsibility for the entire publication.[66] The publication must reproduce the "sense and substance" of the information provided by the defendant.[67] A defendant who has contributed material but has no control over the publishing process will not ordinarily be found liable unless they have assented to its final form.[68]

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65 *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231 at [121] (citations omitted).

66 *Rush v Nationwide News*, above n 44, at [119]; and *Bunt v Tilley*, above n 40, at [21]–[22].

67 *Rush v Nationwide News*, above n 44, at [121] citing *Parkes v Prescott* (1869) LR 4 Exch 169 at 178; and *Mohareb v Fairfax Media Publications Pty Ltd (No 3)* [2017] NSWSC 645 at [34]–[38].

68 *Rush v Nationwide News*, above n 44, at [124] citing *Dank v Whittaker (No 1)* [2013] NSWSC 1062 at [26]; *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288 at [129]–[137]; and *Thiess v TCN Channel Nine*, above n 42, at 195.

[82] As Mr Akel submitted, some cases in which a source has been found liable for an entire publication are explicable on agency principles.[69] That is true, for example, of *Webb v Bloch*, in which a circular to wheat growers was published by a solicitor on instructions from a committee whose objective was to obtain compensation for negligence in handling wheat delivered to the government for sale.[70] The defendant was a member of the committee.[71]

[83] A source who has provided information to a journalist and expressly or implicitly agreed to having their words published by a media organisation such as NZME ordinarily cannot be held liable for the publication as a whole. Having appreciated that their words would be reported, the source is responsible for publication of what they said.[72] But that is not to assume responsibility for everything said in the publication.[73] Assumption of responsibility is a question of fact. It may be sufficient if the source has seen and approved of the publication in advance.[74]

[84] Walker J found that this is not an agency case.[75] That conclusion is not in dispute. NZME is a media organisation which possesses the expertise and independence one would expect of a firm in the business of publishing. It took responsibility, with Mr Valintine, for verifying the allegations. Mr Bain could neither demand nor veto publication.

[85] But contrary to the tenor of Mr Akel's submissions, that is not the end of the inquiry. Mr Bain was not a mere source either. Unlike others quoted in the Articles, he did not assume responsibility only for words which he anticipated NZME would publish. He was not extensively quoted, but the Articles as a whole reflected the sense and substance of his allegations of clandestine dumping, underreporting quantities of waste tipped, tipping of recycling and underpaying the TCDC. He was an integral part of Mr Valintine's investigation into these practices. To that extent he had some control over the publishing process. Publication by NZME was not merely a known risk. It

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69 *Zeccola v Fairfax*, above n 42, at [18]–[20] citing *Webb v Bloch* (1928) 41 CLR 331.
70 *Webb v Block*, above n 69.
71 At 364 per Isaacs J.
72 *McManus v Beckham* [2002] EWCA Civ 939, [2002] 1 WLR 2982 at [34].
73 *Thiess v TCN Channel Nine*, above n 42, at 195.
74 At 195.
75 Liability judgment, above n 1, at [133].

was his objective from the outset, when he approved Mr Valintine's outline to NZME. And although he did not write the text or ratify the final printed form of the Articles, including headlines and photographs, Mr Bain did see and approve of the text as published. He knew what was being said about and by Mr Christian.

[86] For these reasons we are satisfied that Mr Bain assumed sufficient responsibility for the substance of the allegations about Mr Christian. It is no answer that he did not know the content was defamatory and relied on NZME to ensure it was not.[76] That merely shows that each participant in the chain of publication had a different role to perform. Walker J was correct to find him jointly liable for the Articles as a whole.

Defamatory meaning

The Judge's findings

[87] Walker J analysed the Articles by first inquiring whether they made defamatory allegations about Smart, then considering whether any defamatory imputation was levelled at Mr Christian. Mr Bain did not engage with the first question. He stood his ground on the second, denying that the Articles had the pleaded meanings vis-à-vis Mr Christian.[77]

[88] With respect to the News Article, the Judge found that the ordinary reasonable reader would understand that Smart had engaged in a "rort" (in the sense of sharp and dishonest practice) against the TCDC by paying a discounted sum to dump waste at refuse transfer stations without the TCDC's knowledge or consent, and by having its drivers secretly dump commercial waste to avoid dumping charges.[78] She recognised that the primary focus was on the TCDC and Smart, with Mr Christian being implicated partly because the Article included his response.[79] She identified aspects of the article which implicated Mr Christian as involved in Smart's discounting actions:[80]

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76 *Bunt v Tilley*, above n 40, at [23].
77 Liability judgment, above n 1, at [235].
78 At [252].
79 At [254]–[255].
80 At [257].

(a) the reference to "Christian's team" implying ownership of the commercial decision by management;

(b) the juxtaposition of reference to Mr Christian with the explanation from a former senior manager;

(c) the former manager's reference to "*our* position" in connection with the discoverability of the discount and Mr Christian's own reference to "*my* team" and "not how *we* do business" (emphasis added);

(d) Mr Christian's own response emphasises his personal position; and

(e) the commercial explanation stated by the former "member of Christian's team" which links the introduction to the failure to get compensation for the Chinese ban on taking and paying for recycling.

[89] Turning to the longer Feature Article, the Judge found that the overall impression conveyed was that Smart was ripping off the TCDC by price-discounting in breach of contract, by under-recording waste dumped after hours at transfer stations which Smart managed, and by regular dumping of recycling at the transfer stations.[81] "Rip off" in this context would be understood to mean cheating the TCDC out of fees and dishonestly dumping after hours to avoid weighbridges. As with the News Article, Mr Christian was implicated in Smart's activities in the sense that he directed or was intimately involved in them.[82] This was even more obvious because of the express link to "the Chinese situation", reporting that Mr Christian was struggling with "bad news of his own" and had threatened legal action to force Councils to pay for recycling.[83]

[90] Walker J rejected the argument that Mr Christian's denial and counterattack supplied an antidote to any defamatory sting on the grounds that the denial was too general, and the fact of bad blood between Mr Christian and Mr Bain was diluted by corroboration offered by another former manager who was not said to have a dishonourable motive.[84]

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81 At [272].
82 At [273].
83 At [274].
84 At [258].

Submissions

[91] Mr Akel accepted that Walker J correctly summarised the law as to defamatory meaning.[85] He focused his argument on the meanings said to be defaming Mr Christian, as opposed to Smart, and argued that, because the Articles implicated Mr Christian partly through his denials and counterattack, the bane and antidote principle applies.[86]

[92] As Mr Akel emphasised, almost all the pleaded meanings for each article focused on Smart, as if it were the plaintiff. The pleading alleged both tier one (Smart has engaged in misconduct) and tier two (there is reason to believe Smart has engaged in misconduct) grounds.[87] Only one pleaded meaning in respect of each article directly related to Mr Christian; it was that Mr Christian, as founder, former managing director and current director of Smart, either directed or was complicit in Smart's actions.

[93] Mr Akel contended that the average reasonable reader would not conclude that Mr Christian was implicated in or guilty of any wrongdoing by Smart. There was no direct suggestion that he instigated the activities, directed them or was intimately involved; on the contrary, he was identified as a former boss of Smart. Mr Christian's prominently placed denials and counterattack, in which he vehemently accused Mr Bain of being an aggrieved former employee running a gutter campaign, served as the antidote to any bane.

Discussion

[94] We are not persuaded that the Judge was wrong to find that the Articles implicated Mr Christian in Smart's actual misconduct. We agree with her that the ordinary reasonable reader would take it that Mr Christian was directly responsible for the decisions that had been taken by his "team" to engage in these practices.

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85 See the discussion at [204]–[209] following *New Zealand Magazines v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.

86 As expressed by Baron Alderson in *Chalmers v Payne* (1835) 2 CM & R 156 at 159, applied in *New Zealand Magazines v Hadlee*, above n 85, at 631.

87 See *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [15] referring to the tiers characterised in *Chase v News Group Newspapers Ltd* [2003] EMLR 11 (CA) at [45]–[46].

The Articles conveyed the impression that the decisions were made by senior management. A motive for Smart's actions was located in "bad news of [Mr Christian's] own" — the Chinese decision to ban the processing of imported recyclables — and the fact he had complained that the TCDC had refused to "come and help us".

[95] The bane and antidote principle was examined in *New Zealand Magazines Ltd v Hadlee (No 2)*, where the defendant had published a magazine article in which a prominent female television presenter denied a rumour that she had been in a sexual relationship with the female plaintiff. The article did not suggest that the rumour was true. On the contrary, it repeated the rumour only to deny it, stating "for the record" that the two women had never met.[88] Blanchard J explained that:[89]

> What is involved where someone has repeated a rumour, whilst at the same time saying that it is not so, is a weighing up or comparison of "bane" and "antidote", to adopt Alderson B's expressions in *Chalmers v Payne*... It is a question of degree and competing emphasis but it may be easier to arrive at an answer where the publication contains an express disclaimer or "where the antidote consists in a statement of fact destructive of the ingredients from which the bane has been brewed"…

[96] The essential difference here is that the supposed antidote did not come from the publisher or any source independent of Mr Christian. It came from Mr Christian himself. And as the Judge found, his denials were general. There was no statement of fact which the ordinary reasonable reader would find specifically destructive of the allegations of clandestine dumping, underreporting and underpayment. The reader would appreciate that Mr Bain had an axe to grind and a full account might not be known until the books had been opened and official investigations completed. But other people had corroborated his claims and NZME had chosen to publish them.

[97] For these reasons we are not persuaded that Walker J was wrong to find that the fair-minded reader would understand the Articles to implicate Mr Christian in Smart's sharp and dishonest practices.

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88 *New Zealand Magazines v Hadlee*, above n 85, at 623.

89 At 627 citing *Chalmers v Payne*, above n 86; and *Morosi v Broadcasting Station 2GB Pty Ltd* [1980] 2 NSWLR 418 (CA) at 420.

Responsible communication on a matter of public interest

The defence

[98] The defence of responsible communication on a matter of public interest was recognised by this Court in 2018, in *Durie v Gardiner*.[90] Its elements are that the subject matter of the publication was of public interest and the communication was responsible.[91] The defence is not confined to journalists; rather, it is available to anyone who publishes material of public interest in any medium.[92] It is for the trial judge to decide whether it is made out.[93] The onus of proof lies on the defendant.[94]

[99] With respect to the first limb of the defence, the Court explained that:[95]

> [64] In determining whether the subject matter of the publication was of public interest, the judge should step back and look at the thrust of the publication as a whole. It is not necessary to find a separate public interest justification for each item of information. As already mentioned, public interest is not confined to publications on political matters. It is also not necessary the plaintiff be a public figure.
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> [65] Defining what is a matter of public interest in the abstract with any precision is a notoriously difficult exercise. Trial judges are however likely to find the discussion of public interest in *Torstar* of assistance. There it was said that to be of public interest the subject matter should be one inviting public attention, or about which the public or a segment of the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.

[100] All the relevant circumstances of the publication are to inform the trial judge's assessment of its responsibility.[96] The Court explained that relevant circumstances may include:[97]

> (a) The seriousness of the allegation – the more serious the allegation, the greater the degree of diligence to verify it.
>
> (b) The degree of public importance.

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90 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.
91 At [58].
92 At [59].
93 At [61]–[62].
94 At [59].
95 Footnote omitted. Citing *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640 at [99]–[106].
96 *Durie v Gardiner*, above n 90, at [66].
97 At [67] (footnotes omitted).

(c) The urgency of the matter – did the public's need to know require the defendant to publish when it did, taking into account that news is often a perishable commodity.

(d) The reliability of any source.

(e) Whether comment was sought from the plaintiff and accurately reported – this was described in *Torstar* as a core factor because it speaks to the essential sense of fairness the defence is intended to promote. In most cases it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond. Failure to do so also heightens the risk of inaccuracy. The target may well be able to offer relevant information beyond bare denial.

(f) The tone of the publication.

(g) The inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.

[101] This list is not exhaustive; in any given case other considerations may arise and some of those listed may not.[98] The assessment is to be practical and flexible. The Judge may defer to some extent to the publisher's editorial judgement, particularly in cases involving professional editors and journalists.

[102] As a matter of fact, verification might be undertaken by anyone in the chain of publication. In this case, for example, Mr Valintine, NZME's editors and legal advisors and Mr Bain himself all contributed to verification efforts. Mr Bain did so principally by seeking information from the TCDC and identifying sources whom Mr Valintine might interview.

[103] Mr Patterson accepted that Mr Bain may rely on verification steps taken by NZME before publication. We agree. The subject matter of the publication being of public interest, the availability of the defence turns on whether reasonable steps were taken to verify the content. If they were, the publication struck the appropriate balance between protection of reputation and freedom of expression. We see no reason why the availability of the defence for any joint tortfeasor in the chain of publication should depend on the verification steps which they took themselves. The appropriate balance has been struck if the steps taken were collectively sufficient.

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98 At [68].

[104] The publisher's malice does not preclude reliance on the defence.[99] The defence is not a species of qualified privilege of the publisher which is lost if abused. It is a new defence which rests on the public interest in the information published.[100]

[105] Mr Patterson took a slightly different point, arguing that a publication cannot possibly be responsible in fact if the publisher was motivated by malice. In *Grant v Torstar Corp* the Supreme Court of Canada accepted this,[101] but in *Durie* this Court preferred the view that a person who is motivated by malice may nonetheless act properly by taking objectively reasonable steps to verify the accuracy of a publication.[102] It is a question of fact. We agree. We add that, as just noted, in a case such as this the defence may be made out by others in the chain of publication.

[106] In practice, malice is likely to be subsumed in the analysis of reasonable verification. A publisher who ought reasonably to have known of a source's malice toward the plaintiff may well need to do more to verify the source's allegations. In this case Mr Bain's commercial conflict of interest and his ill-will toward Mr Christian affected his reliability. NZME and Mr Valintine had to take these matters into account when assessing his allegations and scrutinising the sources that he offered NZME.

The Judge's findings

[107] Walker J found that the allegations were serious and might cause significant damage to reputation, requiring correspondingly careful verification.[103] She found that much of Mr Valintine's research focused on verifying the conclusions of Mr Bain, who was his primary source. We have quoted at [47] above her careful factual narrative of the verification steps taken and we have summarised at [49]–[52] her findings about independent sources and the opportunity afforded Mr Christian to comment.

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99 At [83] discussing the rationale for the *Reynolds* defence in English law of responsible journalism on a matter of public interest: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).

100 *Durie v* Gardiner, above n 90, at [82], following *Grant v Torstar Corp*, above n 95, at [88]–[96] and [126].

101 *Grant v Torstar Corp*, above n 95, at [125].

102 *Durie v Gardiner*, above n 90, at [83].

103 Liability judgment, above n 1, at [292].

Public interest

[108] Mr Patterson argued that there can be no public interest in a misleading publication. He contended that the Articles were misleading by omission in important respects:

(a) They did not explain that the TCDC had authorised Smart and others to use refuse transfer stations after public hours but had refused to extend the same privilege to Coastal Bins.

(b) They did not disclose that recycling had been dumped for only one month and only because a dual bin truck had broken down; further, the driver concerned did not allege to Mr Valintine that his instructions to dump contaminated recycling came from anyone in senior management at Smart.

(c) They did not disclose that some commercial trucks had for years carried keys to refuse transfer stations.

(d) They did not disclose that the TCDC had allegedly admitted to Mr Valintine that it had authorised Smart to cut keys and distribute them to commercial drivers.

(e) They did not disclose that the allegation that waste had been dumped without being weighed rested on Mr Bain's analysis, or that no Smart employee alleged that anyone at Smart had told them to bypass weighbridges.

(f) They did not disclose that there may be legitimate reasons (such as after-hours dumping at the gate) for disparities between weights recorded going into and out of a refuse transfer station.

(g) They did not disclose that the alleged losses to the TCDC were calculated by Mr Bain.

(h) They did not disclose that it was likely the same TCDC source who both supplied Messrs Bain and Valintine with the data and ostensibly confirmed to Mr Valintine that Mr Bain's allegations were true.

(i) They did not disclose that Messrs Bain and Valintine were in possession of an email from Smart to the TCDC advising that Smart was considering invoking its option to toll commercial waste through refuse transfer stations at a reduced rate. Nor did they explain that Mr Bain had threatened to go to the media unless Coastal Bins got the same rate.

(j) They did not disclose the extent of Mr Bain's relationships with the sources relied on by Mr Valintine to verify the allegations.

(k) They did not disclose that all of the sources had their information "fact-checked" by Mr Bain before publication.

(l) They did not disclose that Mr Bain was more than a mere source but rather was Mr Valintine's "fixer" who, among other things, arranged the "purported auditors" on whom Mr Valintine relied for corroboration.

[109] We do not accept the premise of these submissions, which we see as an attempt to circumscribe the defence of responsible communication on a matter of public interest by showing that the defamatory imputations were false by omission. The point of the defence is that the public interest may justify a publication shown to have been inaccurate, provided reasonable steps were taken to verify it.

[110] In this case the subject matter concerned the effective workings of local government and the handling of refuse and recycling. The public interest in these matters was clear and very strong.

[111] We accept that material omissions may affect the seriousness of the allegations. They may also point to a failure of verification.

Verification: the data

[112] Mr Patterson argued that there was no direct evidence that anyone undertook any pre-publication audit to verify the data and Mr Bain's calculations. One witness, Mr Lindsay, purported to do so but recanted in evidence. Another, Mr Lindale, failed to complete his work and was not called for reasons of alleged ill-health. A third, the unnamed Council source, had checked only one month's figures. Mr Bain revised his calculations before publication, producing figures sufficiently different to cause Mr Valintine to query why they had changed, but no explanation was ever disclosed. Walker J was wrong to find that that the figures had been corroborated. The TCDC engaged actual experts, PwC and Morrison Cooper, whose analysis contradicted Mr Bain.

[113] The Judge found that the steps taken were sufficiently robust in all the circumstances.[104] We are not persuaded that she was wrong. Mr Valintine took steps to authenticate both the data supplied to Mr Bain and the analysis, obtaining a copy of what purported to be the same dataset from his contact at the TCDC.[105] He could be reasonably sure Mr Bain had not altered it. Advice was taken from industry experts, Mr Lindale and Mr Lindsay. The latter had previously worked for the TCDC and was very familiar with the format of the data. He agreed with the findings of Messrs Bain and Barlow and confirmed his opinion to Mr Valintine. The Judge found him a qualified and reliable witness.[106] Mr Valintine also obtained corroboration from his TCDC source and Terry Kingham, formerly Smart's commercial manager, who co-operated with some reluctance. Neither was called as a witness.

[114] For the reasons given at [64]–[65] above, we are not persuaded that the subsequent Morrison Low and PwC analyses show that the data was materially wrong or that the allegations of unaccounted-for waste and unauthorised discounting were incorrect. Walker J reached much the same conclusions.

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104 At [318].
105 At [299].
106 At [314].

Verification: the TCDC's unwillingness to disclose information

[115] Mr Patterson also argued that the Judge was wrong to find that the TCDC was unwilling to engage with Mr Valintine and Mr Bain while commercial negotiations with Smart were ongoing and that unwillingness was a factor in their suspicion that their allegations were correct. He contended that in fact the TCDC co-operated with the investigation.

[116] We do not accept this submission either. As the Judge found, the TCDC did respond to some questions. Importantly, it confirmed no tolling agreement was in place. But the Judge also found that the TCDC took the view that its interests during protracted negotiations with Smart justified withholding information requested by Mr Valintine and Mr Bain.[107] And it also took the view that it would not respond until its own investigations were complete. She did not criticise the TCDC, conscious that it was not a party, but she found it unsurprising that Mr Valintine would think he was being given the run-around. Importantly, she was satisfied that Mr Valintine and Mr Bain did all they reasonably and responsibly could to extract information from the TCDC.[108]

Verification: other witnesses

[117] As the Judge noted, Mr Valintine also sought confirmation from Smart drivers and former managers. Some gave evidence. They corroborated allegations about discounting. The Judge found them honest and generally reliable witnesses.[109]

Verification: the tolling arrangement

[118] As Mr Patterson submitted, Mr Valintine and Mr Bain were aware of the Smart email of 10 April 2018 prior to publication. However, it remained the position that the TCDC said there was no tolling agreement. It is now common ground that the TCDC was correct. The email did not prove otherwise. As the Judge found, it was no more than a proposal to allow for tolling in the Solid Waste Contract.[110] This is an important

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107 At [325].
108 At [327].
109 At [333], [337] and [346]–[347].
110 At [351]–[352].

finding. As Mr Akel submitted, Mr Christian's claim that Smart had a contractual right to toll through refuse transfer stations lay at the heart of his attack on the Articles.

Verification: involvement of Mr Valintine and NZME

[119] The Judge found that Mr Bain understood that Mr Valintine, a very experienced journalist, and NZME would check the story and have it "legalled". He was entitled to rely on them to do so.[111] In fact, NZME elected to proceed without an independent checking process but Mr Bain was not to know that.[112]

[120] In written submissions Mr Patterson argued that Mr Bain could not rely on NZME without first satisfying himself that all the requirements of the defence had been met. His duty to do so was said to be non-delegable. The position changed in oral argument, as noted above. Mr Patterson accepted before us that Mr Bain could rely on verification steps taken by Mr Valintine and NZME. We agree.

Verification: malice

[121] As noted, Mr Patterson argued that Mr Bain was motivated by malice. The Judge did not agree. When remarking briefly on the defence of honest opinion she stated that she was "easily satisfied that Mr Bain genuinely believed the imputations in the Articles".[113] She accepted that Mr Bain held personal animosity towards Mr Christian which may have spurred him on, but it did not undermine his honest belief in the accuracy of the imputations.[114] The trial Judge's advantages come to the fore with a finding of this kind. Mr Christian has not persuaded us that she was wrong.

[122] We have accepted that the fact that Mr Bain had an axe to grind affected verification by NZME and Mr Valintine. It was necessary to verify his claims. We agree with the Judge that Mr Valintine recognised this and went to significant effort to seek corroboration from a variety of sources.[115]

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111 At [357].
112 At [358].
113 At [390].
114 At [391].
115 At [69], [295] and [379].

Verification: Mr Christian's opportunity to comment

[123] Mr Patterson argued that Mr Christian was not given an adequate opportunity to respond to the allegations. He was never invited to obtain a confidentiality waiver from the TCDC to discuss the issues with Messrs Valintine or Bain. The TCDC relied on the obligation of confidentiality to withhold information from them.

[124] The Judge did not accept these arguments. She found, in the passage quoted at [47] above, that Mr Christian was approached more than six weeks before publication.[116] The allegations were disclosed to him and Mr McLeay and reduced to writing. Mr Christian was invited to "open the books".[117] He opted instead to direct Mr Valintine to Mr McLeay, who declined for confidentiality reasons to answer a long list of questions but said he would approach the TCDC about a release. It seems Mr McLeay did not approach the TCDC. As the Judge observed, the TCDC evidently did not think that the confidentiality provisions precluded it from confirming that there was no tolling agreement.[118]

[125] In our view Mr Christian was given an ample opportunity to comment. Publication was not rushed. It appears that, as the Judge found, Mr Christian used the confidentiality provisions of the Solid Waste Contract as a shield, so assuming a risk that any inaccuracies would not be corrected before publication.[119]

Verification: conclusions

[126] The allegations were serious, but the subject matter was of real public importance. All the defamatory imputations related to the subject matter. There was no urgency to publish but Mr Valintine did not act in haste. Rather, he went to considerable effort to corroborate Mr Bain's claims over a period of months. Some of the sources he relied upon were independent of Mr Bain and others he reasonably found reliable. The allegations were disclosed to Mr Christian, who was given a reasonable opportunity to comment in detail.

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[116] At [80]. See also [359].
[117] At [364].
[118] At [371].
[119] At [371].

[127] For these reasons we agree with the Judge that the defence of responsible communication on a matter of public interest was made out.

[128] This conclusion should not come as a surprise. The allegations stem from Smart's unilateral decision to commence tolling in April 2018 without, as Mr Christian now admits, first securing the consent of the TCDC. The single most important detail in the verification process was the TCDC's confirmation that no tolling agreement was in place. It led inevitably to questions about how Smart was able to tip commercial waste at refuse transfer stations without paying the Gate Rate.

Honest opinion

[129] We need not address the honest opinion defence and we are not prepared to do so in circumstances where the trial Judge did not.

The costs appeal

The costs judgment

[130] Walker J ordered Mr Christian to pay costs of $145,670.50 plus disbursements in respect of the proceeding and trial.[120] That was offset by an award of $13,384 to Mr Christian in respect of certain interlocutory applications, the costs of which had been reserved pending trial.[121]

[131] The Judge generally set costs on a 2B basis. However, she adopted band C for challenges to admissibility of the evidence of Messrs Bain and Valintine and for the inspection phase (which involved inspection of documents discovered by third parties including the TCDC).[122]

[132] The Judge declined to discount costs by taking an issue-by-issue approach in which deductions would be made for defences which did not succeed and Mr Bain's conduct of the defence, including the late pleading of the ultimately successful defence

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120 Costs judgment, above n 7, at [44].
121 At [45].
122 At [18]–[19].

and the non-disclosure of witnesses' names until briefs were exchanged, finding that none of these things significantly increased Mr Christian's costs.[123]

[133] The Judge allowed Mr Bain an uplift of 25 per cent on scale costs for steps preparatory to trial.[124] She accepted that the following factors justified an uplift:[125]

> (a) the pleadings which straddled conceptually different paths to tortious liability without clear differentiation.
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> (b) the arcane and technical nature of the law of defamation more generally.
>
> (c) the novelty of the arguments around publication liability deriving from participation.
>
> (d) the underlying data or information at the heart of the publication and defence was spreadsheet data comprising thousands of lines of technical data and evidence which introduced complexity.
>
> (e) wholesale challenges to Mr Bain's evidence.
>
> (f) challenges to the authenticity of the Smart spreadsheet data. Although Mr Christian was entitled in an adversarial context to take the approach he did, this took up trial time and ultimately proved to be a red herring.

The appeal

[134] On appeal Mr Christian challenged the use of band C for his admissibility challenges and Mr Bain's inspection of third party documents. He contended that deductions ought to have been made for the failure of Mr Bain's joint tortfeasor and honest opinion defences, arguing that there was a clear factual bright line which meant that these matters did add to his own costs. He argued that the late pleading of the responsible communication defence required that he "re-tool" his defence notwithstanding that it had been pleaded by NZME and Mr Valintine before they settled. The late identification of defence witnesses added significantly to the plaintiff's costs. He suggested that he might not have gone to trial had the defence been pleaded earlier.

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123 At [25]–[38].
124 At [43].
125 At [42] (footnote omitted).

[135] Mr Christian also challenged the uplift, arguing that there was nothing novel or technical about the case, that the spreadsheets were effectively ignored during the trial, and that the Judge had already rewarded Mr Bain for the wholesale challenges to admissibility by adopting band C and challenges to authenticity of the spreadsheets were reasonable and did not warrant sanction by way of an uplift.

Discussion

[136] It is not suggested that Walker J misdirected herself as to the applicable principles. She recognised that costs are discretionary, but that they must be awarded on a principled basis and ordinarily follow the result.[126] She correctly held, following *Weaver v Auckland Council*, that costs are ordinarily assessed "in the round", without detailed analysis of the extent to which each side won or lost on each issue.[127]

[137] When assessing the costs award, it is necessary to bear in mind what the Judge had to say in the substantive judgment about Mr Christian's approach to the litigation. Under the heading "Preliminary—credibility and reliability of evidence" she examined and rejected a series of wholesale challenges made by Mr Patterson to the reliability of Mr Bain's evidence:[128]

(a) The first was that there were signs of collusion in the briefs of Messrs Bain and Valintine.[129] The Judge did not accept that the briefs "line[d] up" and found nothing sinister in the fact that the two men had seen and commented on one another's briefs.[130]

(b) The second was that an adverse inference should be drawn from Mr Bain's failure to discover as many text messages and emails as might be expected.[131] The Judge found no reason to think there had been a deliberate purge of electronic records.[132]

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126 At [8].
127 At [30], citing *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [18].
128 Liability judgment, above n 1, at [150].
129 At [151].
130 At [153]–[155].
131 At [156].
132 At [159].

(c) The third was that the TCDC/Smart dataset was unreliable.[133] Although he is a director of Smart, Mr Christian denied knowledge of the data and elected to put Mr Bain to proof. The Judge found that this issue took up hearing time and was resolved by having a senior person in a finance role at the TCDC provide a sworn affidavit confirming that Mr Bain's dataset matched the TCDC's.[134] Nonetheless Mr Patterson persisted, turning his focus to the authenticity of the dataset provided to third parties pre-publication for corroboration purposes and arguing that Mr Bain had failed to prove a chain of custody or eliminate the risk that someone might have modified the data.[135] The Judge accepted what she described as Mr Bain's careful and coherent evidence that there had been no corruption of or interference with the data.[136]

[138] The Judge also rejected a collateral attack on Mr Valintine's credibility which focused on his use of different dates, given in affidavits sworn before trial, for the commencement of his investigation.[137] The Judge did not accept that Mr Valintine had deliberately misled the Court. She found he had made a mistake which she attributed to a lack of care.

[139] It will be seen that Mr Christian sought by collateral means to show that Mr Bain, and to a lesser extent Mr Valintine, were not honest or reliable witnesses. He failed. The Judge found that the attempts to destroy their credibility had a significant effect on the costs of trial.[138] In particular, there was no reason to doubt the authenticity of the Smart/TCDC dataset at trial. Given his position at Smart, Mr Christian might easily have verified it himself. Instead, he challenged its authenticity and accuracy and needlessly put Mr Bain to proof at trial.

[140] We are not persuaded that the Judge was wrong to assess costs in the round, rather than issue by issue. Nor was she wrong to find that the joint tortfeasor defence was reasonably run and did not contribute significantly to costs. We agree with her

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133 At [160].
134 At [161].
135 At [162].
136 At [163].
137 At [170].
138 Costs judgment, above n 7, at [18].

that from an evidential perspective there is much overlap between the responsible communication and honest opinion defences.[139] She did not dismiss the latter defence, although she expressed reservations about it. She might reasonably find that the late pleading of the responsible communication defence did not add to Mr Christian's costs given that NZME and Mr Valintine had pleaded it. She did not accept that witnesses were called and documents produced unnecessarily,[140] and Mr Christian has not shown she was wrong about that. With respect to the late disclosure of witnesses, the Judge drew attention to a suggestion that the need to identify the sources resulted from Mr Christian's claim, disclosed in his own brief of evidence, that Mr Bain and Mr Valintine had fabricated sources.[141] In our view Mr Christian cannot show that the Judge was wrong to find that none of these matters significantly increased his costs so as to justify some deduction from costs awarded to Mr Bain.

[141] We turn to the question whether an uplift on costs for preparatory steps was warranted. Costs related to the dataset and wholesale challenges to Mr Bain's evidence had already been calculated under band C. Care was necessary not to double-count when allowing an uplift for the same matters, since the object of costs is not to punish but to fix a reasonable contribution to costs incurred. But we have been given no reason to think that the award exceeded reasonable compensation for costs actually and unnecessarily incurred by Mr Bain.

[142] In the end, costs are in the discretion of the trial Judge. We are not persuaded that Walker J erred in the exercise of her discretion in this case.

Disposition

[143] The appeals from [2022] NZHC 3394 (liability) and [2023] NZHC 424 (costs) are dismissed

[144] The cross-appeal from [2022] NZHC 3394 is dismissed.

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139 At [29].
140 At [34].
141 At [37].

[145] As Mr Bain has succeeded in substance, Mr Christian must pay costs in this Court for a complex appeal on a band A basis with usual disbursements as fixed by the Registrar. We allow for second counsel.

Solicitors:
Maxim Legal, Auckland for Appellant
Edmonds Judd, Te Awamutu for Respondent

Waste 'rort' may cost $1m: Claim

Company probed over 'secret dumping' accusation

Mike Valentine

One of the country's largest waste-management companies is being investigated for giving itself a huge discount at council-owned transfer stations it manages – which could have cost ratepayers hundreds of thousands of dollars.

Smart Environmental is also being probed over hundreds of tonnes of unaccounted-for waste and allegations of clandestine after-hours dumping, a *Weekend Herald* inquiry has found.

The investigation into the company's operations in eastern Waikato has sparked two inquiries – one by the council and one by the Auditor-General into the council's handling of the matter.

The company is contracted to pay Thames-Coromandel District Council $181 a tonne of waste – but appears to have been paying $77.05 a tonne, documents show.

The council confirmed it was working with "appropriate authorities" to identify whether there was evidence of illegal activity or contractual breaches.

Smart manages the council's seven transfer stations. The council investigation centres on whether Smart introduced the discount without advising or negotiating with the council in what sources believe would be in breach of a council contract.

The *Weekend Herald* learned Smart Environmental had keys cut and distributed to its commercial drivers. It is claimed they could access the transfer stations after hours when weighbridges were not staffed.

Clandestine dumping has been alleged.

Inside waste firm's dirty secret C5

"I have got keys – everyone has keys, we can get in whenever we want to and we do all the time," a Smart Environmental driver said.

Documents show that in one year 2500 tonnes of the company's commercial waste was dumped after hours or was not captured by weighbridge computers at the transfer stations owned by the council – about a third of the annual waste total. Shown evidence from its own records, the council said it was working with "appropriate authorities".

"We want to assure our ratepayers and the public that we take our fiscal responsibilities and contract management extremely seriously," the council said.

It has set up a team of senior managers to look into the claims.

However, the office of the Auditor-General is reviewing the council's management of the contract and why it was unable to identify the apparent missing revenue and alleged contract breaches for so long.

Former Smart Environmental area manager Murray Bain, who alerted the Auditor-General's office, fears the cost to ratepayers could climb: "By my reckoning it is already hundreds of thousands and when it is all wrapped up it could cost anywhere up to a million."

Bain owns Coastal Bins Ltd, which competes with Smart Environmental's commercial division. He says he first warned Thames mayor Sandra Goudie and chief executive Rob Williams in August last year about what he claimed were Smart Environmental's contract breaches.

"Any way you look at it this is a rort on ratepayers. The council is either utterly incompetent or something very underhanded has gone on here."

In his opinion there were "only two options and neither of them is good for ratepayers".

The council declined to comment, saying it was in negotiations with Smart Environmental and any comment would prejudice negotiations, which began in February.

Smart Environmental founder and former managing director Grahame

▶ Continued on A3

Waste 'rort' could cost $1m, accuser claims

▶ From A1

Christian denied any wrongdoing in a lengthy text conversation: "This is simply not how we do business. I am ex-police and I am absolutely straight up, as is my team."

Christian said his former employee had run "a gutter campaign".

Bain conceded there was bad blood but said: "All he has to do is open the books to experts and it will be very clear who is right and who is wrong . . . the truth is there."

A former member of Christian's team said the "discount" was introduced in May last year after the company failed to get compensation for the "Chinese situation", which had resulted in a ban on taking and paying for recycling.

That was despite the contract with the council, which stated Smart took the risk and rewards of recycling prices.

Documents show Smart's weighbridge printouts still had the full amount of $181 per tonne though it was not paying that. The former member of Christian's team said the council was not consulted or advised, but that the information was discoverable in monthly claims, which were spreadsheets with 15,000 lines of information.

"Our position was it was there if they looked for it," the source said.

Smart Environmental is one of the country's largest private waste-management companies, with numerous residential and commercial deals, as well as contracts with 14 councils.

The *Weekend Herald* sent a list of detailed claims to the council and Smart Environmental's new chief executive Todd Mcleay. Mcleay said the company's contract with the council prevented the company responding and the council declined to comment on the basis it could prejudice negotiations with Smart.

The Feature Article

Inside story

Former Smart Environmental boss Grahame Christian says the team are "straight up" and the clandestine activity described "would not happen". Photo / Otago Daily Times

Waste firm's dirty secret

A waste contractor is accused of ripping off the Thames District Council which is also now under investigation for its handling of the matter, writes **Mike Valintine**

In the back streets of Thames a Smart Environmental truck pulls up to the locked gates of the local rubbish transfer station. With keys he shouldn't have the driver unlocks the gates and tips his load of commercial waste.

A few hundred metres away Larry Cooper is already aware it is yet another clandestine after-hours load. He has felt the vibration inside his home as the large truck bounces over judder bars on its way in and now his television viewing is interrupted by the loud beeps from the truck as the load is tipped.

"I have complained so many times but it never really stops – it's like a hornet's nest, by the time you get rid of one you already know another one has started," he says.

In scenes more reminiscent of New Jersey and an episode of *The Sopranos* than New Zealand's green heartland, it is just one of hundreds of loads that one of the country's biggest waste companies will allegedly dump after hours, avoiding weighbridge systems that are supposed to ensure accurate records and payment.

A *Weekend Herald* investigation has discovered that even during opening hours when the loads are recorded by weighbridge computers, Smart Environmental's commercial trucks are paying less than half the price the printout records it has paid the council.

The Thames District Council has confirmed it is investigating the company's operations – but at the same time the Auditor General is looking into the council's handling of it.

But the situation may have already cost ratepayers hundreds of thousands of dollars and given the company a commercial advantage that is putting competitors under huge financial pressure.

A deeper dig into Smart's operation in the eastern Waikato finds evidence of altered spreadsheets, missing reports, dockets and revenue. There is also clear evidence of trashed recycling and hundreds of tonnes of unaccounted waste at transfer stations Smart Environmental manages for the Thames and Coromandel District Council.

Until recently Smart Environmental was run by former policeman Grahame Christian, who promoted the company's point of difference as "No hidden costs or surprises. We are up-front and honest."

In responding to the *Weekend Herald*'s inquiries he denied the allegations and pointed the finger at an ex employee he claimed had been running a gutter campaign against the company.

"I am ex police," he says. "I am absolutely straight up as are my team."

But now, more than a year after the secret discount was first applied, the Thames Coromandel District Council has appointed a senior team of managers to investigate alleged breaches of the contract provided by the *Weekend Herald* and says it has been working with "appropriate authorities".

"We want to assure our ratepayers and the public that we take our fiscal responsibilities and contract management extremely seriously, and our utmost intention is to meet those commitments," the council said.

But in a further twist the council is itself being investigated by the Auditor General's office (OAG) over its management of the contract.

THE OAG investigation was prompted by a complaint laid by former Smart area manager Murray Bain who has been trying to get the council to investigate since August last year.

"The council has been either incompetent or something very underhanded has gone on here," Bain says. "There are only two options and neither of them is very flash."

"By my calculations this has already cost local ratepayers hundreds of thousands of dollars – it could even reach a million by the time this is sorted out. Heads will need to roll."

Smart Environmental has a stranglehold on waste in the region. Not only is it the single biggest commercial waste operator it also holds all the council contracts for kerbside rubbish collection and recycling.

Significantly, it also manages the council's seven refuse transfer stations. The council sets the opening hours and the fees for dumping and the company is left to supervise the sites and operate the council's weighbridges, computers and software, which record the details of every load. Smart collects the money and rebates what is owed back to the council.

It is a highly flawed arrangement, says Bain, who now owns Coastal Bins, which competes with Smart's Commercial operation.

He says the lack of scrutiny by the council means a Smart company is left to police a Smart commercial operation.

"Here the company apparently gave itself a huge discount, which breached its contract, and the council was totally unaware it was being ripped off for over a year. Even when it was told it was being duped the council still couldn't find out how, and how much money it had lost."

With a staff of more than 400 and contracts with 14 other councils, Smart Environmental describes itself as a New Zealand business "good news" story. But last year, after China's ban on taking other countries' recycling waste, Christian was struggling with bad news of his own.

"It is costing us millions of dollars and, sadly, very few of our client councils throughout New Zealand want to come and help us," he told the *Waikato Times* in August last year.

What had been a revenue earner had almost overnight become a liability and as waste stockpiled, Christian was threatening legal action against some of his clients to force them to contribute.

"Contractually they are bound to do that, they just don't want to do it," he claimed. "Councils don't have the budget. It is not in their forecast. Well, guess what? It is not in ours either."

THE THAMES Coromandel District Council was one of those not rushing to help. Sources say it had a clear "no gain – no pain" contract, which gave Smart all the revenue from recycling but also all the risks associated with fluctuating prices.

For years the council had watched the company benefit from the arrangement and saw no obligation now the price honeymoon was over.

But what the council didn't know was that for months before Christian's threats, the company had been in breach of its contract, which states only the council can alter pricing at the transfer stations.

And according to the company records obtained by the *Weekend Herald*, it did so without consulting with or notifying the council.

A senior Smart Environmental manager at the time confirmed that in May last year the company altered spreadsheet data giving its commercial division a large discount at the transfer stations Smart Environmental managed for the council.

On weighbridge dockets it still appeared Smart Environmental was paying the council rate of $181 a tonne but would later discount the rate to $77.05 a tonne for its own commercial waste.

It had not told the council because it claimed the information was discoverable in monthly claims sent to the council, which are computer spreadsheets with 15,000 lines of detail.

The council did not uncover it because for most of the year it didn't receive and didn't ask for the accompanying transaction reports from weighbridges where the discount can be found.

"If they didn't get transaction reports then you would have to seriously ask, why not?" Bain says.

"Every council gets a transaction report. Without it, they have no method of verifying the monthly claim.

"All they needed to do was check the landfill report with the transaction report, which would have matched tonnes in against tonnes out. My 8-year-old grandson would find that."

ALTHOUGH THE council had been kept in the dark, the *Weekend Herald* investigation has discovered the company's drivers were given a heads-up at a health and safety meeting early last year when they were told restrictions on using the council transfer stations were now lifted.

"When I asked why, a manager told us it was because we had a new deal with the council," a driver says. Until then, Smart Environmental's staff were under strict instructions not to dump at the transfer station unless unavoidable or could be justified for operational reasons.

The reason was the council rate of $181 a tonne was much more expensive than the nearby Tirohia landfill, which charged between $95 and $105 a tonne.

Operational staff tell of being censured if a load to a transfer station could not be adequately explained.

"They would come down on us like a tonne of bricks," said one.

But when they questioned the new arrangement they said they couldn't get straight answers.

When one questioned paperwork that showed the rate still at $181 a tonne, she was told by a senior manager "don't worry we get that changed later".

According to another council source, the volume of commercial waste diverted to the transfer stations increased markedly under the lower rates. Records highlight that in January last year it dumped just two tonnes of waste at the Thames transfer station but in May it had spiked to 113 tonnes and by the end of August had hit 245 tonnes.

Even when it was told it was being duped the council still couldn't find out how, and how much money it had lost.

Murray Bain (left), Coastal Bins

What had been a tiny fraction had quickly risen to a third of the total volume handled by the transfer station.

This is matched by a corresponding decline in Smart's commercial waste taken direct to the Tirohia landfill to a point in September when it stopped altogether.

The effect on council revenue is found in Smart's own data. It shows in November last year, when a reconciliation with a transaction report is able to be completed, the council should have received a rebate from the Thames transfer station alone of $64,000 if Smart had paid the agreed rate.

The council received just $44,000 after Smart applied its discount and then added transport costs to the landfill.

A further $13,000 is lost at two other transfer stations and when the loss of revenue from tonnes unaccounted for at the stations the total reaches almost $58,000 for the month. Sources inside Smart and the council say when the discount was finally discovered, Smart argued it had a "historical right" based on an email exchange with the council in 2013.

According to a company source, the email raised the issue of a tolling rate, effectively a discount for high-volume users. This discount was the same fee the council paid Waste Management to tip at the Tirohia landfill with the added GST. Smart paid the transport cost so the council "would not be out of pocket", says one source.

Meanwhile, documents obtained by the *Weekend Herald* also show almost two-thirds of Smart's commercial loads last year were never captured by weighbridge computers.

A former worker tells of having keys cut for the drivers so they could access the dump.

The driver explains how he would regularly dump loads after hours. Sometimes he would look through the weighbridge kiosk window and record the weight of his load.

"Sometimes I couldn't see the computer screen or it was too dark so I didn't bother."

The weights recorded would later be loaded manually into the weighbridge transaction report up to a week afterwards.

Smart's Christian claims no knowledge of after-hours access by his drivers.

"It may happen but we would insist all our staff account for all transactions," he says. "We have an outstanding reputation of honesty and any such activity as described would be clandestine and involve many people. It just would not happen."

However, he declined to comment in detail.

In November last year, according to the records, 63 of the 80 commercial loads were not captured by weigh station staff, but were entered manually into the system afterwards without independent verification.

FROM HIS home near the Thames transfer station Cooper says he has complained numerous times to the council about the after-hours access, which can begin as early as 6am and run until 9.30pm, but to no avail.

"I've been like a little fox terrier. I have held on to it and keep giving it a good shake."

He says he has complained up to a dozen times in the past 18 months.

"They have told me the same thing is happening all over the Coromandel – you have to be careful not to complain too much because they will write you off as a moaner."

In just one month at the Thames facility, 98 tonnes of waste was not captured coming in, yet the council paid for it to be transported and dumped at the Tirohia landfill.

A district council waste manager from another region confirms the loss would have got his attention very quickly. "I have withheld payments over five or 10 tonnes; something is very wrong if you have that much," the manager, who asked not to be identified, said.

Bain says he has managed 12 council contracts over his career and has had payments withheld when as little as a tonne of waste could not be reconciled. Other councils have live feeds from weighbridge computers to council offices and some have independent contractors on the weighbridge.

"Here Smart effectively invoices Smart. When we tip there, we get an invoice from Smart, not the council, and I think it is a conflict of interest and because of that transparency should be paramount but it isn't."

A video taken by one driver shows kerbside recycling he had picked up from the Waipa district, more than 120km away, being tipped in at the Thames transfer station.

The residents of Te Awamutu and Cambridge had tried to separate their recycling only to have it end up in a tip in Thames. "I can tell you I did 30 tonnes in just one month."

This is confirmed in the records obtained by the *Weekend Herald*.

The driver knows the recycling he dumped at Thames will be mixed with waste and sent back another 39km to the landfill he had passed with the load the previous day. "It doesn't make sense – unless you're not paying for it," he says with a wry grin.

The irony is that the Thames council alerted the Waipa District Council but appears to have done little further investigation itself even though the dumping of recycling is a breach of its own contract and the council appears to have paid to dump it at a landfill.

It's the lack of action that gets to Bain. "They could have changed the locks on the transfer stations. It would have cost bugger all and saved them a small fortune but even that they refused to do."

It is a sentiment shared by Cooper.

"The council is supposed to be the sheriff. They are expected to fix it but around here Smart seems to be able to do anything they like."

The *Weekend Herald* has supplied a long list of detailed claims to the Thames council and Smart Environmental's new chief executive Todd Mcleay. Mcleay said the company's contract with the council prevented the company responding and the council declined to comment on the basis it could prejudice the negotiations with Smart.