IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-001818
[2022] NZHC 3394

UNDER	The Defamation Act 1992
BETWEEN	GRAHAME CHRISTIAN Plaintiff
AND	MURRAY BAIN Defendant

Hearing:	8-11 February 2022; 14-18 February 2022; 21-25 February 2022; Written submissions 11 March 2022 and 1 April 2022
Appearances:	C T Patterson and E J Grove for the Plaintiff J Dickson, D Dustan and A Cox for the Defendant
Judgment:	14 December 2022

JUDGMENT OF WALKER J

This judgment was delivered by me on 14 December 2022 at 11 am
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

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[1] Grahame Christian complains of defamation in two articles published by NZME Publishing Ltd (**NZME**) in the *Weekend Herald* and other NZME media under the by-line of Michael Valintine. Mr Christian is a company director and businessman living in Whitianga. He is the founder of Smart Environmental Limited (**Smart**), a privately owned refuse and recycling company.

[2] NZME is the publisher of the *New Zealand Herald* (including the *Weekend Herald*), the *Herald Online*, *Hawke's Bay Today* and *Bay of Plenty Times.* It published a front-page news article (**the News Article**) and feature article (**the Feature Article**) about Smart's provision of services to Thames Coromandel District Council (**TCDC**) in the *Weekend Herald* on 3 August 2019 (together, **the Articles**). Both, with minor alterations, were available in the *Herald Online.* One was republished by NZME with minor alterations in the *Hawkes Bay Today* and *Bay of Plenty Times*.

[3] The full text of the Articles published in the weekend edition of the *New Zealand Herald* are annexed for ease of reference. On 8 August 2019, NZME deactivated the online Articles after contact from Smart's solicitors. Initially on a temporary and "without prejudice" basis, the Articles were never reactivated. In the relatively brief period the Articles were available online, there were 3,382 unique browser views for the News Article and 10,264 unique browser views for the Feature Article.

[4] Mr Christian commenced defamation proceedings on 9 September 2019. Smart did not issue proceedings.

[5] Mr Christian originally sued three defendants—NZME, Michael Valintine and Murray Bain. He asserts that Mr Bain, who is quoted prominently in the articles, is responsible as a joint tortfeasor with NZME and Mr Valintine. Mr Christian settled the claim against NZME and Mr Valintine on a confidential basis on 24 August 2021. The settlement included a retraction and apology. He did not settle with Mr Bain. Mr Bain applied to strike out the claim against him. He argued that the settlement against NZME and Mr Valintine prevented Mr Christian from continuing his claim

against him. I declined to strike out the claim in a judgment delivered on 10 December 2021.[1]

[6] On 6 November 2021, NZME published an apology and retraction. The apology was picked up by social media sites and republished online. Mr Christian also widely circulated the apology with his own commentary.

[7] The apology included the following statements:

> NZME has now received documentation which indicates that the Morrison Low and PWC investigative reports concluded (in summary):
>
> Smart Environmental engaged in correspondence with the Council in relation to its commercial waste disposal fees from around April 2018.
>
> Smart Environmental's tolling fees were charged in reliance on that 2018 correspondence; and
>
> 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.

[8] Mr Bain is not sued in respect of his statements to the named author or to NZME knowing and intending they would be republished by NZME. The Articles quote Mr Bain on an attributed basis and others on both an unattributed and attributed basis. Mr Bain accepts that the quotes are accurately reported and attributed to him. He acknowledges as he must, that he is a source for the Articles. Mr Christian attributes responsibility for the publication of the entire Articles and the republications

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1 *Christian v NZME Publishing Limited & Ors* [2021] NZHC 3390.

of the sting of the Articles on social media sites to Mr Bain. He pleads that the republications aggravate damage to his reputation.

[9] The assertion that someone in Mr Bain's position may be responsible for the Articles in their entirety is, at least at first blush, a novel application of the broad principle of responsibility for a defamatory publication.

[10] Mr Patterson submitted that the primary contest between the parties is whether Mr Bain's fingerprints are sufficiently across every aspect of the Articles and would not have been published but for his involvement or whether he was one of many sources responsible only for his utterances to Mr Valintine. The way in which Mr Christian has pleaded and argued his case means that Mr Bain has no potential liability should the Court accept the latter proposition.

Protagonists

[11] Mr Christian was the main shareholder of Smart (and its predecessor) until mid-2017 when his shares were acquired by two investment firms and he gifted a parcel to long-standing employees and co-directors. He was the managing director of Smart until shortly before the Articles were published. He remains a director and shareholder.

[12] Smart is one of New Zealand's largest waste management firms. By 2019, Smart had over 500 personnel, a significant fleet of vehicles, facilities, plants and equipment throughout the country. It provides services throughout the country, not only to private businesses and clients but also to councils. One of its significant waste management contracts is with TCDC, the Matamata-Piako District Council (**MPDC**) and Hauraki District Council (**HDC**). These services are provided under what is known as the Eastern Waikato Contract for Solid Waste (**Solid Waste Contract**).

[13] The Solid Waste Contract was negotiated and finalised in 2013. It provides the backdrop to the Articles.

[14] Mr Christian gave evidence of his background, his involvement in the community and his former career with the New Zealand Police. He presented as a

successful and self-made entrepreneur. He said that, before publication of these Articles, he had intended to stand for election as a ward councillor in the Mercury Bay ward of TCDC. He is chair of his iwi's land claim (Wai 475) and chair of the Pare Hauraki Iwi Asset Holding Company. That entity manages significant iwi assets in aquaculture, fisheries and other property. Mr Christian was recently asked to chair a Coromandel community organisation whose objective was to preserve New Chum Beach. He remains in the co-governance group after the successful purchase of the headland, working with the Environmental Defence Society, Waikāto Regional Council and the Coastal Trust. He said that the Articles greatly distressed him and deeply affected his mana in the Māori community, amongst his colleagues and industry peers. He described the Articles as "relentless, utterly vindictive and cruel".

[15] Mr Bain used to work at Smart. He has long experience in the refuse and recycling industry. Mr Bain started his own waste business in Te Awamutu which he sold around 2009. After a few years out of the industry, he joined Envirowaste in mid-2014. He was "poached" a couple of years later by Mr Christian and offered a role with Smart as commercial manager based out of Kopu, Thames. After a very short period, Mr Bain stepped up to be the area manager. In that role he managed the Solid Waste Contract.

[16] Mr Bain left Smart in December 2017 after a breakdown in his relationship with Mr Christian. Although I heard evidence about the triggers for that breakdown, it is unnecessary to traverse the detail. It suffices to say that the dealings between the pair of them have been acrimonious since then. The acrimony did not cease after Mr Bain settled his terms of departure with Smart. On the contrary, it was followed by an employment dispute involving allegations of Smart's breach of the settlement agreement and counter-allegations that Mr Bain was breaching his restraint of trade.

[17] The third protagonist is Michael Valintine. Mr Valintine is a journalist with a career in broadcasting spanning more than forty years. He has won multiple investigative journalism awards during that time and worked in leading news, current affairs and investigative journalism roles. He describes himself now as a freelance journalist, producer, director and executive producer of content for media.

[18] Messrs Bain and Valintine were known to each other. They first met sometime in 2003 when Mr Bain approached Mr Valintine in a local café, having recognised him from his television career. At that time, Mr Bain was embroiled in efforts to uncover the truth about the death of his brother at the Waiouru army base. He had commenced his own investigation and was battling the New Zealand Army and Government. He approached Mr Valintine and asked, "If I had a story to get out in the media, how would I go about that?" This piqued Mr Valintine's interest. He asked Mr Bain to tell him the story. Together over many years they successfully exposed the truth about the fatal shooting of Mr Bain's brother in the Army, obtaining a hard-fought public apology from the NZ Army and Police.

[19] Mr Bain had a great deal of respect for Mr Valintine's skill set as a consequence. Mr Valintine in turn admired Mr Bain's dogged determination. While they cultivated a close relationship in that period, they had only sporadic contact after about 2008. From time to time, they ran into each other on the Coromandel Peninsula. Nonetheless, that early experience working closely set the scene for their involvement in the Articles at issue.

The genesis of the Articles—an overview

[20] The Articles had a long period of gestation.

[21] Mr Bain incorporated Coastal Bins Limited (**Coastal Bins**) with his business partner, Michael Barlow, not long after leaving Smart. Mr Barlow was also a former employee of Smart. Coastal Bins is based in Thames but has also expanded beyond Thames. It competes with Smart in some aspects of its business but not others.

[22] Sometime in April 2018, Mr Barlow first saw Smart commercial trucks unloading waste at the refuse transfer station (**RTS**) at Thames. A few weeks later he observed Smart commercial trucks tipping after hours. To understand the significance, it is necessary to describe refuse and recycling services in the Coromandel area in general terms.

[23] Waste that will ultimately be disposed in landfill is either taken to landfill directly or delivered to an RTS first. At an RTS, the waste is compacted into pods

which are then placed on trucks and taken to landfill. RTS sites are owned by local councils. The landfill sites are owned by third parties. In this proceeding, the key landfill site is at Tirohia, owned by Waste Management Limited (**Waste Management**).

[24] At the material time, the opening hours at the Thames RTS were between 8.30 am and 2.30 pm on weekdays. In the peak period season, those hours were extended to 5.30 pm. On weekends and public holidays, the opening hours were between 10.30 am and 5.30 pm. The Tirohia landfill operated between 6.30 am and 4 pm.

[25] Councils have responsibility for the collection, management and disposal of waste within their boundaries. The Solid Waste Contract sets out Smart's obligations for collecting waste, providing, operating and maintaining drop off and transfer facilities for the collection and consolidation of waste and processing and transporting waste.

[26] Under the Solid Waste Contract there are three types of waste:

(a) **Council Waste**. This is waste that councils have contracted Smart to collect for them. It includes general household waste and recyclables. The general household waste is put into official council rubbish bags purchased by residents and left at the kerbside for collection by Smart. Each council has a different coloured bag. These are often called "kerbside bags" in the industry. Recyclables are also put on the kerbside for collection.

(b) **Commercial Waste.** This is collected from Smart's third party customers such as retail and business clients.

(c) **Specified Waste**. Specified Waste is waste collected by Smart from third parties within the council territorial boundaries in specified ways.

[27] Smart operates two fleets of trucks with different configurations and operational capacity. The first fleet is used for collection of Council Waste and Specified Waste. These trucks are configured to suit the kerbside collection of different types of products and are branded with council logos and graphics. The second fleet is for collection of Commercial Waste. These are usually gantry, rear-loader, side-loader and front-loader trucks which are configured differently.

[28] Up until 10 April 2018 when a fire decommissioned the facility, Smart used the Kopu in-house waste facility (**KRC**) owned by Mr Christian to store waste collected from its operation. This included Council Waste, Specified Waste and Commercial Waste, all stored separately. Council Waste from each separate council also needed to be stored separately for invoicing purposes because each council and Smart had separate accounts with the owner of the Tirohia landfill. Councils negotiate special volume rates for disposal at landfill which tend to be significantly better than the rates that a smaller landfill user such as Smart could negotiate.

[29] The rate to use an RTS, known as the "gate rate", is set by the council that owns it. Generally, it is cheaper to take waste directly to landfill than to use an RTS. This is subject to geographical and efficiency factors. Sometimes Smart would not be able to dispose of waste at the landfill. A truck may have a breakdown and not get to the landfill before closing or travel distances between refuse "runs" may mean that trucks could not reach the landfill before closing. In those scenarios, the truck would be offloaded at the KRC. This allowed Smart to ensure daily offloads of its entire fleet to enable trucks to recommence a run before 6.30 am the next day.

[30] Waste tonnes are generally accounted for at landfills and RTS sites by weighbridges. Some weighbridges are operated automatically. The driver of the truck enters details into a keypad and the system automatically generates a printed weigh docket. Offloading after hours at an RTS means the weigh station kiosk would be closed, so there would be no external system for drivers to enter details and no weigh docket printed. This could practically be overcome by a driver looking into the kiosk window and writing down the weight when they go in and out of the RTS.

[31] Offloading Council Waste after the RTS had closed was not unusual. Truck drivers of Council Waste trucks had always had keys in the refuse trucks to manage this. According to witnesses who formerly worked at Smart, it was only after the KRC fire that Smart commercial drivers were given keys to enable access to the RTS.

[32] Witnesses and documents frequently referred to "tolling" arrangements. It became apparent that this term was used in various ways. Sometimes it was used as a synonym for price "discount". David Howie, general manager and director of Waste Management gave evidence for Mr Bain. His explanation of the term "tolling" was generally consistent with Mr Bain's use. He agreed that tolling arrangements are common in the refuse industry and have a particular meaning. A tolling arrangement, properly understood, is not synonymous with a discount but is separate to contract pricing. Mr Howie said:

> A tolling agreement, like those used by Waste Management, is generally entered between three parties – a collection entity, a third party refuse transfer station owner and a landfill owner… the transfer station owner would consolidate waste from numerous parties and transport the waste to the landfill. Both the collection entity and the transfer station owner would have a direct commercial relationship with the landfill owner and both could deliver waste to that site directly, with their own, often different, disposal pricing at the landfill.
>
> The collection entity would set up a tolling agreement with the transfer station owner to drop off waste at the transfer station site, consolidate it, and have it transferred to the landfill for a set per tonne fee – this is the tolling fee. The material being taken to the transfer station by the collection entity would be weighed in over a certified weighbridge, with this volume information being provided on a regular basis by the transfer station owner to both the collection entity and the landfill.
>
> The transfer station owner would charge the collection entity the tolling fee at a per tonne rate each month for this material and the landfill would deduct the recorded collection entity's volume from the transfer station owner's monthly volume, and charge disposal for that volume directly to the collection entity at their agreed disposal rate.

[33] In the background, Smart was endeavouring to persuade TCDC that during the 2013 negotiations of the Solid Waste Contract, TCDC had agreed that Smart could put its Commercial Waste through the RTS sites and on to landfill at Council's rate. This was first signalled in an email from Mr Christian to TCDC on 9 April 2018. Mr Christian indicated that Smart planned to do this at the end of that month.

[34] It was apparent that any such entitlement was news to Mr Bruce Hinson, a senior manager at TCDC. He said he was unfamiliar with that condition and would await further detail from Smart.

[35] Mr Christian sent a second email to Mr Hinson and other senior persons at TCDC who had oversight of the Solid Waste Contract on 10 April 2018. In the email, Mr Christian asserted that Smart and TCDC had agreed several concessions in favour of Smart in return for Smart's obligation to purchase all wheelie bins and crates as part of the Solid Waste Contract. One of the concessions he asserted was that "on request Smart could toll its Commercial waste through Council transfer stations". The email included what purported to be an extract from the Solid Waste Contract but was actually an extract from Smart's proposal during the 2013 negotiations. That extract proposed an option to toll Commercial Waste. Mr Christian wrote:

> Accordingly we advise from May 1, 2018 Smart wishes to exercise this clause to toll commercial waste at Transfer Stations.
>
> The mechanics of this clause we propose are the following:
>
> 1. All commercial waste into RTS is recorded as Smarts.
> 2. The waste goes into landfill at Council's rate.
> 3. Smart deducts the transport and waste component from its monthly invoice as a credit.
>
> We look forward to your prompt response.

[36] There was no record of any substantive response produced to the Court. Mr Christian confirmed in cross-examination that TCDC did not respond. He asserted that it was common in business dealings to assume agreement if there is no response.

[37] Two days later, on 12 April 2018, a senior manager at Smart emailed an update to Mr Hinson and copied other TCDC personnel. He stated:

> The KRD is no loner [sic] operational …the KRC won't come back online. As per Grahame's email on Monday, we have enacted the agreement to take our commercial waste to the Thames RTS.

[38] Smart and TCDC met a few days later for a partner meeting. Curiously, the minutes of that meeting make no mention of any alleged tolling agreement and there

is no documentary evidence to suggest that Smart advised TCDC that it would be charging itself $77.05 per tonne for disposal of Commercial Waste at TCDC RTS sites. It was not surprising then that throughout Mr Bain's investigation, TCDC denied there was any documented tolling agreement. There were no witnesses from TCDC in this trial.[2] On the evidence that was presented, I was left with the distinct impression that Smart's approach and arguments in support of its position were no more than a negotiation strategy designed to increase leverage.

[39] Mr Barlow's observation of Smart commercial trucks dumping at the Thames RTS raised a red flag. Drop-offs at an RTS were actively discouraged when Messrs Bain and Barlow worked at Smart because of the expense. Messrs Barlow and Bain started tracking Smart's commercial trucks. They wanted to know whether Smart was obtaining any pricing advantage which could possibly explain the change in practice. They suspected that Smart had a newly negotiated and better rate.

[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.

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[2] There was an affidavit from a TCDC representative authenticating documentary evidence. Another witness was a former employee of TCDC.

[42] On 4 September 2018, Mr Bain met with Mr Hinson. Mr Bain emailed Mr Hinson after the meeting writing:

> In light of the openness [sic] of the meeting and your undertaking to research matters and advise your findings/decisions/changes, we therefore formally apply a temporary halt to our LGOIMA request effective immediately…

[43] On 1 November 2018, Mr Bain attended an ERA hearing of his employment dispute with Smart. Sometime before that hearing, Mr Bain had reached out to Mr Valintine. He asked whether they could meet in Hamilton. Mr Valintine's recollection was that Mr Bain wanted to talk about what he thought could be a television current affairs story. Mr Bain's recollection was that he suggested Mr Valintine go down to Hamilton to talk about a potential story about Smart's control of TCDC RTS site and possible abuse of that control. Mr Valintine travelled to Hamilton and met with Mr Bain before the hearing. He sat through the hearing. He described it as a "valuable exercise", giving him an insight into the relationship between the main protagonists.

[44] At the end of that day, Mr Bain told Mr Valintine that he was waiting on more information from TCDC and would not bother him until he had enough to justify Mr Valintine's attention.

[45] At some stage, TCDC engaged Morrison Low and PriceWaterhouseCoopers (**PWC**) to investigate the allegations. Precisely when this took place is not clear. Mr Bain was not interviewed by PWC or Morrison Low until November 2019, well after publication of the Articles.

[46] At around this time, commercial negotiations began between TCDC and Smart on a number of issues associated with the Solid Waste Contract.

[47] In December 2018, Mr Barlow's brother-in-law, a Smart driver, gave Mr Barlow a visual recording of Waipa recycling being tipped at the Thames RTS. The driver stated that he had been instructed to tip the recycling by his manager at Smart. He gave similar evidence to this Court. Mr Christian acknowledged on cross-examination that tipping Waipa recycling at the Thames RTS would amount to a breach Smart's services contract with Waipa District Council.

[48] In early 2019, events took a turn when Mr Bain received a memory stick in his letterbox from an anonymous source. According to Mr Bain, it contained Smart/TCDC data for the 2018 calendar year. Amongst the material appeared to be monthly claims and supporting data including RTS transaction reports for November and December 2018. Mr Bain, along with Mr Barlow, began the process of interrogating the data to see if they could decipher the pricing issues.

[49] Mr Bain explained that:

(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.

(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.

(f) The data populating the solid waste component of the claim is taken from the RTS transaction reports.

(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.

(h) The product ID shows whether the load is revenue to the council.

(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.

(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.

[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.[3] In the absence of correction by TCDC, the Court can infer that these records were generally accurate.

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[3] Non-party discovery was provided by TCDC during the proceedings.

[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 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.

[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 decided to grant itself a reduced disposal rate for commercial waste.

[64] Mr Bain's evidence is that it was around late January or early February 2019 when he contacted Mr Valintine again to arrange to meet in Auckland. Mr Valintine thought the first contact after the ERA hearing was early in the New Year. Their different recollection as to timing is not material for present purposes. Mr Bain explained to Mr Valintine where matters had got to with TCDC. After that get together Mr Valintine formed the view that there were significant public interest issues at stake which were worth looking into. He decided to travel to Thames to go through the issues in more detail.

[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 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.[4] 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.[5] 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.

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4 Requests were also made to other councils which were parties to the Solid Waste Contract.

5 Ms White's formal title was Communications and Economic Development Group Manager.

[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] NMZE 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.

[71] I return later in this judgment to the verification process that Mr Valintine says he undertook.

[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 Messrs 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.

[87] On 16 July 2019, the Office of the Auditor-General reported to Mr Valintine that its work was ongoing.

[88] A series of changes in editor responsibility at NZME saw the draft articles languish for a period. Mr Valintine emailed NZME on 17 July 2019 pointing out that the story had been sitting with NZME for weeks. He asked for confirmation that the *New Zealand Herald* would publish and give the story some priority.

[89] Stuart Dye, the editor of the *Weekend Herald* and *Herald on Sunday* responded to Mr Valintine. Mr Dye was called as a witness by Mr Bain. His evidence was slim. He did not discuss the editorial role of NZME other than to state that NZME has a rigorous process in place for stories submitted by freelancers. He gave no detail about that process but confirmed that legal advice from external lawyers was obtained.

NZME did not waive privilege in that advice. Mr Dye confirmed that Mr Bain had no input into the headlines or other headings or titles in the Articles.

[90] Mr Patterson pressed Mr Dye on cross-examination about the rigour of that editorial process. The exchange was as follows:

> Q: So, is it your understanding that your lawyer had the numbers checked?
>
> A: No, the lawyer reviewed the whole story. The numbers would have been checked as part of our internal processes.
>
> Q: Okay, who internally at *The Herald* checked the numbers?
>
> A: That would have been the Head of Business Duncan Bridgeman.
>
> …
>
> Q: So you couldn't be confident that Duncan Bridgeman would be able to understand what was – the evidence that's been given, very complex documentation?
>
> A: I mean I guess that's duly – I would have confidence in Duncan as I would with most senior editors of *The Herald* because that is our job to quickly understand complex information and be able to trust that we can publish it.

[91] Mr Patterson then put a series of propositions to Mr Dye about the relative complexity of the Smart/TCDC data. He suggested to Mr Dye that a partner at PWC and an expert at Morrison Low could not understand Mr Bain's analysis and that TCDC did not accept Mr Bain's workings. The cross-examination continued:

> Q: So now having been told that would you be confident to tell the Court that Mr Duncan Bridgeman would have been able to verify Mr Bain's workings?
>
> A: I mean I, yeah, I can't say with certainty.

[92] This line of questioning appeared to shake Mr Dye's confidence in the rigour of the review process. Yet, there was no cogent evidence presented to the Court that PWC or Morrison Low could not understand Mr Bain's analysis. There was only Mr Bain's supposition in respect of Morrison Low's findings following TCDC's issue of a press release purporting to summarise its findings.[6] Similarly, there was no evidence of TCDC challenging Mr Bain's workings.

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[6] Only summaries of those reports were made available post publication despite request by Mr Bain. The findings of PWC and Morrison Low are hearsay and generally inadmissible if intended to be offered to prove the truth of their contents. The summaries cannot be conclusive of anything.

[93] Smart settled its employment dispute with Mr Bain the day before the Articles were published. Mr Valintine texted Mr McLeay to tell him that the Articles were to be published the next day.

Events after publication

[94] By 8 August 2019, NZME had deactivated the Articles. A month later, Mr Christian commenced this proceeding. PWC began interviewing Mr Bain in November the same year. Messrs Bain, Barlow and Valintine were all interviewed by Morrison Low around the same time.

[95] In early 2020, Smart and TCDC concluded their negotiations and entered into a deed of settlement. The deed records that with effect from 1 April 2020 Smart is to pay the gate rate for the disposal of Commercial Waste at any of TCDC's RTS sites. TCDC posted a statement on its website announcing the conclusion of the negotiations with Smart. That statement referred to reports from PWC and Morrison Low concluding that the media allegations are either rebutted by the evidence or the amounts involved were not material to the contract. Mr Christian circulated the TCDC post with further commentary.

[96] Mr Christian settled his claim against NZME and Mr Valintine on 24 August 2021.

Issues on liability

[97] The claims in respect of the Articles give rise to four issues on liability:

(a) whether Mr Bain has any responsibility in the law of defamation for the Articles;

Mr Bain wrote to Morrison Low on 19 May 2020 describing the published finding as "astonishing" and suggesting that he can only conclude that it indicates that Morrison Low disregarded his information as "non-factual". He asked Morrison Low to advise the reasons why it considered the information to be incorrect and to confirm whether the investigation findings were evidence based. Morrison Low did not respond substantively.

(b) whether the Articles convey any of the defamatory natural and ordinary meanings pleaded by Mr Christian;

(c) whether the defence of responsible communication on a matter of public interest is available to Mr Bain; and

(d) whether the defence of honest opinion is available to Mr Bain. This raises a number of sub-issues:

(i) Would the ordinary reasonable reader understand the conveyed defamatory imputations to be comment in the sense of an expression of opinion?

(ii) Is the expression of opinion based on truly stated facts referred to in the article or otherwise generally known?

(iii) Is the opinion genuinely held by Mr Bain?

[98] Depending on the outcome on those issues, remedial issues then arise including as to the effect of the settlement with NZME and Mr Valintine, an assessment of damages, including punitive damages and the availability of injunctive relief.

[99] Thirteen witnesses gave evidence. Some gave evidence in person in Court, others by VMR. The VMR procedure was agreed by the parties to mitigate risk to participants as a result of the COVID-19 pandemic. Closing submissions were also delivered by VMR with leave to file full written and referenced submissions after the hearing.

Is Mr Bain responsible in law for the Articles?

[100] Publication is an essential element of the tort of defamation. Publication is the process by which a defamatory imputation is conveyed or disseminated. Liability for publication is strict.[7] The primary publisher of the Articles was NZME. NZME

[7] The strictness is mitigated by the defence of innocent dissemination and s 21 of the Defamation Act 1992.

controlled and performed the physical act of disseminating the Articles. NZME retained editorial discretion including as to the final decision whether or not to include the Articles in the print and/or web version of the *New Zealand Herald*.[8]

[101] However, as publication is a 'process', the relevant acts are not limited to the actual physical act of dissemination. Rather, they include steps in the chain preceding dissemination. It is trite that the author or journalist who composes a print media article (the originator) is as responsible in law as the editors and owner of the media entity for the act of dissemination.

[102] Unless this Court finds that Mr Bain is also responsible at law for the publication by NZME of the Articles, there is no case to answer. This threshold question is not without difficulty. First, there is a degree of novelty in the proposition that someone in Mr Bain's shoes is liable. While courts have traditionally expressed the principles of accessorial liability to publication in sweeping terms, as Palmer J said in *Sellman v Slater* "[t]here is little New Zealand authority on the outer limits of responsibility for publication by procuring, or being an accessory to, the making of defamatory statements".[9] Moreover, Courts more often discuss the principles in the context of interlocutory applications where claims of liability need only be tenable to survive strike out so offer limited guidance. *Sellman* was such an example.

[103] Secondly, the New Zealand Bill of Rights Act 1990 (**NZBORA**) requires that defamation law strikes an appropriate balance between protection of reputation and freedom of expression.[10] The latter imperative tends not to explicitly feature in the early 'bedrock' authorities. It has played a greater role in the analysis of publication liability in more recent internet defamation cases where the question of "who is a publisher" is particularly acute. Accordingly, one must be cautious in the application of the general statements from these early authorities and critically focus on their particular context.

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8 There is no suggestion that NZME had a contractual or other obligation to publish. Nor is there any suggestion that NZME's editorial discretion was curtailed for any reason.

9 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [103].

10 New Zealand Bill of Rights Act 1990, s 14.

[104] Thirdly, Mr Christian has pleaded and argued his case on the issue of publication in various ways without necessarily distinguishing inherently different concepts. This is not surprising when trying to fix Mr Bain with liability for the whole contents of the Articles when, on their face, he has contributed only part. The comments in the Articles attributed to Mr Bain were initially a slim basis on which to assert responsibility for the whole. Through the discovery process and, as the evidence emerged, evolution of this part of the case was inevitable.

[105] Whether Mr Bain's liability was founded on statements made to Mr Valintine which Mr Bain knew and intended would be republished, as a co-publisher as participant or party or as joint tortfeasor on general tortious principles was not clear on the pleaded case. These routes to liability are conceptually different and have different proof requirements.

[106] The first statement of claim pleaded in summary:

(a) NZME published two articles authored by Mr Valintine.

(b) Those articles were republished by NZME and non-parties and such republishing was the natural and probable consequence of NZME's publication.

(c) Those articles made allegations based materially on statements made by Mr Bain to Mr Valintine and repeated and/or published such statements verbatim as quotations.

[107] Then at [23], Mr Christian pleaded:

> At all material times, Mr Bain intended and/or consented and/or reasonably foresaw NZME's repeating, and relying upon for the Articles, the Bain statements, including the quotations of the Bain statements contained in the Publications.

[108] The key to Mr Bain's alleged responsibility in this pleading appears to be statements he made to Mr Valintine which he intended NZME to publish. This has the

hallmarks of a pleading of 'intended republication' without particularising the actual statements in the articles which Mr Bain is said to have contributed.[11]

[109] At [30], Mr Christian pleaded that the Articles were intended by both Mr Valintine and Mr Bain to damage his reputation (as well as the reputation and business of Smart) and that Mr Bain was motivated by personal malice and anticipation of commercial benefit. This might be read, at least implicitly, as an allegation of a common design along general tortious principles.

[110] The next iteration of the statement of claim was not materially different in so far as the basis for Mr Bain's alleged liability for publication is concerned.[12]

[111] Despite the uncertainties in the pleaded case, it is clear that Mr Bain was not under any illusion that the claim was limited to the quotations attributed to him. This was obvious in an earlier interlocutory hearing of Mr Bain's application to strike out the claim on the basis that the settlement between Mr Christian, NZME and Mr Valintine also released Mr Bain as joint tortfeasor.[13]

[112] Shortly before trial, and without opposition, Mr Christian added particulars to his amended statement of claim.[14] The operative paragraph now reads:

> [22] The Rort Article, the Dirty Secret Article and the Dirty Secret Republications (collectively as "the Publications"):
>
> > [22.1] were authored by Mr Valintine;
> >
> > [22.2] made allegations that were based materially on statements made by Mr Bain to Mr Valintine including statements:
> >
> > > of opinion;
> > >
> > > of advice as to the wording;
> > >
> > > as to contents and accuracy of drafts of the Publications;
> > >
> > > comprising hearsay;

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11 This follows the line of authority in *Slipper v BBC* [1991] 1 All ER 165 (QB).

12 Amended statement of claim dated 29 November 2019.

13 *Christian v Bain* [2021] NZHC 3390.

14 The second amended statement of claim was filed initially in draft with an application seeking leave on 28 January 2022. The defendant consented to the application for leave to amend and an order was made accordingly. The amendments added further particulars at [22] of the first amended statement of claim dated 29 November 2021.

> embodied in documents and analyses prepared by Mr Bain; and
>
> as to the accuracy, reliability and/or truthfulness of documents provided to Mr Valintine by Mr Bain and third parties and third party information obtained by Mr Valintine
>
> (collectively "the Bain statements");
>
> [22.3] materially relied upon, embodied, repeated and/or published the Bain statements including repeating and/or publishing verbatim as quotations some of the Bain statements.

[113] While ostensibly added as particulars, these are additional strands to the case on responsibility. The flavour of these particulars is participation in publication of the Articles.

[114] In opening the plaintiff's case, Mr Patterson contended that Mr Bain was not a mere journalistic source but collaborated with Mr Valintine to jointly craft every aspect of the allegations and the Articles with the common intention to ultimately see them published.

[115] In closing, Mr Patterson submitted variously (in summary):

(a) Mr Bain is liable not as a publisher but as a joint tortfeasor having procured and played a substantial part in having the articles published;[15]

(b) that the plaintiff need only establish that Mr Bain causally contributed, in a material sense, to the defamatory imputations being published;

(c) Mr Bain procured and played a substantial part in having the Articles published; and

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[15] This is a difficult submission to understand. If it is intended to rely on the general law principles of joint tortfeasorship set out in *Fish & Fish Ltd v Sea Shepherd UK* [2013] EWCA Civ 544, [2013] 3 All ER 867 at [45] and upheld by the Supreme Court on appeal (*Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10, [2015] AC 1229*)*, there is only the barest foundation in the pleading and no reference to nor development of the elements of common design. If the reliance is on an assertion of procurement or participation, the conclusion is that a defendant would be treated as a co-publisher in the legal sense within the rubric of the law of defamation.

(d) but for Mr Bain's involvement, the pleaded imputations would not have been published so he was just as responsible for the contents as if he had been a formally accredited and attributed co-writer or editor with Mr Valintine.

[116] In support, Mr Patterson relied on statements in the leading text, *Gatley on Libel and Slander,*[16] the decision in *Sellman* and a fine-grained analysis of the communications between Mr Bain and Mr Valintine.

[117] Ms Dickson contended that Mr Bain had a much more limited involvement in the Article. She argued that the Articles overall were not based materially on statements he made. Rather, Mr Bain was only one of more than 15 sources for the Articles; Mr Valintine conducted his own investigation; he and/or NZME maintained editorial control throughout and it was Mr Valintine who inserted the references to Mr Christian and the Sopranos (among other elements of the articles) which are relied on for the defamatory meanings. Mr Bain cannot be responsible for spin or inaccuracy as a result of the contribution of others. She relied on *Alsaifi v Secretary of State for Education*[17] and s 14 of the NZBORA in support of these propositions.

[118] Ms Dickson submitted that it follows that the chain of causation between Mr Bain's contribution and commercial publication by NZME was broken. In short, that Mr Bain had no need of a defence for all of the contents of the articles, only the quotations attributed to him which are defended as honest opinion.

Legal principles—responsibility for publication

[119] *Gatley on Libel and Slander* summarises the principles of responsibility for publication in the following terms:[18]

> **General principles: responsibility for publication.** The person who first spoke or composed the defamatory matter (the originator) is of course liable, provided he intended to publish it or failed to take reasonable care to prevent

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16 Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013). Since the trial, a newer edition of *Gatley* has been published: Richard Parkes and Godwin Busuttil (eds) *Gatley on Libel and Slander* (13th ed, Sweet & Maxwell, London, 2022).

17 *Alsaifi v Secretary of State for Education* [2019] EWHC 1413 (QB).

18 *Gatley* (12th ed), above n 16, at [6.10] and [6.11] (emphasis added). See also *Gatley* (13th ed) [7.10]–[7.11].

> its publication. However, at common law liability extends to any person *who participated in, secured or authorised* the publication (even the printer of a defamatory work) though this was qualified by special rules for mere distributors, who could escape liability by showing lack of knowledge of the defamatory nature of the publication and the exercise of reasonable care.
>
> **Joint and several liability**: In accordance with general principle, all persons *who procure or participate* in the publication of a libel, and who are liable therefore, are jointly and severally liable for the whole damage suffered by the claimant.

[120] In a subsequent chapter, *Gatley* records:[19]

> **Alteration of defamatory matter**: Where it is alleged that the defendant is liable as publisher, on the ground that he has authorised another to publish, he is not necessarily protected because the material has been altered. The correct principle is that:
>
> > where a man makes a request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether full or in outline, and *the agent* publishes that matter, adhering to the sense and substance of it, although the language be to some extent his [the agent's] own, the man making the request is liable to an action as the publisher. If the law were otherwise, it would in many cases throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents.
>
> The question is whether the defendant authorised the substance and the sting.

[121] This passage from *Gatley* is cited often. It draws support from the English cases of *Bunt v Tilley* and *Bataille v Newland*, both first instance decisions by specialist libel judge, Eady J.[20] The expansive language is adopted by other leading texts. *Duncan and Neill on Defamation* states that "[e]very person who knowingly takes part in the publication of defamatory matter is *prima facie* liable in respect of that publication" and:[21]

> A person who authorises or ratifies publication by another will be taken to have participated in it. … A person may also be liable for the defamatory publication of another person on normal tortious principles of vicarious or accessory liability, or under the law of agency.

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19 At [6.54] (emphasis added).

20 *Bunt v Tilley* [2006] EWHC 407 (QB), [2006] 3 All ER 336; and *Bataille v Newland* [2002] EWHC 1692.

21 Richard Rampton and others *Duncan and Neill on Defamation*, (5th ed, LexisNexis, London, 2020) at [8.10].

[122] The New Zealand text, *Burrows and Cheer on Media Law* says:[22]

> It is trite law that if a defamatory statement appears in a publication all those *concerned with it* are liable — for a newspaper, for example, this will be the company, the editor, the reporter, even the subeditors and layout editors.

[123] And, in a leading Australian text, David Rolph says:[23]

> Any person or entity who voluntarily participates in the dissemination of defamatory matter is, in principle, a publisher.

[124] Two recent New Zealand High Court decisions discuss responsibility for a defamatory publication. Both refer to and apply the principles in *Gatley.* Both also rely on the Australian High Court decision of *Webb v Bloch.*[24]

[125] *Newton v Dunn* was a defamation claim borne of a dispute between the plaintiff and two community figures, Mr and Mrs L.[25] Mrs L had worked with the plaintiff who was principal of the school. Their relationship soured. An employment dispute ensued. The Judge described the employment dispute as "one of several fronts on which the battle between Mrs [L] and [the plaintiff] unfolded.[26] Sometime afterwards, Mrs L engaged a ghost writer for a fee to write about her experiences and to "profile" and "expose" the plaintiff. The contract of engagement was explicit about the intent and purpose behind the book. As part of an information gathering exercise, the writer composed a letter to people in the community seeking information. The letter was defamatory of the plaintiff. The plaintiff sued the writer and then joined Mr and Mrs L.

[126] Materially, the letter had been sent to Mr and Mrs L in draft before its circulation. Some amendments were made at Mrs L's suggestion but these largely related to statements about persons other than the plaintiff. The letters eventually disseminated incorporated passages from the draft seen by Mr and Mrs L.

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22 Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (8th ed, Lexis Nexis, Wellington, 2021) at 60.

23 David Rolph *Defamation Law* (Thomson Reuters, Sydney, 2016) at [8.30].

24 *Webb v Bloch* (1928) 41 CLR 331.

25 *Newton v Dunn* [2017] NZHC 2083. This was one of the few substantive decisions in this areas.

26 At [37].

[127] Justice Collins accepted that Mr and Mrs L were "publishers" if they either authorised or participated in the sending of the letters. He referred to the statement by Isaacs J in the High Court of Australia in *Webb v Bloch*:[27]

> All who are in any degree accessory to 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 *suggest* illegal matter in order that another may write or print it, and that a third may publish it, all are equally amenable to the act of publication when it has been so effected.

[128] Mr and Mrs L at least implicitly authorised the sending of the letter under the terms of the agency agreement. Authorisation for publication arose when they raised no objection to the relevant defamatory passages after careful consideration knowing it was going to be sent to a number of recipients. Mrs L participated in publication by furnishing the letter writer with the names and addresses of recipients and played a material role in ongoing publication of the revised letter.[28] Materially, Collins J rejected the submission that a defendant cannot be liable as an accessory to a publication unless shown to have exercised control over its final form.[29]

[129] In *Sellman v Slater,*[30] public health professionals complained of defamatory blog posts and comments. They sued the individual responsible for the blog who had posted the material, along with a public relations practitioner who posted comments. They also joined two other parties whom they said procured the publication of the substance and sting of those posts and comments, by engaging the public relations practitioner as intermediary for a fee.

[130] Those parties applied to strike out the claim. Palmer J summarised the law on procuring or being an accessory to the making of a defamatory statement. He started with the passage from *Gatley* cited above. He referred to statements in *Bataille v Newton* that encouraging the primary author, supplying him with information intending or knowing that it will be republished, or instructing or authorising him to

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27 *Webb v Bloch,* above n 24, at 364 (emphasis original). To "conduce" in this context means "to lead" or "contribute to the result" or "bring about.

28 At [128]–[130].

29 At [85], the Judge also rejected the submission that *Thiess v TCN Channel 9 Pty Ltd (No 5)* [1994] 1 QD R 156 (QSC) had modified the law articulated by the High Court of Australia in *Webb v Bloch.*

30 *Sellman v Slater,* above n 9.

publish it can give rise to legal responsibility.[31] He also referred to the following passage from *Bunt v Tilley*:[32]

> In determining responsibility for publication in the context of the law of defamation, it seems to me to be important to focus on what the person did, or failed to do, in the chain of communication. It is clear that the state of a defendant's knowledge can be an important factor. If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue. So too, if the true position were that the applicants had been (in the claimant's words) responsible for "corporate sponsorship and approval of their illegal activities".

[131] I pause to interpolate that both *Bataille* and *Bunt* were interlocutory decisions. Neither involved primary acts of publication by media content providers. In *Bunt,* the issue was in what circumstances, if at all, an internet service provider which facilitated a defamatory communication could be held to be a publisher. In *Bataille*, the issue was whether someone providing defamatory content or encouraging its communication within a workplace environment, but who did not compose it nor physically distribute it, can be responsible for publication.

[132] Palmer J accepted that liability for defamation arises from procuring, participating in, instructing, authorising, or encouraging publication of a defamatory statement. Consequently he declined to strike out the claim.

[133] The reliance on *Webb* is explicable in both *Newton* and *Sellman* because all three cases can be readily understood in terms of principal and agency relationships between the party who actually communicated the defamation and those who were said to have "conduced" publication by bringing it about. None of those authorities involved an independent media party as primary publisher. Ms Dickson argues, with some force, NZME and Mr Valintine's actions operated as a novus actus interveniens. I consider that Mr Bain was not in an agency/principal relationship with NZME. In my assessment, he was never in a position to authorise, instruct, or direct NZME in the relevant sense.

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31 *Bataille v Newland*, above n 20, at [25].
32 *Bunt v Tilley,* above n 20, at [21].

[134] Although the context of *Webb* is an agency and principal relationship, it is frequently cited by Australian courts as to the extent of liability for participation in the publication of a defamation. *Webb* was recently approved by a majority of the High Court of Australia in two internet-related cases *Fairfax Media Publications Pty Ltd v Voller*[33] and *Google LLC v Defteros.*[34] Both cases involved factual contexts very different to the case argued against Mr Bain. Shortly stated, the majority in *Voller* said that any act of participation in the communication of defamatory matter to a third party is sufficient to make a defendant a publisher, regardless of their knowledge or intent.[35] Understood in this way, a person who has been instrumental in, or contributes to any extent to, the publication of defamatory matter is a publisher.[36]

[135] A more factually similar case to the issues at hand is *Thiess v TCN Channel Nine Pty Limited (No 5).*[37] TCN Channel Nine broadcast four programmes. The second defendant was the acknowledged source. He approached the broadcaster, provided information about events and incidents as well as supporting documents and names of individuals who could be interviewed to corroborate the key assertions. He helped with research and interviewing contacts. He became part of the broadcaster's team and was contracted to receive a conditional fee in the event of broadcast. He also appeared in one or more of the programmes. In all respects, he was "central" to the programme themes or structure.

[136] At trial, a jury found that the second defendant was not a publisher. The plaintiff unsuccessfully appealed. A full Court of the Queensland Supreme Court said that it was not enough for a plaintiff to show that, without the source, the television programmes would never have been devised or broadcast. Its view of *Webb* was that the case involved a publication which the defendants were held to have given authority or approval to the final form to which they had contributed.[38] Unlike *Webb,* there was no agency/principal overlay. It could never have been suggested that the source was the principal of TCN channel since he did not exercise control over the final form of

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33 *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27, (2021) 392 ALR 540.
34 *Google LLC v Defteros* [2022] HCA 27.
35 At [30] per Kiefel CJ, Keane and Gleeson JJ, [68] per Gageler and Gordon JJ.
36 At [32] per Kiefel CJ, Keane and Gleeson JJ, [59] per Gageler and Gordon JJ.
37 *Thiess v TCN Channel Nine Pty Limited,* above n 29.
38 At 194.

the programmes. Rather, he played a subsidiary and intermediate part, albeit he was important to the programmes.

[137] The Court said:[39]

> What is said in *Webb v Bloch* and *Gatley* would perhaps suffice to make [the defendant] liable with TCN 9 if he had seen the script or viewed the programmes before publication; but the evidence is that he did not do so. The decision in *Webb v Bloch* is concerned with a case that is in some ways the direct converse of this.

[138] *Thiess* has been approved in a number of cases. In *Zeccola v Fairfax,*[40] the plaintiff sued the proprietor of a newspaper, the journalist who wrote the article and also a quoted source. That person quoted was sued in respect of the whole article rather than for republication of his statements to the journalist although he was not the only source of information relied on by the journalist. The Court summarily dismissed the claim as incapable of disclosing an arguable case. The Judge appeared to have accepted that the breadth of the imputations complained of plainly arose from material that had nothing to do with anything that individual had said to the journalist.

[139] In *Rush v Nationwide News,*[41] a media defendant sought to join its source to whom it had gone for comment before publishing an article. The Court dismissed the application on multiple grounds including the weakness of the proposed claim. The Court said it was highly questionable whether the statements by the interviewee were reasonably capable of conveying any, let alone all of the imputations in the article.

[140] The source had asked the reporter to read out the proposed article before commenting but, materially, the spelling of the headline—a pun or word substitution which arguably conveyed the defamation— was not read out. The Court stated that the plaintiff had to establish that by contributing material the defendant had participated in or was an accessory to the entire publication. It was not enough to establish only that the source brought about the republication of the statements he or she made to the journalist because it was not possible to plead a cause of action based

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39 At 195.
40 *Zeccola v Fairfax Media Publications Pty Ltd (No 3)* [2015] NSWSC 1007.
41 *Rush v Nationwide News Pty Ltd (No 2)* [2018] FCA 550, (2018) 359 ALR 564.

on publication of only part of the article.[42] Rather, the plaintiff would have to prove that the article reproduced the sense and substance of the defendant's statement to the journalist. Where a person merely contributed material but had no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she assented to its final form.[43]

[141] Finally, I refer to the decision of *Alsaifi v Secretary of State for Education.*[44] Ms Dickson argued that the following propositions can be taken from this case*:*

(a) A source is not responsible for any errors or misleading aspect of the context in which his or her source material appears.

(b) The source cannot be held responsible for inaccuracy, spin or additional material added by the media which alters the meaning of the source material.

(c) The source is entitled to assume that his or her contribution will appear in the context of an account that is fair and accurate. If the account is not "fair and accurate" and the effect is to give the source material a defamatory meaning that it would not otherwise bear, the source should not be held liable for the media publisher's inaccuracy which is beyond the control of the source.

(d) A person cannot be held liable for republication that person did not intend, authorise or foresee.

[142] The claim in *Alsaifi* was limited to the four lines from a source's press release inserted by a journalist in an article. The plaintiff did not contend that the source was liable for the contents of the whole article. In short, it was a republication case. I also note that the passage in the judgment setting out the second proposition was itself

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42 At [120] citing *Mohareb v Fairfax Media Publications Pty Ltd (No 3)* [2017] NSWSC 645 at [40]–[44].

43 At [124] citing *Dank v Whittaker (No 1)* [2013] NSWSC 1062 at [22]. See also *Dank v Cronulla-Sutherland District Rugby League Football Club Ltd (No 3)* [2013] NSWSC 1850; and *Purcell v Cruising Yacht Club of Australia* [2001] NSWSC 927.

44 Above n 17.

taken from an earlier decision of Warby J in parallel proceedings.[45] However, a key part of Warby J's statement was omitted in the subsequent decision. The whole passage reads that the source cannot be held responsible for any inaccuracy or unfair spin which the rest of the article contained *if that was not known to [the source]*.[46]

[143] In conclusion, *Alsaifi* is factually and legally a different kind of case. It does not advance Mr Bain's defence because Mr Christian does not stake his claim on the quotes attributed to Mr Bain in the Articles.

[144] Although responsibility in law for a defamatory publication has wide reach, there must be limits. Contribution to or connection with a publication can take many forms. There is a spectrum of involvement. At one end there is the commercial publisher, such as NZME, who undertakes the arrangements for the physical dissemination. In the traditional media environment, editors, sub-editors and journalists sit close to the commercial publisher; they are sufficiently connected to the process of dissemination to be joint tortfeasors.

[145] Where does a journalist's source sit on that spectrum? Sources are the lifeblood of investigative journalism. Encouraging the free flow of information between a journalist and his or her source is squarely in the public interest and a vital component of any democracy.[47] This principle is well recognised. If a news medium is sued and admits publication, a Court will not order it to disclose its sources before trial.[48] Section 68 of the Evidence Act 2006 provides that journalists are not compellable to disclose confidential sources unless a Court finds there is greater public interest in disclosing their identity. There are also guiding principles for the grant and execution of warrants for the search of media premises.[49] These examples underscore the importance of protecting media sources.

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45 *Alsaifi v Trinity Mirror Plc and Board of Directors* [2017] EWHC 1444 (QB).
46 At [65] (emphasis added).
47 See Law Commission *Evidence Reform* (NZLC R55, 1999) at [301].
48 High Court Rules 2016, r 8.46. This is a codification of the "newspaper rule".
49 *Television New Zealand Ltd v Attorney-General* [1995] 2 NZLR 641 (CA) at 647–649. The Court of Appeal at 648 said warrants should be issued against media only in exceptional cases where it is truly essential in the interests of justice if there is a substantial risk that it will result in the "drying-up" of confidential sources of information for the media.

[146] An overly inclusive approach where sources are held responsible for the whole of an article, broadcast or other publication would make potential sources reluctant to comment. This would have an unjustified chilling effect on the media and freedom of expression contrary to s 14 of NZBORA.

[147] A mere source does not generally have any control over the final form of the publication or the process of publication. A source may be completely unaware of the overall message or sting conveyed in a programme or article.[50] A source may however attract liability for his or her contribution in the course of commenting (subject to editorial distortion) knowing and intending that media republish his or her comments. This is not to be conflated with liability as a joint tortfeasor.[51]

[148] As a starting point then, an informant or source does not without more join in or assent to the whole of a publication by media. A source is not liable by dint of being a source. As Eady J said in *Bunt v Tilly:*[52]

> To participate in a publication in such a way as to be liable in accordance with the law of defamation is not … to be equated with being a source of the information contained within the relevant document.

[149] This proposition is the starting point only. At the heart of this contest is the question whether or not Mr Bain's participation was limited to that of a source. This requires an examination of the evidence as to what he did and did not do in the lead up to publication by NZME.

Preliminary—credibility and reliability of evidence

[150] Both parties challenged as inadmissible swathes of evidence in witness briefs. Counsel proposed, and I accepted that, save for agreed excisions from the briefs, the challenged evidence would be admitted *de bene esse*. The Court was invited to determine the various challenges later.[53] For the most part, I have dealt in this

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50 See for instance *Berezovsky v Russian Television and Radio Broadcasting Co* [2010] EWHC 476, [2010] All ER 85 at [54].

51 Different considerations may apply where an entire publication is capable of being characterised as a republication of content supplied by a source, for example, where there is no additional material giving rise to the imputations. See *Rush v Nationwide News Pty Ltd (No 2),* above n 41, at [129].

52 *Bataille v Newland*, above n 20, at [25].

53 The parties agreed that rulings were not required before closing submissions.

judgment with those challenges where material to certain issues or findings rather than make line by line determinations. But, it is necessary to address at the outset Mr Patterson's overarching challenge to the reliability of Mr Bain's evidence.

[151] There were three strands. First, indicia in the briefs and process of evidence preparation. Mr Patterson submitted these suggested at best "innocent infection" and, at worst, collusion. Mr Patterson submitted that there is clear evidence that at least Messrs Valintine and Bain, if not as well Mr Barlow, were colluding to line up their evidence so that they were all singing from the same hymn sheet.

[152] Mr Patterson attempted to draw parallels between the evidence preparation and preparation of the Articles. Mr Patterson argued that, collectively, these features meant the Court ought to strike out Mr Bain's evidence about the limits of his participation where his evidence is not otherwise corroborated by a document or reliable independent source. Alternatively, it ought to place no weight on his evidence.

[153] I am not persuaded by this submission. The briefs do not "line up" in the way suggested by Mr Patterson. The explanation for both Messrs Valintine and Bain recalling exactly the words Mr Bain used when first meeting Mr Valintine and inclusion of that quote in their brief rings true.

[154] It is trite that a witness's evidence must be their own uncontaminated and impartial evidence. Messrs Bain and Valintine clearly spoke to each other about the process of evidence preparation. It is clear that on one occasion they attended an evidence preparation session together. It is common in civil cases that the evidence of one witness is seen and commented on by another.[54] Mr Bain disclosed in his brief that he had read Mr Valintine's signed brief of evidence and intended to avoid repetition by covering the same ground. Mr Bain's brief, for the most part, focused on different subject matter to Mr Valintine's brief. Mr Barlow was also cross-examined and re-examined on his process of preparing evidence.

[155] I am not persuaded that their respective evidence is contaminated such that excising significant swathes is justified. Such a wholesale approach would be a blunt

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[54] *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 at [25].

response in any event. A more nuanced approach is called for in which all of the evidence is assessed against the contemporaneous material on an issue-by-issue basis.

[156] Secondly, Mr Patterson points to a lack of text messages and emails produced by Mr Bain in discovery. Mr Patterson invited the Court to draw adverse inferences about Mr Bain's role in the preparation of the Articles based on gaps in the documentary record. He focussed particularly on an email from Mr Bain to Mr Valintine dated 10 April 2019. The subject line of this email referenced an attachment titled "Herald draft .docx". That attachment was discovered by Mr Valintine but not Mr Bain. It was common ground between counsel that it was discovered in PDF format.[55]

[157] Shortly before trial, Mr Christian's counsel had requested that Mr Bain search his computer for the 'native' word document. I assume that the interest was to identify the originator and editing history through metadata potentially visible in the native format. In cross-examination, Mr Patterson squarely put to Mr Bain that it was he who in fact wrote and presented a draft article to Mr Valintine attached to this email. Mr Bain denied writing this or any draft. Mr Valintine confirmed in cross-examination that Mr Bain did not write a draft or one word of the Articles.

[158] Mr Bain confirmed that he had asked his "IT guy" to search his system for the draft to no avail and that his solicitors had communicated this in response to the query. Asked what he remembered, if anything about the annexure "Herald draft .docx" he said "… it's a draft from Mike Valintine. I would've possibly had it and fact checked it. I do remember that I did send a complete draft back to him because he'd lost one…It would've been a draft that I'd received from Mike and he had lost the original so I would've sent it back to him. He was always having IT troubles."

[159] Mr Bain also confirmed that he had unsuccessfully requested from his telecommunications provider back-up copies of texts only to discover they are automatically deleted after 30 days. He referenced this cohort of unavailable

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[55] In the electronic bundle provided to the Court, this title was hyperlinked. On clicking the hyperlink I was taken to what appeared to be a word version of the document, rather than a PDF. This was not apparent at trial when working from the physical case bundle rather than the electronic bundle.

documents in his affidavit of documents during the discovery process. Parties have an obligation to retain relevant material when they learn of proceedings (or potentially when put on notice of proceedings). These proceedings were filed on 9 September 2019, just over a month after the Articles were published. Mr Bain had not received any letter before action. There is no reason to infer that the absence of texts in Mr Bain's discovery was the result of a deliberate purge. In any event, Mr Valintine's phone apparently did retain texts since he has discovered many text messaging threads. I therefore reject this challenge based on the material presented to the Court.

[160] Thirdly, Mr Patterson mounted a challenge to the authenticity of the Smart/TCDC data. Initially, it was a wholesale challenge to the reliability and status of the Smart/TCDC data at the core of Mr Bain's complaints. Having been alerted to this challenge on the eve of trial, Ms Dickson's efforts to confirm the veracity of this data with Mr Christian were met with resolute resistance. Mr Christian's evidence was that he was too far removed from matters of accounting managed by a large accounting team to know about the contents of monthly claims, transaction reports and supporting data. Two of the plaintiffs' intended witnesses who may possibly have been in a position to confirm both the authenticity of the data and Mr Bain's extrapolations from that data were not ultimately called by the plaintiff. It was apparent that Mr Christian's approach was to put Mr Bain to proof as to authenticity. He was entitled to take this approach but it must also be borne in mind that the ability to authenticate was within Mr Christian's power as director of Smart.

[161] This issue subsumed hearing time. In the end, the wholesale challenge amounted to a red herring. A workaround involved a senior person in a finance role at TCDC reviewing the Smart/TCDC data produced by NZME in discovery and providing a sworn affidavit. Thereafter, the plaintiff accepted that particular dataset as being a match to the authentic set held by TCDC.

[162] Mr Patterson persisted with his challenge. He turned his focus to the authenticity of the version of the Smart/TCDC data provided by Messrs Bain or Valintine to third parties pre-publication for corroboration purposes. He argued that the defendant had failed to establish the chain of custody given that anyone working with the "live" version of the Smart dataset was able to modify the data cells.

[163] In supplementary oral evidence, Mr Bain carefully and coherently explained the steps he took to verify that there had been no corruption of data or other interference calling into question the reliability of the data in he received anonymously. His grasp of the detail was impressive. I am satisfied about the sufficiency of those steps on the balance of probabilities. I reject any inference that Messrs Bain or Barlow altered data cells to derive a particular outcome. They merely filtered the data in those cells by use of pivot tables. This was a way of interrogating large amounts of data by filtering in or out defined or nominated cells. It was this selection or filtering that required technical industry knowledge and awareness of Smart's codes.

[164] In support of my assessment of Mr Bain and Mr Barlow's credibility on this aspect, I saw no incentive or motivation to alter the raw data in any event. Mr Bain's driver when interrogating this material was to find out what commercial advantages were enjoyed by Smart to explain why it was dumping commercial waste at the RTS after the closure of the Kopu facility. Mr Bain's keenness to show his analyses to TCDC representatives, and others such as PWC underscored his belief in the genuineness of the Smart/TCDC data. There was ample opportunity for TCDC representatives to challenge the integrity of the data pre-publication. There is no cogent evidence before the Court that they did so.

[165] Mr Patterson also made a collateral attack on the reliability of Mr Valintine's evidence. He relied on two affidavits sworn by Mr Valintine earlier in the proceeding when still a defendant, represented by NZME's solicitors. These affidavits were sworn in support of his application to refuse to answer interrogatories on the grounds that to do so would disclose the identity of confidential sources.[56] In the first, sworn on 18 August 2020, he deposed that he began his in-depth investigation in July 2018. The second affidavit also referred to this date.

[166] Mr Valintine corrected this date in supplementary oral evidence.[57] He did not begin his investigations proper until early 2019. He stated in his evidence that he had

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[56] Relying on s 68(1) of the Evidence Act 2006.

[57] Mr Patterson objected to this supplementary evidence. I apprehended that he intended to expose the error on cross-examination rather than let Mr Valintine have the opportunity to explain himself.

picked up this error only when reviewing the affidavits in the case bundle before trial. He denied that he was only now admitting to "providing two false affidavits" because Mr Christian had done the exercise to identify the falsity. In short, he denied having been "caught out" by Mr Christian's analysis in his brief of the timeline based on contemporaneous material.

[167] Errors in dates can be a slip. That usually arises where the date is incidental to the substance of the evidence. In this instance, the date of commencement of the investigation was not merely incidental and is more troubling. Mr Christian's brief explicitly points out the apparent contradiction between Mr Valintine's affidavits and the contemporaneous communications. It is the sort of statement in a brief which stands out or ought to stand out to someone responding to that brief. But, had Mr Valintine picked this up when he read Mr Christian's brief as part of his evidence preparation, it is much more likely that he would have made the correction in his brief, rather than leave it to trial with the attendant risk of being undone on cross-examination. I note too that Mr Christian's original brief to which Mr Valintine was responding had itself incorrectly noted the commencement date deposed to by Mr Valintine. It referred to Mr Valintine having deposed that he started his investigation in July 2017. This obvious error was amended in a brief served shortly before trial. This gives credence to Mr Valintine's statement that he had not taken much notice of this part of Mr Christian's brief as he assumed it was just an error.

[168] Mr Patterson squarely put to Mr Valintine that he had deliberately misled the Court about the start date of his investigation because the date was relevant to the date on which he could say his sources had been given an assurance of confidentiality. His point was that Mr Valintine had been motivated to claim an earlier commencement time so that the sources that Mr Bain was already managing could be wrongly asserted as Mr Valintine's confidential sources. Mr Valintine emphatically denied this.

[169] An accusation that a witness or party has deliberately misled the Court is a serious accusation requiring a commensurate level of proof. The proposition advanced by Mr Patterson as to motivation faces an obstacle. Mr Valintine's affidavit sworn on

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The impact of Mr Patterson's cross-examination was not lost by the grant of leave to adduce supplementary evidence.

13 October 2020 sets out the various promises of confidentiality made to sources. With the exception of two such sources, Mr Valintine deposes to the date of his first contact with the source. He does not depose to any first contact predating March 2019. There is then no apparent advantage in the earlier date.

[170] I am not in a position to conclude that the inaccuracy was anything other than a regrettable lack of care when Mr Valintine swore the affidavits.

[171] Mr Christian's evidence was more broad-brush. On these issues, much of his brief comprised a timeline and analysis of the contemporaneous documentary material. To the extent that this was truly submission, I have put that material to one side.[58]

Analysis of Mr Bain's role

[172] Mr Bain acknowledges the quotations attributed to him but I have concluded that his contribution to the Articles extended well beyond the mere provision of those quotes. Although he was not the composer of the Articles, I consider he was not just a source. In the only sense that matters, he encouraged and participated in publication of the Articles. He is responsible in law for them. Neither his lack of editorial control nor the role of NZME as commercial publisher absolves him of legal responsibility for publication. I set out my reasons.

[173] Most of Mr Bain's evidence in chief related to the interrogation of the Smart/TCDC data and his communications with TCDC. Mr Bain downplayed his role in the Articles themselves. He gave the distinct impression that the Articles were Mr Valintine's sole domain. At times, Mr Bain deflected when documents were put to him in cross-examination. At other times, he refused to accept self-evident propositions. This tendency did not however reflect lack of truthfulness but a hard-wired belief that the Articles were NZME's and Mr Valintine's responsibility. That belief was misguided. It was doubtless formed without any appreciation that "publication" in the law of defamation is something of a term of art.

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[58] Mr Christian's evidence understandably focused on the effect of the publications on him.

[174] Mr Bain instigated the Articles. He initiated the contact with Mr Valintine and requested his involvement knowing and intending that Mr Valintine expose the findings of his investigation.

[175] Mr Bain's purpose in contacting Mr Valintine was to again use the prospect of media exposure to get traction with TCDC. To that end, although Mr Bain denied it, I agree that he implicitly threatened TCDC with media exposure when he wrote to TCDC following a meeting with them on 8 January 2019:

> We also discussed the various enquiry we have had from media in recent weeks and our position of "no comment" to date.
>
> The effect 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.

[176] Being the instigator is not however sufficient to justify the law treating Mr Bain as a joint tortfeasor. Journalists are commonly "tipped off" by an informant. The "but for" test advanced by Mr Patterson would conceivably lead to all sources and whistle-blowers being treated as responsible as publisher. For the reasons already discussed that approach does not strike the required balance between freedom of expression and right to reputation. However, Mr Bain's first contact with Mr Valintine crisply sums up what transpired in respect of these Articles. Mr Bain had a story to get out in the media and sought Mr Valintine's assistance to achieve that.

[177] The fact that Mr Bain provided and analysed the Smart/TCDC data also does not mean that his role transcended that of a source. Similarly, Mr Bain's role in identifying at least some of the other points of contact for Mr Valintine, facilitating introductions and meetings and even presence at some of the interviews does not characterise Mr Bain's actual role. I accept that potential interviewees would likely be wary of media. The involvement of someone whom they know and trust and who can vouch for the bona fides of the journalist logically increases the odds of an interview. This is consistent with Mr Cox's evidence, a former driver at Smart and now employee of Coastal Bins, and Mr Valintine's own experience.[59] Mr Valintine's

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[59] Mr Cox is also the brother-in-law of Mr Barlow.

evidence was that using a source to contact other potential sources is not unusual when he or she has already carried their own inquiries and been in contact with them.

[178] Mr Patterson argued that Mr Valintine had encapsulated the relationship best when he said in evidence that he and Mr Bain were engaged in a "collaboration" in relation to the Article. In fact, at that stage Mr Valintine was talking about collaboration in respect of the investigation into Smart and TCDC. That is not necessarily the same thing.

[179] I note that when Mr Valintine referred to "collaboration" it was in the context of his evidence in relation to "Interviews/Corroboration Process". He stated that he had asked Mr Bain to provide the names and details of some of the key people he had spoken to in relation to the allegations as part of the "collaboration process". When reading his brief, Mr Valintine initially read "corroboration process" rather than "collaboration process". This made more sense contextually. When I asked Mr Valintine to confirm what his evidence was, he reverted to "collaboration process". This was despite the fact that corroboration was a recurring theme in his brief.

[180] The same curious substitution of the word "collaboration" occurred in another part of Mr Valintine's brief when the word "corroboration" made more sense contextually. Although in the end immaterial, I do not regard this reference in Mr Valintine's evidence to "collaboration" as the "king-hit" Mr Patterson sought to make of it.

[181] I accept there were many other sources for the Articles. These included Terry Kingham, formerly of Smart; Kris Lindale and David Lindsay. I accept there was a TCDC confidential source. It is significant however that those sources fulfilled a secondary role—to corroborate Mr Bain's hypotheses. The following evidence given by Mr Valintine in re-examination is telling:

> … I didn't rely on Murray and I could not have published the story by relying upon Murray. It required the corroboration of all of the sources to get it anywhere near across the line. *Murray's was purely the allegations I had to corroborate, corroborate them from numerous sources.*
>
> (emphasis added)

[182] None of these aspects of Mr Bain's involvement individually or collectively mean that Mr Bain participated in publication in the required sense. The multiplicity of "sources" is a neutral factor in my assessment of responsibility for publication. However, two other aspects do persuade me.

[183] First and most material is Mr Bain's knowledge and approval of the whole content of the Articles, combined with his active encouragement of Mr Valintine at each step. This encouragement and approval began before NZME's involvement. It continued as the Articles developed.

[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.

[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" referred to in [156] above. The attachment as discovered by Mr Valintine is headed "Draft Murray". It reads like a very early iteration of the news article.[60] 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".

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[60] A subsequent email from Ms Alexander dated 12 April 2019 suggests that is how she read it also as she suggested forging on with writing up the story.

[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.

[197] In cross-examination, Mr Bain described his fact-checking role as limited to checking industry terminology only. He said that he did not and was not expected to check matters that Mr Valintine sourced from other parties or to comment on

Mr Valintine's drafting. This may have been correct in respect of the early drafts but does not accurately represent the exchanges between the two as the drafts evolved. Mr Bain did provide comment, in approving and encouraging terms. In sending Mr Bain the complete drafts, I infer that Mr Valintine was inviting feedback on all of the contents of the drafts.[61]

[198] Mr Bain's approval of the drafts, particularly the final draft on the eve of publication, means it is unnecessary to decide whether or not Mr Bain had the ability to withdraw or reposition his quotes or could have influenced changes to the Articles. That scenario never arose because Mr Bain was whole heartedly supportive of Mr Valintine's weaving of the story. His review of the drafts and communications to Mr Valintine in respect of those amounts to active encouragement and involvement in the steps to publication beyond those of a source, just as signalled by the Court in *Thiess.*

[199] Related to this point are the Articles themselves. Mr Bain's comments do not read only as an industry insider's take on the allegations but as implicitly affirming the sting of the underlying allegations themselves.

[200] The second aspect are the various instances of Messrs Bain and Valintine discussing theories, exchanging ideas, opining on the credibility of TCDC's responses and discussing what weight should be given to information from third parties. Mr Bain provided tactical advice to Mr Valintine as to how to approach other sources, what to ask them and how to ask them. He also took the lead with some witnesses. In an email thread beginning 2 March 2019, Messrs Valintine and Bain discuss meeting up with a confidential source. Mr Valintine asks Mr Bain whether he wants him to come down to meet the source. Mr Bain writes "Happy if you feel you need to but I can also handle myself. But if you need to be 100 percent sure then this would get you over the line". Mr Valintine responded, "I am very happy for you to handle it…my eyes would probably glaze over with some of the detail…but later on would be great to meet up…and discuss what information we need to nail it 100 per cent". Mr Bain

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[61] Mr Valintine gave evidence that he did not send any of his notes from source interviews to those sources to ask them to verify the accuracy of those notes. These exchanges between Messrs Valintine and Bain underscore the difference in the relationship.

replies that he would send Mr Valintine the report from the confidential source the following Monday.

[201] On 27 April 2019, Mr Valintine emailed Mr Bain. His email discussed tactics. He pointed out that Mr Christian will attempt to attack Mr Bain's credibility and anyone else involved in the story. He suggested it would be "great to get the declaration from [the confidential source] confirming they have been through the transaction report and have independently reached the same conclusions and that no data was manipulated in any way." He then went on to ask Mr Bain to clear up the issue of missing transaction documents, asking what can be deduced from what was missing.

[202] The tone and nature of the exchanges between Messrs Valintine and Bain provides further support. These are replete with language consistent with Mr Valintine and Mr Bain working together with a common aim. The exchanges speak to involvement in the substance of the Articles beyond merely the attributed statements of Mr Bain. Two instances of many suffice by way of illustration. When Mr Valintine sent an updated draft to Mr Bain on 11 May 2019, he said, among other things, "[t]hankfully *we* now have enough material to make both sing" (emphasis added). After TCDC responded to a LGOIMA request Messrs Bain and Barlow had the following exchange:

> **MV:** Just got tcdc response...as expected evasive.
>
> **Bain:** You are joking me
>
> The gutless c...
>
> **Bain:** E mail it
>
> I'm short of toilet paper!!
>
> **MV:** Let me work through it first...but they even deny the cameras at Thames rts captured any unauthorised access. Also says Smart allowed to cut keys and give keys to its commercial drivers.
>
> **Bain:** Had a quick read. Not only am I pissed off I'm bloody disgusted that they return total lies and [expletive]. They think we are [expletive] fools or something and we'll discuss later but a few of their own statements are contrary to their contract
>
> **MV:** Exactly...they are either taking the piss or are completely ignorant.

Bain: The latter applies here I think. [Expletive].

[203] In conclusion, for these reasons the plaintiff succeeds in establishing that Mr Bain bears legal responsibility for the Articles as a joint tortfeasor.

Meaning—do the articles bear the defamatory natural and ordinary meanings complained of by Mr Christian?

Legal principles

[204] The plaintiff must prove publication of and concerning him and that the published words have one or more of the various defamatory imputations pleaded by him. If he fails to do so, his case fails. In this jurisdiction, unlike some other common law jurisdictions, the Court is not entitled to find a materially different defamatory meaning on which to base liability.[62] The Court of Appeal has said:[63]

> In light of our finding that neither the pleaded meanings nor the Judge's preferred meanings are made out, we need not express a view on whether it was open to the Judge to uphold the claim on the basis of a meaning that differed from the pleaded meaning, provided the difference was not material. This Court has recognised that there may be limited circumstances in which it is appropriate for a Judge to reformulate the plaintiff's pleaded meanings, while ensuring fairness to the parties and having due regard to the importance of pleadings in defamation cases. But it seems to us that the scope for any reformulation of pleaded meanings must be narrowly confined, having regard to the rule in *Crush.*

[205] It follows that the meaning pleaded in a defamation case assumes critical importance.[64]

[206] New Zealand law also recognises a minor harm threshold. Damage to reputation by publication of a defamatory statement is presumed but will be rebuttable if the publisher of the statement can show it caused less than minor harm.[65] In this case, if the Court finds that any of the pleaded meanings are made out, it is incontrovertible that this threshold would be met.

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62 *Fourth Estate Holdings (2021) Ltd v Joyce* [2020] NZCA 479, [2021] 2 NZLR 758 at [61]–[65]; *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA) at 239–240; and *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA) at [54]–[55].

63 *Fourth Estate Holdings (2021) Ltd v Joyce*, above n 62, at [77].

64 *Gatley* (12th ed), above n 16, at [26.1], note 1 referring to May LJ's description of pleadings in defamation proceedings as an "archaic sarabande" in *Morrell v International Thomson Publishing Ltd*, [1989] 3 All ER 733 (CA).

65 *Craig v Slater* [2020] NZCA 305 at [44]–[45].

[207] Meaning is assessed through the lens of an ordinary reasonable reader not avid for scandal but capable of reading between the lines. The approach to meaning is encapsulated in the judgment of Blanchard J in *New Zealand Magazines v Hadlee (No 2).*[66] The principles are so well known as to be uncontroversial, but I set them out for ease of reference:

(a) The test is objective; under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?

(b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.

(c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.

(d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.

(e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.

(f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that a jury cannot be asked to proceed on the basis that

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66 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.

> different groups of readers may have read different parts of an article and taken different meanings from them.

[208] In short, given the lens of the ordinary reasonable reader, ascertaining meaning is not the exercise in construction which lawyers revel in. It is "not fixed by technical, linguistically precise dictionary definitions ...".[67] Rather, it is impressionistic.

[209] Related to this proposition is the entrenched rule that evidence beyond publication context is not admissible in determining the natural and ordinary meaning of a publication. I have followed that orthodox approach and removed from consideration any evidence given by a witness as to how they understood the publications.[68] This includes purported evidence from Mr Christian as to what he understood the words to mean.[69]

[210] For historical (and artificial) reasons, the law assumes that the reasonable person would derive one single meaning from the words complained of. In short, there is only one right "natural and ordinary meaning" ascribed to the words. Where a defamatory publication conveys more than one defamatory imputation, the single meaning rule is applied in respect of each imputation to ascertain its single correct meaning.[70] As explained in *Duncan and Neill on Defamation*:[71]

> … the single meaning rule is not concerned with restricting the number of 'right' meanings, but with ensuring that all meanings attributed to the whole or any part of a particular publication are judged by the same standard – the standard of the ordinary reader.

[211] While this principle has been an entrenched part of defamation law, courts have recognised that a more flexible approach may be required to accommodate

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67 *Stocker v Stocker* [2018] UKSC 17, [2020] AC 593 at [25]. Whether or not it is appropriate to resort to dictionary definitions has been the subject of judicial discussion in more recent times. Refer *Stocker v Stocker* at [22]–[25]. Compare *Sellman v Slater*, above n 9, at [86]–[87].

68 *Gatley* (12th ed), above n 16, at [32.26] describes this as a well-settled rule, citing *Charleston v News Group Newspapers* [1995] 2 AC 65 (HL) at 70. See also *Gatley* (13th ed) at [34.026].

69 A claimant may however in the context of damages address the effect of the publication which may include his understanding of the meaning. This is not evidence of meaning, however. See *Gatley* (12th ed), at [32.30] and *Gatley* (13th ed) at [34.026]. Refer memorandum on behalf of third defendant dated 14 January 2022 and schedule of objections. I upheld the objections where the ground of objection is evidence of meaning with the exception of the objections in [28], [80] (part only), [81.2], [11], [118.1], [247], [253] and [463] (first line).

70 *Duncan and Neill on Defamation*, above n 21, at [5.13].

71 At [5.13].

developments in the available defences to defamation. The Privy Council in an appeal from Jamaica has suggested that if the words used might readily convey different meanings to ordinary reasonable readers, the court could take the meaning reasonably put on the words by the journalist into account when assessing the standard of responsibility required before the defence is made out.[72]

[212] At the end of the hearing, I anticipated the possibility that the single meaning rule may have a role to play in the issues before the Court. As neither counsel had addressed the rule, I asked for submissions on the ambit of the single meaning rule, whether it remains applicable in New Zealand and how, if at all, it might inform any issue in this case.

[213] Neither party argued that the rule no longer applies in New Zealand although discussion of the rule has been scant. Mr Patterson suggested that if the single meaning rule is to be departed from whenever the defence of responsible communication on a matter of public interest is engaged, the defendant has the onus to credibly establish they held a genuine belief that their intended meaning was in the public interest. In *Peters v Television New Zealand Ltd,*[73] the Court of Appeal said, albeit without discussion, that the meaning of the broadcast must still be considered in light of the single meaning rule, referring to *Charleston v News Group Newspapers Ltd*[74] and *Broadcasting Corporation v Crush.*[75]

[214] It is arguable that the artificiality of a rule which ignores the reality that people may read and interpret the same words differently does not strike the right balance between the protection of reputation and freedom of expression. Without detailed argument from the parties, it is not for this Court to say that the single meaning rule

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72 *Bonnick v Morris* [2002] UKPC 31; [2003] 1 AC 300. See too *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273 at [51] per Lord Phillips MR: "when deciding whether to publish, and when attempting to verify the content of the publication, the responsible journalist should have regard to the full range of meanings that a reasonable reader might attribute to the publication." See too the statement in *Durie v Gardiner* [2017] NZHC 377, [2017] 3 NZLR 72 at [81] referring without criticism to the Supreme Court of Canada decision in *Grant v Torstar* 2009 SCC 61, [2009] 3 SCR 640.

73 *Peters v Television New Zealand Ltd (TVNZ)* [2011] NZCA 231, [2012] 2 NZLR 466 at [45]. See also *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA).

74 *Charleston v News Group Newspapers Ltd,* above n 68.

75 *Broadcasting Corporation of New Zealand v Crush*, above n 62.

no longer represents good law in this jurisdiction. That remains an issue for another time and another court.

The contest as to meaning

[215] What then would such a reader draw or infer from the words, in their context and in light of generally known facts? Given the impressionistic nature of the exercise, I read the Articles to form a preliminary view as to meaning without considering the pleaded case and arguments in detail. I then turned to the submissions. I requested a copy of the Articles in their "as published" form to better understand the perspective of a reader of the publication potentially unconsciously influenced by layout and page position. This forms part of the overall context.

[216] Each of the Articles is said to give rise to a separate cause of action although they appear in the same issue, albeit different sections, of the *Weekend Herald*. Neither counsel suggested that the Articles should be read as one coherent whole when determining meanings despite the fact that there is a "teaser" for the Feature article in the News Article.[76] As this was the way both parties approached it, I also treat the articles as two separate publications. This inherently assumes that readers did not necessarily read both Articles.

News Article

[217] The News Article appeared on the front page under the headline "Waste 'rort' may cost $1m: Claim" and ran over to an inside page. It is the lead article. The word "rort" is in single quote marks. This generally implies attribution to someone quoted in the article. The reference to "claim" is directed to either the quantum or to the "rort". At this stage the reader cannot know. The subtitle reads "Company probed over 'secret dumping' accusation". "Probe" implies that the company (as yet unnamed) is an unwilling or unforthcoming target of questions.

[218] The first segment of the News Article takes up approximately one-third of the front page in the print version. A small photograph with caption "Clandestine dumping

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[76] Compare the approach in *McGee v Independent Newspapers Ltd* [2006] NZAR 24 (HC) in which two broadcasts were treated as parts of a story emerging over two days.

has been alleged" accompanies it. The front page is dominated by an unrelated photograph and teaser for another article in the Canvas magazine supplement. On the run-on page, there is a small two-column segment on the lower half of the page.

[219] The News Article was published at or about the same time with minor alterations in the *Herald Online* under the title *"*Waste firm Smart Environmental investigated over secret dumping claims*"*.

[220] The thrust of the News Article is an investigation into two aspects of Smart's business practices in conjunction with TCDC's management of its contract with Smart. Those two aspects are Smart's after-hours access to transfer stations leading to unaccounted for dumping of waste after hours and Smart unilaterally discounting its cost of dumping waste at transfer stations owned by TCDC but managed by Smart.

[221] The first paragraph directs the reader's attention to investigation of "one of the country's largest waste-management companies" for giving itself a huge discount at a possible cost to ratepayers of hundreds of thousands of dollars. This links back to the use of "rort" in the headline. The paragraph connotes uncertainty in relation to the cost to ratepayers rather than uncertainty as to the fact of a discount.

[222] Smart is identified in the second paragraph as the target of the probe into unaccounted for waste and allegations of clandestine dumping. The adjective 'clandestine' infers secretive or illicit.

[223] The next few paragraphs refer to two inquiries—one by the TCDC and one of the TCDC's handling of the matter. The News Article records the TCDC's confirmation that it was working with "appropriate authorities" to identify any evidence of illegal activity or contractual breaches. The quote is implicitly attributed to TCDC. Some context is provided in the reference to the contractual rate of $181 a tonne versus what "appears" to be the discounted rate of $77.05 a tonne. The "appears" connotes uncertainty about the precise rate. There is a reference to the investigation centring on whether Smart introduced the discount without advising or negotiating the rate with the Council and that sources "believe" this would be in breach of contract.

[224] The News Article then changes tack. It refers to issues of unaccounted for waste and access to TCDC-owned transfer stations after hours. It makes a link to dumping when weighbridges were not staffed. The provision of keys to drivers to the transfer stations is confirmed by one Smart driver.

[225] Next, there is reference to documents showing that about one third of the annual waste total was dumped after hours or not captured by the weighbridge computers at the transfer stations. TCDC's response that it was working with "appropriate authorities" is repeated, along with a quote attributed to the TCDC assuring ratepayers and the public that it takes its fiscal responsibilities and contract management seriously.

[226] The News Article goes on to note the Auditor-General's review into TCDC's management of the contract and why it was unable to identify "apparent" missing revenue and alleged contract breaches for so long.

[227] Mr Bain is then introduced by name. He is first described as a former Smart area manager who alerted the Auditor-General's office. This suggests to the reasonable reader that he is someone with inside knowledge of Smart's operation, lending credence to the accuracy of the allegations. The News Article points out that Mr Bain owns a company competing with Smart's commercial division. Mr Bain is quoted in respect of what he claims are contract breaches in the following terms:

> 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.
>
> …
>
> [there were] only two options and neither of them is good for ratepayers.

[228] The News Article then states that TCDC has declined to comment to avoid prejudice to negotiations with Smart. This suggests the issue is a commercial one between Smart and TCDC rather than a legal matter.

[229] At this point, interrupted by the page break, there is the first mention of Mr Christian by name as Smart's founder and former managing director. His response by way of a lengthy text conversation is reported to be:

> This is simply not how we do business. I am ex-Police and I am absolutely straight up, as is my team.

[230] The News Article reports Mr Christian's counter-punch that his former employee was running a "gutter campaign". Mr Bain's concession that there is "bad blood" between the two men follows. Mr Bain's pithy riposte to the counter is then quoted:

> 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.

[231] Next there is confirmation by an unnamed "former member of Christian's team" of the "discount", its introduction in May 2018 and its connection with Smart's failure to get compensation for China's new policy resulting in a ban on taking and paying for recycling. This is not a separate allegation but supports the imputation by providing a possible motive for Smart's actions. It goes on to say that the team member confirmed the TCDC was not consulted or advised but that the information was discoverable in the monthly claim spreadsheets of 15,000 lines of information. The former member is quoted in terms that:

> Our position was it was there if they looked for it.

[232] The News Article concludes with a description of Smart, its size and a statement that a list of detailed claims had been sent to the TCDC and to Smart's new chief executive, Todd McLeay, but both declined to comment for commercial reasons. In Smart's case, this was said to be required by Smart's contract with TCDC. TCDC declined to comment on the basis it could prejudice negotiations with Smart.

Respective arguments as to meaning

[233] In his closing argument, Mr Patterson submitted that the defamatory meaning an ordinary reasonable reader would take from the articles is that Mr Christian instigated, directed or was complicit in wrongdoing of various forms by Smart. Mr Patterson described the overall impression conveyed by the Articles (collectively) in these terms:

> Smart has, since mid-2018 at least, been intentionally and systematically ripping off the Council for dumping fees via a clandestine scheme which had

> many different facts and moving parts. Mr Christian was the master-mind behind those actions.

[234] I pause to interpolate that this is not how the case was cast in the pleadings. The simplicity of Mr Patterson's summary belies a more complex pleaded case.

[235] Mr Bain denied that the articles have the pleaded meanings of and concerning Mr Christian. He did not engage on the issue of meaning vis-à-vis Smart. Ms Dickson submitted that the articles concern Smart and TCDC, not Mr Christian. In the alternative, that any sting in respect of Mr Christian is cured by his denials which are accurately reported in the body of the Articles.

[236] Given the differences between the pleaded case and the presented case, it is necessary to unpack the pleading.

[237] After the introductory averments, the first cause of action notes that Mr Christian is identified by name in the article as the founder and former managing director of Smart. It then sets out the alleged natural and ordinary meaning of the News Article. Thirteen imputations are pleaded.[77] For the most part, they are grouped into "Discount Allegations" and "Clandestine Dumping Allegations".[78] Particulars of the most directly relevant statements or parts said to give rise to the pleaded meaning are set out for each although the plaintiff relies on the contents of the whole Article as conveying the meaning.

[238] Of the 13 imputations, only one is pleaded of and concerning the plaintiff. It reads:

> That Mr Christian, as founder, former managing director, and current director of Smart, either directed or was complicit in Smart's actions as alleged by the Discounting Allegation and/or the Clandestine Dumping Allegations.

[239] The following passages are singled out as the most relevant to this pleaded meaning:

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[77] Not all thirteen imputations have the character of discrete imputations. There is a degree of overlap. On any view of it, some appear to be particulars rather than separate imputations.

[78] One pleaded imputation does not fall within either the Discount or Clandestine Dumping allegation categories.

> Smart Environmental founder and former managing director Grahame Christian denied any wrongdoing.
>
> …
>
> 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"
>
> …
>
> The former member of Christian's team said the council was not consulted or advised…

[240] In this roundabout way, the pleading brings into play each of the actions by Smart described as the Discount and Clandestine Dumping Allegations. The sting is said to be that Mr Christian directed or was complicit in each of Smart's actions. This does not on the face of the pleading include the meanings other than the Discount and Clandestine Dumping Allegations, which I outline at [247] below.

[241] Mr Patterson approached the question of meaning in two steps. He submitted that the plaintiff has pleaded that each of the two articles alleged wrongdoing by Smart and then that Mr Christian either instigated, directed or was complicit in that wrongdoing. He accepted that:

(a) the pleaded imputations are the only meanings that the case can and must be determined against; and

(b) the allegations against Smart in the articles are intrinsically part of the conveyed meanings in relation to Mr Christian.

[242] This approach requires the Court to find that the article bears at least one of the pleaded imputations against Smart before determining whether it means that Mr Christian either directed or was complicit in that particular action by Smart. In other words, there would be two hurdles for the plaintiff to cross before he gets home on the pleaded meanings.

The Discount Allegations

[243] Using the terms of the tripartite classification discussed by the Supreme Court in *APN New Zealand Ltd v Simunovich*, the Discount Allegations are pleaded variously as first tier and second tier meanings in the alternative.[79] Broadly, a tier one meaning imputes actual misconduct; a tier two meaning asserts that there are grounds to believe or suspect guilt; and a tier three meaning asserts that there are grounds for investigating whether the plaintiff is guilty of misconduct.

[244] It has become orthodox to plead in this way in a defamation case though any apparent difference in shades of meaning from guilt at one end of the spectrum to the existence of grounds to investigate can obscure rather than identify the real issue. As observed by the Supreme Court in *Simunovich*, meanings in different tiers may shade into each other, rather than always falling neatly into one compartment or another.[80] In my assessment, the classification is more useful as a tool to set the parameters for the type of particulars and evidence relevant to a truth defence. It is less useful in determining the overall seriousness of an alleged defamation and impact on reputation.

[245] The Discount Allegations are said to be that:

(a) Smart has (or there is good cause to believe Smart has) engaged in a "rort" upon the TCDC and the TCDC's ratepayers (**the ratepayers**) i.e. engaged in a scam or fraud or unethical or sharp or illegal practice.

(b) The "rort" had already cost the TCDC and ratepayers up to $1,000,000 and could cost the ratepayers hundreds of thousands of dollars a year if it continues. In my assessment, this adds little to the first meaning save it informs the reader of the scale of the issue. The specific passages relied on are a subset of the earlier passages relied on.

(c) As part of that "rort", Smart has (or there is good cause to believe Smart has) intentionally, in breach of its contract with TCDC and without TCDC's knowledge or consent, been paying $77.05/tonne (**the**

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79 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [15].
80 At [16].

discount rate) to dump waste at transfer stations rather than a contractual rate of $181/tonne being the rate Smart should have paid.

(d) While the discount rate could have been identified by TCDC from analysis of the 15,000 line "monthly claim" spreadsheets sent to TCDC by Smart, those spreadsheets are the only disclosure Smart had ever made of the discount rate to TCDC and Smart intended, and relied upon, TCDC not becoming aware of the discount rate from the spreadsheets and intended to mislead TCDC.

The Clandestine Dumping Allegations

[246] The next series of imputations, collectively termed the Clandestine Dumping Allegations, is said to be a second part of the "rort":

(a) Smart has (or there is good cause to believe Smart had) for unlawful and/or improper purposes, had keys cut for its drivers so that they could access TCDC transfer stations after hours to dump commercial waste.

(b) Smart was (or there is good cause to believe Smart was) having its drivers dump commercial waste after hours so as to avoid the commercial waste being weighed by the RTS weighbridges, and consequently to avoid paying dumping charges to TCDC for the commercial waste.

(c) Smart was carrying out dumping without TCDC knowledge or permission.

(d) Smart was (or there is good cause to believe Smart was) actively concealing the afterhours dumping from TCDC by doing so clandestinely.

(e) Smart had (or there is good cause to believe Smart has) been dumping such commercial waste after hours, without paying dumping fees, at a historic rate of up to 2,500 tonnes/year. Up to a third of all annual waste

dumped by anyone in TCDC's transfer stations comprised commercial waste that Smart had clandestinely dumped after hours and had neither weighed nor paid dumping charges for.

[247] Further imputations are pleaded against Smart. These are not pleaded as within the Discount and Clandestine Dumping Allegations. As mentioned earlier, the pleaded meaning in respect of the plaintiff only refers back to the Discounting and Clandestine Dumping allegations. It does not refer to these further imputations that:

(a) Smart's actions, as alleged, may be illegal in the sense of being criminal; and

(b) Smart's actions have caused the Council to suspect Smart of having engaged in illegal activity and the Council has reasonable basis for such suspicion.

Conclusions as to meaning of first article

[248] It is common ground that the plaintiff has the onus of establishing that the pleaded imputations arise from the publications.

[249] The primary targets of the News Article are Smart and TCDC. The meaning of "rort" is key to ascertaining those meanings vis-à-vis Smart. The "rort" reference is the overarching sting connecting the pleaded imputations, many of which are not materially different but variations on the same theme.

[250] Mr Christian appears to rely on various definitions of "rort—at the one end, fraud or illegality through to scam, and at the other end, unethical or sharp practice. Yet, sharp practice is materially different both in nature and seriousness from fraud. Unethical practice is different from illegal practice. In reality then, there are multiple meaning possibilities wrapped up in this pleading approach.

[251] I accept that "rort" is generally understood in these multiple ways. Its meaning in any particular use is heavily context dependent. It is inevitably understood in a pejorative sense.

[252] Approaching the question of meaning in the two-step way advocated by Mr Patterson, I consider the News Article conveys the meaning would be understood by the ordinary reasonable reader to mean vis-à-vis Smart that:

(a) Smart had engaged in a rort on the TCDC and TCDC ratepayers (in the sense of sharp and dishonest practice) in two respects:

(i) By paying a discounted sum rather than the contracted rate to dump waste at RTS sites without TCDC's knowledge or consent.

(ii) By having its drivers secretly dump commercial waste so as to avoid commercial waste being weighed by the RTS weighbridges, and consequently to avoid paying dumping charges to TCDC for the commercial waste.

[253] I accept Ms Dickson's submission that the pleaded case lacks coherence in terms of any second tier imputation against Smart. If the meaning is one of reasonable grounds to suspect, how can it be said that Mr Christian directed or was complicit? One can only direct or be complicit in regard to something that has occurred. The answer however is that the News Article conveys a first tier imputation.

[254] The next step is whether there is any defamatory imputation levelled at Mr Christian. The fact that the primary focus is on TCDC and Smart and the absence of express allegations of wrongdoing on the part of Mr Christian do not obviate the obvious connection between Smart's conduct and Mr Christian. An implication by a side wind is no less an implication.

[255] Similarly, it is no answer on the issue of meaning that the publishers' motivation or intention behind including Mr Christian's response was to provide balance. An entrenched aspect of meaning is that intention is irrelevant. That principle goes both ways. Mr Patterson asserts that implicating Mr Christian was deliberate, intended and achieved. He sought to rely on pre-publication communications between Mr Bain and Mr Valintine and post-publication congratulatory messages received by

Mr Bain.[81] That evidence is not admissible on the question of meaning. I distinguish the use of extrinsic evidence to show whether a plaintiff is identified by innuendo and its use to aid meaning. The former may be permissible. The latter is not.

[256] I similarly do not take into account Mr Bain's evidence in cross-examination that "Grahame is Smart". Mr Bain is not the ordinary reasonable reader and his view on this aspect has no heft.

[257] I consider that the following aspects of the article most clearly implicate Mr Christian as involved in Smart's discounting actions:

(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.

[258] I do not accept the submission that if there was any sting directed at Mr Christian, it was abated by the vehemence of the published denial and the counter-allegation that an aggrieved former employee was running a "gutter campaign". In short, the denial did not provide the antidote or cure to the implication of wrongdoing by Mr Christian. There are two reasons. First, the denial of any "wrongdoing" is at

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[81] By which I take Mr Patterson to mean a false rather than true innuendo given the reliance on natural and ordinary meaning only.

too high a level of generality. Secondly, the fact of bad blood between Mr Bain and Mr Christian is diluted by the stated corroboration of another former manager in respect of whom there is no suggestion of a dishonourable motive.

[259] I conclude that the reader would understand the article to implicate Mr Christian as having directed or been complicit in these actions by Smart as pleaded by the plaintiff.

Feature Article

[260] The second, much longer, Feature Article was published on an inside page in a separate section of the same edition of *The Weekend Herald.* The banner title is "Inside Story". The headline is "Waste firm's dirty secret"—a play on words. There is a breakout under the headline reading "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".

[261] The Feature Article also appeared on the *Herald Online* under the headline "Special investigation: How waste management firm Smart Environmental fudged its Coromandel rubbish contract."

[262] The Feature Article takes up most of the page and is the only article on the page. There is a photograph of what appears to be a landfill and a prominent cut out of Mr Bain along with a smaller photograph of Mr Christian against a black background. The photograph is captioned "Former Smart Environmental boss Grahame Christian says the team are [sic] "straight up" and the clandestine activity described "would not happen". Mr Bain's name and company name are captioned alongside his image with the statement, "[e]ven when it was told it was being duped the council still couldn't find out how, and how much money it had lost."

[263] There follows over 70 paragraphs. There is more detail and context than the News Article. There is some overlap and repetition but also additional material. There is a different emphasis and tone as would be expected in a feature.

[264] Mr Christian adopted the same pleading approach in respect of the second article.

[265] First, he contends that the article would have been understood to convey in relation to Smart that:

(a) Smart has (or there is good cause to believe Smart has) "ripped-off" or "duped" the TCDC and ratepayers i.e. engaged in a scam or fraud or unethical or sharp or illegal practice.

(b) The "rip-off" or "dupe" caused by Smart has already cost TCDC and ratepayers up to $1,000,000, and could cost ratepayers hundreds of thousands of dollars a year if it continues.

(c) The "rip-off" or "dupe" is also giving Smart an unfair commercial advantage as against its trade competitors, putting its trade competitors, including Mr Bain's company, Coastal Bins, under huge financial pressure.

(d) As part of the "rip-off" or "dupe", Smart has (or there is good cause to believe Smart has) intentionally, in breach of its contract with TCDC and without TCDC's knowledge or consent, been paying $77.05/tonne to dump waste at transfer stations rather than a contractual rate of $181/tonne which Smart should have paid.

(e) NZME and/or Mr Valintine had, through their investigations, confirmed that Smart had been paying less than half of what it should have been paying when dumping waste (during opening hours) at the TCDC's transfer stations.

(f) While the discount rate (or underpayments) could have been identified by TCDC from analysis of 15,000 line "monthly claim" spreadsheets sent to TCDC by Smart, those spreadsheets are the only disclosure Smart has ever made of the discount rate to TCDC. Smart intended,

and relied upon, TCDC not becoming aware of the discount rate from the spreadsheets, and intended to mislead TCDC and/or "hide" what was going on, or "keep the Council in the dark".

[266] These are collectively termed "the Second Discount Allegations" and are pleaded as a combination of first and second tier meanings.

[267] The plaintiff pleads that there is a second element to the asserted "rip-off" or "dupe", namely that the article alleged Smart had, or there is good cause to believe Smart:

(a) had without permission from TCDC, provided keys to its drivers so that they could access TCDC's transfer stations after hours to dump commercial waste;

(b) had its drivers dump commercial waste after hours to avoid the commercial waste being weighed by the RTS weighbridges, and consequently to avoid paying dumping charges to TCDC for the commercial waste;

(c) was carrying out dumping without TCDC's knowledge or permission;

(d) was actively concealing the after-hours dumping from TCDC by undertaking the dumping clandestinely;

(e) had circumvented weighing, at TCDC transfer stations, up to two thirds of all of the commercial waste Smart was dumping at those transfer stations. That Smart thereby avoided paying some or all of the charges which should have been paid for such dumping; and

(f) by its actions, in relation to the after-hours dumping, was acting akin to organised crime organisations such as those fictionally portrayed in the television show "The Sopranos" which might be criminal.

[268] Collectively, these are termed the Second Clandestine Dumping Allegations.

[269] A third element of the "rip-off" pleaded is that Smart is intentionally dumping as general waste or trash, rather than recycling, substantial quantities of waste materials that were supposed to be recycled (**the Recycling Fraud Allegations**).

[270] Finally, vis-à-vis Smart, it is pleaded that evidence exists that Smart had altered spreadsheets and/or concealed or destroyed, or simply never created documentation to conceal revenue, and to "hide" the discount and/or after-hours dumping, from TCDC.

[271] The last pleaded imputation is the only meaning pleaded of and concerning Mr Christian. It reads:

> ... Mr Christian, as founder, former managing director, and current director of Smart instigated, directed and/or was intimately involved in Smart's activities as alleged by the pleaded meanings at 36.1 to 36.9 above.

[272] I consider that the overall impression conveyed is that Smart was ripping off the TCDC in three ways—by price discounting in breach of contract, by under-recording waste dumped after hours at TCDC-owned transfer stations which it managed and by regular dumping of recycling at the transfer stations. "Rip off" in this particular context would be understood to mean cheating the Council out of fees and dishonestly dumping after hours to avoid the weighbridge systems. Rather than second tier meanings, these are first tier meanings connoting that Smart was guilty of these things rather than suspected of these things. The key reasons for reaching this view are a combination of the:

(a) headline;

(b) assertive language;

(c) relative prominence of the photograph of Mr Bain compared to Mr Christian;

(d) insufficiency of the counter-balancing material to displace the meaning of guilt in the context of the article as a whole;

(e) sentence reporting that Mr Christian "declined to comment in detail" which follows immediately from the denial of knowledge of after-hours dumping, dilutes the robustness of the general denial;

(f) prominence of the breakout reference to accusations of ripping off the council. Although expressed as an "accusation" only, when read together with the headline it would be understood as an assertion of guilt;

(g) corroboration of the resident living near the site who speaks of frequent complaints and the frequency of afterhours dumping, particularly given the scene-setting description in the first paragraph;

(h) statement that "[a] *Weekend Herald* investigation has discovered that…Smart Environmental's commercial trucks are paying less than half the price the printout records it has paid the council";

(i) confirmation from TCDC that it is investigating the company's operations;

(j) reference to "[a] deeper dig into Smart's operation … 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 … .";

(k) quotes attributed to Mr Bain. Although he refers to apparent discounts, the statement that TCDC still couldn't' find out how, and how much money it had lost once told it was being duped, is emphatic. As a former manager within Smart, Mr Bain is positioned as a whistle-blower with inside knowledge;

(l) confirmation from a senior Smart manager at the time that Smart altered spreadsheet data giving its commercial division a large discount at the

transfer stations and reference to their view that there was a historical right to a discounted rate;

(m) statement that "the council had been kept in the dark" and repeated reference to a "secret discount";

(n) reference to data and documents showing the volumes of commercial loads never captured by weighbridge computers, albeit entered manually into the system afterwards;

(o) statement of the former anonymous worker who explained how he would regularly dump loads after hours and would sometimes record load weight and other times did not bother;

(p) detail of 98 tonnes of waste not captured at the Thames RTS yet transported and dumped at the Tirohia landfill;

(q) reference to video taken by a driver showing kerbside recycling being tipped in at the Thames RTS and the stated volumes quoted by that driver;

(r) comparison with organised crime on the television show *The Sopranos*.[82]

[273] Just as with the first article, sufficient attention is accorded Mr Christian that, along with the overall tone and content, Mr Christian is implicated in Smart's activities profiled. This is in the sense that he directed or was intimately involved in Smart's activities.

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[82] I considered whether the Court was in fact entitled to take this reference into account given there was no innuendo meaning pleaded. In the end, it was not essential to the conclusion but added support. It is such a well-known television programme that I accept it has come to be synonymous with the business dealings of organised crime syndicates. This sensationalist comparison would be understood as overblown hyperbole in my assessment rather than a serious comparison but adds to the sense of something happening which is not above board.

[274] Along with the points made in respect of the News Article, the implication of Mr Christian is even more obvious because of the express link to "the Chinese situation". The article reports that it was Mr Christian who "was struggling with bad news of his own" and Mr Christian who threatened legal action against TCDC. This supports the sting by providing the motivation for Smart's activities.

[275] Overall, the principal defamatory sting of both Articles is largely the same. Mr Christian has discharged his onus of establishing one or more of the pleaded defamatory meanings. Mr Bain therefore is liable for defamation unless he can show he has a defence. He has pleaded two defences: responsible communication and honest opinion. He has not sought to establish that the Articles are true or not substantially different from the truth.

Is the defence of responsible communication on a matter of public interest available to Mr Bain?

Legal principles

[276] In *Durie v Gardiner,* the Court of Appeal recognised the existence of a new defence of responsible communication on a matter of public interest which sits outside the rubric of common law qualified privilege.[83] There are two elements to the defence:

(a) The subject matter of the publication must have been in the public interest to publish; and

(b) The communication must have been responsible.

[277] Provided these two essential elements are made out, this defence protects statements of fact though they damage the reputation of a plaintiff and are untrue. Materially, one of the key considerations for the Court of Appeal in *Durie v Gardiner* was the public interest in ensuring that effective investigative journalism is not impeded by the publication of true, but not provably true, stories.[84] In short, truth is not as important as honest and reasonable belief in the truth of the facts where the

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83 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.
84 At [54].

public interest justifies this approach. The defence involves a rebalancing of the interest in protection of reputation and in freedom of expression.

[278] This relatively new defence is a standalone defence.[85] There are significant differences between this defence and common law qualified privilege (and extended qualified privilege for political expression). The focus of the new defence is the subject matter rather than the occasion on which it is published.

[279] The development of responsible communication defence has been informed to some extent by the development of what is known as "*Reynolds* privilege" in the United Kingdom as well as the defence of responsible communication on matters of public interest in Canada.[86] The United Kingdom Supreme Court said of *Reynolds* privilege:[87]

> Reynolds privilege arises not simply because of the circumstances in which the publication is made, although these can bear on the test of responsible journalism. Reynolds privilege arises because of the subject matter of the publication itself. Furthermore, it arises only where the test of responsible journalism is satisfied, and this requirement leaves little or no room for separate consideration of malice.

[280] In the High Court judgment of *Craig v Slater*, Toogood J held that because responsible communication on a matter of public interest is no longer a matter giving rise to common law qualified privilege, the provisions of s 19 of the Defamation Act do not apply.[88] While the Court of Appeal overturned aspects of the first instance decision, it did not touch on this observation. Toogood J also expressed the view that it did not necessarily follow that a communication on a matter of public interest would be held irresponsible merely because the author is predominantly motivated by ill will towards the subject. He considered that the author's predominant motivation was a question likely to be subsumed by the enquiry into whether the author acted responsibly.

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85 *Durie v Gardiner*, above n 83, at [82].

86 *Reynolds v Times Newspapers Ltd* [2002] 2 AC 127 (HL); and *Grant v Torstar Corp*, above n 72.

87 *Flood v Times Newspapers Limited*, above n 72. There are however some differences between *Reynold* privilege and the responsible communication defence. It must be borne in mind that a holistic approach to the development of defences is required.

88 *Craig v Slater* [2018] NZHC 2712 at [347].

[281] I respectfully agree. The key consideration in a source verification case is what steps a defendant took to verify the allegations before publishing. It is conceivable that a defendant took every step reasonably available despite a motivation to harm a plaintiff. The juridical and conceptual basis for the defence of responsible communication—the public interest in dissemination in matters of public concern—underscore this approach.

[282] In *Grant v Torstar;*[89] McLachlin CJ in the Supreme Court of Canada said of Canada's version of this defence:

> People in public life are entitled to expect that the media and other reporters will act responsibly in protecting them from false accusations and innuendo. They are not, however, entitled to demand perfection and the inevitable silencing of critical comment that a standard of perfection would impose.

[283] The defendant bears the onus of proof on the question of public interest and responsibility.[90]

[284] The Court of Appeal set out guidance as to the type of circumstances or factors which inform the assessment of responsibility. These are:[91]

(a) the seriousness of the allegation. The more serious, the greater the degree of diligence required to verify it;

(b) the degree of public importance;

(c) the urgency of the matter. In short, whether the public's need to know required publication at that time, taking into account that news is often a perishable commodity;

(d) the reliability of any sources;

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89 *Grant v Torstar*, above n 72, at [62].
90 *Durie v Gardiner*, above n 83, at [59].
91 At [42] and [67].

(e) whether comment is sought from a plaintiff and accurately reported. This has been described as a core factor because it speaks to the essential sense of fairness the defendant is intended to promote;

(f) the tone of the publication; and

(g) the inclusion of defamatory statements which were unnecessary in communicating on matters of public interest.

[285] The list of factors is not exhaustive. Some listed above may not be relevant. Others not listed may be relevant. These are guidelines and not a test. The standard of conduct must be applied in a "practical and flexible" manner.[92]

[286] The Court also said that, in some instances, the publication of defamatory allegations made by an unidentified source may not attract the defence. This depends on the basis on which the publisher considered the source reliable and the approach in the article. In short, whether the article made it clear it was relying on a confidential source or sources.[93]

[287] The Court of Appeal in *Craig v Slater* re-emphasised and re-affirmed these principles.[94]

[288] It is convenient to discuss the factors bearing on the assessment of responsibility in this case under the following heads:

(a) The degree of public interest.

(b) Process of verification—diligence of investigation.

(c) Role of Mr Valintine and NZME.

(d) Opportunity given to Mr Christian, Smart and TCDC to comment.

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92 At [56].
93 At [68].
94 *Craig v Slater*, above n 65, at [97].

(e) Editorial licence.

[289] As I have concluded that Mr Bain was a joint tortfeasor, the assessment is not limited only to the steps that Mr Bain himself took. A plaintiff cannot be heard to argue that a defendant worked together with another with a common aim and is thus a joint tortfeasor but the assessment of whether the communication was responsible is individualised.

Degree of public interest

[290] Mr Christian acknowledged that the issues canvassed in the Articles touched on matters of public interest. I put it higher than that. The Court stands back and looks at the thrust of the publication as a whole in determining the question of public interest, rather than each of its divisible elements.[95] The Articles related to the operation and functioning of local government, the manner in which rates are used by local councils to fund public services, the management of those services and the recycling and refuse practices carried out in New Zealand landfills and refuse transfer stations. These are quintessentially matters of significant public concern. Whether a local government entity is managing essential public services in a fiscally responsible way is central to its function.[96] The issues were also potentially politically charged and the public had a right to know.[97] The inquiries put in motion by TCDC suggest that it ultimately had the same view about public interest.

[291] Mr Patterson suggested that the higher the degree of public interest, the greater the need for verification since there can be no public interest in publishing inaccuracies on important matters. This proposition, if accepted, would tend to cut across the purpose of the defence. The extent to which the degree of public interest informs the assessment and how is fact and context dependent.

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95 *Durie v Gardiner*, above n 83, at [64].

96 The plaintiff did not argue that the issues were of local rather than nationwide concern.

97 The *New Zealand Herald* reported on 19 February 2020 the Mayor's announcement that TCDC overspent its 2018/19 operational budget, including a "blow out" of about $2.6M on the Solid Waste account due to several stated reasons. While arguable self-serving (and hearsay depending on its intended use), I consider that the fact of any announcement, and its subsequent reporting supports the finding of public interest in these issues.

Verification steps

[292] I accept that the allegations in the Articles were serious with the potential for significant damage to reputation. This means that a greater degree of verification is required to meet the responsibility threshold.

[293] I refer briefly to the challenges to Messrs Bain and Valintine's evidence (of which there were many). The primary challenges were in relation to hearsay statements. Some examples from Mr Valintine's brief of evidence by way of illustration are:

> [128] I subsequently established a confidential TCDC contact, a whistle-blower, who was able to confirm not only was the document genuine but the monthly claims (January-December 2018) had been paid by TCDC to Smart.
>
> …
>
> [131] That TCDC whistle-blower superseded the need of the outside auditor/reviewer because the TCDC source was more conversant with the waste contract and the issues involved.
>
> …
>
> [242] The source revealed the Council was, until Murray started raising issues, unaware of the dramatic increases in Smart's third party commercial waste being dumped through its transfer stations from May 2018, largely because it had not received transaction reports and had not been able to audit the volumes.

[294] Other examples include the wholesale recounting of what other sources were said to have conveyed to him. I accept that such statements comprise hearsay if they are intended to be relied on for the truth of their contents. Unless one of the exceptions in the Evidence Act 2006 applies, those statements are inadmissible for that purpose. However, to the extent that statements by third parties who are not witnesses in the proceeding are relied on not for the truth of their contents but as evidence of the pre-publication verification process, I consider they are not hearsay and are admissible.[98]

[295] Much of Mr Valintine's research was focused on verifying the conclusions Mr Bain had reached. In short, the primary source was Mr Bain (and to a lesser extent

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[98] Refer *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL44, [2007] 1 AC 359 at [62]; and *Flood v Times Newspapers Ltd*, above n 72, at [75]–[80].

Mr Barlow). The other sources were secondary for corroborative purposes. There were many interviewees. The question is two-fold: whether I am satisfied on the balance of probabilities that the sources did make certain corroborative statements to Mr Valintine (not whether those sources were telling the truth); and whether, Messrs Valintine and Bain genuinely and reasonable believed in the reliability of those sources.

[296] Mr Valintine's evidence is that he interviewed the following as part of a verification process:

(a) a confidential TCDC whistle-blower;

(b) Terry Kingham—ex Smart commercial manager;

(c) Alley O'Grady—former operations staff person at Smart;

(d) Debra Park—former operations staff person at Smart;

(e) A third former operations staff person at Smart;

(f) David Cox—former Smart driver;

(g) Michael Beros—former Smart driver;

(h) two other Smart drivers—confidential source;

(i) David Houia—weighbridge operator;

(j) Michael Barlow—formerly of Smart and now business partner of Mr Bain;

(k) David Lindsay—formerly of TCDC;

(l) Kris Lindale—industry expert; and

(m) Larry Cooper—neighbour of Thames RTS.

[297] In addition, his evidence was that there were a number of unnamed confidential sources such as an unnamed competitor, and a waste manager from another region.

[298] At the heart of the allegations was the memory stick which had mysteriously been left in Mr Bain's letterbox. The Bain/Barlow analyses involved interrogating this data and presenting it to Mr Valintine in a digestible form.[99] It is likely that Mr Bain knew exactly who had left the memory stick there but professed ignorance to protect that person. Both Messrs Bain and Valintine were alive to the need to ensure the data was accurate and up to date. Neither had any suspicion that it was unreliable but the basis for that original lack of suspicion was never made clear in evidence.[100]

[299] Mr Valintine was not content to rely solely on Mr Bain's analysis, nor that of Mr Barlow. He took steps both to authenticate the Smart/TCDC data on the memory stick and the analysis. He obtained a copy of what purported to be the same dataset independently from his TCDC source and went through a matching exercise to ensure it was the same material Mr Bain had earlier anonymously received in his letterbox. This would only take matters so far. It was conceivable, if not likely, that if Mr Valintine's whistle-blower was from TCDC, then it was the same person who had delivered the memory stick to Mr Bain. Theoretically that meant that the integrity of Mr Valintine's dataset may not have been any greater than Mr Bain's dataset (although it rules out interference of the dataset by Mr Bain). That presupposes unlikely cynical conduct by someone at TCDC for no obvious purpose. That proposition is speculative and not credible.

[300] To check the reliability of Mr Bain's analysis, the first industry expert that Messrs Bain and Valintine went was Kris Lindale. He was one of a shortlisted number of potential contacts suggested by Mr Bain and was approached as he was no longer working in the waste industry. Mr Bain says that he was conscious that no waste

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99 On 6 April 2019 Mr Bain emailed Mr Valintine a detailed spreadsheet analysis based on Smart's claim to TCDC. This included a graphical representation of the tonnes of waste from RTS sites to Tirohia, and month by month summaries of the actual claims according to the analyses by Messrs Bain and Barlow.

100 It is reasonable to infer that their view was informed by their knowledge of the identity of the source but the Court did not have this advantage.

company wants its staff to be involved in something that may negatively reflect on a council since councils are its mainstay customers.

[301] Mr Lindale's involvement was short-lived for reasons explained in evidence by Mr Bain. However, he did provide some initial comments on the data he reviewed. In an email dated 6 March 2019, Mr Lindale (who was at that stage a confidential source but whose identity was subsequently revealed) wrote:

> I can see you have stumbled onto some rather untoward and dubious business dealings. However what really astounds me is that Council have not.
>
> I believe that there are three distinct issues here that show a level of either incompetence or deceit (or both).

[302] According to Mr Valintine, Mr Lindale conveyed that it would be necessary to validate the claim information and confirm that TCDC had paid in accordance with it before there could be any confidence in the integrity of the data. He also came up with some different numbers to the outputs Mr Bain had recorded. Mr Valintine responded to Mr Lindale noting that while the information confirms "we" are on the right track, it also highlights the need to drill down further. He queried a number of aspects of the data and asked Mr Lindale to identify any information he might need to help reach more emphatic conclusions. For example, he asked:

> Also with Cell AQ27 is there any way we can firm this up either way bearing in mind I can only publish what I can prove to be true. It certainly begs a question or two.

[303] Mr Valintine's evidence is that he spoke with Mr Lindale but no notes or other record of that discussion were produced. Mr Valintine said that these discussions "for the most part assuaged my concerns".

[304] According to Mr Bain, they ended their consults with Mr Lindale due to a medical event suffered by Mr Lindale. Mr Bain gave evidence that he did not wish to put any strain or stress on Mr Lindale.

[305] Mr Lindsay was another industry expert to whom Messrs Valintine and Bain went to corroborate the claims. He gave evidence. Mr Lindsay has over 15 years' experience in the waste industry and holds a Masters in Waste Management. He

worked for TCDC between about November 2015 until November 2017. In that role, he was responsible for, among other things, reviewing and approving the monthly claims submitted by Smart for approval under the Solid Waste Contract. He was very familiar with the format of the Smart/TCDC data and supporting claims documentation.

[306] In or around mid-2017, when he was with Smart, Mr Bain had approached Mr Lindsay at Mr Christian's request to negotiate a price which would take advantage of TCDC's preferential rate for disposing of general waste at the Tirohia landfill. At that time, Mr Lindsay made it clear to Mr Bain that TCDC could not accept the proposal without breaching its agreement with the owner of the Tirohia Landfill.

[307] Mr Lindsay explained in his evidence that while he was working at TCDC, he would receive a claim every month from Smart setting out the rebate to be paid to TCDC supported by a lot of detailed information. That included an RTS transaction report containing detailed information regarding every load disposed of at the RTS including the time of disposal, the type of waste disposed, the weight and price charged. Mr Lindsay reconciled the claim against the information in the RTS transaction report before validating and paying the claim. He says that the database was controlled and managed by Smart and TCDC did not have access to it.

[308] In July 2019, Messrs Valintine and Bain contacted Mr Lindsay. Mr Valintine forwarded to Mr Lindsay copies of some of Smart's claims to TCDC for the 2018 calendar year. This was the set of spreadsheets provided by Mr Bain to Mr Valintine comprising each of the 2018 monthly claim forms and the RTS transactions for November 2018. These included the transaction reports and the claims for November and December 2018. Mr Bain asked Mr Lindsay to verify that:

(a) Smart was taking a discount and paying just $77.05 per tonne for its third party commercial waste that did not fall within the exception for specified waster.

(b) Up to two-thirds of Smart's non-specified waste at the Thames RTS was not recorded by weighbridge computers but entered subsequently.

(c) There were 98 tonnes unaccounted for at the Thames RTS.

(d) The tonnage of Smart commercial waste put through the Thames RTS had escalated after a fire at the Kopu KRC in April 2018.

[309] Mr Lindsay's evidence in his brief was that he analysed the claims and RTS transaction reports and agreed with the findings of Messrs Bain and Barlow. He said that he confirmed his view to Mr Valintine by telephone and in email exchanges between 31 July and 2 August 2019. In cross-examination, he clarified that this was the only significant discussion he had with Mr Valintine.

[310] I pause to interpolate that Ms Dickson sought to introduce a supplementary brief from Mr Lindsay shortly before he gave evidence on the second to last day of trial. It added little other than confirming that he had read and agreed to comply with schedule 4 of the High Court Rules 2016 and referenced a second and more recent analysis of the underlying data. I apprehend this was an attempt to overcome Mr Patterson's earlier criticisms of the absence of expert evidence for the defendant by validating the analysis through an expert lens.

[311] Mr Patterson strenuously objected. He argued that Mr Lindsay's role pre-publication meant that he could not exercise the impartiality required of an expert witness. As he put it, Mr Lindsay was not in a position to have now "re-examined Mr Bain's calculations and/or analyses with a fresh, objective and disinterested gaze, open to the possibility that they might be incorrect and, as a consequence, his alleged 2019 analysis was also incorrect".

[312] I declined leave to adduce the supplementary evidence with the exception of Mr Lindsay's more particular description of the documents he had been provided with and analysed at the request of Messrs Valintine and Bain pre-publication. My reasoning was that the proposed supplementary evidence was not at its core expert opinion. He carried out the same data sorting exercise that Messrs Bain and Barlow had carried out, applying the same methodology. His ability to do so did not stem from expertise in the field of waste management but from his factual familiarity with the documents generated as part of the claims process between Smart and TCDC. He

did not draw inferences or conclusions. He simply applied the same methodology and reached the same outputs, thereby inferentially confirming no sorting errors by Mr Bain. In my view, the proposed evidence was essentially factual, did not engage s 25 of the Evidence Act 2006 and was needless repetition of his first brief.

[313] On cross-examination, Mr Lindsay accepted that he was only able to corroborate that the weight of waste taken from Thames to Tirohia had changed significantly over a very short period of time and that the supervisor had manually put through a large amount of waste which is not usual or expected at the Thames RTS. There was the following exchange with Mr Patterson:

> Q. So would you accept that you hadn't been able to confirm Mr Bain's figures or analysis in 2019?
>
> A. I think I confirmed his analysis in 2019 I don't think I confirmed his figures.

[314] Mr Lindsay candidly agreed that he had an unfavourable view of Mr Christian which motivated him to agree to assist Mr Bain when asked. But he was clearly qualified to speak to the manner of analysis and in my assessment could also be relied on to address the matters he was asked to review without rancour. I do not accept that any personal views he held made his evidence unreliable.

[315] Mr Valintine also went to his confidential TCDC source and Mr Kingham to verify aspects of the data analysis. His interview with Mr Kingham provided important and credible verification. Mr Valintine understood that Mr Kingham was formerly the branch accountant and administration manager for Smart in 2018. He agreed to speak as a confidential source.[101] According to Mr Valintine's brief transcribed notes of his interview, Mr Kingham confirmed:[102]

(a) Smart began discounting its commercial waste in May 2018.

(b) The rate was $77.05 which was $67.00 a tonne plus GST. This was the estimated Council rate at Tirohia.

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101 Mr Kingham subsequently agreed to be identified.

102 While the interview was recorded, Mr Valintine gave evidence that his practice was to transcribe the key points and then reuse the recording device essentially "over-writing" earlier recordings. No audio record of the interview was discovered.

(c) The initiative was to compensate Smart for the revenue losses from China's refusal to take further recycled waste.

(d) He was authorised by senior management to include the discounted rate in claims from May 2018 onwards. He had not advised TCDC of the rate in the monthly claims as the information was available "if they looked for it".

(e) The discounted rate was not in the Solid Waste Contract but based on an "historical rate" referred to in emails during the contract negotiations. There was a tacit agreement to introduce it anytime.

(f) Drivers accessed RTS sites after hours—they had to, especially for the Coromandel runs as they could not get back in time. There was nothing untoward about it …Sometimes drivers put in a wrong weight but the system overall worked well and was 90 per cent accurate.

(g) Smart did not supply transaction reports with the monthly claims in 2018 until October or November when TCDC asked for them.

[316] Mr Kingham did not give evidence although there was an early indication that he would do so.[103] Mr Patterson was critical of Mr Valintine's telephone interview with Mr Kingham as lacking rigour. He presented it as a missed opportunity to correct inaccurate inferences. He cross-examined Mr Valintine based on a lengthier interview Mr Kingham gave to the private investigator engaged by TCDC after the Articles were published.[104] The exchange went, in part, as follows:

> Q. Mr Valintine you've told the Court that as kind of kind of audit and authentication, verification process that you spoke to Mr Kingham?
>
> …
>
> Q. Yes but did he explain to you or did you ask about how the charge back process operated?

---

[103] Ms Dickson sought leave to admit an affidavit from Mr Kingham authenticating the Smart dataset. Mr Patterson objected on the basis he wished to cross-examine Mr Kingham. I declined to admit the affidavit without the witness presenting for cross-examination.

[104] Mr Patterson challenged the admissibility of this transcript on the basis it was hearsay but put the contents to Mr Valintine in a series of questions, which are not in themselves evidence.

A. I can't say specifically if we took it as read in our conversation. We were discussing all this. I didn't go back to him and say: "Can you give me," like a statement from a private investigator because we weren't starting off from scratch. I had a fair amount of information and he, he appreciated that fact or understood that. We were talking in a language which kind of meant we understood some processes or most of the processes.

…

Q. … [D]id you ask or did he tell you that Mr Christian implemented the change by giving instructions, essentially, to implement the arrangement that he'd said had previously been arranged with Council which was known as tolling, did he say anything along those lines?

A. Yes, he did say – we did discuss things along those lines that Mr Christian and the senior managers had implemented the change and given the order, if you like for want of a better [word], to implement (inaudible 15:47:57)

Q. Did you ask or did he tell you that he'd seen copies of emails which he thought confirmed the agreement between the Council and Smart and that Smart were entitled to do that, did he tell you that?

A. Yes, those emails were based on that. But he also said that it was accepted it was not in the contract and that if it was not, there was an argument that if it wasn't in the contract – if it didn't make the contract it couldn't be used.

…

Q. Did you ask or did he volunteer that the agreement might have been at the Chief Executive level within the Council?

A. No.

Q. Did you ask him whether or not there may have been an informal or backdoor deal involving the tolling?

A. No because we – because the whole basis for the introduction, for want of a better term, was based on the 2013 emails.

Q. Yes, did you ask him or did he volunteer to you that there may have been an agreement [in] principle that tolling could occur?

A. He didn't go that far. No, he didn't because he was saying there was no agreement reached. There was – it didn't make the contract.

Q. Did he say – did you put to him that there was no agreement reached?

A. Yes, there was – well, yes, because we discussed it and he agreed that it had never made the contract.

…

Q. Did he explain that the effect in dollar terms meant that there was no cost to the council?

A. He may have said that. I'm not 100% sure but of course it didn't include the costs to council of all the overheads.

Q. Did you – you didn't ask him about the cost to council including the overheads, did you?

A. I quite possibly did.

Q. Well there's no note – in your notes, there's no reference to you discussing the overhead costs to council?

A. No there isn't but I believe we discussed the overall thing that, that it wasn't – that effectively the way Smart saw it was, it was no cost to council.

…

Q. Did he explain to you that Grahame had had no input into the mechanics of implementing the change in the claim?

A. No, he did not.

Q. Did you ask him what involvement Mr Christian had in implementing the change?

A. Yes, I did. Yes, I did.

Q. What did he say to you?

A. He said that Grahame, if I remember rightly, certainly Grahame was involved in the decision and I believe led that decision at the end.

…

Q. But having been told that by Mr Kingham as an experienced journalist, you must have been itching to ask the next question, because it's the most obvious, which is well how was he involved?

A. Yeah, we discussed that, yes.

Q. Okay and what did he tell you?

A. Oh he was evasive and exactly what Mr Christian you know how he was involved and only he basically from memory used the fact that there were a number of senior managers but it was led by Mr Christian.

Q. Why is none of that contained in your notes given the central critical importance of that allegation?

A. Well because, because I couldn't, I couldn't say with certainty that it was Mr Christian and I was waiting upon the response from, from Smart to the allegations.

[317] Mr Patterson's cross examination illustrated that the journalistic exercise could have been more rigorous but that is not the right question. An interview by a journalist is a very different proposition to an interview by a private investigator. It is doubtful that Mr Kingham would have consented to spend as much time with Mr Valintine as he did with the private investigator or be as open with Mr Valintine.

[318] I consider that the steps taken by Mr Valintine in particular to authenticate the Smart/TCDC data were sufficiently robust in all the circumstances. He was justified in having confidence that no one had tampered with that data.[105] The other information he was receiving also generally supported Mr Bain's own analysis which would have given him more confidence in his primary source.

[319] The second stream in the verification process was the various interactions with TCDC. Mr Valintine, and before him Coastal Bins, made a series of LGOIMA requests to TCDC. Far from assuaging the concerns, the responses from TCDC made both more suspicious. Where answers were given, they were often inconsistent with activity that Mr Bain and Mr Barlow had themselves observed first-hand.

[320] On 22 February 2019, TCDC's then in-house counsel responded to four LGOIMA requests dated between 24 August 2018 and 29 January 2019. The first of these requests had been put on hold by agreement with Coastal Bins but later resurrected. TCDC refused requests for information about disposal arrangements and rates of general waste relating to the Solid Waste Contract. It relied on ss 7(2)(b)(ii) and 7(2)(f)(i) of LGOIMA. It sought more specificity in respect to other requests, refused to provide copies of the Solid Waste Contract, the findings of Morrison Low's audit investigation and Smart's monthly claims to TCDC for the period January 2018 to January 2019.

[321] The LGOIMA response did purport to respond to some questions. The following questions and answers are the most material for present purposes:

> *Do the operating times [for TCDC RTS sites] apply to all users or are selected users allowed to dispose [of] waste outside operating times?*

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105 Refer discussion in [299] above.

> No one other than the refuse transfer site operator should be in the RTS afterhours unless they have permission from [TCDC].
>
> …
>
> *Do all users pay the approved charges or do select users pay a different rate than the rates advertised on TCDC's website?*
>
> The general public pays the fees displayed on the billboards located at the refuse transfer stations and on the Council website.
>
> *Is the RTS site weighbridge staffed and operating for any users disposing outside normal operating hours?*
>
> No, as stated, only the refuse transfer site operator should be in the RTS afterhours unless they have permission from the council.
>
> …
>
> *Does TCDC have a documented agreement with Smart Environmental for the "Tolling" of Commercial waste disposal at any of TCDC RTS sites?*
>
> No.

[322] TCDC explained that withholding certain requested information was necessary to enable commercial negotiations with Smart. Other requests were refused on the basis that disclosure would unreasonably prejudice Smart's commercial position.

[323] Mr Valintine followed up with a series of LGOIMA requests between 14 June and 21 June 2019. TCDC adopted the same or similar position, refusing to respond to questions related to rates of disposal agreed with Smart on the basis of prejudice to commercial negotiations. The more material responses were:

> *Have cameras at the Thames RTS captured any unauthorised access?* Not that we are aware of as at 11 July 2019.
>
> *Do you still stand by that statement [that in response to the question on whether TCDC had a documented agreement with Smart Environmental for tolling of commercial waste at TCDC RTS sites you responded in the negative]?*
>
> … With regards to agreements with SEL, the position is that there is a contract between the Councils and SEL for the collection of waste services, which includes specified third party collections.
>
> *If so, was there an informal or non-documented tolling agreement with Smart Environmental at any time over the contract period to the date of our response to Murray?*

There is a contract between the Councils and SEL for the collection of waste services.

Do any users of the TCDC RTS sites have a tolling or discounted rate below the $181.00 a tonne posted by Council?

The TCDC rates for refuse disposal can be found here – [URL for TCDC's RTS website]

…

Did the TCDC authorise SEL to cut keys to RTS sites and distribute those keys to commercial division drivers?

Yes, as operator of the site.

…

*Was the TCDC aware that in 2018 a total of 2,614.*84 *tonnes of third party waste delivered by SEL was not recorded on transaction reports. (At $181.00 a tonne this amounts to ($472743.03).*

SEL has provided transaction reports. The information in those transaction reports is being investigated.

…

How many complaints has the TCDC received regarding noise/afterhours access to the Thames RTS in the last five years?

5 complaints relating to noise

4 complaints relating to after opening hours

3 complaints relating to noise and after opening hours.

How many complaints has the TCDC received regarding afterhours access in the past 18 months (from January 1 2018 until now)?

See the above answer.

[324] In addition, the LGOIMA response dated 12 July 2019 confirmed that Smart provided transaction reports only on TCDC's request after the fact, and that council officers had raised concerns within TCDC about unauthorised access afterhours, the possibility of a heavily discounted rate or the dumping of recycling from Waipa at the Thames RTS by Smart.

[325] Two main themes emerge from TCDC's responses. First, its interests during prolonged commercial negotiations justified withholding information. Secondly, that many matters remained "under investigation" and TCDC would not respond pending

the outcome of that investigation. It is not surprising then that Mr Valintine formed the view that it was almost impossible to wrestle any information of any value from TCDC and what information it did provide was often ambiguous, created confusion and was at times inaccurate.[106]

[326] The inability to get to the bottom of the issues through TCDC's non-responsiveness is an important part of the context. This is not a criticism of TCDC which is not a party to this proceeding. Its non-responsiveness may well have been justified on commercial prejudice grounds. Nonetheless, this was all grist to the investigative mill.

[327] In my assessment, both Messrs Bain and Valintine did all they could to extract explanations from TCDC. Those steps were thorough and responsible. They awaited an appropriate period, they followed up to clarify responses and they kept a channel of communication open with TCDC.

[328] The third stream in the verification process was the interviews with former Smart drivers and current drivers whose identity was protected. I heard evidence from David Cox and Brian (Dudley) Thompson. Mr Thompson was not interviewed by Mr Valintine before the Articles were published and so I put his evidence to one side in respect of this issue.

[329] Mr Cox is a truck driver with Coastal Bins. He worked for Smart for about four years until 14 December 2018. He joined Coastal Bins over a year after leaving Smart. He is Mr Barlow's brother-in-law, something that Mr Valintine was unaware of at the time of publication of the Articles. Mr Cox was one of three drivers interviewed by Mr Valintine on a Sunday in March 2019. These were initially confidential interviews. Mr Valintine says that he taped the driver interviews and then transcribed relevant quotes to a working document which became the first of many drafts. The recording was not kept. Mr Valintine said this was because he shared the recording device with his wife who is also a journalist.

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[106] Mr Patterson objected to this evidence from Mr Valintine. He argued that it was impermissible opinion and legal submission. I disagree insofar as it goes to Mr Valintine's state of mind during the investigation, providing context for and informing the available steps in the investigation.

[330] Mr Valintine says that Mr Cox informed him that he had been instructed to dump more than 30 tonnes of kerbside recycling collected from Waipa at the Thames RTS. This was because his recycling truck had broken down and there was no replacement available. He was instead instructed by his immediate supervisor to use a "rear loader" in which recycling could not be separated. Mr Cox had filmed himself dumping a load of recycling and confirmed to Mr Valintine that this was taken at Thames RTS. Mr Cox took a total of four videos which were presented to the Court. He told Mr Valintine that he did so as self-protection (albeit expressed in more colourful vernacular) because he knew it was wrong. He also said that this was on more than one occasion.

[331] Mr Valintine cross-checked this information with the Smart/TCDC data and considered that it corroborated the information from Mr Cox.

[332] Mr Cox also confirmed that he had 24/7 access to the TCDC's RTS and regularly tipped after the RTS had closed and the gates were locked.

[333] Mr Cox gave evidence at trial. He was direct and credible. He confirmed each of the bits of information given to Mr Valintine. He also said that taking a video of the dumping of recycling was something he did without being asked. He said that he gave it to Mr Barlow because he wanted to talk to somebody about it. He said that he did not know at the time that Messrs Barlow and Bain were looking into Smart but "showed the videos to [Mr Barlow] and hoped that [Mr Barlow] would be able to protect me somehow if I got into trouble or that [he]would at least know about how I felt about the situation".

[334] On 31 July 2019, Mr Cox was also interviewed by the private investigator engaged by TCDC. An unsigned transcript of his interview with Mr Campbell is generally consistent with what he had told Mr Valintine.[107]

[335] The fact that Mr Valintine was unaware of Mr Cox's relationship to Mr Barlow does not diminish his value as a source given that the Smart spreadsheet data matched

[107] There were some differences including as to the period over which Mr Cox worked for Smart.

what Mr Cox was saying and given the existence of video evidence of mixing recycling.

[336] Mr Valintine said that he interviewed a second driver named Michael Beros. Mr Beros unfortunately died before trial. Mr Valintine says that Mr Beros outlined to him a similar experience with Smart when he had been instructed to pick up TCDC recycling with rubbish in a truck designed only for refuse. This had the effect of trashing the recycling. He expressed concern to Smart's operations manager but was told to keep doing it. He too confirmed that he had keys to the RTS and accessed it as late as 9.30 pm.

[337] Mr Patterson objected to this evidence on the same hearsay grounds. As discussed, it is only hearsay if led as to the truth of its contents rather than as evidence of what Mr Valintine was told at the relevant time. Even if it was relied on for the truth of its contents (which it is not at this stage of the analysis), the circumstances relating to the statement provide reasonable assurance that the statement is reliable given the consistency with the transcript of Mr Campbell's interview with Mr Beros on 20 July 2019.[108] If required, I would have been inclined to admit the evidence under s 18 of the Evidence Act 2006.

[338] Mr Valintine interviewed a person whom he was told and believed to be a third Smart commercial driver. That person has not been named and remains a confidential source. Mr Valintine's evidence is that this driver confirmed that, up until the Kopu fire in April 2018, commercial drivers took Commercial Waste either direct to Tirohia landfill or to the KRC at Smart's Kopu depot. After the fire, he told Mr Valintine that the position reversed and commercial drivers were told to dump at the more expensive RTS sites. He confirmed that the copy of the weighbridge docket he received showed the gate rate when using the RTS sites and that this remained the case after the change but that management told him that Smart had negotiated a better rate with TCDC.

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[108] This is despite the fact that the transcript is not signed by Mr Beros.

[339] As before, Mr Patterson objected to this evidence on hearsay grounds. For the same reasons and for the same limited purpose, I decline to strike out this evidence from Mr Valintine.[109]

[340] The second cohort of sources interviewed by Mr Valintine were former Smart managers who had been involved in the day-to-day running of the commercial side of Smart and an operational worker who had day-to-day contact with the drivers. Two—Alleyne O'Grady and Debra Park—also gave evidence. At the time of Mr Valintine's first interview with them they asked for and received an undertaking of confidentiality. Mr Valintine's evidence was that the round table interview was taped and quotes used in the Articles transcribed from the tape and subsequent interviews. Brief transcribed notes headed "Allie IV" were produced in evidence. There has been no suggestion that these sources were not accurately quoted.

[341] Mr Valintine also recounted concerns that the three interviewees expressed about being named in the Articles. The specifics, and whether or not the concerns were justified, is of no moment. The point is that Mr Valintine considered what they told him as part of his assessment of their bona fides. This is relevant since refusal to speak on the record or be identified as a source may, in some circumstances undermine veracity.

[342] Mr Valintine says that the three confirmed that:

(a) Smart commercial trucks had always, until May 2018, paid the gate rate posted by TCDC.

(b) Due to the high price, commercial drivers were not allowed to use the RTS sites except for operational necessity and generally only with the approval of the commercial manager because of the higher cost.

(c) Sometime before June 2018 at a monthly business review meeting, Mr Christian had instructed the use of the RTS sites instead of tipping

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[109] That is, I declined to strike paragraphs 176–187 from Mr Valintine's brief.

direct to Tirohia or other landfills. He had explained it was because the company now had a better deal with TCDC.

[343] Ms O'Grady told Mr Valintine that she noticed the weighbridge dockets still recorded the gate rate so, worried about being blamed for the high cost, she stuck with the old policy of going direct to Tirohia. She asked for an explanation, but could not understand the responses. Later, when asked by Mr Christian how many loads had gone to RTS sites, she told him "not many". She says that Mr Christian responded along the lines that "you are losing me money".

[344] Ms O'Grady also said that about a couple of months after the change in policy, she had been asked to get keys for the RTS sites cut for commercial drivers.

[345] Ms O'Grady gave evidence of speaking with Mr Valintine on multiple occasions and meeting with him twice. She had left Smart in June 2018. She also worked for a very short time at Coastal Bins on a part-time basis in late 2018. After leaving Smart, she had received messages from Mr Christian which she found upsetting. Ms O'Grady was also interviewed by the private investigator engaged by TCDC on 20 July 2019. These related to Smart's employment dispute with Mr Bain. Ms O'Grady was forthright in her evidence that she (understandably) had limited recollection of her discussions with Mr Valintine because of her circumstances. To an extent, she was reconstructing what she expects she would have told him. However, she clearly recalled being worried about the change in practice at Smart because a budget blow out might affect her performance assessment.

[346] I found Ms O'Grady to be a straightforward and honest witness whose evidence was unaffected by any of her dealings with Smart or Mr Christian. I also accept Mr Valintine's account of what Ms O'Grady told him pre-publication.

[347] Ms Park gave similar evidence. Ms Park was confused about the timing of the meeting with Mr Valintine in a local café. She too stated that she no longer recalled exactly what she told Mr Valintine. Nonetheless, her evidence generally supported what Mr Valintine reported she had told him.

[348] The third cohort of sources was Mr Howie, an individual from the owner of the Tirohia landfill, Waste Management New Zealand Ltd. He was not prepared to be interviewed on the record but confirmed to Mr Valintine there was no agreement between the owners and TCDC which allowed commercial operators the benefit of TCDC's lower rate for tipping. He gave evidence at trial. He confirmed that he had spoken with Mr Valintine pre-publication.

[349] Generally, all the information coming Mr Valintine's way, except the LGOIMA responses from TCDC, was consistent and supported Mr Bain's hypothesis. There was one significant exception. Pre-publication, Messrs Valintine and Bain were made aware of the email from Mr Christian to TCDC dated 10 April 2018 outlined above at [35].

[350] The question is whether this email should have alerted Messrs Valintine and Bain that TCDC had at least been notified or that there was an agreement between Smart and TCDC for a reduced rate at the RTS sites.

[351] On its face, one would expect that this email would have prompted inquiry as to whether there was any response from TCDC. However, Mr Valintine's TCDC source had confirmed there had been a rigorous search for contemporaneous documents and there was no tolling or discount agreement. There were also LGOIMA responses denying any discounting arrangement or tolling and Mr Bain's recollection of an attempt in 2017 to negotiate a discount with TCDC. There was also nothing to this effect in the formal Solid Waste Contract and a contractual provision requiring any variation to be in writing. It was reasonable to understand that such an arrangement was hardly a minor or mechanical variation.

[352] A closer scrutiny of Mr Christian's email is telling. It did not, with respect, advance a cogent argument of an agreement reached in 2013 between Smart and TCDC. The language instead reads very much as a preliminary proposal, not a statement of intention but rather of a desire to instigate a tolling arrangement.[110]

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[110] In cross-examination, Mr Christian agreed that TCDC had not come back to Smart with a substantive response.

[353] Subsequent emails between Smart and TCDC on the subject were however produced to the Court. These included an email from Ben Dey of Smart to TCDC following the fire at the Kopu facility to which I have already referred at [28].

[354] This email was put to Mr Bain in cross-examination:

> Q. And so, would you accept that Ben [Day] is notifying the Council that the option is being enacted?
>
> A. I accept that Ben [Day] is saying here they are going to do it which contrary to Grahame's 10th of April email.
>
> Q. … Wouldn't you agree that the words "we have enacted" is stating something that's happened?
>
> A. States something that's going to happen, yes.
>
> Q. Well no because he would say words to the effect of: "We will be," yes, yes agreed, yes. But you'd have to accept that we have [is] communicating to the Council that Smart has done it?
>
> A. Correct.

[355] The series of emails mean that the statements in the News Articles that "[t]he council investigation centres on whether Smart introduced the discount without advising or negotiating with council …" and "[t]he former member of Christian's team said the council was not consulted or advised" were misleading. The fact of disposal at Tirohia at "Council's rate" was disclosed. What was not explicitly disclosed is the rate.

[356] However, there is no evidence that Messrs Bain or Valintine were ever provided with the subsequent emails or had any notice of them. On the contrary, Mr Valintine said in evidence that he was "pretty sure we had one email, not the series". In my view, absent knowledge of the subsequent emails, the email dated 10 April 2018 is not evidence that Messrs Bain and Valintine's genuine belief in the sting of the Articles lacked objective reasonableness.

Involvement of Mr Valintine and NZME

[357] Mr Bain's involvement of Mr Valintine in the investigation came about because of his earlier experience of Mr Valintine's investigative capabilities. He respected

Mr Valintine as an experienced and highly regarded journalist. Mr Bain was entitled to expect a commensurate level of professionalism. He was also informed by Mr Valintine that NZME would have any articles 'legalled' and the underlying data audited for accuracy. He would have been aware that the *New Zealand Herald* was one of New Zealand's largest and most reputable media entities. The fact that he knew and understood there would be an independent 'checking' process would have increased his level of comfort that the Articles were accurate and lawful.

[358] That NZME apparently elected to proceed without an independent checking process does not detract from Mr Bain's understanding and expectation of process.

Opportunity to respond/comment

[359] Mr Valintine approached Mr Christian for comment more than six weeks before publication. This was initially in a series of texts between 12–24 June 2019 although Mr Valintine proposed to then email Mr Christian with a full set of questions.

[360] Mr Valintine characterised his text exchange with Mr Christian pre-publication as an "interview". This is an embellishment. Nonetheless I consider that Mr Valintine put to Mr Christian that the proposed story:

(a) related to the TCDC contract and what appears to be a significant discount Smart gave its commercial operation at TCDC RTSs which on its face breached contract terms; and

(b) included other issues and allegations, including afterhours access, apparent missing or unaccounted tonnes through the transfer stations, a significant number of loads not captured on weighbridges and recycling from Waipa being dumped in the Thames RTS.

[361] Mr Christian responded by text, "Wow that is pretty serious Mike and all denied". He then went on the counter-offensive against Mr Bain. He texted:

> We know who is making these complaints. He is an ex employee whom we are in legal proceedings against, and found over one thousand files in a

> memory stick that he stole from his previous employer. He has been running a gutter campaign against us for the past 12 months.

[362] Among other things, Mr Christian also told Mr Valintine in the text exchange:

(a) Smart had invested $8 million into the contract and was able to access transfer stations at a negotiated rate that offset Smart's massive and ongoing investment.

(b) The unaccounted tonnes issue was an error by a consultant, since rectified.

(c) Smart had to dispose of contaminated recycling after a significant fire, followed by another at the Kopu site. This was disclosed to Smart's clients.

(d) He was not able to comment about after-hours access except that it may happen but Smart would insist all staff account for transactions.

(e) Smart has an outstanding reputation of honesty and any such alleged action would have to be clandestine, involve many people and just would not happen.

[363] In follow-up text exchanges, Mr Christian suggested that Mr Bain should have known about the RTS rate when employed by Smart as it was definitely in the contract. This statement was at odds with Mr Valintine's knowledge of the Solid Waste Contract, Mr Bain's clear recollection of being asked to try to negotiate a preferential rate during his time at Smart and what the TCDC informant had conveyed.

[364] Mr Valintine proposed to Mr Christian that he "open the books" and the best way forward may be for Mr Valintine to send a series of questions and statements to both Mr Christian and Mr McLeay. Mr Christian responded:

> I think that is a good idea Mike. I honestly don't know why there is bad blood. Murray left of his own volition and whilst on paid 6 months leave, he was setting up in competition to us.

> I would want an undertaking that if we produce the documents that you will also publish that you have viewed the memory stick that clearly shows the stolen information and his private information on the stick and an email to me acknowledging that the stick was his.

[365] Mr Valintine's riposte was that Mr Bain was one of a dozen sources involved in the corroboration process and had had a minimal role given he was not employed by Smart at the relevant time. He indicated to Mr Christian that he would email the substance of the issues that needs to be addressed to both he and Mr McLeay.

[366] In Mr Christian's penultimate text to Mr Valintine, he said "send the email…and we will seek legal advice". He pointed out that Smart had a confidentiality obligation in the Solid Waste Contract to which Mr Valintine responded:

> I assure you there is no intent to have a trial by media but rather a pain staking [sic] attempt to ascertain sic the truth before publication. That can most easily be achieved by "opening the books" as we largely appear to have agreed to last evening.

[367] On 24 June 2019, Mr Valintine texted Mr Christian again for clarification to which Mr Christian texted back saying that he no longer has the right to speak on behalf of Smart in any capacity and the correct process is via Mr McLeay. He added that he "cannot and will not respond to any further queries".

[368] Mr Valintine had already emailed Mr McLeay on 13 June 2019 with a series of statements and asked for a response. He set out twenty detailed statements in his email. Materially, they included:

(a) In 2018, Smart reduced the fee it paid for its commercial waste dumped at the TCDC RTS sites from the council posted rate of $181 per tonne down to $77.05.

(b) Smart did so without consultation with the TCDC or notification of the "discount".

(c) This was a breach and deprived TCDC of substantial revenue during 2018.

(d) Retroactively Smart argued the "discounted" rate was based on an email exchange in 2013 which included discussion over a "tolling" rate for Smart.

(e) No agreement was reached with TCDC on a tolling rate at the time nor was it included in the contract or any subsequent variations.

(f) That from January through to October last year Smart did not send weighbridge transaction reports with the monthly claims to TCDC as had been common (and industry) practice until that point.

(g) Without transaction reports TCDC was unable to do an accurate reconciliation of the claim.

(h) Smart had keys cut to access RTS sites and supplied them to its commercial drivers allowing unfettered access to those sites after hours.

(i) Smart dumped commercial loads after hours and without TCDC's approval on a regular basis.

(j) In December 2018, Smart dumped more than 30 tonnes of recycling from the Waipa district in the Thames RTS.

[369] Mr McLeay contacted Mr Valintine by telephone but did not provide any written response. He told him that there were reasonable explanations for the key points but the clause in the Solid Waste Contract meant that he could not talk without TCDC approval. Mr Valintine's evidence is that Mr McLeay undertook to ask TCDC to let him respond. All went quiet. On the eve of publication, which was many weeks later, Mr Valintine texted him again to advise that the Articles were to be published the next day. Mr McLeay telephoned Mr Valintine in response. It appears he may have thought the story had "gone away".[111]

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[111] It is possible that Mr McLeay's belief stemmed from a negotiated settlement of the outstanding appeal against the Employment Relations Authority determination between Smart and Mr Bain.

[370] The email to Mr McLeay was fulsome and detailed. I consider it implausible that Mr Christian would not have seen Mr Valintine's email to Mr McLeay or its contents would not have been communicated to him by Mr McLeay. Common sense dictates that he was in the loop. It strains credibility to think that the senior persons at Smart were not discussing how to respond, if at all. This is particularly so since the allegations all related to the period in which Mr Christian was the managing director. He also remained on the board of Smart.

[371] There was the opportunity to seek waiver of the confidentiality provision from TCDC, if required, to address any inaccuracies. There is no evidence that Mr Christian or Mr McLeay did so. It was not logical in this context for one of the parties to the Solid Waste Contract to use the confidentiality provisions to prevent the other from correcting the record. It is apparent that TCDC had no qualms about providing high level comment to Mr Valintine although it refused to engage on the detail. It was quoted in the Articles.[112] In my assessment, Smart and Mr Christian chose not to respond, or to seek a release from TCDC. They preferred to use the confidentiality provision as a protective shield. They were entitled to do so. They had no obligation to speak with media. But, having adopted that strategy, they were on risk that any inaccuracies would not be corrected pre-publication. This is part of the context against which the publishers' responsibility must be assessed.

[372] There was no urgency to publish given the context. This was not a situation of perishable news in the ordinary sense. However, I reject the suggestion that the Articles were rushed to print and did not afford Smart and/or Mr Christian a reasonable opportunity to respond and or comment in a meaningful way. The contrary is true. I reject the criticism that the omission of certain details in Mr Valintine's communications with Mr Christian and Smart, such as, among other things, his access to TCDC data from an unnamed source, Mr Bain's analysis of that data, that Smart was under investigation by the Office of the Auditor-General and that there was video evidence of the dumping of recycling, led to unfairness. That level of specificity may

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[112] The terms of settlement included bilateral non disparagement provisions. The plaintiff did not make anything of those terms which both Smart (by Mr Christian) and Mr Bain arguably breached. As soon as TCDC commented to Mr Valintine for the article it is arguable that restrictions fell away as a result of the public domain exception.

be required of a prosecutor in a legal process but it is unrealistic for an investigative journalist.

[373] I am therefore satisfied that substance of the allegations was sufficiently put to both Mr Christian and Smart pre-publication to avoid unfairness.

Editorial licence

[374] Mr Patterson was critical of omissions from the Articles which created a misleading impression. He referred to:

(a) knowledge that other users of the RTS, not just Smart, had after-hours access so it was misleading to imply that Smart was the only operator accessing the RTS after hours.

(b) Mr Bain's knowledge that Smart drivers had keys to the RTS sites during his time with Smart.

(c) the publication of opinion from industry sources who were not aware that the analysis on which they commented relied on unauthenticated and unaudited data and who would not likely have suggested wrongdoing had they known.

(d) Mr Bain's knowledge that the Office of the Auditor-General was not taking any further investigative steps pending the conclusion of TCDC's inquiry.

(e) the failure to "qualify" other sources who were connected to Mr Bain leaving readers with an unbalanced view as to what weight, if any, to put on the assertions.

(f) the failure to disclose that the base information relied on Mr Bain's analysis only.

(g) omitting reference to the fact Mr Bain had made claims in the ERA against Smart in respect of disparaging statements by Mr Christian.

(h) omitting Mr Bain's threat to TCDC that he would go to the media unless they provided him with the same discounted rates.

[375] A publication may be held protected even if the journalistic exercise has in some respect fallen short of the standards to be expected of a responsible journalist. As Bingham LJ stated in *Jameel:*[113]

> If the thrust of the article is true, and the public interest condition is satisfied, the inclusion of an inaccurate fact may not have the same appearance of irresponsibility as it might if the whole thrust of the article is untrue.

[376] Courts must make allowance for editorial judgment and the fact that reasonable minds may differ on such a question.[114] As the United Kingdom Supreme Court stated in *Flood*:[115]

> The courts therefore give weight to the judgment of journalists and editors not merely as to the nature and degree of the steps to be taken before publishing material, but also as to the content of the material to be published in the public interest. The courts must have the last word in setting the boundaries of what can properly be regarded as acceptable journalism, but within those boundaries the judgment of responsible journalists and editors merits respect.

[377] In any event, I do not accept Mr Patterson's criticisms. Some, with respect, miss the point. It is the fact that it was the drivers of the Commercial Waste trucks who were given keys after the KRC fire rather than drivers of the Council Waste trucks which was material. The ERA issues were not particularly relevant. The fact that the Office of the Auditor-General was holding off investigating until TCDC responded was neither here nor there and, in my assessment, there was sufficient verification of the data analysis for the purposes of how the data was reported in the Articles.

[378] Finally, I have considered Mr Patterson's point that there was no need to reference Mr Christian by name in the Articles. His argument was that omitting that reference would have lessened the gravity of the sting and the decision to do so was

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113 *Jameel (Mohammed) v Wall Street Journal Europe Sprl,* above n 98, at [34].
114 At [51].
115 *Flood v Times Newspapers Ltd*, above n 72, at [137].

motivated by personal malice on the part of Mr Bain. While I accept that naming Mr Christian brought more focus to him, Mr Christian was implicated in the Articles regardless of whether or not he was named.

Conclusion on the defence of responsible communication

[379] The steps taken to verify the substantive allegations, the multiplicity of sources and their reliability combined with the inadequacy of the responses from TCDC to LGOIMA requests and the ample opportunity afforded to Smart and Mr Christian to respond substantively all lead me to conclude that this was a reasonable journalistic investigation on issues of public interest.

[380] Mr Bain's commercial interests in obtaining the same rates that Smart was receiving does not derogate from the steps Mr Valintine took to corroborate and verify the information before publication. Both Messrs Valintine and Bain had an honest belief in the substance of the matters published. They also had an expectation that the editors at NZME would exercise professional judgment and care.

[381] I uphold the defence of responsible communication on a matter of public interest. It follows that the claim in respect of the Articles must be dismissed.

[382] This defence provides the whole answer to Mr Christian's claim regardless of the truth or falsity of the allegations in the Articles. That I have concluded that the Articles were responsible communications on a matter of public interest of course says nothing about the accuracy of the sting of the Articles. That may appear a harsh result for any plaintiff concerned with reputational damage. In this instance, any reputation damage has been assuaged in part by the apology and retraction on the part of NZME and by the published findings of the TCDC following its inquiry.

Honest Opinion

[383] It is strictly unnecessary to discuss the defence of honest opinion in the light of my conclusions. However, both counsel provided extensive written submissions. In case it should be of assistance, I offer a few observations.

[384] I accept that a defendant's denial that a publication has the meaning complained of by a plaintiff does not preclude a defence of honest opinion.[116] The denial of meaning will nonetheless be one of the many factors to be taken into account in the assessment of whether any opinion is genuinely held.[117]

[385] Two particular requirements of the defence of honest opinion will be determinative in the present case. The first is the requirement to show that the defamatory imputation is recognisable as an expression of opinion rather than fact. The question is how the publication would strike the ordinary, reasonable, reader. Without finally deciding the point, I observe that the defamatory imputation arising in this case is a combination of conclusionary opinion and fact. The allegation that Smart's activities rorted TCDC and ratepayers is the conclusionary opinion but is inextricably tied to the description of Smart's activities. These elements are statements of fact. They fall well outside the principle expressed in *Gatley* that "a statement that may be regarded as an assertion of fact may yet be comment for the purposes of the defence if it comprises an inference from other facts stated or referred to".[118]

[386] Compounding the difficulty for the defendant is that the defamatory sting is that Mr Christian is complicit Smart's rort. This is the crux of the claim. It is difficult to see how this would be understood other than as a statement of fact.

[387] The second key requirement of particular relevance in this case is that a defendant must be able to prove the existence of true facts on which the opinion is based. This is because a sufficient factual basis for the opinion will allow the reader or audience to "assess the validity of the opinion for themselves against the relevant facts truly stated".[119] The onus is on a defendant to prove on the balance of probabilities and on admissible evidence of primary or underlying facts that those publication facts are true or not substantially different from the truth.

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116 In this regard, I respectfully agree with the decision in *Gatland v Fairfax New Zealand Limited* [2016] NZHC 970 and in *Arnold v Fairfax New Zealand Limited* [2016] NZHC 207.

117 The plaintiff filed and served a notice under s 39 of the Act asserting that Mr Bain had no honest belief in the imputations. The notice also sought to impugn Mr Bain's motive.

118 *Gatley* (12th ed), above n 16, at [12.8].

119 *APN New Zealand Limited v Simunovich Fisheries Limited*, above n 79, at [18].

[388] Not every fact in the publication must be shown to be true. The defendant must show that the opinion is genuine having regard to the facts that are proved to be true or not materially different from the truth or other true facts generally known at the time of publication.[120]

[389] Materially in this jurisdiction, the test of whether the opinion was honestly held is a subjective test. There is no objective element in the test.[121]

[390] I say that the two required elements in [385] and [387] will determine the outcome of the defence of honest opinion because I am easily satisfied that Mr Bain genuinely believed the imputations in the Articles. Mr Bain's evidence that he considered Mr Christian is Smart and should have responsibility for what he perceived to be Smart's wrongdoing was not shaken under cross-examination. His views were consistently held by him as seen in the contemporaneous documents.

[391] The defence of honest opinion is not defeated by malice. Mr Bain's motivation is relevant only in so far as it may tend to show that Mr Bain did not honestly hold the views. I do not doubt that Mr Bain's motivation was to advance the commercial interests of Coastal Bins by rectifying what he saw as an unfair playing field. I conclude that Mr Bain's personal animosity towards Mr Christian may have spurred his tenacity but it did not undermine his honest belief in the accuracy of the imputations.

Result

[392] I find that:

(a) Mr Bain is a joint tortfeasor;

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120 There would also need to be consideration of the effect, if any, of the Court's conclusion that the Articles were responsible communications on a matter of public interest. The Court in *Yeo v Times Newspapers Limited* [2015] EWHC 3376 appeared to accept the proposition that comment may be supported by facts published with the protection of *Reynolds* protection but was influenced in that view by the statutory defence of honest opinion in ss 3(3) and 3(7)(b) of the Defamation Act 2013 (UK). This proposition was neither pleaded nor argued in this case and not be addressed.

121 This is different in England and Wales although it might also be said that the "objective test" of honest comment in that jurisdiction is generous. Refer *Gatley* (12th ed), above n 16, at [12.27] and *Gatley* (13th ed) at [13.020] discussing the Defamation Act 2013.

(b) the Articles were defamatory of Mr Christian;

(c) the Articles bore the meanings set out in [252] and [272] above; and

(d) Mr Bain succeeds in his defence of responsible communication on a matter of public interest.

[393] I dismiss Mr Christian's claim. Consequently, the question of damages does not arise.

Costs

[394] Both parties requested to be heard on questions of costs. If costs cannot be agreed, memoranda of no more than 5 pages in length should be filed within 30 days, responses no more than 10 days thereafter and a reply if any (of no more than 3 pages) within a further 5 days.

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Walker J