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Case No: HQ15D04178

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

10 November 2017

Before:

**HIS HONOUR JUDGE MOLONEY QC
(SITTING AS A JUDGE OF THE HIGH COURT)**

Between:

KOFOWOROLA ADEOLU DAVID

Claimant

and -

ZARA HOSANY

Defendant

**The Claimant in person
Victoria Jolliffe (instructed by Carter-Ruck) for the Defendant
Hearing dates: 20th, 21st and 24th July 2017**

HTML VERSION OF JUDGMENT

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His Honour Judge Moloney QC:

1. INTRODUCTION AND OUTLINE CHRONOLOGY

1.1 This judgment follows the trial of a libel action brought by one Governor of the East London Foundation NHS Trust (Mr David, the Claimant) against another Governor (Ms Hosany, the Defendant) in respect of three documents written and published by her in 2015. The documents related to a complaint brought by her against him under the Governors' Code of Conduct.

1.2 This action has been the subject of a previous judgment by myself, [2016] EWHC 3797 QB. That related to applications by each side to strike out on the other's case or enter summary judgment. I did strike out a variety of claims brought by Mr David, including claims in slander and harassment, malicious falsehood, breach of confidence or privacy and under the DPA. However, I declined to strike out his three libel claims, which were then listed before me for trial.

1.3 At paras 1.3 to 1.16 of that interim judgment, I set out an outline chronology of the principal events, to which I refer as part of this judgment.

1.4 In briefest summary, the main relevant events are as follows:

Before 20 Jan 2015

Mr David and Ms Hosany worked together as Governors and developed a friendly relationship with one another. (Both were aged about 35 at the time).

20 Jan 2015

After a meeting they had supper and drinks together. At the end of the evening there is a crucial dispute as to whether, as Ms Hosany says, Mr David made a pass at her, an allegation which Mr David firmly denies.

21 to 23 Jan 2015

The next day, 21 Jan 2015, Ms Hosany was chairing a meeting of the Governors QI group, of which Mr David was a member. Then and over the next 2 days, a dispute arose between them about the work of the group and in particular, Ms Hosany's role as its chair. Mr David says this was a normal part of Governor's business. Ms Hosany says it was bullying and harassment on Mr David's part, motivated by his indignation at her having rejected his advances on the night of the 20th.

24 Jan 2015 to 2 Feb 2015

The Chair of the Trust, Marie Gabriel, became involved in the dispute. At an early stage, Ms Hosany told her the story about Mr David making a pass at her. Following discussions between them, Ms Hosany decided to make a formal complaint against Mr David.

2 Feb 2015

Ms Hosany drafted and sent to the Chair (Ms Gabriel) and the Secretary of the Trust (Keisha Ehigie) a 7-page document referred to as Written Complaint I, now complained of as the first libel.

3 Feb to 2 March 2015

During this period, Mr David discussed the dispute with the Chair. They reached a voluntary agreement to limit the contact between Mr David and Ms Hosany at meetings. Following Mr David's attendance at a QI group meeting on 18 Feb 2015, as to which Ms Hosany made allegations of misconduct by him, the Chair suspended Mr David from the QI group on 24 Feb 2015.

3 March 2015

Meanwhile, Ms Hosany had been redrafting Written Complaint I in consultation with the Secretary, Ms Ehigie. On 3 March 2015, she submitted the revised version, Written Complaint II, as a formal complaint under the Code of Conduct. It is similar but not identical to Written Complaint I and is sued on as the second libel.

March, April and May 2015

During this period, Written Complaint II was considered by the Nominations and Conduct Committee of the Governors. They decided to engage an independent consultancy, Capsticks, to carry out an inquiry. (Meanwhile, Mr David had obtained copies of both Written Complaints by means of a Data Protection Act request.) Capsticks produced a report which exhibited copies of both versions of the Written Complaint, and provided it to the Committee.

June 2015

On 1 June 2015, the Committee held its final hearing, following which it concluded that Mr David should face a formal charge before the Council of Governors and be suspended from all Governor duties meanwhile (as he was on 22 June 2015). On 30 June 2015, Mr David sent Ms Hosany a Pre-Action Protocol letter in respect of a defamation claim. Also on 30 June 2015, Ms Hosany was due to attend a meeting of the Trust's members and was concerned that Mr David might attend it in his capacity of a member, if not a Governor. (Mr David did attend that meeting and did sit next to Ms Hosany, though he says this was not deliberate). Ms Hosany then sent an email to Mason Fitzgerald, the Trust's Director of Public Affairs, which is the third document complained of as a libel.

July 2015

As a result of the events of 30 June, the Committee suspended Mr David from all Governor duties; on 14 July, Mr David resigned as a Governor.

October 2015

The present action was commenced. Its progress was delayed by the strike-out applications to which I have referred. Following the first judgment in September 2016, directions were given for trial, which was heard before me on 20 and 21 July 2017 with closing submissions on 24 July. Mr David and Ms Hosany were the only witnesses. Mr David represented himself, while Ms Hosany was represented by counsel and solicitors specialising in defamation.

1.5 Ms Hosany did not plead the defence of truth, but relied on the defence of common-law qualified privilege, to which Mr David responded with a plea of express malice. Resolving the malice issue will require me to make findings of fact, in particular as to the events of the evening of 20 Jan 2015.

1.6 I shall deal below with the following disputed issues. (Reference/identification is not disputed).

a. Publication

Ms Hosany accepts that her Written Complaints (and to a lesser extent the email) were circulated to a relatively small number of Governors and/or executives at the Trust. Mr David contends that there was also publication of the documents to a wider circle, and that in consequence, the allegations became known indirectly to an even wider circle by repetition. I will have to determine the extent of publication of each document, and to what extent Ms Hosany is liable in law for such publications by the Trust.

b. Defamatory Meaning

It is not disputed that the Written Complaints referred to and were defamatory of Mr David, though the nuances and severity of the meanings are disputed and will have to be determined. It is disputed whether the 30 June email was defamatory at all.

c. Qualified Privilege

Mr David contends that the publications were not privileged at all, because of Ms Hosany's position as a "public authority" under the Human Rights Act 1998, and because the publications related to private matters. In the alternative, he disputes the applicability of qualified privilege in respect of many, though not all, of the alleged publishees, on grounds specific to their various circumstances. It is for Ms Hosany to satisfy me in each case that an occasion of qualified privilege applied.

d. Express Malice

Here the burden is on Mr David in respect of Ms Hosany's knowledge and motivation in publishing the words complained of. It is his case that Ms Hosany fabricated the allegation about his sexual behaviour towards her on the evening of 20 Jan 2015 as part of a power struggle between them as Governors, and deliberately misrepresented or exaggerated her accounts of his subsequent behaviour towards her at meetings.

e. Serious Harm and Damage

If Mr David succeeds in respect of qualified privilege and malice as above considered, section 1 of the Defamation Act 2013 also requires him to show as a pre-condition of liability that the words complained of have caused "serious harm" to his reputation. At a final trial, this issue overlaps considerably with the issue of quantum of damage.

2. PUBLICATION OF THE WORDS COMPLAINED OF

2.1 As above stated, this involves consideration, separately in respect of each of the three items complained of, of two questions:

- a. Which persons or groups of persons are likely to have read the actual documents complained of? This is a pure question of fact.
- b. In respect of each such person or group, is Ms Hosany liable for that publication as a matter of law?

(I am not concerned at this point with the question of how far the defamatory allegations (if any) were spread orally or by other means to persons who never read the actual words; that question only arises in respect of the issues of serious harm under s.1 and quantum).

2.2 The legal principles applicable to the original author's responsibility for publication of defamatory material in the form of written words are familiar and not in dispute in this case. I refer to Chapter 8 of Duncan & Neill on Defamation (4th edition 2015) from which I draw the following basic propositions:

- a. The author is liable for publication to any person to whom she directly provided a copy of the document containing the words complained of.
- b. She is also liable for any such publication by another person which she has authorised or ratified.

c. Where the onward publication by another person has not been authorised or ratified, but is nevertheless reasonably foreseeable, the original author may be answerable for it in damages as a consequence of the original publication. But it is less clear whether there is a separate substantive cause of action against her. The editors of Duncan & Neill suggest at para 8.18 n.4 that the original publisher should be protected if she has used her best endeavours to prevent republication.

2.3 Mr David attempted to rely, in support of his case on liability for publication, on section 1 of the Defamation Act 1996 and section 8 of the Defamation Act 2013. Each of these sections refers to the concept of "publication"; but for the following reasons, I do not consider that they are relevant to the issues I am considering at this point in my judgment.

a. Section 1 of the 1996 Act is not, as Mr David suggests, directed at defining in what circumstances a person is liable for publishing or causing the publication of defamatory words. That remains a matter of common law. Rather, as the opening line of s.1 (1) indicates, it is concerned to define in statutory terms the common-law defence sometimes called "innocent publication": "*In defamation proceedings a person has a defence if he shows that...*" No such defence was relied on in this case, so s.1 of the 1996 Act is irrelevant to it.

b. His reliance on s. 8 of the 2013 Act is similarly misconceived. Section 8 is also concerned with a defence, not with the concept of publication. It relates to the "single publication rule" and has the effect of applying the short limitation period starting with the date of the original publication of a libel to later publications by the same person of substantially the same libel. (This is intended to protect internet archives, for example). It too is irrelevant to the issues in this case.

c. As a matter of courtesy to Mr David, who has done an immense amount of work and legal research on a case which is very important to him, I should also deal briefly with two authorities on which he places reliance. Theaker v. Richardson [1962] 1 WLR 153 was an unusual case in which the defendant wrote a letter addressed to the claimant herself (which would not be publication to a third party) but the claimant's husband opened and read it. By a majority, the Court of Appeal declined to overturn the jury's conclusion that it was reasonably foreseeable that such a thing might happen as a result of the defendant's act. Such a decision is of limited value as a source of legal principle; but in any case, my conclusion on the evidence here (set out at 2.12 to 2.15 below) is that it was not reasonably foreseeable by the Defendant that her Written Complaint I would enjoy the unintended wider publication which it in fact received.

d. Godfrey v. Demon Internet [2001] QB 201 was concerned with the liability of an Internet Service Provider (ISP) for material placed on its server by a third party, and with the defence of "innocent publication" under s.1 of the 1996 Act, which was properly in issue in that case. It considered the old common law case of Byrne v. Deane [1937] 1 KB 818 in which a golf club was sued for failing to take down a defamatory notice on the club notice board. This line of authority concerns the extent of responsibility of third parties for defamatory material originated by another person without their knowledge. It has no relevance to a case like the present, in which the Defendant accepts that she both wrote the words in question and published them, to the extent set out below.

2.4 I shall now seek to apply the principles stated at 2.2 above to the disputed allegations of publication arising in respect of each of the three documents in turn.

WRITTEN COMPLAINT I

2.5 Ms Hosany accepts that she sent this directly by email to the Chair and the Secretary of the Trust (both of whom as will be seen have a specific role under the Complaints Procedure) by email dated 2 February 2015. She does not dispute her liability for that publication.

2.6 Ms Hosany also accepts that on 30 May 2015 she emailed a copy of Written Complaint I to a fellow Governor, Norbert Lieckfeldt, by sending him a full copy of the Capsticks Report to which it was attached. This was in the context of inviting him to attend the upcoming Conduct Committee meeting as her "friend" as permitted by the rules. (The privilege issues to which this gives rise are considered at (4) below).

2.7 Mr David alleges the following further direct publications of Written Complaint I by Ms Hosany, which Ms Hosany does not accept:

a. To Melanie Folkes-Mayers, a friend who was advising Ms Hosany on Human Resources matters relevant to her complaint. But the only evidence of communication between them is an email from Ms Hosany of 27 Jan 2015 sending her copies of the Code of Conduct and terms of reference of the Conduct Committee. This pre-dates the composition of Written Complaint I, let alone Written Complaint II, and there is no evidence that Ms Folkes-Mayers ever received the complaints themselves from Ms Hosany or anyone else. I conclude that she was not a publishee.

b. To Carrie-Ann Wade-Williams, the Trust's Director of Communications. There is evidence that Ms Hosany wanted to discuss matters on the telephone with her in early February 2015, and that she was later interviewed as part of the Capsticks inquiry; but there is no evidence that she was ever provided with a copy of any of the three written documents now complained of.

c. To Carol Ann Leatherby. Like Ms Wade-Williams, Ms Leatherby is a fellow Governor with whom Ms Hosany may have discussed aspects of her complaint orally, but as to whom there is no evidence that she ever saw any of the three written documents complained of.

d. To Amar Shah. He was a senior officer of the Trust to whom Ms Hosany sent an email on 28 January 2015 telling him of her decision to make a formal complaint against Mr David. Again, this was before the composition of Written Complaint I and there is no evidence that Mr Shah was ever actually provided by anyone with a copy of any of the three documents complained of.

2.8 Turning to indirect publications of Written Complaint I, Ms Hosany accepts that the following persons were provided with copies of Written Complaint I, not by her but by third parties.

a. The 4 Governor members of the Conduct Committee considering her complaints:

Ajith Lekshmanan, Neil Wilson, Katherine Corbett and Ferenkeh Jalloh;

and the Senior Independent Governor, Nicola Bastin.

(They received it as an exhibit to the Capsticks Report.)

b. The Human Resources advisers to the Trust and the Conduct Committee:

Sandi Drewett and Eyong Besong;

c. Alice Wyman, the Capsticks executive conducting their inquiry.

2.9 Mr David alleges, and Ms Hosany disputes, indirect publication to the following persons:

a. Three PAs to the Chair of the Trust: Nicola McCoy, Maxine Cameron and Christine Collins. As to these, it is clear that on 17 March 2015 Ms McCoy emailed Mr David a series of documents pursuant to his DPA request, including Written Complaint I and Written Complaint II, so she could have read them. However, there is no evidence that she actually did so; if she did do so, it is likely that she was not authorised by the Trust, let alone Ms Hosany, to do so. As to Ms Cameron and Ms Collins, there is no evidence linking them to the actual written complaints, as opposed to having some more distant involvement with the inquiry.

b. Joy Pons, the Trust's Information Governance Officer, who dealt with Mr David's DPA request for copies of (inter alia) the two Written Complaints. Her email of 6 March 2015 states that Ms Ehigie was dealing with the DPA request; and indeed Ms McCoy's email of 17 March 2015 referred to above sends the requested documents to Mr David direct without copying in Ms Pons. Mr David submits, understandably, that if Ms Pons was responsible for the Trust's DPA matters, it would be surprising if she did not look at the documents which were the subject of the request. In principle, I see the force of this; but the emails show clearly that, at least on this occasion, she delegated the task to Ms Ehigie. In any event, if Ms Pons had seen any of the documents in her capacity as DPA officer, it would have been as a direct result of Mr David's own DPA request, but for which she would plainly never have seen them. In other words, publications to her would have been authorised or consented to in advance by Mr David himself and could not constitute a publication upon whom he could sue anyone, least of all Ms Hosany.

c. Dean Henderson. He was the Chair of the 30 June 2015 meeting. Earlier that day, Ms Hosany sent an email to Mason Fitzgerald, the Director of Corporate Affairs, asking him to inform Mr Henderson of the full nature of her complaint, so that he would be alerted to the need to protect her from being harassed by Mr David at the meeting. Mr Fitzgerald replied that he had "alerted" Mr Henderson about Mr David's suspension. It appears probable that this was done orally (see Mr Fitzgerald's email to Ms Gabriel of 30 June 2015 referring to his "conversation" with Mr Henderson) and there is certainly no evidence that Mr Henderson was sent a copy of either of the Written Complaints.

d. Paul Binfield is referred to in an email from Norbert Lieckfeldt dated 12 February 2015 as having mentioned the fact that a Hackney Governor had been the subject of a recent complaint. Mr David is a representative of Hackney on the Governors (as is Ms Hosany) so this may well be a reference to him. But at most it proves that Mr Binfield had heard of the complaint, not that he had read it.

e. Richard Harwin is the Trust's Police Liaison Officer. On 3 July 2015, he accompanied Ms Hosany to Shoreditch Police Station when she reported Mr David for harassment following the 30 June 2015 incident. He sent Mason Fitzgerald an email that afternoon reporting the meeting. His email makes no mention of any documents being produced by Ms Hosany to the police and there is no evidence to suggest that he was ever provided with copies of the Written Complaints (as opposed to receiving an oral briefing).

f. Mason Fitzgerald, the Corporate Affairs Director, was not directly involved in the Conduct Committee complaints process or present at any of its

meetings. It is probable that he knew the nature of the allegations in Written Complaint I and Written Complaint II, but there is no evidence that he read the actual documents.

g. Shefa Begom provides support to Trust workers in need of it. On 6 February 2015, in course of email conversations with Ms Ehigie about the formal complaint (Written Complaint I), Ms Hosany asked for such support and (in an email disclosed at a very late stage) Ms Ehigie replied "As discussed, I have copied in Shefa". This might suggest that she was copied into Written Complaint I itself, but on the basis of her reply ("Keisha has sent me your details"), I consider it more probable that she only received the email, not a copy of Written Complaint I.

2.10 Having decided who read Written Complaint I, the next question is whether, in relation to each of those persons, Ms Hosany is responsible in law for publication to them, according to the legal principles set out at 2.2 above.

2.11 Plainly she is responsible for the direct publications to Ms Gabriel, Ms Ehigie and Mr Lieckfeldt; she does not dispute this.

2.12 As to the indirect publications of Written Complaint I, Ms Hosany denies responsibility on the following basis:

a. She was told by Ms Gabriel in an email dated 27 Jan 2015 that a written complaint would "provide clarity for the complainant (yourself), the receiver (initially myself and then possibly the Committee if escalated)" (i.e. the Committee would not see it unless it was escalated).

b. Written Complaint I itself ends "I trust the complaints will not be shared with any further parties without my consent".

c. On 4 February 2015, Ms Ehigie asked her when she wanted Written Complaint I to be disclosed to the Committee, and would she like Ms Ehigie to summarise it for the Committee. (This was the genesis of Written Complaint II).

d. Between 5 February and 3 March 2015, Ms Hosany and Ms Ehigie were engaged in preparing the "summary" which became Written Complaint II. In the course of this process, Ms Ehigie told Ms Hosany "We will not be sharing your original full complaint".

e. When on 3 March 2015 Ms Hosany sent Ms Ehigie the final version of Written Complaint II, she said "Please find attached a copy of my complaint I would like to be submitted to the CC".

f. In her email of 30 May 2015 to Mr Lieckfeldt sending him the Capsticks report, Ms Hosany commented: "They also included a draft I'd sent initially to Marie to inform her of what was happening. Keisha then asked me to put it in bullet form to use officially so not sure why my draft was used as evidence also".

2.13 It is clear from the above contemporary documents that:

a. Written Complaint I was originally sent to the Chair and Secretary for their eyes only, with the possibility that Ms Hosany would later authorise its publication to the NCC.

b. This was superseded by Written Complaint II; Ms Hosany was plainly told Written Complaint I would not be circulated.

c. Ms Hosany plainly concurred with the circulation of Written Complaint II; there was no intention at that stage to circulate the very similar Written Complaint I as well.

2.14 Written Complaint I was only put into circulation following an unforeseeable chain of events with which Ms Hosany was not involved.

a. The Committee decided to engage Capsticks and as a result, Alice Wyman was given access to all evidence (including Written Complaint I).

b. Independently, Mr David served his DPA request for both versions, which were then sent directly to him and referred to in his evidence to Capsticks.

c. As a result of (a) and (b) above, Capsticks chose to exhibit Written Complaint I to their report, to Ms Hosany's evidently sincere surprise and indignation.

2.15 Given that Ms Hosany never expressly or impliedly authorised onward publication of Written Complaint I and that its eventual disclosure was the result of a sequence of unforeseeable events outside her control, I conclude as a matter of law that she is not legally responsible for any of the proven republications of Written Complaint I, that is to the five Governors on the Committee, to its HR advisor Sandi Drewett, or to Alice Wyman.

2.16 This is largely an academic question, however, given that as set out below Ms Hosany does accept liability for publication of Written Complaint II to those people, and Written Complaint II is substantially similar to Written Complaint I, indeed rather more serious.

WRITTEN COMPLAINT II

2.17 In the light of the above findings as to Written Complaint I, the publication issues around Written Complaint II can be dealt with much more shortly.

2.18 Ms Hosany accepts direct publication of Written Complaint II to Ms Ehigie and Mr Lieckfeldt. She accepts that it was in fact published to Ms Gabriel (an ex officio Committee member), the five Governor members of the Committee and the HR advisors, as well as to Alice Wyman.

2.19 Mr David's allegations that Written Complaint II was published more widely than that are the same as in respect of Written Complaint I, and fail for the same reasons.

2.20 Ms Hosany does not dispute legal responsibility for the indirect publication of Written Complaint II to the Committee members and their advisors – by this time, she was familiar with the Code of Conduct and well understood the Complaints Process. As to Ms Wyman, she may not have expressly agreed that the Committee would call in an outside investigator but she certainly took no steps to prevent it. It was a reasonably foreseeable consequence of her complaint, and I conclude that she is liable for publication to her as part of the complaints process.

THE 30 JUNE EMAIL

2.21 The email was directly sent to Mr Fitzgerald and Ms Gabriel; although Ms Bastin had been in the preceding email chain it does not appear to have been sent or forwarded to her.

2.22 As a result of this email, Mr Fitzgerald prepared a further complaint to the Committee based on Mr David's alleged conduct at the 30 June meeting. That complaint was presented orally by Ms Gabriel to the Committee meeting on 7 July 2015; a formal

written complaint was promised for the next meeting but was superseded by Mr David's resignation. It is probable that the essence of the allegation made by Ms Hosany in the email was communicated orally by Ms Gabriel to the Committee members; but there is no evidence that they were given copies of the email itself, so they cannot be libel publishees.

2.23 In his Witness Statement, Mr David suggests a further group of publishees of the email:

- a. Another PA, Melanie Docherty, who corresponded with him on Ms Gabriel's behalf in respect of the 30 June incident;
- b. Richard Harwin, in respect of the visit to the police station;
- c. Peter Landsman, in respect of an oral communication from Ms Hosany; and
- d. The Trust staff who were told to have Mr David removed by security if he turned up at Trust premises in breach of the ban.

2.24 For the same reasons as those given in respect of similar alleged publishees of Written Complaint I, I do not accept that Mr David has discharged the burden of proof upon him in respect of proving that any of these people actually read a copy of the email. In respect of Mr Landsman, it is clear that he did not; in respect of the others, there is no or no sufficient reason to suppose that they did. The communication of the allegations, if made at all, could have been made orally or by another document. There is no reason to suppose that it was by means of the circulation of the email itself (which for the reasons considered at (3) below as to defamatory meaning is not easy to understand without background information or further explanation).

GENERAL PUBLICATION

2.25 Besides identifying named publishees as considered above, Mr David also invites the inference that a wider class of people not individually known to him had read the Written Complaints and the email. It is perfectly legitimate to put forward such a case, and to base it on inference rather than direct evidence if necessary; but a factual basis for the inference must be laid.

2.26 Mr David's case is that it became clear to him from remarks passed that the general nature of the allegations was widely known around the Trust and the area, sometimes in an exaggerated form. This is not improbable; but it is more likely to have been caused by oral repetition than by the unauthorised circulation of these manifestly confidential documents.

2.27 If the actual documents had been more widely distributed and read, it is likely, especially in this email age, that some copies would have been found, or perhaps even sent to Mr David himself. There is no evidence at all of this, and therefore no reason to attribute the spreading rumours to written rather than oral repetition; so this part of his Mr David's case fails for want of proof.

3. DEFAMATORY MEANING

3.1 I shall now decide whether the words complained of are defamatory at all (which is not disputed, at least in respect of Written Complaint I and Written Complaint II) and if so, what defamatory meaning or meanings they bear.

3.2 The Court's primary task is to determine the natural and ordinary meaning of the words, according to the familiar principles approved by the Court of Appeal in many cases, for example Gillick v. BBC [1996] EMLR 26) per Neill LJ, as set out in Duncan & Neill (supra) at para 5-16.

"(1) The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer watching the programme once.

(2) The hypothetical reasonable reader (or viewer) is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal.

(3) While limiting its attention to what the defendant has actually said or written the court should be cautious of an over-elaborate analysis of the material in issue.

(4) A television [i.e. general media] audience would not give the programme the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article.

(5) In deciding what impression the material complained of would have been likely to have been on the hypothetical reasonable viewer, the court are entitled (if not bound) to have regard to the impression it made on them.

(6) The court should not be too literal in its approach.

(7) A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally, or be likely to affect a person adversely in the estimation of reasonable people generally."

3.3 In this case, Mr David at various points refers to "innuendo" meanings. The law distinguishes between the "true innuendo", that is a defamatory meaning which is only apparent to readers with knowledge of special background facts, and the "popular innuendo", which is no more than the pleader's summary of the sting of the libel in other words. There is more scope in this case for the application of the true innuendo principle to the 30 June email than to the Written Complaints, which are detailed and carefully written documents whose meaning would be apparent to the general reader without benefit of special knowledge.

3.4 In considering the meaning of the documents complained of here, the two points of special importance in terms of the Court of Appeal's above guidance are these:

a. The characteristics of the hypothetical reasonable reader

With the exception of Ms Wyman, all the proven publishees here are either Directors or officials of the Trust. They may be presumed to be serious responsible people, who in a work context would be likely to approach documents more carefully and analytically than the general newspaper reader.

b. The context and circumstances

The Written Complaints, and indeed the email, are documents written in a formal official context, which by their nature are likely to contain serious criticisms of Mr David, and in respect of which the addressees may be asked to make important decisions. Again, this is likely to lead the reasonable reader of such a document to adopt a more careful and analytic approach than the general newspaper reader.

THE WRITTEN COMPLAINTS

3.5 With that background, I turn to consider the meaning of the Written Complaints. (They are relatively lengthy typed documents, 7 and 6 pages respectively, which should be annexed in a Schedule to this Judgment.)

3.6 They are similar but not identical. The principal differences are these:

- a. Written Complaint I is in the form of a letter to Ms Gabriel, addressed in the second person, whereas Written Complaint II is addressed more formally to the members of the Committee.
- b. The incidents are differently ordered. In Written Complaint I the "precursory incident" is mentioned only on page 4, whereas in Written Complaint II, it appears in its correct chronological position on page 1, giving it greater prominence.
- c. Written Complaint I only refers to 8 events, up to 29 Jan 2015, whereas Written Complaint II includes 4 more in Feb 2015.
- d. Significantly, Written Complaint I gives a fairly detailed and specific account of the events of the evening of 20 January 2015, describing Mr David's conduct as "he grabbed me round the waist, pulled me to him and whispered in my ear that he wanted to be more than friends with me". Written Complaint II adopts a vaguer formulation "his unwanted advances ... escalated to inappropriate acts of both a physical and verbal nature" which paradoxically may give a more serious impression of his alleged conduct.
- e. Written Complaint I contains a substantial passage about the Sex Discrimination Act 1975 and the nature of sexual harassment, which is omitted from Written Complaint II.

3.7 Both in his Amended Particulars of Claim and his Skeleton Argument and written submissions prepared for the trial, the Claimant has done his best to set out the defamatory meanings of which he complains. But he has done so by way of a running commentary on the words complained of, rather than by setting out his meaning in a clear concise form as defamation practice generally demands. Over and above the Defendant's meanings, set out below, his case may be summarised as that the reasonable reader would understand the publications complained of, in particular the Written Complaints, in the following principal meanings:

- a. that the incident of the 20th January was of a most serious nature, premeditated, unlawful and leading to an attempt to follow the Defendant home for the purposes of rape or sexual assault;
- b. that the various later incidents complained of are also to be categorised not merely as harassment but as unlawful sexual harassment;
- c. that there was a conflict of interest between his roles as Governor and as a party politician, and that he intended to abuse his Governor role for political advantage;
- d. that he had improperly failed to engage in the mediation process and the Trust's procedures;
- e. (as to the 30 June email) that his conduct at that day's meeting was a further instance of sexual harassment.

3.8 The Defendant, having the benefit of specialist legal advice, has set out in her Skeleton Argument the following as the highest defamatory meaning which either Written Complaint I or Written Complaint II can bear:

(1) Mr David behaved in an intimidating and bullying manner towards Ms Hosany in his dealings with her as a fellow Governor in one-to-one encounters, meetings and emails amounting to breaches of the Governor's Code of Conduct.

(2) Mr David may have behaved in this way as a result of an earlier incident on the evening of 20 Jan 2015 during which Ms Hosany rejected Mr David's unwanted advances thus making the conduct at (1) amount to unlawful sexual harassment.

3.9 Having stood back and re-read Written Complaints I and II separately, and endeavouring to put myself in the position of a hypothetical reasonable reader with the characteristics described above, reading the words for the first time without the benefit of lengthy legal argument, I conclude that the natural and ordinary meanings of Written Complaint I and Written Complaint II are rather more serious than those for which Ms Hosany contends, and that in some respects the meanings are closer to those for which Mr David contends.

3.10 I find that the natural and ordinary defamatory meanings are as follows:

WRITTEN COMPLAINT I

A. In the course of working with Ms Hosany as a fellow governor of the East London Foundation NHS Trust, Mr David persistently bullied, insulted and intimidated her, face to face, at meetings, and by email, to such an extent that she suffered serious physical and emotional stress.

B. He unreasonably persisted in this behaviour despite warnings from the Chair of the Trust.

C. His reason for treating Ms Hosany in this way was because she had declined his request to enter into a sexual relationship with him. In those circumstances his treatment of her constituted unlawful sexual harassment.

D. His above conduct was a breach of the Governor's Code of Conduct.

E. In addition, he breached the Governor's Code of Conduct by taking improper advantage of his position as a governor to further his party political interests.

WRITTEN COMPLAINT II

A. In the course of an evening out together, Mr David had sexually assaulted Ms Hosany against her will.

B. Because she had refused to enter into a sexual relationship with him, he persistently bullied, insulted and intimidated her in the course of working with her as a fellow governor of the Trust. He did so face to face, at meetings and by emails, to such an extent that she suffered serious physical and emotional stress.

C. He persisted in this behaviour despite warnings from the Chair of the Trust, and defied the Chair's attempts to protect Ms Hosany from harassment by him at meetings.

D. His treatment of Ms Hosany constituted sexual harassment.

E. His conduct at B, C and D above was a breach of the Governor's Code of Conduct.

F. In addition, he breached the Governor's Code of Conduct by taking improper advantage of his position as a governor to further his party political interests.

3.11 In relation to the principal differences between these meanings and those for which the parties contended, my reasons are as follows:

3.12 I do not accept Ms Hosany's contention that a reasonable reader would have understood her to be saying that Mr David's treatment of her may have been the result of her rejecting his sexual advances, rather than that it was the result. This argument is based on her repeated use of the phrase "I feel" or its equivalent. On this point, I see a close analogy with the well-known repetition rule, dealt with at para 5.17 of Duncan & Neill supra, by which a person who says "X told me this" is treated as if he had said "This is the fact". While each publication must be read on its own terms and without applying fixed rules of construction, when in this case an apparently responsible person describing events to which she was a party says that she "feels" Mr David's motivation was as stated, and uses that feeling as the basis for a serious allegation of harassment, my conclusion is that the reasonable reader would understand her to be saying that such was in fact his motivation.

3.13 As to whether the reasonable reader would understand Ms Hosany to be saying that Mr David's sexual harassment of her was unlawful, this allegation is express in Written Complaint I because of the reference to the Sex Discrimination Act. That reference is not found in Written Complaint II, and I do not consider that a reasonable reader would imply in the concept of unlawfulness when that formed no express part of Ms Hosany's long and detailed written complaint.

3.14 As to the description of Mr David's sexual conduct towards Ms Hosany, and whether a reasonable reader would understand it in a defamatory sense independently of the allegations about Mr David's subsequent behaviour, there is an important distinction between Written Complaint I and Written Complaint II. In my judgment, a reasonable, right-thinking member of modern society would not consider it shocking or discreditable for a man, at the end of a social evening alone with a single woman of equal status whom he found attractive and friendly, to put his arm around her waist and ask her if she would like them to become closer. Provided he did nothing positively indecent and took "No" for an answer, most right-thinking people would accept this as a normal part of life, as indeed Ms Hosany says she did at the time. So, in Written Complaint I, what is criticised is Mr David's conduct after that incident. (It might be defamatory of a married man to allege that he had so behaved to another person, imputing infidelity; but Mr David has never complained of that meaning).

3.15 In Written Complaint II, however, the effect of blurring the physical details of the incident, while putting it on page 1 of the complaint, is to give the reader the impression that the physical acts, described as "inappropriate", were of a serious though unspecified nature and were very unwelcome. This is a separate and defamatory allegation which should be reflected in the meaning. (However, I do not consider that any reasonable reader would infer from the words of either complaint that Mr David's conduct was premeditated or that in offering to walk her home he was setting out to rape or assault her; that is a gross exaggeration of the content and tone of these Complaints.)

3.16 Both Complaints emphasise the persistence of Mr David's harassment at the Trust despite interventions from the Chair. That is a matter that this readership would take as seriously.

3.17 I also accept his submission that while most of the specific matters in the Complaints fall under the general description of harassment of Ms Hosany, there is one serious allegation of a separate but defamatory nature. That is the allegation, common to both Complaints, that in an email Mr David had indicated his intention to continue taking political advantage of his role as a Governor, a matter which Ms Hosany says she had

previously warned him against. This is a distinct defamatory allegation which should be separately reflected in the meaning.

THE 30 JUNE EMAIL

3.18 This is worded as follows:

"Hi Mason

Can I just report that he turned up to the meeting tonight and Dean just said Hi to him. He walked straight past empty chairs to the end of the room where I sat, removed a piece of paper in the seat, sat down and handed it to me. I moved seats.

He followed me into the next room after the meeting. I left the room. He signed in as a governor on the register which Dean has. My number is

Best wishes. Zara"

3.19 On its face, the email neither names Mr David nor contains any expressly defamatory allegation against him. However, like any allegedly defamatory document, it must be read in its context, which for this purpose, I take to be the email string of which it is almost the final post, the string headed RE: PRE ACTION PROTOCOL which began with Mr David's email to her at 0815 on 30 June 2015, forwarded by Ms Hosany to Ms Gabriel, Mr Fitzgerald and Ms Bastin at 0918 and continued throughout the day.

3.20 The initial email from Mr David himself is enough to identify him as the unnamed person later referred to in the words complained of.

3.21 In her 0918 email, Ms Hosany referred to harassment, intimidation and her anxiety that Mr David might turn up at that evening's meeting. At 1140 Ms Gabriel asked Mr Fitzgerald what assurances he could give about tonight and at 1152, he responded that he had alerted Dean [Henderson] about Mr David's suspension.

3.22 It is, therefore, clear from the context alone, without resorting to extrinsic information such as would found an innuendo meaning, that it was Ms Hosany's concern that Mr David would attend the meeting despite his suspension and would therefore harass and intimidate her. In that context, a reasonable reader of the whole string would plainly understand the email to be an allegation that Mr David's acts towards Ms Hosany, there set out, constituted harassment and intimidation and would give the email the following meaning:

Mr David deliberately harassed and intimidated Ms Hosany at a meeting on 30 June 2015 by attending it, sitting next to her and following her around, when he well knew that she did not want him to do so and found it distressing.

3.23 One could reach the same conclusion by way of true innuendo, because both the actual publishees, Mr Fitzgerald and Ms Gabriel, had a sufficient knowledge of the nature of Ms Hosany's previous complaints and the reasons for Mr David's suspension to reach a similar conclusion about meaning, even if they had not read the preceding messages in the string. But since they plainly did read them, it is an artificial distinction.

3.24 Mr David suggested that the 30 June email did not merely allege harassment and intimidation but sexual harassment, since that was central to Ms Hosany's previous complaints. But sexual harassment is not referred to in the email string, specifically not in Ms Hosany's earlier reference to harassment and intimidation, and my conclusion is that a reasonable reader would not view the email as alleging specifically sexual harassment in the absence of any express reference to sexual matters anywhere in the email string.

3.25 Finally, on the question of meaning, I should deal briefly with the question whether the meanings I have found the various documents complained of to bear are defamatory of Mr David. Neither side devoted any time in submissions to this question, no doubt because the answer is obvious. A defamatory statement is one which has the effect of lowering a person's reputation in the eyes of right-thinking members of the community, generally though not always by alleging some misconduct. The Written Complaints allege a series of acts of misconduct and the 30 June email does so when read in context. Each document is clearly defamatory in respect of each meaning I had found, in the common-law sense of that term. (Of course, by s.1 of the Defamation Act 2013, a statement is not defamatory unless it also causes serious harm, a question considered at (6) below.)

4. QUALIFIED PRIVILEGE

A. General Principles

4.1 In principle, defamation is close to being a tort of strict liability. Once it is shown that the defendant has caused the publication of words which refer to and are defamatory of the claimant, she will be liable regardless of her motivation or intention in so doing, unless she can establish one of the recognised statutory or common law defences.

4.2 One of the most commonly used defences is that of common-law qualified privilege. This focuses not so much on the content of the words complained as on the occasion on which they were published. Were the circumstances such that the publisher had a legal, social or moral duty or interest to make the publication, and the publishee a corresponding duty or interest to receive it? If so, the publication took place on an occasion of qualified privilege, the qualification being that the publisher must not be actuated by express malice. But unless the claimant can prove such malice, the defendant will have a complete defence (see Duncan & Neill above, para 17.05 and following).

4.3 The categories of common-law qualified privilege are not closed. Because the purpose of the defence is to advance the common convenience and welfare of society by encouraging the free communication of defamatory allegations on suitable occasions, developments in social life will generate new situations to which the privilege may be held to apply. But a well-recognised occasion of privilege has long been the making and handling of complaints to the proper authorities, especially complaints about public officers, persons in authority and those with responsibilities towards the public. (See Gatley on Libel and Slander (12th edn 2013) at 14.59 to 14.62 and the authorities there cited.) This is not an obsolete head of privilege but one of increasing importance in modern conditions. A person who makes such a complaint has a recognised interest in having it considered and determined; and the receiving body has a corresponding interest, and usually a corresponding duty, in so doing.

4.4 In order for the purposes underlying the privilege to be carried into effect, the defence is not confined to publications passing directly between the person making the complaint and the person whose role it is to determine it. The law recognises that, as a practical matter, other people such as advisors, secretaries and administrators are likely to play a part in facilitating the process, and the privilege extends to such "ancillary" publications as are reasonably required to carry the privileged purpose into effect. But publications to people who have no sufficient link to the purposes for which the privilege is recognised will fall outside the scope of the privilege and will not be protected.

B. Public Authorities

4.5 In Clift v Slough Borough Council [2010] EWCA Civ 1484, the Court of Appeal recognised a limitation on the scope of common-law qualified privilege, applicable to "public authorities" responsible for a defamatory publication. A person's right to reputation is an aspect of his Article 8 ECHR right to respect for his "private and family life, home and correspondence". By s.6 (1) of the Human Rights Act 1998, *"it is unlawful for a public*

body to act in a way which is incompatible with a Convention right". It follows that, even if a defamatory publication by a public authority meets the common law criteria of qualified privilege, for example, common and corresponding interest, the publication will nevertheless be unlawful and disentitled to privilege if it is incompatible with the claimant's Article 8 rights.

4.6 The Article 8 right is itself a qualified one. By Article 8(2):

"There shall be no interference by a public authority with the exercise of this right except such as if in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, or for the protection of the rights and freedoms of others".

4.7 In the present case, Written Complaints I and II contain allegations about Mr David's sexual behaviour and his personal relations with Ms Hosany. Their publication to third parties, therefore, engages his Article 8 rights. (This is not so in respect of the 30 June email, which does not deal with such matters but with allegations about his conduct at a public meeting).

4.8 If this action had been brought against the Trust itself or one of its officers acting on its behalf, it would be clear that the defendant was a public authority and the Clift restriction on qualified privilege would apply. But can the same be said when, as here, the defendant is an individual Governor of a public authority and the publications were made in relation to a complaint about another Governor's conduct towards her?

4.9 Subsections 6 (3) and 6 (5) of the Human Rights Act 1998 address this question.

"(3) In this section "public authority" includes:

a. a court or tribunal; and

b. any person certain of whose functions are of a public nature.

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private".

4.10 Although the point was not fully argued before me, I am prepared to accept that there may be circumstances in which an individual member of the governing body of a public authority, such as a councillor or governor, might meet the test of having certain functions of a public nature, and might therefore be categorised as themselves being a public authority. This might be the case if, for example, the individual held a leadership role or was vested with some decision-making power. The terms of the statement complained of, and the circumstances in which it was made, might well themselves provide a clear indication as to whether they had been published as part of the exercise of a function of a public nature.

4.11 But, as s.6 (5) makes clear, even if a human being has the character of a public authority when exercising a public function, it does not follow that all their acts are done in that capacity. If "the nature of the act is private", then the person is not a public authority subject to s.6 (1) in respect of that act.

4.12 The issue thus becomes whether, in relation to each act of publication for which Ms Hosany is responsible, that act should be characterised as one done in the exercise of a public function, or as a private act.

4.13 The circumstances of each act of publication are analysed below from the standpoint of the common-law tests of duty and interest. What that analysis demonstrates is that, on Ms Hosany's part, the interest in question is primarily the private one of protecting her own security and well-being from Mr David's alleged sexual harassment. This private interest has a link to her public functions as a Governor, since that is the context in which the alleged harassment is occurring; but that does not make the act of publication one done in the discharge of a function of a public nature. (I note that under the Trust's Code and Procedure anyone affected may make such a complaint against a Governor; the complainant themselves does not need to be a Governor.)

4.14 For the above reasons, my conclusion on this issue is that in relation to the acts of publication for which Ms Hosany is responsible, they are all acts of a private nature within s.6 (5) of the Human Rights Act 1998 so that s.6 (1) and the Clift principle have no application to them. The general principles of common law qualified privilege apply to this case without the addition of the Clift factor.

4.15 Although it is not strictly necessary to decide how Clift - type Article 8 considerations would have influenced the outcome in this case, it is self-evident that there is a considerable overlap between the common law principles underlying qualified privilege and the Convention principles underlying Article 8. It is easy to see how the recognition of the right of an individual to make an honest complaint about alleged harassment to a limited and appropriate group of responsible persons could equally be justified in Convention terms as a proportionate and lawful interference with the claimant's Article 8 rights in the interest of the protection of health and morals and for the protection of the rights and freedoms of others.

C. The Written Complaints

4.16 The key documents here are the Terms of Reference of the Nominations and Conduct Committee and its Appendix A, the Procedures for Conduct Hearings. The specific provisions most relevant to the defence of qualified privilege in this case are the following:

"A. TERMS OF REFERENCE

2. MEMBERSHIP

2.1 The Committee shall be appointed by the Council of Governors and shall be composed as follows:

- * Trust Chairman**
- * Deputy Chair of the Council of Governors (ex officio)**
- * two council members representing the public constituency**
- * one council member representing the staff constituency**
- * one council member representing staff organisations.**

2.2 ... The Senior Independent Non-Executive Director will also be a member of the Committee in respect of its duties pertaining to Governors Standards.

2.3 A quorum shall be three members, one of whom must be the Trust Chair or Deputy Chair of the Council of Governors.

3. ATTENDANCE AT MEETINGS

3.1 Only members of the Committee have the right to attend meetings. Other individuals, such as the Chief Executive, Director of Human Resources or external advisors may be invited to attend for all or part of any meeting, when appropriate.

3.2 The Trust Secretary shall act as the Secretary to the Committee.

6. DUTIES OF THE COMMITTEE

The duties of the Committee can be categorised as follows:

6.5 Governors Standards

6.5.2 Receive reports from the Trust Chairman on issues of governor conduct, eligibility and removal.

6.5.4 Provide recommendations to the Council of Governors on issues of governor conduct, eligibility and removal in accordance with the Trust Constitution following the process as set out in Appendix A.

6.5.5 Provide recommendations to the Council of Governors about the process for dealing with any reports of breaches of the Code of Conduct or Trust Constitution following the process as set out in Appendix A."

"APPENDIX (A) PROCEDURES FOR CONDUCT HEARINGS

1. Process on Receipt of Complaint/Allegation

1.1 A written complaint is received and the Chair is notified. The Chair, in consultation with the Lead Governor, will initially attempt to resolve the issue with the governor(s) in question before involving the Committee.

1.2 If the desired outcome is not achieved, or it is not possible to reach a resolution, the Chair calls a meeting of the Nominations and Conduct Committee.

1.5 All evidence relating to the complaint/allegation (including an initial statement from the governor(s) in question) is collated and provided to members of the Committee by the Trust Secretary.

1.10 The Committee is authorised to obtain outside legal or other independent professional advice and to secure the attendance of outsiders with relevant experience and expertise if it considers this necessary..."

4.17 It is convenient to consider the issues of privilege arising in this case by starting with the "core" publication, the one most directly concerned with the purposes for which the privilege is granted, and working outward. The Committee members involved here were the Trust Chair Ms Gabriel, the Senior Independent Non-Executive Governor Ms Bastin, and the four ordinary Governors Mr Lekshmanian, Mr Wilson, Mr Corbett and Mr Jallo. The formal Written Complaint in question was Written Complaint II. It is plain that publication of that document by Ms Hosany to those Governors was in accordance with the Procedures and took place on an occasion of qualified privilege.

4.18 Written Complaint II could not have reached those Governors for their consideration, unless a process existed whereby the complaint was first received by senior executives of the Trust, who could assess its status as a complaint and identify the appropriate body of Governors to receive and consider it. As provided by the Terms of Reference and Procedures, that role was fulfilled by the Trust Chair, Ms Gabriel, and the

Trust Secretary, Ms Ehigie; so publication to these was reasonably required if the complaint was to be pursued, and is also privileged.

4.19 Similarly, the Terms of Reference provide that the Governors may invite the assistance of relevant staff, in this case the Human Rights advisors, Ms Drewett and Ms Besong, who would need to read the complaint in order to carry out their functions.

4.20 And the Procedures expressly authorise the Committee to obtain the help of outside professionals such as Capsticks (Ms Wyman). That was plainly a reasonable step for the Governors to take in order that they could discharge their function.

4.21 Finally, there is the publication of Written Complaint II to Mr Lieckfeldt. Although he was a Governor, he was not on the Committee. The Procedures do not expressly provide for the complainant to be accompanied by a "friend" when presenting her case orally to the Committee; but the Committee has a general power to invite other individuals to attend all or part of any meeting when appropriate. The presence of a "friend" is plainly a legitimate exercise of that power and likely to be of assistance to the Committee in discharging its functions. But such a friend could be of little use to the complainant or the Committee, unless he was allowed to see the written complaint in advance. The element of common and corresponding interest between the complainant, the Committee and the "friend" in knowing the terms of the complaint is clear, and it attracts the same qualified privilege as applies to the other parts of the process.

4.22 I, therefore, conclude that each of the publications of Written Complaint II for which I have found Ms Hosany to be responsible took place on a clear occasion of privilege.

4.23 As to Written Complaint I, this was published in two phases. Originally, it was submitted to and read by Ms Gabriel and Ms Ehigie as a preliminary to the preparation of the formal Written Complaint II. While this preliminary occasion of publication does not, strictly speaking, form part of the Procedure, that does not prevent it enjoying a privilege of its own if it concerns a matter on which Ms Hosany shared a common and corresponding interest with the Chair and Secretary of the Trust, each of whom plays an important part in the complaints process. As more fully set out at (5) below when considering the issue of express malice, it is clear that over the fortnight between the incident of 20 January 2015 and the submission of Written Complaint I on 3 February 2015, Ms Gabriel had become closely and legitimately involved in the growing dispute between Mr David and Ms Hosany in her role as Chair, initially trying to ensure the smooth conduct of its business and later receiving Ms Hosany's oral complaints and advising her how they should be presented for resolution.

4.24 Ms Ehigie became involved with the complaints process on 27 January 2015, when Ms Hosany requested copies of the grievance and conduct policies from her, in her capacity as Trust Secretary. Thereafter, on 3 February 2015, Ms Hosany sent Written Complaint I to both Ms Gabriel and Ms Ehigie with a request for information as to how and when matters would proceed.

4.25 In the above context, it is clear that Ms Hosany shared with both Ms Gabriel and Ms Ehigie a common and corresponding interest in the same subject-matter, namely the making of a complaint against a Governor of the Trust, and the due handling of that complaint. I, therefore, conclude that this was a privileged occasion, whether or not it formed part of the formal complaints process that was later initiated by Written Complaint II.

4.26 This is a convenient moment to mention an issue raised by Mr David, in connection with publications to various members of Trust staff including Mason Fitzgerald. His point, in summary, is that since this was a dispute between Governors, which had to be decided by Governors, what business or concern is it of the Trust's staff, who are not Governors?

4.27 The answer lies in the concept of ancillary privilege, considered at 4.4 above. The Governors do not operate in a vacuum. They cannot discharge their functions without the advice and assistance of staff. Senior staff like Ms Gabriel and Ms Ehigie had a direct interest in the dispute between Mr David and Ms Hosany, which was threatening to cause disruption to an important Trust public meeting. In addition they have express roles in the complaints process as spelt out above. Less senior staff had a role to perform in assisting the Conduct Committee with advice on HR matters. Their role is closely analogous to that of civil servants dealing with Government ministers. They are not the decision-makers but they are indispensable to the process. Publication to them is not extrinsic to the complaints process but a necessary part of it.

4.28 Finally as to Written Complaint I, there is the publication by Ms Hosany to Mr Lieckfeldt. Written Complaint I formed part of Capsticks' exhibits, annexed to their Report and Written Complaint II. For the same reasons as applicable to Written Complaint II, I conclude that providing Mr Lieckfeldt with the same evidence as the Committee whose meeting he was to attend as Ms Hosany's "friend" is a legitimate part of the complaints process and is similarly protected by qualified privilege as a matter in which all concerned shared a common and corresponding interest.

D. The 30 June email

4.29 This was sent by Ms Hosany to Mr Fitzgerald immediately after the 30 June meeting, (at which Mr David admits he sat next to Ms Hosany notwithstanding the steps that had been taken by the Trust to restrict contact between them). It was then forwarded by him to the Chair, Ms Gabriel.

4.30 This email does not form part of the complaints process as such. It arises in the context of protecting Ms Hosany from further confrontations with, and potentially harassment by, Mr David. Ms Hosany had been in contact with Mr Fitzgerald that day about her having received a letter before action from Mr David, and they had also been discussing the possibility that Mr David would attend that night's meeting (see 2.9(c) above).

4.31 In these circumstances, it is clear that the subject matter of contact between Mr David and Ms Hosany at Trust events, and the protection of Ms Hosany from such contact, was one in relation to which Ms Hosany had a legitimate interest in communicating with responsible Trust officials such as Mr Fitzgerald and Ms Gabriel, who were dealing with her case, and as to which they had a common and corresponding interest and indeed duty to receive her communication and act on it. Again, it is a plain example of a communication on a privileged occasion.

4.32 In summary, all the instances of publications complained of for which Ms Hosany is responsible took place on occasions of qualified privilege. Mr David's claim will, therefore, fail unless he can prove that Ms Hosany was actuated by express malice, which is considered at (5) below.

5. EXPRESS MALICE

5.1 As set out at (2) and (4) above, I have concluded that all the publications for which Ms Hosany is responsible in law were made on occasions of common-law qualified privilege. It follows that in order for Mr David to succeed, he must prove, in relation to one or more of those publications, that when Ms Hosany caused it, she was actuated by express malice.

5.2 Express malice, such as will rebut a defence of qualified privilege, has been defined by the House of Lords in the leading cases of Horrocks v Lowe [1975] AC 135 and Reynolds v Times Newspapers [2001] 2 AC 12). The applicable principles are summarised at para.19.06 of Duncan & Neill (above) as follows:

"(a) The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. Evidence of the defendant's state of mind can therefore be tendered by either or both sides.

(b) The defendant is entitled to be protected by the privilege unless the claimant proves that the defendant had an improper motive for publishing the words and that the improper motive was the sole or dominant motive.

(c) If the defendant did not believe that when he published was true this fact is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interest can justify a man in telling deliberate and injurious falsehoods about another.

(d) If the defendant made the publication recklessly, being indifferent to the truth of what he published and neither considering nor caring whether it was true or not, he will be treated as if he knew it to be false. But carelessness or impulsiveness or irrationality in arriving at a positive belief in the truth of what was published does not amount to indifference to the truth.

(e) Even where the defendant did believe the words to be true the claimant may still be able to prove that the publication was actuated by an improper motive, for example, a desire to injure the claimant or to achieve some personal advantage unconnected with the duty or interest which constitutes the reason for the privilege. But in such a case, that is, where the defendant believed the words to be true, judges and juries should be very slow to draw the inference that the sole or dominant motive for publication was the improper motive."

5.3 If the defamatory meaning which the Court has found the words to bear is not the same as the meaning which the Defendant intended to convey, then in considering the question of honest belief, which is entirely subjective, the Court should apply the Defendant's intended meaning. (Duncan & Neill, above at 19.0).

5.4 Here, Mr David's case on malice in respect of the Written Complaints may be summarised as follows:

a. On the evening of 20 January 2015, the only physical contact that took place between himself and Ms Hosany was an obviously innocent touch on her back when he offered her his umbrella. There was no grabbing round the waist, no whispering in the ear or suggestion of a sexual relationship, and consequently no express refusal by Ms Hosany or reference by her to him being married with children.

b. She could not possibly be mistaken about this or honestly believe that anything of the sort took place.

c. What did happen was that, in the course of a conversation about whether they liked each other (platonically) he told her that he liked working with her but that he thought she could be rather controlling. When he said this she seemed upset, and shortly afterwards they left the bar.

d. When he messaged her to say he was sorry for spoiling the evening, he was referring to this awkward remark, not to anything physical.

e. At the QI group next day, there was a bona fide disagreement between them about their respective roles in conducting an upcoming public meeting, which led to a heated exchange of emails.

f. In order to strengthen her hand in that dispute, Ms Hosany decided to make an official complaint against him, and to reinforce it with a deliberately false allegation of sexual harassment (what Mr David described as the "magic bullet" which would render his position untenable).

g. In addition to making a wholly false sexual allegation, Ms Hosany also exaggerated and distorted her account of his behaviour towards her at meetings in a further deliberate attempt to discredit him.

5.5 If this case, or even just the part about the falsified sexual allegation, were true, then plainly Mr David's argument for a finding of express malice would be very strong. Equally, if in fact Ms Hosany was telling the truth about the sexual allegation, and Mr David was falsely denying it both to the Trust and to the Court, then his case on malice would be fatally weakened. It is therefore necessary for the Court to determine, as a factual matter, what if anything did happen between the parties that evening, because in the circumstances that will in practice determine whether and to what extent Ms Hosany honestly believed in the truth of her complaints.

5.6 Before moving to that inquiry, I should deal with two preliminary matters raised by Mr David. The first is a pleading point. In his Amended Particulars of Claim, Mr David set out at Paras (7) to (52) a "Fact Chronology" which included at (12) an account of events on 20 January 2015 and the words "we parted ways without incident". In her Defence, at Para (5), Ms Hosany pleaded as follows:

"The relevance or purpose of the paragraphs under the heading "Fact Chronology" and "Key Procedural Chronology" (paragraphs 7 to 65) is not understood. For reasons of proportionality, the Defendant declines to plead to these paragraphs but does not admit the facts therein".

5.7 Mr David relies on the provisions of CPR 16.5 as to the contents of a Defence. Sub-rule 5(1) requires a defendant to state which allegations in the Particulars of Claim she denies, which she admits, and which she is unable to admit or deny but requires the claimant to prove. (There is no provision for the old practice of "non-admission".) 5(5) says that a defendant who fails to deal with an allegation shall be taken to admit it.

5.8 Mr David therefore contends that Ms Hosany has admitted that nothing happened on the evening of the 20th. For this reason, he did not even deal with those events in his Witness Statement (though fortunately he had already done so at some length in his submissions to the Capsticks inquiry).

5.9 The Defendant's response is as follows:

a. By CPR 16.4(1)a, the Particulars of Claim should include "a concise statement of the facts on which the Claimant relies".

b. In a defamation claim, the claimant has no need to prove any facts beyond those of publication of the words complained of. The nature of the Defence will determine the factual issues in dispute.

c. The "Chronology" was therefore irrelevant and vexatious and it was a proper course to decline to plead to it. Its allegations were expressly not admitted and cannot be turned into admissions by an over-literal application of CPR 16.5.

5.10 In support of these propositions, Ms Hosany relies on the observations of Tugendhat J. in the case of *Ontulmus v Collett* [2013] EWHC 980 (QB). In that case, the libel claimant had pleaded several paragraphs of "Background" analogous to the "Chronology" here. On an application to strike the Background Particulars out, Tugendhat J. stated (at para. 27) as follows:

"Pleading matters which are not those on which a claimant relies is contrary to the overriding objective. If the matters in those paragraphs become relevant to any defence that is raised, then they should be pleaded in a reply. The claim can be understood without any background other than that which is pleaded in paras (1) to (6). If the remaining "background" is relevant, for example, to aggravation of damages, then that should be stated. But a history of previous matters in dispute between the parties has no place in a claim for libel, unless it is relevant to a constituent of the cause of action".

5.11 It appears to me that those observations are plainly correct as a matter of defamation practice and are of equal application in the present case. (Although here Mr David does plead aggravated damages, he does not rely on any part of the "Chronology" to do so). Mr David's contention that Ms Hosany has admitted the principal matter in dispute between them is artificial and without merit and for the reasons given by Tugendhat J. I dismiss it. (Indeed, Mr David should count himself fortunate that I permitted him to give oral evidence about the 20 January incident even though it was not dealt with in his Witness Statement).

5.12 Mr David's other preliminary point has more weight. It is that the Code of Conduct relates only to the conduct of Governors in that capacity. As Capsticks accepted, the events of 20 January, whatever they might have been, took place off Trust premises and not in the course of Trust business; they were personal between Mr David and Ms Hosany. If so, Mr David submits, then for Ms Hosany to include the "precursory incident" in her complaint was not merely irrelevant to it, but intended to prejudice the inquiry against him, and hence malicious.

5.13 As a matter of law, it is correct that if irrelevant defamatory matter is incorporated into a privileged publication, it will still be protected by the privilege, but its inclusion may be taken into account in deciding whether, in all the circumstances, the defendant was malicious. (See Horrocks v Lowe (above) at p.151, where Lord Diplock cites with approval Lord Dunedin's words in Adam v Ward [1917] AC 309 at 326 to that effect).

5.14 But here, it is clear, especially from Ms Hosany's express reference to the Sex Discrimination Act in Written Complaint I, and from her very use of the term "precursory incident", that her complaint to the Governors does not relate to the 20 January incident itself, but rather to its aftermath, the hostile behaviour of Mr David towards her which she attributes to sexual rejection. On her case, the 20 January incident is necessary background to her real complaint, which cannot be understood without it. It follows that if her account of the incident is true (or is honestly believed by her, which in this case is likely to be the same thing), then it would plainly not be malicious for her to include it in her complaint. If on the other hand, her account is false/not honestly believed by her, then she will plainly be malicious whether or not the allegation was relevant. In short, this point when correctly analysed adds nothing to Mr David's case on malice one way or the other.

5.15 In deciding a dispute of fact between two people in respect of a private incident to which they were the only witnesses (what is sometimes described as "one person's word against another"), the Court should not, or not initially, base its judgment on an assessment of the parties' respective personal credibility. Rather, it should consider systematically:

- a. the admitted or undisputed facts relevant to the incident;
- b. any objective evidence bearing on it, such as contemporary or near-contemporary texts and messages between the parties;
- c. all the surrounding circumstances, including the general probability or implausibility of their respective accounts, and whether they have been consistently maintained.

The decision which person to believe should so far as possible be the product of that inquiry; such matters as character and demeanour will seldom be decisive in themselves.

5.16 It is fortunate that in this case there is an extensive body of contemporaneous messages (texts, WhatsApp and the like) and emails, as well as the parties' own formal statements in the course of the Committee's inquiry fairly soon after the incident.

5.17 The nature of the relationship between the parties prior to the evening of 20 January 2015 is relevant in two principal respects:

- a. it may indicate which version of events is more consistent with that relationship;
- b. if there is a marked difference between their relationship before and after that evening, that change may cast some light on what took place.

5.18 The evidence includes a large number of WhatsApp chat messages (similar to texts) passing between them during the month before 20 January 2015. This period includes Christmas and New Year, so it would not be surprising to see friendly or even affectionate messages between colleagues at that time. However, in number and content, these messages are consistent with a warm and perhaps growing friendship between them, rather stronger on his side.

5.19 Examples include:

- a. his use of the nicknames "poshy" and "posh eyes" (because she lived in a smarter part of Hackney than he did);
- b. her use of affectionate terms for him such as "hun" (for honey) though she says this is not uncommon for her;
- c. the increasing frequency of the messages – about 60 on 13 January 2015 for example;
- d. occasional moves on his part towards closer contact with her. For example, on 13 January 2015, in response to her simple statement that she was making lunch for a friend, he messaged that he hoped to test her culinary skills some time, and followed it with a "personal looks like" emoji. (She made no response).

5.20 On one occasion (18 December 2014), after going out, they sat in her car outside her house talking for so long that her car battery ran out. Later that evening, he messaged her to say sorry and she replied "No need to apologise, silly".

5.21 Their messages continue in this way up to 20 January 2015, combining businesslike discussions of Trust business with lighter messages. At 10.15pm on 19 January 2015, for example, they discuss how they could both put themselves forward for the participation committee, and Ms Hosany says "We could do it together. That would be cool". (There is no sign of rivalry or competition at this point).

5.22 On the evening of the 20th January itself, there are of course no messages during the fairly lengthy period they are together. But immediately afterwards, there is an important exchange which I should set out in full.

KD.	2207	Are you home safe?
ZH.	2218	Yep. All in thanks. Let me know when you get in too.

KD.	2221	I'm just getting in. Sorry for spoiling the night.
KD.	2225	But thanks for everything.
ZH.	2237	That's cool. Glad you're in safe. See you tomorrow.
KD.	2244	Night dream good dreams.

(The parties give different explanations of this to which I shall return after reviewing all the evidence).

5.23 The 20th January was a Tuesday. The rest of that week, up to and including Sunday 25th, is a crucial period during which the parties' previously good personal and professional relationship suffered an almost complete breakdown.

5.24 Wednesday 21 January 2015

a. The principal relevant event on this day was a meeting of the QI group to plan a forthcoming presentation to the Borough Members on Thursday 29 January (the BMM). Prior to that meeting, at 1508, Ms Hosany sent Mr David a message about a Governors' email, which led to a friendly though not intimate exchange of messages between them. (Mr David says this shows nothing serious can have happened the previous night; Ms Hosany says she was trying to be business-like and put matters back on their previous footing).

b. The QI Group meeting did not go well. According to Ms Hosany, Mr David arrived late and was disruptive, joking about the refreshments and challenging her proposals about the BMM, in particular as to their respective roles in leading the meeting. Ms Hosany says he behaved in the same manner as usual and that a vigorous discussion on business matters was appropriate.

c. In the absence of third party witnesses, it is difficult to reach a conclusion about whether and to what extent Mr David's behaviour at this meeting went beyond acceptable limits and can be attributed to sexual rejection as Ms Hosany contends. Subsequent communications cast more light on this.

d. Mr David and Ms Hosany spoke after the meeting. Later that night, Ms Hosany sent Mr David a message which is a fairly clear indicator that they had parted on bad terms but that she was still trying to restore good relations.

	ZH	0049	I think it would be useful if we met to speak before the CoG [Council of Governors] meeting). Seems we both got heightened and misunderstood perhaps.
	KD	0900	Hiya. I would try to get there a few minutes early because of that.

5.25 Thursday 22 January 2015

a. At 0956 Ms Hosany emailed Amar Shah, a senior Trust colleague, saying she was feeling disheartened and undermined (about her role as QI Lead). She stated that:

	-	"Kofo seems to have an issue with overlap of roles (at the BMM)".
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	-	"He, therefore, could not accept that as the QI Lead, I was able to make decisions independent of the group".

b. Mr David also emailed Mr Shah, at 1324 asking him for confirmation of the role of the QI Lead and whether the QI Lead had "a voting power that nullifies all of the other Governors on the QI Project". (It was a formally-worded request which included references to the Trust's statutory basis).

c. At 1404, Ms Hosany emailed the QI Group members with a summary of the previous day's meeting and a draft agenda for the BMM. In her covering email, without naming Mr David, she asked:

"... that we continue to treat each other with respect and as part of a team. Everyone's contributions are valid, however, we do have a framework to work in and it is my job to ensure that we stick to it".

(In context, this was clearly a reference to Mr David's conduct the previous day and her fear that he might behave similarly at the BMM).

d. The proposal was that Mr David should chair the BMM Meeting, but that Ms Hosany should be the "compere", opening the meeting and summarising the debate.

e. Mr David responded at 1515, challenging Ms Hosany's proposals:

"Hi Zara. Well done on that, it's falling into place nicely. Just to clarify the point you raised about the "compere" setting the parameters of the meeting and ground rules of what questions would be allowed, my understanding is that it's supposed to be the role of the Chair A compere is more suitable at events with multiple speakers and segments".

f. The Chair, Marie Gabriel and Amar Shah were concerned at this growing dispute between two Governors and its possible effects on the upcoming BMM. Ms Gabriel contacted both Mr David and Ms Hosany in an attempt to conciliate. At 1454, Ms Hosany emailed Ms Gabriel asking if they could find "a confidential space to speak" before the Council of Governors meeting due to start at 1700.

g. The Council of Governors meeting passed off without incident.

5.26 Friday 23 January 2015

a. At 0910, Ms Hosany emailed Ms Gabriel asking if they could meet on Monday (26th). Ms Gabriel replied, agreeing to do so and telling her not to think about CoG or QI for the rest of the weekend. In turn, Ms Hosany replied that she had to respond to "Kofo's antagonistic email" and that he had been "disrespectful and undermining" and had questioned her role as the QI Lead.

b. Ms Gabriel replied at 1037, urging Ms Hosany to leave matters to her. Ms Hosany replied at 1100, saying:

"I think we're getting into a power/control battle and something happened this week which I wanna confide in you confidentially. I'm not sure who else to speak to about it. Would have been better face to face but would rather speak about it sooner than later".

(This is clearly a reference to her allegations about the night of the 20th; on Mr David's case it is the beginning of the malicious false allegation).

c. Ms Hosany did not take Ms Gabriel's sensible advice to "leave it". At 1203 she circulated a response to Mr David's email of 1515 the previous day. In it, she insisted that she would act as a compere or facilitator of the BMM despite Mr David's objections.

d. At 1409, Mr David responded, also to the whole group, in strong terms:

"..... Just to be clear, I will not have any patronising speeches made to the meeting beforehand, it just won't be happening I can't have someone make a speech that might upset the tone of the meeting and be expected to take the flak afterwards".

(He also indicated his willingness to refer people who raised their own health problems at the meeting to Councillors. This is capable of being interpreted as blurring the boundaries between Trust and party-political activity).

e. At 1505, Ms Hosany replied (to the whole group) in equally strong terms:

"... I feel a lot of what you have said is inappropriate, rude and patronising ... If you don't feel able to perform this duty, we can place another Chair for the meeting next week".

f. At 1658, Marie Gabriel intervened, asking that no further emails be sent and stating that she would meet both Mr David and Ms Hosany on Monday 26th to find a way forward.

g. (At some point, Ms Hosany spoke to Ms Gabriel privately and gave her an oral account of what she said had happened on the night of the 20th).

5.27 Sunday 25 January 2015

a. At 1752, Marie Gabriel sent both Mr David and Ms Hosany a long carefully-considered email aimed at delineating the boundaries between their respective roles at the BMM meeting.

b. At 2034, Mr David replied to both in a reasonably conciliatory manner, accepting their dual roles but continuing to argue his case.

c. At 2047, however, Ms Hosany replied to Ms Gabriel alone, stating:

"I too have given this much further thought and unfortunately, I have come to the conclusion that due to Kofu's disregarding physical actions of infringing my personal space and propositioning me in such an uncomfortable manner, I don't feel able to work with him. I have tried, however, the way he conducted himself in Wednesday's meeting and his nonchalant attitude after both events where he was not able to recognise that he had done anything wrong and I, therefore, don't feel I should have to be subjected to being around him any further than I need to. In a work situation, touching someone inappropriately would be taken really seriously and is a sackable or disciplinary offence... I am, therefore, asking that due to his poor conduct both in meetings, in public correspondence, his personal tirade against me and most importantly, his inappropriate gesture towards me that he be asked to leave the QI group ...".

5.28 Monday 26 January 2015

- a. Ms Gabriel met Mr David and Ms Hosany separately at about 10am, and reached the conclusion that they would not be able to present the BMM together and that a third Governor should chair that meeting. (Her email of 1705 on 27 January 2015 refers).
- b. At 1030, Mr David and Ms Hosany attended a meeting with Trust staff at which the breakdown in their working relationship continued to be apparent.
- c. That afternoon, Ms Hosany sent Ms Gabriel two emails (1524 and 1555) in which she stated her intention of making a formal written complaint.

5.29 Tuesday 27 January 2015

At 1148, Ms Gabriel emailed Ms Hosany requesting her to submit a formal written complaint giving details of the incidents complained about, at least in bullet point form.

5.30 From this point, so far as the question of malice in respect of Written Complaints I and II are concerned, the essential events have occurred and matters move on to the complaint and investigation stage.

5.31 As set out in the Chronology at 1.4 above, Ms Hosany submitted Written Complaint I on Monday 2 February 2015 and redrafted it in conjunction with the Secretary, Keisha Ehigie, producing Written Complaint II on 3 March 2015.

5.32 Subsequent Events

The main focus shifted to the arrangements made to separate Ms Hosany from Mr David in relation to Trust business, and the further action taken against him in that regard. These are of little relevance to the malice issue since they are equally consistent with Mr David being the innocent and indignant victim of what he would have known to be a false and malicious complaint.

5.33 The parties made their statements to the Capsticks investigation and the Conduct Committee; but since the focus of those inquiries was not so much on the 20 January incident as its aftermath, and since I have had access to the same original material as those inquiries and have heard the parties for myself, they add little to the matrix of evidence on which the malice issue turns. (I should say that Mr David sought to demonstrate, by painstaking analysis of Ms Hosany's various statements, that there were material inconsistencies which went to show that her account to the Court was not to be believed. For my part I did not find anything in those alleged inconsistencies that went beyond the ordinary variability of human recollection and narration, and certainly nothing so powerful as to displace the positive considerations, set out below and largely based on the contemporaneous material, which have led me to my conclusions on the malice issues.)

5.34 The 20 January Incident; Discussion and Conclusions

- a. From the above evidence, which is largely drawn from the contemporary words of the two parties themselves, one thing emerges with stark clarity. Between the afternoon of 20 January and the afternoon of 21 January, something happened which completely transformed the personal and working relationship between them. All jokes and affection cease, and they become locked in a "turf war" over Trust business in which they had been allies.
- b. What was that event (or series of events)? Mr David says it was his remark that Ms Hosany was rather controlling, which so angered her that she decided to make up a false sexual allegation against him. Ms Hosany says it was his "pass" at her and her rejection of it, which led in turn to his increasing hostility to her in Trust meetings and correspondence.

c. The former version is very difficult to reconcile with the actual events of the 21st and 22nd. If Mr David did make a remark about Ms Hosany being "controlling" and was so aware that it had upset her that he felt the need to apologise to her immediately for spoiling the evening, it is improbable and inexplicable that the very next day he would return to that subject at the QI meeting and challenge her leadership role at the Group and in relation to the BMM. It is almost equally improbable and inexplicable that Ms Hosany, a woman of good character, a health professional engaged in voluntary public duties, would respond by escalating this dispute with a fabricated sexual allegation.

d. The latter version is entirely consistent with the nature of the parties' pre-20 January relationship as expressed in their messages. Two people of the same age and with many interests in common meet in a work context and become friends. They begin to see each other after work. Mr David begins calling her nicknames, complimenting her on her appearance, trying to get an invitation to dinner at her flat. Ms Hosany goes along with this to a certain extent, not rebuffing him or avoiding him. One night he goes too far for her, and he immediately apologises for "spoiling the evening". The next day, she tries to smooth matters over, but he is resentful and tension begins to show at work. Once matters escalate to the level of a formal written complaint, he is unable to admit the truth of what happened (innocent enough as it was) and is, therefore, compelled to call his accuser a liar.

e. Though the version of events set out above is a plausible one, and consistent with the documents, it is largely circumstantial and could be refuted by credible oral evidence. Both Mr David and Ms Hosany are intelligent, articulate professional people and each gave evidence well and clearly. But, even under what must have been the ordeal of direct cross-examination by her accuser, Ms Hosany gave every impression of sincerity, whereas both in question and answer, Mr David gave an impression of braggadocio. In short, nothing in the parties' demeanour in giving oral evidence led me to doubt the clear impression given by the contemporary documents.

f. I therefore conclude on the balance of probability that on the evening of 20 January 2015, at the end of a friendly evening together, Mr David did put his arms round Ms Hosany and ask her if she would like their friendship to go further. In doing so, he believed that she would or might consent. He did not try to kiss her or touch her intimately, and he let go as soon as she made her reaction clear. He even apologised at the next opportunity and Ms Hosany accepted his apology.

g. In the light of my findings about this incident, and the subsequent dispute which I have outlined above, I also find on the balance of probability that when Ms Hosany made her written complaints about Mr David, she did so honestly believing that they were true and fair. As to the 20 January incident, she had direct knowledge of what had happened; and in the light of that knowledge, I am satisfied that her interpretation of Mr David's subsequent conduct and motivation towards her at meetings (as set out in the Written Complaints) and in the course of the complaints procedure was genuinely and sincerely held. I therefore conclude that Mr David has failed to discharge the heavy burden upon him of proving her express malice, and that in relation to Written Complaints I and II, the defence of qualified privilege must succeed in relation to all the publications proven.

5.35 **The 30 June email**

a. The malice issue in relation to this can be dealt with much more shortly. In oral evidence, Mr David explained that he did go to the meeting in question. He has an eyesight problem, such that he sat down in a vacant chair, not realising that it was next to Ms Hosany. Later he did go into the next room, not with any intention of following Ms Hosany (who he did not realise was present there), but in order to sign the attendance book.

b. Given that he was well aware of the likelihood that Ms Hosany would be at the meeting, and of her sensitivity about coming into contact with him, this account may well seem unconvincing or at least incomplete. But accepting for present purposes that it is true, that is, that he did sit next to Ms Hosany at the meeting and then go into another room where she was present, though in each case with no intention of harassing her, where does that leave his case on malice?

c. From Ms Hosany's subjective view, his admitted conduct must have appeared to be deliberate; or at least, Mr David has put forward no evidence at all to suggest that she did not honestly believe so. In the circumstances, there is no credible case for express malice in respect of the allegations in the email, and again the defence of qualified privilege in relation to it must succeed.

6. "SERIOUS HARM" AND QUANTUM

6.1 By section 1(1) of the Defamation Act 2013

"A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant".

6.2 Although for the reasons set out above, I have concluded that, even if the above test is satisfied in respect of the publications in question here, the claim must fail, I should go on to decide this issue, since it relates to one of the essential elements of liability for defamation.

6.3 I should emphasise two points at the outset:

a. the s.1 test relates to whether the publication has in fact caused serious harm to the Claimant's reputation. This issue of causation and damage is not affected by whether or not there was in fact a good defence to the words.

b. the s.1 test is not the same as the exercise of assessing the quantum of damages for defamation. It is merely a threshold test; once "serious harm" is established, there is no need under s.1 to go further and decide how serious the harm was. And it is expressly confined to injury to reputation; it excludes the issues, often equally important to quantum, of injury to feelings and aggravated damages.

6.4 Since the trial of this action, and after I had circulated the first draft of this judgment, the Court of Appeal has delivered its important judgment on s.1, Lachaux v. Independent and others [2017] EWCA Civ 1334, which reviews the previous High Court decisions and clarifies the interpretation of the section. However, it is accepted by the legal representatives of the Defendant, who is the party more affected by my decision on s.1, that nothing in the Court of Appeal's decision should lead me to a different conclusion from the earlier High Court judgments that had been cited to me. This is because the legal issues which most concerned the Court of Appeal do not arise in this case.

6.5 I shall therefore quote some passages from Theedom v Nourish Training (No 1) [2015] EWHC 3769 (QB) not (I hope) because it is a decision of mine but because the facts of that case were closer in many respects to the present one than the other High Court decisions, including Lachaux itself.

(14)	This section has made a major change to the substantive law of defamation, and its practical application is still in the early stages of evolution. I have been greatly assisted, as to both law and practice, by two previous decisions of the High Court, those of Mr Justice Bean, as he then was, in <i>Cooke v Mirror Group Newspapers</i> [2014] EWHC 2831 (QB) and Mr Justice Warby in <i>Lauchaux v Independent Print Limited & Ors</i> [2015] EWHC 2242 (QB).
(15)	<p>From those authorities and from the plain words of the section, I draw the following principles, with which I do not think either of the experienced specialist libel counsel who appear before me would much differ:</p> <p>a) In addition to satisfying all the previously existing requirements of the common law; a defamation claimant must now establish, as a substantive element of his claim, that the statement complained of has in fact caused or is likely to cause serious harm to his reputation.</p> <p>b) Under s.1 (2), a body trading for profit must, in order to establish that serious harm, show actual or likely serious financial loss; but a natural person, such as the present claimant, does not have to satisfy that further requirement."</p>
(29)	<p>"Reviewing all the facts as I have found them and seeking to apply the principles I have set out above, my conclusions on the issues of serious harm to reputation are as follows:</p> <p>a) When, as here, one has:</p> <p>i) defamatory words of a fairly high degree of gravity;</p> <p>ii) publication to a fairly substantial audience, both in terms of number (over 100) and, more importantly, in terms of proximity and potential importance to the claimant's career;</p> <p>iii) a vulnerable claimant in the form of a young man starting out in a competitive business and trying to make his way; and</p> <p>iv) an influential and prima facie reliable author of the words complained of</p> <p>then those circumstances of themselves raise an inferential case for serious harm to reputation, so strong as to call for rebuttal.</p> <p>b) The rebuttal evidence here has established that the claimant has suffered no demonstrable financial loss and that relatively few recipients of the email are positively known to have taken adverse action against him as a result. But as the Act specifically provides, pecuniary loss is not a requirement for a human claimant, and its absence does not rebut the inferences flowing from the libel itself. Similarly, the fact that few publishees have manifested hostility to the claimant's face is not a reliable guide to his standing in the eyes of those who remain silent.</p> <p>c) No steps have been taken to withdraw or correct the email, let alone to apologise for it, so whatever harm it originally caused is likely to have persisted.</p>
(30)	I therefore conclude that the claimant has persuaded me, on the balance of probability, that the publication of these emails has caused harm to his reputation of a sufficient degree of seriousness to pass the threshold set by s.1 (1) above".

6.6 In the present case, though the context of an internal disciplinary process is different from the facts of Theedom, many of the same considerations are present:

a. The defamatory meanings are grave ones, by their nature likely to cause serious harm to reputation.

b. The class of publishees is small, smaller than in Theedom, but they are for the most part influential people who work closely with Mr David in the Trust.

c. Though the actual written publications were confined to that narrow class, I accept Mr David's evidence that, unsurprisingly, knowledge that Ms Hosany had made a complaint against him which was under investigation became widespread within the Trust. This "ripple effect" is a recognised factor in assessing injury to reputation.

d. In respect of the 30 June email, though its publication was very limited indeed, both Ms Gabriel and Mr Fitzgerald hold high positions in the Trust

and were familiar with the background. The suggestion that Mr David had deliberately defied the Trust and approached Ms Hosany at a public meeting will have caused real additional harm to his reputation in their eyes.

6.7 There are defamation cases which can properly be described as "not serious" in terms of injury to reputation, and in respect of which s.1 provides valuable protection to defendants whether at the interim or trial stage. This is not such a case. Despite my conclusion that Mr David's evidence on the 20 January incident was untruthful, I have no difficulty in accepting that he was genuinely committed to his work as a Governor of the Trust, both because of his personal concern for the mentally ill and because of a legitimate and honourable ambition to do public service as a step towards a political career. His good name in that area of his life, and particularly among his fellow Governors, was a very important matter to him, both subjectively and objectively. Publication of these documents within that circle has in my judgment actually caused real and serious harm to his reputation within the Trust, to a sufficient degree to pass the s.1 threshold. If that threshold were set so high that claims of this type could effectively not be brought, then the Article 6 and Article 8 rights of the claimants would not have been duly respected.

6.8 Although I have felt able to rule on the s.1 issue, it is not appropriate to go further and make a ruling on quantum in the alternative to my previous findings on liability. The main reason is that my liability findings turn on the absence of malice on Ms Hosany's part. If, on the contrary, she had been malicious, and her allegations about Mr David's conduct on 20 January had been lies, then as an innocent man falsely accused, Mr David would have had a substantial claim in respect of injury to feelings and aggravated damages, as well as a claim for injury to reputation. I do not consider it necessary or right to make hypothetical findings about quantum on that counter-factual basis.

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