[redacted]

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY **CP 109/98**

BETWEEN **ROGER ERIC WYNDHAM BUCHANAN**

Plaintiff

339

A N D **OWEN ROBERT JENNINGS**

Defendant

Hearing: 26-27 February 2001

Counsel: M R Camp QC & M F McClelland for Plaintiff
M A F Gilkison for Defendant
T Arnold QC & T Warburton for Intervenor

Judgment: 4 April 2001

RESERVED JUDGMENT OF HERON J

Solicitors:

KPMG Legal, Wellington for Plaintiff
Mackay Gilkison, Wellington for Defendant
Crown Law Office, Wellington for Intervenor

[1] These are proceedings in defamation brought by a senior official of the New Zealand Wool Board. They are defended solely on the grounds of absolute privilege and quantum of damages if that arises.

[2] In the course of a parliamentary debate in the House of Representatives on 9 December 1997, the defendant said:

> ... This year one of the boards spent $3.5 million promoting the Barbarians rugby team in Great Britain, for what appears to be no other reason than that two of the senior officials involved in the process could continue an indulgence in an illicit relationship. To me that seems to demand a great deal more scrutiny by the levy payers ...
>
> I would just like to ask the Minister a couple of questions about the role of the performance audit ...
>
> ... Would he expect the performance audit to reveal the expenditure of some $3.5 million by a board, in this particular instance the Wool Board, on promoting the Barbarian rugby team's trip to Great Britain when it seems the only benefit arising from that particular trip was the opportunity for two senior officials, one from both sides of that agreement, to have a romp in London. Would he expect a performance audit to reveal that, so that producers would know what their money was being used for? ...

[3] At all material times the defendant was a list MP for Act New Zealand, and that party's rural spokesman. As a prelude, at a seminar in Waipukurau where he was one of a panel of speakers the defendant said the Board's sponsorship of the Barbarians' tour of the United Kingdom was the result of "who was sleeping in who's bed".

[4] The remarks made in the Parliamentary debate were reported both on radio and in the print media. In particular, for this case, the debate was reported and referred to in Radio New Zealand Today in Parliament, on Thursday 11 December 1997. The Independent newspaper, of 18 February 1998, following an interview with Mr Jennings, Rural News of 23 February 1998, (but without reference to the matters of concern in this case), and again in the Rural News of 9 March 1998.

[5] At the time of the Parliamentary debate and the consequential reports which followed, the tour by the Barbarians rugby team of the United Kingdom, had occurred over 12 months previously. This promotional tour, supported by the Wool Board, was processed and sanctioned before the Board in an unexceptional way. It appears to have arisen from the initiative of Mr A C Timpson, a director of the Board, but from an early stage of its formulation Mr Buchanan was actively involved in it, and would have been seen to have been the principle executive officer in charge of bringing it about. I have read the board's papers relating in some detail to the proposal overall and the way in which it finally received approval and funding, all of which is unexceptional. It discloses Mr Buchanan as the initiating executive officer, responsible for the project in conjunction with staff within the board but also in conjunction with media and advertising professionals and the New Zealand Rugby Football Union, and Mr John Hart in particular.

[6] Mr Buchanan, not surprisingly, accompanied the team to the United Kingdom and was spokesman on occasions for the board when the occasion required it. He had direct involvement in the way in which the promotion was advanced and delivered by the team.

[7] Accordingly persons in the wool growing and marketing industry, must have known that Mr Buchanan was the driving force behind the project, if not originally thereafter, and the officer who in fact represented the board when the team was in the United Kingdom. Consequently the sting of the defamation in this case is that he not only was motivated by a desire to carry on an affair which could be continued during the overseas tour, and that it did occur at the time of the tour. It is also claimed that the words meant that he acted unprofessionally, unethically and fraudulently.

[8] The editor of The Independent, requested one of his reporters, Mr G D Speden to interview Mr Jennings some weeks after the debate. In addition, Mr Jennings had issued a media statement, about the concerns he had expressed in the House although in that statement he had not referred to the defamatory material now sued upon. In the course of an interview of approximately 20 minutes between Mr Speden of The Independent and Mr Jennings, Mr Jennings said:

> That he did not resile from his claim about the officials relationship, just the money.

[9] The full article comprised commentary by Mr Speden and included the following:

> Jennings' continuing attacks on the board are part of his full-time by-election campaigning for Act. Sheltering under parliamentary privilege, Jennings told the House in December that the board had spent $3.5 million on the Barbarian tour – "for what appears to be no other reason than two of the senior officials involved in the process could continue and indulge in an illicit relationship".

[10] There followed commentary indicating that Mr Jennings had since been given reason to think that the $3.5 million was the budget for the entire Barbarians tour rather than the board's sponsorship and also that he had changed his estimate of the cost of a video commissioned by the Board which he had also criticised. Then it was reported as follows:

> Jennings said he did not resile from his claim about the officials' relationship, just the money.
>
> The figures he cited in the House had come from "several sources", he said. He was waiting for more information.
>
> He had told Wool Board officials that he would publish a retraction if he was wrong.
>
> "I still haven't been proved wrong".

[11] Then followed a reported comment from the plaintiff as to the sponsorship agreement, the cost of it, the efficacy of it and a reported comment from the plaintiff regarding the allegation that a board official had engineered the sponsorship to pursue an affair. Mr Buchanan said he had no idea what Mr Jennings was alluding to. The article reported Mr Buchanan as saying that the person who first brought the sponsorship opportunity to the board's attention had had no further involvement in the deal, he said.

[12] Certain shades of meaning were claimed from this article which gives rise to the first cause of action. I find that the comment "I still haven't been proved wrong" could not reasonably be applied to the relationship question, but rather to the money.

I also regard as speculative any suggestion that Mr Buchanan might have been deflecting attention onto another member of the board who had initiated the involvement, thereby lessening the impact on him or that it in any way turned the focus away from Mr Buchanan in any material way.

[13] The publication of the article on 18 February 1998 in The Independent, brought forth a response from Mr Jennings and after dealing with his motivation in raising these matters, and calling for an audit of the expenditure on the video, and related matters, he said:

> I would also welcome a cost benefit analysis on how much wool the sponsorship will sell, alternative appraisals and the full audited costs including any travel and association Mr Buchanan may have had.

[14] Mr Speden in relation to the use of the word 'resile' said this:

> With respect to the line in the story "Jennings said he did not resile from his claim about the official's relationship, just the money", in the absence of my notes I cannot say precisely what words Mr Jennings uttered that led me to write that sentence. I recall, however, questioning Mr Jennings carefully and at length as to which elements of his Parliamentary statements he held to or resiled from. My objective was to secure an accurate understanding of his position and I recall questioning him until I was satisfied that I had such an understanding. This process typically involves formulating and reformulating questions on the same point or points until I am satisfied I have received a clear answer (or that I am not going to receive one) and I recall that being the pattern of my interview with Mr Jennings. I cannot recall whether the word "resile" was uttered by Mr Jennings, myself, or both. I do recall being confident that the line I wrote, as set out above, was an accurate account of Mr Jennings' position. I remain confident that it was so.

[15] In cross-examination it was suggested that the word 'resile' might have been the suggestion of the sub-editor, or in some way have been an embellishment on what Mr Speden actually reported. I do not accept that. Mr Speden was not seriously challenged in cross-examination and I was impressed with the circumstances surrounding his recollection of events, particularly his disavowal of writing the words about cowering behind Parliamentary privilege.

[16] It is plain also that Mr Jennings, who did not give evidence, knew that he was going to be interviewed about what he said in Parliament. It would be unrealistic to suggest that he would not anticipate when confirming what he had said that the reporter would refer to the text of the Parliamentary statement in the published article. It can be said that to the certain knowledge of the defendant, and he called no evidence to suggest otherwise, he would cause to be published about the plaintiff, his affirmation of not only what was said in the House, but in a context where what was said in the House would be published again. The reader does not have to go any further than the article to see what is being confirmed or not resiled from. That material of course emanates from the newspaper and the journalist not from Mr Jennings himself. The newspaper is not sued.

[17] In ***Prebble v Television New Zealand Limited*** [1994] 3 NZLR 1, the Privy Council confirmed the striking out of certain allegations which would call into question statements made in the House of Representatives. The proceedings had been brought by a cabinet member against Television New Zealand in respect of a Frontline Programme, in the course of which allegations of corruption and conspiracy were made concerning the policies of selling state owned assets. Two types of pleading were said to infringe the principle of Parliamentary privilege because they contained allegations which if they were pursued, would suggest that the statements in the House were calculated to mislead the House or were otherwise improperly motivated. Further the defendant intended to allege that the actions of the plaintiff in procuring the passage of legislation was part of the alleged conspiracy and as such, dishonest and improper. In the High Court, Smellie J struck out all the allegations which if allowed to stand, impeached or questioned proceedings in Parliament. The case is high authority for the application of Article 9 of the Bill of Rights 1688 and the constitutional significance in the democratic institutions of this country of the doctrine of absolute privilege. It did not directly involve the point for consideration here, namely whether the defamation has been repeated outside the House. Their Lordships said (7):

> In addition to art 9 itself, there is a long line of authority which supports a wider principle, of which art 9 is merely one manifestation, viz, that the Courts and Parliament are both astute to recognise their respective constitutional roles. So far as the Courts are concerned

they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: Burdett v Abbot (1811) 14 East 1; Stockdale v Hansard (1839) 9 Ad & El 1; Bradlaugh v Gossett (1884) 12 QBD 271; British Railways Board v Pickin [1974] AC 765; Pepper (Inspector of Taxes) v Hart [1993] AC 593. As Blackstone said in his commentaries (17th ed, 1830), vol 1, p 163:

> ". . . the whole of the law and custom of parliament has its original from this one maxim, 'that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere'."

According to conventional wisdom, the combined operation of art 9 and that wider principle would undoubtedly prohibit any suggestion in the present action (whether by way of direct evidence, cross-examination or submission) that statements were made in the House which were lies or motivated by a desire to mislead. It would also prohibit any suggestion that proceedings in the House were initiated or carried through into legislation in pursuance of the alleged conspiracy.

[18] A further statement of principle was to the effect as follows: (8)

> This view discounts the basic concept underlying art 9, viz the need to ensure so far as possible that a member of the legislature and witnesses before Committees of the House can speak freely without fear that what they say will later be held against them in the Courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.

[19] Following reference to ***Wright v Lewis*** (1990) 53 SASR 416, where the scope of Parliamentary privilege was said to be capable of waiver in certain cases, their Lordships observed (9):

> The privilege protected by art 9 is the privilege of Parliament itself. The actions of any individual member of Parliament, even if he has an individual privilege of his own, cannot determine whether or not the privilege of Parliament is to apply. The wider principle encapsulated in Blackstone's words quoted above prevents the Courts from

> adjudicating on issues arising in or concerning the House viz whether or not a member has misled the House or acted improper motives. The decision of an individual member cannot override that collective privilege of the House to be the sole judge of such matters.

[20] The Privy Council upheld the Judge at first instance and the Court of Appeal, except and in so far as the latter court imposed a stay.

[21] ***Laurance v Katter & Anor*** (1996) 141 ALR 447 a decision of the Court of Appeal of Queensland was concerned with statements made outside the house. It considered S.16(3) of the Parliamentary Privileges Act 1987 which provides in summary that it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made in proceedings in any court or tribunal concerning proceedings in Parliament for the purposes of questioning or relying on the truth, motive or intention of good faith, or otherwise questioning of motives of any person or drawing inferences or conclusions from anything forming part of the proceedings in Parliament. The Act was challenged in terms of its constitutionality. In that case the plaintiff was faced with acceptance that his cause of action could only be established by proving what the first defendant said in Parliament. The first defendant's statement was that he was not going to allege anything except for the statements he had made in Parliament, but that he had evidence to support those statements. The exact words taken from Fitzgerald P's judgment were:

> (i) I'm not going to be alleging anything except for the statements I have made inside parliament. Every single one of those statements was backed up with the hardest of hard evidence. Every single one of them was fully documented. I'm holding a file in my hand here with some 15 source documents and every single one of those statements was backed up by those source documents.
>
> (ii) Every single statement that I have made has been backed by the hardest of documentary evidence. The information I put into the House yesterday was backed up by a statutory declaration. The information a week before and yesterday again was backed up by cabinets submissions and by a letter signed by Graham Richardson himself.

.... You have the documentary evidence available to you that I have available to me. The documentary evidence says proof positive of every single statement that I have made.

[22] In a detailed judgment Fitzgerald P, in examining the constitutionality of S.16(3) said:

> The principle argument that s 16(3) is disproportionate in the material sense is related to its potential operation in defamation litigation, for example, an action brought by a Commonwealth parliamentarian based on criticism of his or her parliamentary performance. However, any appearance of injustice which might otherwise exist loses much of its substance if, as this court is bound to accept, such criticism is constitutionally protected in accordance with the doctrine enunciated in *Theophanous, Stephens* and the subsequent line of cases. It is true that there are circumstances in which that protection is unavailable; for example, malicious publication of known defamatory falsehood is unprotected by that doctrine. Hence, leaving to one side for the moment the position under s 49 of the Constitution or the remainder of the Parliamentary Privileges Act, if s 16(3) is wholly or partially invalid, that subsection, if valid, would in at least some circumstances prevent effective suit for defamation by a Commonwealth parliamentarian who was defamed by the malicious publication of known falsehoods concerning his or her participation in "proceedings in Parliament" as defined by s 16(2). I do not find that particularly surprising or objectionable. Parliamentary "powers, privileges and immunities" belong to parliament (or the material House) not the individual members (*Sankey v Whitlam* (1978) 142 CLR 1; 21 ALR 505) and it is not unjust or unreasonable that the public interest which they are intended to serve has adverse consequences for parliamentarians as well as ordinary citizens who are without recourse for defamation published of them by a member of parliament in parliament. Indeed, the defamed member of parliament at least has a public and absolutely privileged forum in which to respond to maliciously false defamation by an ordinary citizen, as well as the opportunity to achieve vindication by having the citizen punished by the material House for contempt: Erskine May, *Parliamentary Practice,* 21st ed, people 126-8.

[23] And then at 480:

> Examples can be found which starkly illustrate the impact which parliamentary privilege can have on individual rights and liabilities, and the distortion which it can produce in particular disputes: see, for example, *Wright and Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416, and *Prebble.* It is irrelevant to the present issue whether the decision of the Full Court of South Australia in *Wright* and of the New Zealand Court of Appeal in *Prebble* should be preferred to the

> opinion of the Privy Council in the latter case. Whether or not some actions should be stayed because of the consequences of parliamentary privilege, it would not be possible to fashion a law with respect to parliamentary privilege which did not have the potential for injustice in some circumstances; Art 9 of the Bill of Rights plainly was capable of producing injustice for individuals, and any law which accords absolute privilege to statements made by a particular group in specified circumstances must necessarily be capable of injustice if abused, for example, if maliciously false defamatory statements are made. Such a consequence does not mean that a law enacted pursuant to a constitutional power to declare parliamentary "powers, privileges and immunities" is invalid as beyond power.

[24] Fitzgerald P accordingly held that the plaintiffs general attack on the validity of S.16(3) could not succeed. Finally the Judge concluded that even if S.16(3) was constitutionally invalid, article 9, if it continued to apply, would present the plaintiff in this case with similar obstacles to those which exist by virtue of S.16(3).

[25] Pincus JA discussed the practical effect of S.16(3) by giving illustrations of proceedings brought by a member of Parliament, only to be met with a S.16(3) barrier, and by members of the public against a member of Parliament, and then went on to say:

> Suppose, in such a suit, that it happens that the parliamentarian makes no attempt to establish the truth of anything in the speech which has been attacked, then the defendant is equally disabled. The proposition that what was said consisted of untruths cannot be proved because what was said cannot be proved. The predicament would be particularly galling, one would think, for a defendant who was the subject matter of the untruths. These strange consequences are not ones which follow from a far-fetched example. Criticism, perhaps strong criticism, of what politicians have said in parliament is a common affair and particularly likely to occur where the critic's complaint is that a parliamentary speech traduces him or her.

[26] Pincus JA considered that S.16(3) did not apply to defamation suits.

[27] Davies JA considered that S.16(3) did not apply to the facts of this case, although he agreed it came within the literal terms of subsection (3)(c) and said:

> No impropriety is alleged against the first defendant in respect of what he said in parliament. What is alleged against him in the statement of claim is that what he said outside parliament was false and defamatory of the plaintiff. It is true that proof that what the first

> defendant said outside parliament was false will also prove that what he said in parliament was false. But that is because he incorporated the latter in his statements outside parliament. The privilege of Art 9 applies to the statements in parliament but not to the statements made out of parliament even though they incorporated by reference the statements made in parliament. This case is distinguishable in this respect from *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (I leave out of account the effect which the implied freedom of political discussion would have on cases such as this) in which the defendant, sued by a parliamentarian for defamation, was attempting to use what the plaintiff said in parliament against him to prove dishonesty and improper motive. It does not follow from what I have said that the first defendant could be cross-examined in this action upon what he said in parliament for the purpose, for example, of showing that what he said there, and consequently his reaffirmation outside parliament, was made with an improper motive. But that question is not before the court.

[28] Contrasted with the facts in this case, the majority discussion and particularly the decision of Davies JA, would lend considerable support to the plaintiff's position because in content if not in style, the words uttered by the defendant in each case are to the same effect, namely that the statements albeit made in the House are nonetheless true. In the Australian case evidence of the truth is said to be available which perhaps reinforces the nature of the repetition. Davies JA referred to having incorporated the statements made in Parliament in the statements outside the House. It would I think, be difficult to suggest that the defendant had not done the same here but the defendant and the Attorney-General suggest such a concept is wrong in principle and approach.

[29] In ***Rann v Olsen*** [2000] SASC 83 a decision of the Full Court of the Supreme Court of South Australia the majority judgment in ***Laurence v Katter*** was not followed. The plaintiff, the Leader of the Opposition in the Parliament of South Australia, issued proceedings against the premier of South Australia. To journalists Mr Olsen (the defendant) said that Mr Rann (the Plaintiff) had lied when he told a Committee of the Commonwealth Parliament that Mr Olsen had leaked confidential information to the opposition. Pleading truth in substance and in fact required Mr Olsen to prove that Mr Rann did lie when giving evidence to the committee and would need a specific finding of telling lies. It would not be sufficient in the context of those proceedings to prove the statement incorrect.

[30] S.16(3) of the Parliamentary Privileges Act was held to be constitutionally valid and applicable. It was held therefore that the defendant was prevented from proving that the statements uttered by him were true in substance and in fact, but the court found that the inability of a party to adduce evidence as a result of the application of this rule did not provide ground for staying the action, which was a matter for the discretion of the court and could be subject to further orders.

[31] For the purpose of the case stated to the Full Court, by the trial Judge, there was no dispute that Mr Olsen had uttered words defamatory of Mr Rann to the extent of saying that Mr Rann deliberately lied when giving evidence to the committee of the commonwealth Parliament. Mr Olsen sought to prove, and Mr Rann denied that Mr Rann's statement to the committee that Mr Olsen was the source of confidential leaks was a lie. In further elaboration, Doyle CJ said:

> Mr Olsen will need to prove the very evidence that Mr Rann gave to the Committee, and to prove that that evidence was untrue. As I have explained earlier, he will seek a finding that the particular statement made about him to the Committee was a lie. Mr Olsen's statement was that Mr Rann's evidence to the Committee was a lie. This is not a case in which, by establishing that Mr Rann told a lie outside Parliament, Mr Olsen will incidentally prove that a statement to the same effect made by Mr Rann in proceedings in Parliament is also a lie. The evidence tendered by Mr Olsen, and the questions asked, will directly concern (or be about) the evidence of Mr Rann. They must, if the plea of truth is to succeed. The same is true, with appropriate adjustments, of evidence tendered by Mr Rann and questions asked by him with a view to establishing the truth of what he said, in responding to Mr Olsen's attack.
>
> Nor is this a case in which the Court will, under the plea of truth, simply be asked to receive evidence of what Mr Rann said as a matter of fact, relevant in some way simply as a fact. It will not suffice for Mr Olsen simply to prove what Mr Rann said. He will do that, of course, but he will also want to prove that that statement, when made, was a lie. Mr Rann will want to prove that it was true.
>
> I consider that s 16(3) makes unlawful the course of action proposed to be followed by Mr Olsen and Mr Rann in dealing with the plea by Mr Olsen of truth. Neither party can waive the operation of s 16(3). The Court is bound to observe the statement by Parliament that the proposed course of action is not lawful.

[32] The paradox of provisions such as Article 9, Bill of Rights Act 1688 is highlighted in Doyle CJ's judgment (477):

> But the effect of s 16(3) is to deny Mr Olsen an important defence at common law to a claim under the law of defamation. In that respect it does burden freedom of speech. It leaves Mr Olsen unable to resist a claim, on the grounds of truth, in respect of words spoken by him being words constituting part of communication on matters of government and politics. I reject the submission that the section does not burden freedom of communication at all.
>
> If the provision has any impact on Mr Rann, it is to make it more difficult for him to succeed in a claim under the law of defamation. It prevents him from relying on the truth of this evidence to the Committee, in the sense of seeking a specific finding that it was true. In this respect the provision does not interfere with freedom of communication. If anything, it enhances it, by limiting the availability of a common law remedy otherwise available to Mr Rann for use against Mr Olsen for what he said in the course of communication on matters of government and politics.
>
> What this highlights is that often s 16 will enhance freedom of communication, by limiting or removing the availability of a legal remedy or the ability to impose a detriment in respect of things said in the course of protected speech. It may be that the only burden imposed on freedom of communication by the provision is the burden identified in this case. On the other hand, there may well be other situations in which a person, sued for a defamatory statement referable to something said in the course of protected speech, will be disadvantaged in legal proceedings. For present purposes I will assume that s 16 will burden freedom of communication in other ways.
>
> The burden is a significant chilling effect upon communication relating to parliamentary matters. Persons speaking about or commenting upon such matters run the risk, in some circumstances, of being unable to defend an action for libel or slander based upon what they have said.
>
> Just as the protection of those who speak in the course of proceedings in Parliament is important, so is the freedom of speech of those who speak about or comment on what happens in Parliament. In our society, each freedom seems equally important to me. The effect of my construction of s16(3) is to render vulnerable to legal action, by the persons upon whose conduct it is important that they be free to comment, persons who choose to comment upon proceedings in Parliament. It is easy to envisage that the prospect of legal action, which can only be defended on limited grounds, could well restrain journalists and others from commenting freely about what is said in the course of proceedings in Parliament. There is an undeniable risk

> that free and lively debate about what happens in Parliament will be impeded.
>
> On the other hand, the burden should not be overstated. It is difficult to say how often it will arise. And it needs to be remembered that a burden is imposed only when the defence to an action for libel or slander involves directly challenging or relying on the truth of something said in the course of proceedings in Parliament.

[33] Earlier Doyle CJ had said that the more specific provisions of S.16(3) precluded an approach which Davies JA had adopted in ***Laurence v Katter***, and which Doyle CJ's predecessor had reasoned in ***Wright v Lewis*** (1990) 53 SASR 416 as a more flexible approach under Article 9. He added:

> There will be clear cases, but there will also be borderline cases, and this is an area in which there is plenty of room for differences of opinion. Parliament could not have intended that such an important provision would depend upon judicial assessment of the impact, in the particular case, of the proposed course of conduct.

[34] In ***Peters v Cushing*** [1999] NZAR 241 a statement made on the Holmes show by Mr Peters alleged corrupt and improper political pressure on him. It was later said in Parliament by Mr Peters to be referring to the plaintiff. Some months later, further reference was made to the original programme and the identity of the plaintiff disclosed, not by what was said in Parliament but openly by the defendant. In respect of a cause of action on the publication on the first occasion, a Full Court of the High Court, Ellis and Greig JJ, held that because the first publication relied on evidence of what was said in Parliament to attribute the actions to the plaintiff, the same was protected by article 9 and that cause of action should fail. The second cause of action which did not rely for identity on the Parliamentary statement, but by something emerging from the second statement, constituted, the Court held, a republication of the defamation in the first programme, by reference to it in the second programme, without problems of identification.

[35] In this case the Attorney-General sought and obtained leave from the House of Representatives to intervene to assist in the current proceedings. Leave was duly given. It was said that the determination of the proceedings were likely to involve important questions as to the scope of Parliamentary privilege. As Mr Arnold QC quickly identified, this case raises the question of what constitutes a repetition

outside the House, and in particular whether reference to a statement made in the House by a member speaking out of the House, which in itself is not actionable as defamatory can become actionable through the doctrine of adoption or as Davies JA said in ***Laurance v Katter,*** incorporation.

[36] It is said the court's approach to that question will determine as a practical matter the scope of Parliamentary privilege. The Attorney submitted that if the courts require a clear and unequivocal repetition outside the House of remarks made inside the House, the proper scope of Parliamentary privilege will be fully preserved. If on the other hand the court takes an expansive view of what constitutes a repetition, the scope of Parliamentary privilege will be greatly reduced.

[37] There can be no doubt the statements made inside the House are protected by Parliamentary privilege and that is an absolute privilege. It reflects the appropriate constitutional relationship between the courts and Parliament, reflected in the principle of mutual restraint or non-intervention. It is enshrined in article 9 of the Bill of Rights 1688, and an absolute privilege merely reflects the need for free and fearless discussion for the proper conduct of the business of the House of Representatives.

[38] In the authorities that I have reviewed and by the words of the ancient Act itself, it is clear that a party to litigation cannot bring into question anything said or done in the House, by suggesting that a members action or words were inspired by improper motives or untrue or misleading statements, and that this rule applies even though it may act to the disadvantage not only of members of the public *viz a viz* parliamentarians, but parliamentarians and any proceedings they may bring against any other person.

[39] The rule goes so far as to preclude support for a cause of action as a result of events within the House, even though the cause of action arises outside the House. A repetition however, by a member outside the House, of a statement made inside the House, is not protected, and may form the basis of a defamation claim. In asserting Parliamentary privilege and the view that a conservative non-expansive approach be taken, Mr Arnold referred to a number of the authorities, and in

particular ***Prebble v Television New Zealand*** for support. I do not intend to review those submissions. The values that he emphasised, and the importance of them, go without saying. It is when they conflict with other values, such as the right of citizens to bring proceedings in the courts, when their reputations are damaged, other than by statements made in Parliament, do the issues come into focus.

[40] Of particular importance, Mr Arnold argued, was that a member of the House, at the time he or she speaks, should not be inhibited from stating fully and freely what he or she has to say, and that if the rules as to repetition are expanded or made unduly flexible, and rely on a host of qualifying circumstances, such as might be caught up in the exercise of a Judge's discretion, then a member will not know what will be constrained in saying what he might otherwise say for fear of crossing the border line when the matter is referred to further by the media or by other people, to him for further comment. That is a pragmatic position but Mr Arnold says it reflects the practicalities of the situation.

[41] One might think that whenever material of this defamatory kind is mentioned outside the house, it would be relatively easy for the broadcaster of the material to refuse to further comment, or at the most to confirm that that is what he said. In this case one further step has been taken and the critical word used is 'resile'. Mr Jennings would have known that the press would be free to refer to what he said in Parliament, and would be able to refer to that in the narrative of the article, to which the critical words 'resile' would be adjoined. On the other hand, it is not the newspaper that is being sued, it is Mr Jennings, and it is what he said in context which is seems to me is pivotal.

[42] Mr Arnold further submitted that having regard to ***Prebble*** and ***Church of Scientology of California v Johnson-Smith*** [1972] 1 QB 522, any erosion of parliamentary privilege which allows the conduct of a member of parliament to be impeached by indirect proceedings, would render the privilege ineffective.

[43] Mr Arnold says that the traditional approach is reflected in the decision of ***Stopforth v Goyer*** (1978) 87 DLR (3d) 373 where whilst it was held that absolute privilege did not apply, the statement made outside the House was substantially the

same as made in the House. He said that ***Beitzel v Crabb*** [1992] 2 VLR 121 and ***Laurance v Katter***, moved beyond this traditional approach.

[44] Mr Camp says there is no relevant privilege if you fully repeat outside the House, what you have said inside. It is only where you have to rely on the content of what was said inside, to complete your cause of action, that absolute privilege may operate.

[45] Here the critical thing however is, Mr Jenning's knowledge that he is being interviewed about his statement and having the statement put to him, the one that he made in the House, by a journalist who is likely to report the total conversation, including the allegations that he made in the House. That report could be verbatim or otherwise, but in the course of the interview he tells the reporter that he did not resile from his claim. Mr Jennings then effectively confirms that position in his subsequent letter to the paper.

[46] In a decision of a Full Court of this court, on a review of the Master's decision not to strike out the present cause of action, the court effectively rehearsed the respective cases to be put forward at trial. I respectfully adopt their approach and their reasoning. The Full Court considered that an arguable case existed that there was an effective repetition of the alleged defamatory material outside the House of Representatives. It said:

> [20] It is not in dispute that statements made outside Parliament are not protected by absolute privilege even if they simply repeat what has been said in Parliament: *Gatley on Libel and Slander*, 9th ed., paragraph 13.28 citing *Duncombe v Daniell* (1838) 2 Jur. 32; *R v Lord Abingdon* (1794) 1 Esp. 226, 170 ER 337; *R v Creevy* (1813) 1 M & S 273, 105 ER 102; and *Stopforth v Goyer* (1978) 87 DLR (3d) 373. In the last of these authorities, a Minister repeated to a reporter outside the House a statement in substantially the same form as he had made shortly before in the House. While recognising the scope of the principle of absolute privilege as described in the *Church of Scientology* case and other authorities, Lieff J held at 382 that the privilege did not apply even though the Minister's answer was in substance the same as the statement already made in the House.
>
> [21] It follows that an attack may be made on the truth of allegedly defamatory remarks made outside the House even if that would

amount to an indirect attack on the truth of the same or similar remarks made in the House. If a Member of Parliament chooses to repeat the remarks outside Parliament, he or she is not protected by the privilege and takes the risk that a defamation action may succeed.

Adoption by reference

[22] The question is whether, and if so in what circumstances, a Member of Parliament may become liable by referring to a statement made in the House without actually repeating the words used. The issue commonly arises where the defendant is asked whether he used allegedly defamatory remarks on a previous occasion. It is clear that if the defendant goes no further than acknowledging having made the statement, he cannot be sued on that account. If the plaintiff is to succeed, it must be upon the basis of the original statement: *Freeman v Poppe* (1905) 25 NZLR 529 and *Griffiths v Lewis* (1845) 14 LJQB 197.

[23] What is the position however where, in answer to the inquiry, the defendant says words to the effect that he stands by or does not resile from the remarks earlier made but without actually repeating them? This issue arose in the Supreme Court of Victoria in *Beitzel v Crabb* [1992] 2 VLR 122. The defendant Minister had made certain remarks about the plaintiff in the House which were alleged to be defamatory. The Minister's statement was widely reported in the media. In a later radio interview, the Minister was asked whether he proposed to apologise to the plaintiff. The Minister replied, "I stand by what I said." However, he went further indicating that the plaintiff could "say what he likes ...., investigations are continuing and the result would be what the result is". The reporter further noted that the Minister had called the plaintiff "a blood sucking parasite" and suggested that he would have to apologise if the facts were not borne out. To that question the Minister replied, "Sure, I mean if it turned out that I had had some brain-storm and everything I had been told and everything I had all read had all been something I had imagined and I had dreamed it up, yes, I would apologise but that's not the case". The Minister went on to say that he did not regret the remarks, he did not think the words used were too strong, and he did not think that the plaintiff had got as much as he deserved.

[24] Hampel J rejected a submission that even if it were a case of repetition or adoption of what was said in Parliament, the attribution of any meaning to what was said outside Parliament necessarily involved what was said in Parliament and would therefore be protected by privilege. The Judge also rejected a similar submission based upon s 16(3) of the Parliamentary Privileges Act 1987 (Cth).

[47] Hampel J in ***Beitzel v Crabb*** said whether what is said outside Parliament amounts to a publication is a mixed question of fact and law. He referred to the

absence of direct authority and cited analogous cases supporting the proposition none of which are other than persuasive in this court.

[48] The Full Court was attracted to the reasoning of Davies JA in ***Laurance v Katter*** and considered the authorities generally supported a cause of action in the present circumstances. It is of interest to note that the Full Court had regard to the reference in Gatley to the Faulkes Committee report supporting the loss of the privilege in such a case. At paragraphs 204 and 205 of the report the Committee gave examples close to the circumstances in this case. It said:

> 204. No parliamentary privilege attaches to the repetition outside Parliament of statements previously made in the course of Parliamentary proceedings.
>
> 205. The same principle must clearly apply to a member who verifies such a statement outside Parliament, for example, by saying "every word I spoke in yesterday's Debate was true", or who in a statement outside Parliament extends a statement previously made in Parliament, for example, by saying "Mr S is a good example of the class of persons I criticised in Parliament yesterday".

[49] In the end I have reached the view that the bright line required by Mr Arnold is sufficiently able to be seen in the circumstances of this case and it was crossed by Mr Jennings in the present context. He went looking for further media attention in respect of his criticisms of the Wool Board generally, to which Mr Buchanan's motives and role were necessarily attached. The one story relating to excessive or profligate expenditure was unlikely to be traversed without reference to the actions of officials. Then in response to that willingness to discuss the issues outside Parliament, Mr Jennings met with Mr Speden and stated he did not resile from his Parliamentary statements as discussed earlier in this judgment, in the certain knowledge those remarks would only be reported in the context of his remarks about Mr Buchanan whom he unequivocally identified in his subsequent letter to the Independent. All those events seem to me to put it beyond any category where the remarks in Parliament may be unintentionally repeated in a media scrum outside Parliament or inadvisably referred to in an oblique way without any intention to give up the privilege which does and should result from Parliamentary debate.

[50] I do not see that Mr Jennings or anyone else, could claim to be subject to some impediment in raising issues of the kind he did in Parliament, because of events which later followed. Those events were largely of Mr Jennings making and at his initiative. He did not have to grant any interview or having done so, write again to the newspaper or indeed include the topic of Mr Buchanan in his post Parliamentary statements at all. Whilst there is danger in any inhibition on parliamentarians to freely and fiercely debate the issues of the day there is a corresponding concern that by not categorically drawing the line on statements freely made outside the House which effectively repeat the defamation there is scope for the subtle use of protected parliamentary assertions being used in a wider way including being fed into the mainstream media in circumstances such as occurred here.

[51] I have not overlooked the relationship of the Independent to Mr Timpson, a member of the Wool Board, he being its financial underwriter as he described it. The Wool Board, who are meeting Mr Buchanan's costs, have undoubtedly come under attack from Mr Jennings from time to time, and no love would have been lost between them. The possibility of Mr Jennings being set up for the present proceedings has not escaped me, but the evidence of Mr Speden and Mr Jenning's subsequent actions in responding to the article in the Independent have dissuaded me from that view. I find the defamation is proved but I consider in the circumstances the first publication in the Independent is the operative defamation. The second removes any possible doubt in the reader's mind as to the subject of the earlier reference and emphasises or aggravates the defamatory material.

Damages

[52] I intend to award damages only in respect of the first publication but bearing in mind the reinforcement and possible repetition it received in the second publication.

[53] I do not think an award of punitive damages is required notwithstanding the absence of any defence of truth or fair comment. I also take into account the circumstances surrounding the cost of the promotion which Mr Jennings got badly

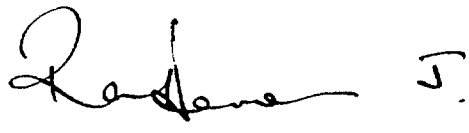
wrong. All in all however, I consider compensatory damages are sufficient. See ***Quinn v TVNZ*** [1996] 3 NZLR 24.

[54] The defamatory words are to be regarded as reflecting on the plaintiff in the context of his employment, always an aggravating concern. On the other hand they carry some degree of implausibility when one considers the likelihood of such personal motives transcending the economic imperatives a Board would (and did) inevitably follow. That is what I think one should read into it by way of context and impact.

[55] On the other hand, the suggestion of infidelity in this case would pervade not only the work environment but would go deep into family issues, none of which were required to be the subject of evidence. They need no elaboration and the publication would undoubtedly have been distressing and alarming to Mr Buchanan. They also came so long after the events that dealing with them retrospectively would no doubt have been difficult. Mr Buchanan can point to no obvious career disruption or loss of opportunity and his employer it would seem, backs him to the hilt.

[56] Enhancing the publicity surrounding the publication relating to Mr Buchanan, is its attachment to the issue of choices made by the Board and the fact that it involved a high profile New Zealand undertaking, namely an overseas rugby tour by many well known rugby personalities. All of that makes the reference to Mr Buchanan in the context all the more gratuitous and Mr Jennings would have known that.

[57] I think an appropriate award is one of $50,000 and I enter judgment for that amount together with costs which I fix at category 3, together with all reasonable costs and disbursements.



Delivered at 4.25 pm on 4 April 2001.