IN THE COURT OF APPEAL OF NEW ZEALAND CA106/01

BETWEEN OWEN ROBERT JENNINGS
Appellant

AND ROGER EDWARD WYNDHAM BUCHANAN
Respondent

Hearing: 26 March 2002

Coram: Richardson P
Gault J
Keith J
Blanchard J
Tipping J

Appearances: M F Gilkison for the Appellant
M R Camp QC and M McClelland for the Respondent
T Arnold QC and T Warburton for the Attorney-General as Intervener

Judgment: 23 May 2002

JUDGMENTS OF THE COURT

		Paragraph No
Richardson P, Gault, Keith and Blanchard JJ		[1]
Tipping J		[70]
Appendices A :	***The Independent*, article, 18 February 1998**	[169]
B :	***The Independent,* letter, 4 March 1998**	[170]

RICHARDSON P, GAULT, KEITH AND BLANCHARD JJ
(DELIVERED BY KEITH J)

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The principal question and our answer

[1] The principal question in this appeal is whether a Member of Parliament may be held liable in defamation if the Member makes a defamatory statement in the House of Representatives – a statement which is protected by absolute privilege under art 9 of the Bill of Rights 1688 – and later affirms the statement (but without repeating it) on an occasion which is not protected by privilege. We conclude that a Member may be held liable in those circumstances and that the defendant was rightly held liable in this case. His appeal based on absolute privilege is accordingly dismissed. Our reasons turn on the words of art 9 and the public interest underlying it. The Member's "freedom of speech … in Parliament" is not itself being "questioned", and the important public interest in the Member not being inhibited from speaking fully and freely in Parliament at that earlier time is not affected.

The facts and the proceedings

[2] Mr Buchanan, a senior official of the New Zealand Wool Board, claimed he was defamed by statements made by Mr Jennings, a Member of Parliament. Mr Buchanan was actively involved in organising a promotional tour in November 1996

of the United Kingdom by the Barbarians rugby team, supported by the Board. He accompanied the tour to the United Kingdom and was directly involved in advancing and delivering the promotion. Mr Jennings, in a debate in the House of Representatives on 9 December 1997, said this about the tour:

> … 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 … .
>
> And:
>
> 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] Mr Buchanan's second amended statement of claim, on which the matter went to trial, quoted these passages and said that:

> The plaintiff will refer to and rely on the full wording in the Hansard reports at trial to establish as an historical fact that the words were spoken by the defendant.

[4] On 18 February 1998 *The Independent* newspaper published an article relating to the statement in Parliament. The statement of claim refers to that article (which is set out in full in Appendix A) in this way:

> 8. In a statement to *The Independent* newspaper which the defendant knew and understood would be published and which was published in an article in the 18 February 1998 issue of *The Independent* under the headline "*Jennings' Woolly Smear Turns to Flannel*" the defendant falsely and maliciously stated of the plaintiff *inter alia* that:
>
> > He did not resile from his claim about the officials' relationship, just the money.

> The plaintiff will refer to and rely on the full wording of the article … at trial.

(The pleading claims that on 17 December 1997 Mr Buchanan told Mr Jennings that the sponsorship figures he had quoted in Parliament were grossly incorrect and that Mr Buchanan provided him with the correct figures. Mr Buchanan also challenged Mr Jennings about the alleged illicit relationship. The reference to "just the money" is to be seen in that context.)

[5] The first cause of action was stated in this way:

> In publishing the words set out in [para [4] above] to *The Independent* the defendant referred to, adopted, repeated and confirmed as true and was understood to refer to, adopt, repeat and confirm as true, the statement and subsequent reports of the statement he made in Parliament on 9 December 1997 as set out in [para [2] above].

[6] The pleading then claimed that those words referred to and were understood to refer to the plaintiff for various stated reasons. The remainder of the first cause of action alleged the natural and ordinary meaning of these words; knowledge of falsehood or recklessness in publishing them; the lack of any steps to withdraw or retract or resile from them in any way; and serious damage to reputation, distress and embarrassment. These matters are no longer in issue. Only the question of absolute privilege is.

[7] The statement of claim also presented a second and alternative cause of action based on a letter (Appendix B) written by Mr Jennings and published in *The Independent*. The particular passages pleaded were as follows:

> **Board berated**
>
> I wish to clear up some points made by your correspondent Graeme Speden [who had interviewed Mr Jennings] in (*The Independent*, February 18) … .
>
> … During that debate I challenged the board to refute the figures I quoted. The board refused to do so … .
>
> … As far as the Barbarians tour was concerned, I find it interesting that the board is cowering behind a sponsorship agreement … .
>
> I would also welcome a costs-benefit analysis on how much wool the

> sponsorship will sell, alternative proposals and the full audited costs, including any travel and association Mr Buchanan may have had … .
>
> … Instead of focusing on my comments, *The Independent* should turn its attention on the Wool Board to uncover the truth about its activities.
>
> **Owen Jennings**
> **Act New Zealand**

[8] The defence of absolute privilege was also the ground for a strike-out application which was dismissed by Master Thomson and, on review, by the High Court. Both held that the two causes of action on which the matter went to trial were arguable. *Buchanan* v *Jennings* [1999] NZAR 289, [2000] NZAR 113. That defence also failed at trial before Heron J who fixed the damages at $50,000 : *Buchanan* v *Jennings* [2001] 3 NZLR 71. Mr Jennings appeals.

The earlier judgments

[9] Since the earlier stages of this case, like this appeal, have all been solely or primarily concerned with the defence of the parliamentary privilege and all three judgments have been reported, our summary of the two High Court judgments is brief.

[10] On the strike-out application, Neazor and Randerson JJ reviewed the pleadings, the facts, and the New Zealand, Australian, English and Canadian authorities, reports and texts on art 9. They reached this conclusion on the law:

> Although the expressions “adoption by reference” and “repetition” are frequently used interchangeably in this context, we prefer the terminology of “effective repetition” because it better captures the rationale for denying the defence of privilege. Whether there has been an effective repetition is essentially a question of fact and degree. The whole of the circumstances will call for examination, including the remarks originally made in the House, the nature and context of the questions asked subsequently, and the defendant’s response. Where the words of the Parliamentary statement are not repeated outside Parliament, the plaintiff will seek to establish some sufficient temporal or other substantive link to the Parliamentary statement. Regard may also be had where necessary to the extent of any prior reporting of the Parliamentary statement to establish whether the public could

> reasonably be expected to link the defendant's remarks outside the House to the Parliamentary statement. All of this is background to the central question whether what has been said outside Parliament is properly to be regarded as a repetition of the statement protected by privilege. It is not enough to avoid the privilege that there be a reference outside Parliament to a statement inside the House: there must be sufficient to be a repetition of it. Otherwise, the proceeding is a challenge to a statement made inside the House. ([2000] NZAR at 122-123)

[11] On the facts, the Full Court concluded that there was an arguable case that the parliamentary remarks had been effectively repeated outside the House. The proceedings accordingly went to trial.

[12] Following the trial, Heron J held, first, that the comment "I still haven't been proved wrong" could not reasonably be applied to the relationship question, but rather to the money. Secondly, the Judge did not accept that the word "resile" might have been the suggestion of the sub-editor or in some way have been an embellishment on what the reporter actually reported. He continued:

> [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. (para [16] at 75)

[13] Heron J then reviewed the authorities – those already considered in the strike-out decisions – and adopted the approach and the reasoning of the High Court (para [46] at 83-84, quoting [2000] NZAR at 117-119).

[14] The Judge concluded that Mr Jennings had crossed the line and had effectively repeated the defamation. He found the defamation proved but considered that in the circumstances the first publication was the operative defamation. The

second publication removed any possible doubt about the subject of its earlier reference and emphasised or aggravated the defamatory material.

The submissions

[15] Mr Gilkison, for Mr Jennings, submitted the decision of the Privy Council in *Prebble* v *Television New Zealand* [1994] 3 NZLR 1 was applicable and binding on the facts of this case. The reference to the Member's words in Parliament was in breach of art 9 as interpreted in that case. Independently of that submission, he contended that Heron J had been wrong in law and fact to find that the words complained of constituted effective repetition. Finally, he submitted that the "I do not resile" remark had not been properly proved.

[16] The Solicitor-General, for the Attorney-General who had been permitted to intervene because of the major public importance of the issues, submitted that parliamentary privilege has three sources : the constitutional relationship between the Courts and Parliament, art 9, and the recognition that absolute privilege is necessary to encourage the free discussion necessary for the proper conduct of the business of the House. He emphasised the principles contained in *Prebble* and the judgment of the House of Lords in *Hamilton* v *Al Fayed* [2001] 1 AC 395. One consequence of accepting the effective repetition rule would be to permit Court examination of statements made in Parliament, for instance by allowing the cross-examination of Mr Jennings about what he had said in Parliament had he given evidence. That was contrary to art 9 and to *Prebble*. To apply "effective repetition" or "adoption by reference" would reduce the scope of parliamentary privilege and would run counter to the proper constitutional relationship between Parliament and the courts and the need for mutual respect and restraint. In his written submissions (but not his oral ones) he also submitted that "adoption by repetition allows, by implication, a waiver by an individual Member of the privilege of Parliament, which he or she is not able to waive". It is convenient to deal with this submission here. We do not see this as a case of waiver of the House's privilege. What is involved is an action based on a statement made outside the proceedings of the House. It has long been established for instance that a Member can be held liable for a full repetition outside parliament of a parliamentary speech (para [30] below).

[17] Mr Camp QC submitted that Mr Buchanan was not asking the Court to call in question what was said in the House when suing on a repetition. The reference back was only to explain how the public would understand the later statement. He accepted that the Court should be assiduous to protect the privilege of Parliament. *Prebble* was not a repetition case so the issue in the present case was not before that Court. What *was* in issue there was the clear prospect of evidence to call into question the truth of what was said in the House. But, as that case said, Hansard could be used to prove what was said as a matter of history. In effective repetition cases, that is all that occurs. Further, where the Court decides effective repetition on a case by case basis there is no danger that the freedom of speech in Parliament will be inhibited. He rejected the proposition that full repetition was necessary. But Mr Gilkison and Mr Arnold contended that the approach in cases allowing actions on the basis of effective repetition ("a fictional device") was contrary to art 9 of the Bill of Rights because the parliamentary statement would be questioned and adjudged. It is that difference we have to resolve.

Article 9 of the Bill of Rights

[18] Article 9 of the Bill of Rights provides:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament.

The preamble to the Bill recited "that the late King did endeavour to subvert … the laws and liberties of the people by prosecution in the Court of King's Bench for causes and matters cognizable only in Parliament".

[19] Article 9 was the culmination of a long struggle for parliamentary supremacy, involving a history of conflict between the House of Commons and the Tudor and Stuart monarchs during which successive monarchs used the criminal and civil law to suppress and intimidate critical members of the Commons (*United States* v *Johnson* 383 US 169, 178 (1966)). The struggle went back to at least the time of Edward the Confessor. More immediate in the minds of the Parliament of 1688 would have been particular events of that tumultuous century including the successful prosecution in the King's Bench of Sir John Elliot and others in 1629 for

statements they made in debates in the House of Commons, resolutions of the House in 1641 that those proceedings and the judicial rulings were against the law and privileges of Parliament, and the resolutions adopted and rulings made by both Houses in 1667 and 1668 affirming their privileges, imposing penalties on members who had breached the privileges in particular ways in 1629 and reversing the judgment in the *Elliot* case (3 St Tr 293).

[20] The claims of parliamentarians of the time may also be seen in Sir Edward Coke's proposition in the fourth volume, published in 1644, of his *Institutes of the Laws of England*:

> It is lex et consuetudo Parliamenti, that all weighty matters in any Parliament moved concerning the Peers of the Realm, or Commons in Parliament assembled, ought to be determined, adjudged, and discussed by the course of the Parliament, and not by the Civill law, nor yet by the Common laws of this Realm used in more inferior Courts; which was declared to be secundum legem et consuetudinem Parliamenti concerning the Peers of the Realm, by the King and all the Lords Spirituall and Temporall; and the like pari ratione, is for the Commons for anything moved or done in the House of Commons. (4 Inst 15)

The reference to "more inferior courts" is to be explained, at least in part, by the fact that volume 4 of the Institutes "concern[s] the jurisdiction of Courts" and that ch 1, within which the quoted passage appears, is titled The High and Most Honourable Court of Parliament.

[21] It is convenient to set out the shorter version of this statement which Blackstone purported to quote (1 Comm 158-59 in the first edition (1765) and 163 in later editions) and which has been often quoted since, for instance by the Privy Council in *Prebble* v *Television New Zealand* [1994] 3 NZLR 1, 7:

> 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.

[22] Coke made that statement after he had (again) been for some years a member of the House of Commons – he had been a major participant in the deliberations that led to the Petition of Right of 1627 – and of course some years before art 9 stated the

privilege in authoritative and more confined legislative form. In particular, his word "discussed" is to be compared with the narrower "impeached or questioned" in art 9. At least one of Blackstone's editors also criticised the passage (in its briefer form) as implying a power which "surely is repugnant to the spirit of our constitution" (Edward Christian, 15th ed 1809, 163 n18; see also 164 n19).

[23] Much more significant than that criticism is that made in 1999 by the Joint Committee on Parliamentary Privilege of the United Kingdom Parliament : the "oft quoted [Blackstone/Coke] statement … is now accepted as being too wide and sweeping" (Session 1998-99 HL 43-I, HC 214-I para 42). The Committee, chaired by Lord Nicholls of Birkenhead, a Law Lord, also said this:

> This legal immunity [guaranteed in art 9] is comprehensive and absolute. Article 9 should therefore be confined to activities justifying such a high degree of protection, and its boundaries should be clear. (Executive Summary p1).

[24] Forty years ago Lord Radcliffe, speaking in his judicial capacity, similarly stressed the importance of identifying

> the circumstances and situations in [which] a member of the House is exercising his "real" or "essential" function as a member. For, given the proper anxiety of the House to confine its own or its members' privileges to the minimum infringement of the liberties of others, it is important to see that those privileges do not cover activities that are not squarely within a member's true function. (*Attorney-General of Ceylon* v *de Livera* [1963] AC 103, 120.)

Its corporate purpose

[25] One important feature of the privilege is its corporate purpose. According to *Erskine May's Parliamentary Practice* (22d ed 1997) 65, "Fundamentally, … it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members". The Standing Orders Committee of the New Zealand Parliament similarly in 1989 said that "this body of law … is not intended to confer personal benefits on a privileged group, but … is intended to facilitate the workings of our most important constitutional institution" (1987-90 AJHR I 18B para 8; see also the recommendation in para 9; and similarly David McGee, *Parliamentary Practice in New Zealand* (2d ed 1994) 468).

[26] That corporate character is emphasised by the traditional actions of the Speaker of a new Parliament and the Governor-General, as set out in Standing Orders 21, 22, and 23 of the House of Representatives:

> 21. After electing a Speaker, the House adjourns until the time indicated by the Governor-General for the delivery of the Speech from the Throne. The Speaker-Elect seeks the Governor-General's confirmation as Speaker before the next sitting of the House.
>
> 22. On being confirmed by the Governor-General as Speaker of a new Parliament, the Speaker shall, on behalf of the House, lay claim to all the House's privileges; especially to freedom of speech in debate, to free access to the Governor-General whenever occasion may require it, and that the most favourable construction may be put on all the House's proceedings.
>
> 23. The Speaker must report to the House the Governor-General's decision as to confirmation and the Governor-General's reply to the Speaker's claim to the House privileges.

The same emphasis on protecting the integrity of the parliamentary process is to be seen in leading cases on the Speech and Debate Clause of the United States Constitution which had its origin in art 9 : "[t]he immunities of the … Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators" (*United States* v *Brewster* 408 US 501, 507 (1972)).

[27] In terms of s242 of the Legislature Act 1908 (consolidating the Parliamentary Privileges Act 1865, especially s4) and as recognised by s3(1) of the Imperial Laws Application Act 1988, art 9 is part of the law of New Zealand. Its meaning and application in the present case turn both on the facts of the case and on the wording of the provision, its purpose, the context from which it arose, and the interpretations, authoritative and other, placed on it over more than three centuries.

[28] The varying interpretations show that while the underlying purpose and principle of art 9 may be clear, considerable uncertainty about the meaning of its terms remains, especially about "proceedings in Parliament", "questioned" and "any … place out of Parliament". It is not just that interpretations may produce

conflicting or unclear answers. So too can legislative attempts to restate or reformulate art 9. We begin however with interpretations and applications of art 9 which do appear to be agreed.

The protection it accords

[29] Article 9 is breached if the reference to "proceedings in Parliament":

(1) is to found the factual basis for legal proceedings against the person making the statement (the person need not be a member of the House, but might for instance be a witness before a select committee); the proceedings might be civil (eg *Dillon* v *Balfour* (1887) 20 LR Ir 600 and *Roman Corp* v *Hudson's Bay Oil and Gas Co* 18 DLR (3d) 134 (Ont HC), 23 DLR (3d) 292 (Ont CA), 36 DLR (3d) 413 (SCC)), criminal, as indicated in the final outcome of the *Elliot* case (para [19] above), inquisitorial (cf Mummery (1978) 94 LQR 276) or disciplinary (*Le Club de la Garnison de Quebec* v *Lavergne* (1918) 27 RJQ 37 and 31 RJQ 349, as discussed in Maingot, *Parliamentary Privilege in Canada* (2d ed (1997) 31-33); or

(2) is to establish malice, for instance to defeat a defence of qualified privilege, or more generally to "suggest that the actions or words were inspired by improper motives or were true or misleading" (*Prebble* at 10 *ll* 40-4).

Proceedings not "in Parliament"

[30] The phrase "proceedings in Parliament" imposes an important limit on the protection. To state the obvious, art 9 does not protect proceedings not in Parliament. So it was early established that the separate publication outside Parliament of a speech by a member (even publication by the member to his constituents) could lead to a criminal conviction for libel (*R* v *Lord Abingdon* (1795) 1 Esp 226, 170 ER 337). Even an order of the House for the printing and publication of parliamentary proceedings outside Parliament did not confer parliamentary privilege according to *Stockdale* v *Hansard* (1839) 9 Ad & E 1, 112 ER 1112. It is

otherwise if the statement outside Parliament is a part of the parliamentary process, as in the *Hudson's Bay* case. Senator Proxmire could not however take advantage of that reading of the Speech and Debate clause in the US Constitution when he distributed from the Congressional Record a statement he had prepared defaming a scientist : that further distribution was not an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House (*Hutchinson* v *Proxmire* 443 US 111, 126 (1979)).

[31] The distinction between proceedings in Parliament and those which are not – a distinction which relates closely to the corporate character of the privilege and its function – is also to be seen against changing law, practice and attitudes to the openness and publication of parliamentary proceedings.

[32] The changes may be seen in a period of just 30 years, beginning with judicial comments in 1839 in *Stockdale* v *Hansard* and the immediate legislative rejection of that decision and ending with the decision given by the Court of Queen's Bench in 1868 in *Wason* v *Walter* (1868) LR 4 QB 73. They occurred even though the Houses then – as now – maintained their rarely used powers to exclude strangers, to debate behind closed doors and to prohibit the publication of debates and proceedings (eg Erskine May 84-85; New Zealand House of Representatives *Standing Orders* 39-40, 217, 219, 220 and 359).

[33] In *Stockdale* v *Hansard* members of the Court expressly rejected the argument that members of the House of Commons should have the right to send copies of Parliamentary papers to their constituents to justify themselves in case their constituents should find any fault with their conduct in Parliament. According to Littledale J:

> If the member whose conduct is blamed by his constituents wishes to vindicate his conduct, he may send what Parliamentary papers he pleases, provided they do not contain any criminatory matter of individuals; but I think it can never be considered as justifiable to publish defamatory matter of other persons to justify his own conduct in Parliament.

> As to the general information to be given to the public of all that is going on in Parliament, I cannot conceive upon what ground that can be necessary. I do not consider as a matter of right that the public should know all that is going on in Parliament. (9 Ad & E at 181, 112 ER at 1180-81)

[34] Patteson J emphasised the control exercised by the House of Commons over access to its proceedings:

> But it is said that the constituents have a right to watch over the conduct of their representatives, and therefore to know what passes in the House. The House itself is of a different opinion; for it is only by sufferance that any one is allowed to be present at its debate; it is only by sufferance that the debates are allowed to be published; and it is only by the special permission of the House that its votes, and proceedings, and papers are communicated to the public, and that in the manner in which they think fit to order. If the constituents had a right to know all that passes, or if the House of Commons were an open Court, then there might be some colour for saying that it was necessary to publish all its proceedings. It is upon the ground that Courts of Justice are open to the public, that what passes there is public at the time, and that it is important that all persons should be able to scrutinize what is there done, that the publication of every thing which there passes has been thought to be lawful. (211-212, 1191-92)

[35] In a number of other respects he also rejected the parallel between the Courts and the House and dismissed the argument based on the need to obtain the requisite information for the member in any legislative or inquisitional measure. He concluded his judgment in this way:

> Where then is the necessity for this power? Privilege, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing : it is to be regarded, not with tenderness, but with jealousy ; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences. The onus of shewing the existence and legality of the power now claimed lies upon the defendants : it appears to me, after a full and anxious consideration of the reasons and authorities adduced by the Attorney-General in his

> learned argument, and after much reflection upon the subject, that they have entirely failed to do so : I am therefore of the opinion that the plaintiff is entitled to our judgment in his favour. (214, 1192; see also Lord Denman at 152-153, 1170)

Protected by legislation in some cases

[36] As indicated, the legislative response was prompt and negative. Within the year, Parliament had enacted the Parliamentary Papers Act 1840 "to give summary Protection to Persons employed in the Publication of Parliamentary Papers". Parliament assessed the public interest in a way which contradicted the Judges:

> Whereas it is essential to the due and effectual Exercise and Discharge of the Functions and Duties of Parliament, and to the Promotion of wise Legislation, that no Obstructions or Impediments should exist to the Publication of such of the Reports, Papers, Votes, or Proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published : And whereas Obstructions or Impediments to such Publication have arisen, and hereafter may arise, by means of Civil or Criminal Proceedings being taken against Persons employed by or acting under the Authority of the Houses of Parliament, or One of them, in the Publication of such Reports, Papers, Votes, or Proceedings; … .

[37] The operative provisions of the Act accordingly provide protection against criminal and civil proceedings brought against persons involved in the publication of parliamentary papers if the publication is by order of either House. Those publishing extracts from such reports bona fide and without malice are also protected. Those protections were taken into New Zealand law in 1856 (Privileges Act 1856 ss8-10; see now Legislature Amendment Act 1992 and Defamation Act 1992 s16(1) and First Schedule, Part I, cl 3).

And protected by courts in others

[38] When the Court of Queen's Bench came to decide in 1868 in *Wason* v *Walter* that a faithful report in a newspaper of a debate in either House of Parliament was not actionable, they concluded that the analogy between parliamentary proceedings and judicial proceedings was "in every respect complete". In reaching that conclusion they rejected the reasoning in *Stockdale* v *Hansard*. They also rejected the view of policy stated by some of the judges in that case. In their judgment

delivered by Sir Alexander Cockburn CJ they set out the preamble to the 1840 Act and said this:

> It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed, – where would be our attachment to the constitution under which we live, – if the proceedings of the great council of the realm were shrouded in secresy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings of parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in addition to the difficulty in which parties publishing parliamentary reports would be placed, if this distinction were to be enforced and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the state, – no subject of parliamentary discussion which more requires to be made known than an inquiry relating to it. (LR 4 QB at 89 quoted in *Lange* v *Atkinson* [1998] 3 NZLR 424, 444)

[39] The Chief Justice went on to reject an argument based on the illegality, as being in breach of Standing Orders, of the publishing of parliamentary proceedings:

> But, practically, each house not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in Hansard or the public journals, and in every debate reports of former speeches contained therein are constantly referred to. Collectively, as well as individually, the members of both houses would deplore as a national misfortune the

> withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of parliamentary proceedings is prohibited by parliament. The standing orders which prohibit it are obviously maintained only to give to each house the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings. Practically, such publication is sanctioned by parliament; it is essential to the working of our parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. (LR 4 QB at 95)

[40] The privilege which the Court here established is the qualified privilege which is familiar as a defence to actions of defamation; it has nothing but its name in common with parliamentary privilege (Keir and Lawson, *Cases in Constitutional Law* (4th ed revised 1954) 126).

Court use of "proceedings in Parliament"

[41] The preceding discussion relates to proceedings or actions *not* "in Parliament" and to their protection or not by law other than art 9. We now return to that provision and, by contrast to the prohibitory list set out in para [29], refer to circumstances in which proceedings in Parliament may be referred to without art 9 providing any impediment. They may be used

(1) to establish what is said or done in Parliament on a particular day as a matter of historical fact (eg *Prebble* at 10-11);

(2) to assist in finding the meaning of legislation (eg *Marac Life Assurance Ltd* v *Commissioner of Inland Revenue* [1986] 1 NZLR 694 and *Pepper* v *Hart* [1993] AC 593; it is interesting that Cockburn CJ referred in a routine way to Hansard in *Wason* v *Walter*; such references appear to have been not uncommon at that time);

(3) (in England at least) to assist in finding that a government decision is or is not to be judicially reviewed, particularly by reference to Ministerial statements made in the House (eg *R* v *Home Secretary ex*

parte Brind [1991] 1 AC 696 and *R* v *Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement* [1995] 1 WLR 386 (CA)); the United Kingdom Joint Parliamentary Committee said of such cases that "when challenging a minister's decision an applicant for judicial review should be as free to criticise the Minister's reasons expressed in Parliament as those stated elsewhere" (para 51); Lord Woolf MR in supporting the practice emphasised that it "does not involve questioning what has happened in Parliament. It involves no more than using Hansard as a factual record of what happened in the House. There is no infringement of the Bill of Rights" (Vol 3 p151; see to the same effect Professor Anthony Bradley p149 para 17); or

(4) if legislation so provides, as with the corruption and bribery of a member of Parliament (Crimes Act 1961 s103).

The uncertain scope of article 9 : three recent cases

[42] Beyond the apparently agreed situations set out in paras [29] and [41] there is still considerable uncertainty about the scope and application of art 9. That can be seen by contrasting a number of statements made by one leading Judge in cases decided in 1992, 1994 and 2000 and an Australian (Commonwealth) statutory provision which he considered to be declaratory of the law in the 1994 and 2000 judgments (while it was mentioned in argument in the first case it did not feature in the judgment). The Australian provision is s16 of the Parliamentary Privileges Act 1987, enacted in response to *R* v *Murphy* (1986) 64 ALR 498. The relevant parts read:

16 Parliamentary privilege in court proceedings

(1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

…

(5) In relation to proceedings in a court or tribunal so far as they relate to:

(a) a question arising under section 57 of the Constitution; or

(b) the interpretation of an Act;

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill

> of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.
>
> …

[43] In *Pepper* v *Hart*, the first of the three cases considered in this part of the judgment, Lord Browne-Wilkinson (with whom five of the other six Law Lords agreed) dismissed the Attorney-General's argument that the use of Hansard for the purpose of construing an Act would constitute a "questioning" of the freedom of speech or debate in breach of art 9. He gave these reasons:

> Article 9 is a provision of the highest constitutional importance and should not be narrowly construed. It ensures the ability of democratically elected members of Parliament to discuss what they will (freedom of debate) and to say what they will (freedom of speech). But, even given a generous approach to this construction, I find it impossible to attach the breadth of meaning to the word 'question' which the Attorney-General urges. It must be remembered that art 9 prohibits questioning not only 'in any court' but also in any 'place out of Parliament'. If the Attorney-General's submission is correct, any comment in the media or elsewhere on what is said in Parliament would constitute 'questioning' since all Members of Parliament must speak and act taking into account what political commentators and others will say. Plainly art 9 cannot have effect so as to stifle the freedom of all to comment on what is said in Parliament, even though such comment may influence Members in what they say.
>
> In my judgment, *the plain meaning of art 9,* viewed against the historical background in which it was enacted, *was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal, for what they said* and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed. Relaxation of the rule will not involve the courts in criticising what is said in Parliament. The purpose of looking at Hansard will not be to construe the words used by the Minister but to give effect to the words used so long as they are clear. Far from questioning the independence of Parliament and its debates, the courts would be giving effect to what is said and done there. ([1993] AC at 638; emphasis added)

[44] About eighteen months later in *Prebble*, this time in the context of defamation proceedings, Lord Browne-Wilkinson quoted subs (3) of s16 of the

Australian Act, a provision enacted "for the avoidance of doubt", and immediately said this:

> That Act, therefore, declares what had previously been regarded as the effect of art 9 and subs (3) contains what, in the opinion of Their Lordships, is the true principle to be applied. ([1994] 3 NZLR at 8)

He continued:

> It is, of course, no part of Their Lordships' function to decide whether, as a matter of Australian law, the decision of Hunt J [in *R* v *Murphy* to which s16 was the legislative response] was correct. But art 9 applies in the United Kingdom and throughout the Commonwealth. In Their Lordships' view the law as stated by Hunt J was not correct so far as the rest of the Commonwealth is concerned. First, his views were in conflict with the long line of dicta that the Courts *will not allow any challenge* to what is said or done in Parliament. Second, as Hunt J recognised, his decision was inconsistent with the decision of Browne J in *Church of Scientology of California* v *Johnson-Smith* [1972] 1 QB 522 (subsequently approved by the House of Lords in *Pepper* v *Hart*) and *Comalco Ltd* v *Australian Broadcasting Corporation* (1983) 50 ACTR 1, in both of which cases it was held that *it would be a breach of privilege to allow what is said in Parliament to be the subject-matter of investigation or submission.* [emphasis added]
>
> Finally, Hunt J based himself on a narrow construction of art 9, derived from the historical context in which it was originally enacted. He correctly identified the mischief sought to be remedied in 1688 as being, inter alia, the assertion by the King's Courts of a right to hold a member of Parliament criminally or legally liable for what he had done or said in Parliament. [Compare the first sentence of the second para of the quote from *Pepper* v *Hart* in para [43] above.] From this he deduced the principle that art 9 only applies to cases in which a Court is being asked to expose the maker of the statement to legal liability for what he has said in Parliament. 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. [original emphasis]

> Moreover to allow it to be suggested in cross-examination or submission that a member or witness was lying to the House could lead to exactly that conflict between the Courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House: if a Court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue. ([1994] 3 NZLR at 8)

[45] It will be seen that passages in this judgment state the scope of the privilege significantly more widely than *Pepper* v *Hart* did. It is no longer limited to legal liability for what was said in Parliament. According to particular words and sentences in the judgment, the privilege extends to challenges to, investigations of, and even submissions on, what is said in Parliament. But that extension is to be balanced against the important limit indicated by the words emphasised in the second paragraph (see para [53] below). After reviewing other authorities and listing the three competing interests (of the legislature, of freedom of speech generally, and of justice in ensuring that all relevant evidence is available to a court, with the first prevailing), Lord Browne-Wilkinson stated this conclusion

> For these reasons (which are in substance those of the Courts below) Their Lordships are of the view that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception such as exists in New Zealand in relation to perjury under s108 of the Crimes Act 1961. ([1994] 3 NZLR at 10)

[46] This conclusion, while wider than his statement in *Pepper* v *Hart*, is narrower than the earlier passages in *Prebble* quoted in para [44] : the conclusion depends on the proposed use suggesting impropriety or the like.

[47] Lord Browne-Wilkinson then made it clear that the principle does not exclude all references in Court proceedings to what has happened in the House, mentioning related United Kingdom Parliamentary practice (for New Zealand, see SO 401) and instancing the proof of what was done and said as a matter of history.

[48] We mention here that while subs (3) of the Australian s16 which was thought

by the Privy Council in *Prebble* to restate the law in art 9 would by itself appear to prevent the use of Hansard for interpretative purposes, contrary to *Pepper* v *Hart* and *Marac* (para [41](2)), that result is avoided by subs (5) to which the Privy Council does not refer. (See also subs (6) in respect of certain prosecutions and inquiries; cf para [41](4) above.) More significantly, subs (3) has been interpreted in Australia as preventing the use of Hansard where Ministerial decisions are attacked, contrary to the accepted practice in England (para [41] (3) above) : *Amann Aviation Pty Ltd* v *Commonwealth of Australia* (1988) 81 ALR 710, 717, and *Hamsher* v *Swift* (1992) 33 FCR 545, 562-565; see also Professor Bradley, para [41](3) above, para 20.

[49] In the last of the three cases, *Hamilton* v *Al Fayed* [2001] 1 AC 395, Lord Browne-Wilkinson, with the agreement of three members of the House of Lords, quoted passages from *Prebble*, one of which emphasised the "wider principle … that the Courts and Parliament are both astute to recognise their respective constitutional roles" and repeated the Coke/Blackstone statement. (The other member of the panel, Lord Cooke, limited his agreement with the judgment to the interpretation of s13 of the Defamation Act 1996, a unique and controversial British provision, not relevant in the present case.) Lord Browne-Wilkinson then quoted s16(3) of the Australian Act and the *Prebble* statement that the provision "contains the true principles to be applied, a view shared by the Joint Committee on Parliamentary privilege":

> It is in my judgment firmly established that courts are precluded from entertaining in any proceedings (whatever the issue which may be at stake in those proceedings) evidence, questioning or submissions designed to show that a witness in parliamentary proceedings deliberately misled Parliament. To mislead Parliament is itself a breach of the code of parliamentary behaviour and liable to be disciplined by Parliament: see *Church of Scientology of California* v *Johnson-Smith* [1972] 1 QB 522 and *Pickin* v *British Railways Board* [1974] AC 765, 800 per Lord Simon of Glaisdale. For the courts to entertain a question whether Parliament had been deliberately misled would be for the courts to trespass within the area in which Parliament has exclusive jurisdiction. ([2001] 1 AC at 403)

[50] One conclusion to be drawn from the above account is the difficulty, if not impossibility, for courts to state, in a consistent way, generally applicable rules in this area of the law. General statements may operate satisfactorily in the circumstances of the particular case in which they are stated but be problematical at

best and misleading at worst in other circumstances. Rather, critical assistance is to be found in the particular words of art 9, its purpose and related principle (even if the particular understanding of both may shift over the centuries), and the actual rulings in, and facts of, the leading cases, as well as the particular facts of the case before the Court. This Court must of course follow decisions of the Privy Council on appeal from New Zealand (in particular *Prebble*), but given the difficulties discussed in this part of the judgment we understand that obligation as relating to the actual ruling on the facts of the case, facts which are distinct from those in the present case.

Critical facts : unprivileged (effective) repetition

[51] We refer now to two facts in the present case which to us are critical. The first is that the alleged defamatory statement is made up in part of a statement published in a newspaper in respect of which no claim of parliamentary privilege could be or is made. The second is that the non-privileged statement was made *after* the privileged statement was made. As mentioned (paras [2]-[5]), the statement of claim pleads the later statement in the newspaper article, especially the sentence about not resiling from the claim and says that the whole article, including that sentence, referred to, adopted, repeated and confirmed as true the statement (earlier) made in Parliament, the report of the statement being used to "establish as an historical fact that the words were spoken by the [appellant] …" . These two facts are not to be found in the three cases discussed in the previous section, notably *Prebble*.

[52] In brief the respondent's case may be put this way:

- the appellant made a statement in Parliament which was fully protected by art 9's absolute privilege;

- the appellant *then* made a public statement, not protected by absolute privilege;

- those reading the public statement would be likely to understand it by reference to the statement made in Parliament and available in Parliament's published, absolutely privileged, proceedings (and in fact repeated in part in the article, a repetition which would appear to have

attracted qualified privilege); or, to put the matter another way, any gap in the public statement was plainly to be completed by going to the published proceedings of Parliament or other available (and generally privileged) sources of the statement; and

- the defamation proceeding does not "question" "freedom of speech" "in Parliament" itself.

On this basis it is the later public unprivileged statement, properly understood, that is being questioned. We accept that analysis of the case.

[53] To return to the purpose of the privilege and to use one of Lord Browne-Wilkinson's statements in *Prebble*, we cannot see that this proceeding breaches the basic concept of art 9 and the important public interest reflected in it. To repeat:

> the basic concept underlying art 9 [is] 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. ([1994] 3 NZLR at 8)

The prospect of the present proceedings would not have inhibited the appellant *at the time he spoke in the House*. It was only his unprotected *later* statement that enabled the proceedings to be brought. We are *not* concerned here with the use of a later Parliamentary statement to give content or identity to an earlier non-privileged statement - the situation in *Peters* v *Cushing* [1999] NZAR 241. Such use would contradict the important public interest reflected in art 9; and indeed the Full Court in *Peters* did hold that art 9 prevented the use of the *later* Parliamentary statement.

[54] We do not see more general statements about wider principle, mutual restraint and non-intervention as being helpful in resolving this case. This appears to be a situation in which Oliver Wendell Holmes is right : "You can never decide a

case by general propositions" (eg Mennel and Compston eds, *Holmes and Frankfurter : Their Correspondence, 1912-1934* (1996) 78). Plainly the courts must be respectful of Parliament's fundamental privileges, privileges required by its essential functions. They must as well, when the issue arises for decision, determine what they understand to be the limits of those privileges, as they have in many cases in many jurisdictions over the centuries. They have, for instance, had to do that when deciding to restore members to the House, issue writs of habeas corpus for the benefit of persons punished by the House, and make orders about the rights of members and others, in all cases, against arguments based on art 9 or its equivalent – as well as rejecting applications for such relief because of art 9. And for the reasons indicated earlier in this judgment, we would not be inclined in determining those limits to give as much weight to the Coke statement as has often been accorded to it. In some circumstances, s14 of the New Zealand Bill of Rights Act 1990 may also be relevant to the determination of the limits.

[55] The approach to the present facts adopted in this judgment is also supported by those cases where the defamation proceeding is founded on a statement, not protected by art 9, with the earlier Parliamentary record being called on simply to complete the non-privileged statement. We mention three cases decided in Australia and New Zealand over the last decade or so. These cases are sometimes considered under the heading "effective repetition" (that is of the privileged statement); eg Joseph *Constitutional and Administrative Law in New Zealand* (2d ed 2001) 410-412. The alternative words "adoption" and "(re)affirmation" also make the point that the protected parliamentary speech or proceeding has come first. That may explain why in the judgments and commentaries the critical importance of the order in time of the statements is not generally made explicit.

[56] The first case is the judgment of Cooke P for this Court in *Hyams* v *Peterson* [1991] 3 NZLR 648. The plaintiff in that case wished to use documents tabled in Parliament "as background or extrinsic material to be considered in appreciating the likely impact and meaning of the publications on which he does sue" (653). A particular "extrinsic fact" was that the plaintiff was identified in the parliamentary documents as a member of the "Gang of 20" – a characterisation indicating the persons listed as probably fraudulent (652). The Court rejected the argument that

because the parliamentary material was privileged it could not be used to afford a link between a prior non actionable publication and the plaintiff individually. It cited a judgment of the East African Court of Appeal to the same effect in support of its position (*Onama* v *Uganda Argus Ltd* [1969] EA 92), stated that the point had nothing to do with the scope of parliamentary privilege, and continued:

> The plaintiff in the present case is not seeking to refer to any parliamentary proceedings, only the reports of parliamentary proceedings. In no way is the plaintiff, in the word used in the Bill of Rights 1688, "questioning" what was said in Parliament. In no way does he seek, as Blackstone put it in a passage mentioned in the *Scientology* case, to have proceedings in Parliament "examined, discussed and adjudged".
>
> With regard to policy and social reasons, if a publication is proved to refer to the plaintiff in a defamatory way, the law provides various relevant defences to the media - qualified privilege, fair comment, justification. All these defences are pleaded by the defendants here … .
>
> There is no reason of common sense or policy why some artificial legal barrier should be placed in the way of the plaintiff in proving what the public in fact would have understood from what was published to the public. (656-657)

[57] It is true that in the *Hyams* case the record of proceedings of the House is being used to identify the plaintiff rather than to complete the substance of the unprivileged statement. But the "common sense [and] policy" referred to in the final sentence appear to us to apply equally to both. In neither case is the exercise of freedom of speech in the House itself being questioned; rather in both cases the Parliamentary record is merely a step in the proof of the meaning the later non-privileged statement will have conveyed. And it must be assumed that the purpose of that statement was to communicate to the public in a meaningful way. The appellant indeed accepts that in his statement of defence when he says that "the statements [he] allegedly [made] outside the House are meaningless without reference to the substance and meaning of what was said inside the House". The reality for well over a century has been that the public has had available to it protected accounts of parliamentary proceedings. Those accounts will often inform unprivileged statements. In cases such as the present one, both the journalists and parliamentarians involved would proceed in any exchange on the basis of those

known or expressly recalled accounts. It is a denial of that reality to consider the public statement on its own.

[58] The availability of those protected accounts perhaps explains the first sentence quoted from the *Hyams* case in para [56] above. Parliamentarians and journalists (and others for that matter) will know the content and substance of the allegedly defamatory statement from some or all of (1) the earlier absolutely protected art 9 statement (because for instance they were in the House when it was made), (2) a direct absolutely privileged broadcast of the statement or (3) a fair report of the statement which has qualified privilege. In practice the sources may well overlap, but does that matter? In terms of the words of art 9, the speech or proceedings *themselves* are not being questioned nor is the purpose of art 9 being inhibited since at the time the member makes the parliamentary statement the member is completely protected. A further factor is the growing emphasis both in law and in practice over the last two centuries on making parliamentary processes more open and more accessible to the electorate and others who are interested. The Court of Queen's Bench emphasised that over 130 years ago in *Wason* v *Walter.* In a related way the New Zealand Parliament twenty years ago, in the Official Information Act 1981, stressed the importance of openness for public participation in the debating and developing of policy and in holding the Executive Government responsible and accountable to Parliament. And very recently the House of Lords has affirmed that "[t]he business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that the government is carried out for the people unless the facts are known, the issues publicly ventilated." (Lord Bingham in *R* v *Shayler* [2002] 2 WLR 754, para 21).

[59] A 1992 Victorian case provides a second instance of effective repetition founding a defamation action. The plaintiff was able to base his proceeding on a radio interview in which the defendant member of Parliament refused to apologise to the plaintiff for what he had earlier said in the Victorian Parliament and said that he stood by what he had stated there (*Beitzel* v *Crabb* [1992] 2 VR 121). The plaintiff's counsel submitted that the cause of action was based on the publication in the radio

interview by the defendant by incorporation and adoption of what he said in the House. Hampel J agreed:

> The cause of action in this case lies in the publication by Mr Crabb by adoption and repetition outside Parliament of words spoken by him in Parliament and published in the media.
>
> It is a well-established principle that members of Parliament may be held liable for afterwards publishing words spoken by them in Parliament, providing that the cause of action is founded on that subsequent publication: *R* v *Lord Abingdon* (1794) 170 ER 337; *R* v *Creevey* (1813) 105 ER 102 and *Australian Broadcasting Corporation* v *Chatterton* (1986) 46 SASR 1.
>
> …
>
> By a publication is meant the making known of defamatory matter to some person other than the person of whom it is written: *Gatley on Libel and Slander*, 8th ed, p101, para 222. Publication may be effected by any act on the part of the defendant which conveys the defamatory meaning of the matter to the person to whom it is communicated. The slander and damage lie in the perception of the hearers of such communication.
>
> …
>
> It is undoubtedly arguable on the facts of this case that, despite the fact that the words previously spoken in Parliament were not subsequently repeated, there would be a sufficient temporal and substantive connection made by the listening public between the words spoken in Parliament by Mr Crabb which were repeated in the media and the comments by him in the press conference and interview of 30 January 1990 for there to have been a defamatory publication by adoption by Mr Crabb on that day.

The tentative wording of the final paragraph is explained by the fact that Hampel J was considering a strike out application.

[60] The third case, decided by the Court of Appeal of Queensland in 1996, was primarily concerned with the scope and constitutionality of s16(3) of the Australian Act (*Laurance* v *Katter* (1996) 141 ALR 447). (To return to an earlier point, the judgments, particularly those of Pincus and Davies JJA, highlight the difficulties of relating that provision to the earlier understanding of art 9 (see especially 484, lines 30-35, and 488-491).) The Court allowed to continue a defamation proceeding based on radio and television statements in which the defendant Member of the

Commonwealth Parliament said that every single statement he had made in the House was backed by the hardest of documentary evidence. The statement of claim alleged the later statements adopted and reaffirmed what he had said in Parliament. Pincus JA concluded that s16(3) did not operate validly (in a constitutional sense) in relation to defamation suits (486). Davies JA asked whether the plaintiff's reliance on what the Member said in Parliament impeached or questioned Parliamentary proceedings. (It will be seen that he read s16(3)(c) very narrowly, going back to the 1688 words; that reading has been disputed, for instance, by Doyle CJ in *Rann* v *Olsen* (2000) 76 SASR 450 but that is of no consequence in the present case.)

> I do not think that it does. The first defendant was free to say what he did in parliament.
>
> 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 Limited* [1995] 1 AC 321 … 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. (490)

[61] The Courts in such cases are saying that there is no difference in principle or indeed in defamatory effect between the complete repetition of the parliamentary statement and its effective repetition, in each case by an unprivileged statement. To repeat, the purpose of protecting freedom of debate and of speech *in Parliament* is not infringed by defamation proceedings being founded on the *later* unprivileged statement. Nor are the precise terms of art 9 itself breached unless of course it is said that the parliamentary speech is inevitably questioned even when the defamatory statement is repeated word for word on a non-privileged occasion. But the privilege does not go that far, as Lord Abingdon long ago and Senator Proximire more recently discovered to their cost (para [30]). The privilege is about debate, speech and proceedings "in Parliament", about promoting free and frank debate and speech

"in Parliament," and about facilitating Parliament's essential political and constitutional functions.

[62] A further policy consideration supports a finding for the plaintiff in cases such as this. The opposite finding would mean that persons who have made an absolutely privileged defamatory statement in the House, knowing that it is in the public domain, could continue with impunity to repeat on non-privileged occasions as often as they wished that they stood by the statement. As best we can determine, such a course would not have been contemplated by the 17th century parliamentarians as requiring protection from the King, in his courts or in other places outside Parliament. To the argument that the law, on this basis, would be uncertain and difficult for individual MPs or others to comply with, there are two answers at least. The first, which may give little comfort, is that after more than 300 years parts of this law remain uncertain (see for instance paras [42]-[50] or the extent of "proceedings in Parliament" as in the *Hudson's Bay* and *Proxmire* cases paras [29] and [30] above). The second is that silence outside the House maintains the protection, as does any statement made outside the House which merely acknowledges or does not affirm or effectively repeat the defamatory statement. Whether a later statement does affirm or effectively repeat the privileged statement is a matter of fact to be determined in the circumstances of the case.

[63] Finally, although the New Zealand and Australian cases on (effective) repetition (or adoption or (re)affirmation) now go back over a decade, there appears to have been no substantial parliamentary or other concern about them. They do not seem for instance to have generated critical responses from within legislatures or by commentators; and the Australian and New Zealand cases considered above are discussed in a routine way in the relevant text books in support of the proposition that absolute privilege does not extend to defamatory statements made outside Parliament including those involving the repetition, effective repetition, adoption or affirmation of publications made inside Parliament; for Australia see eg *Halsbury's Laws of Australia*, Defamation 145-1235 at n11 citing the *Crabb* and *Katter* cases along with such cases as *Abingdon*; and for New Zealand see eg Todd (ed) *The Law of Torts in New Zealand* (3rd ed 2001) 860.

[64] To summarise, the protection afforded by art 9 is limited to "speech … debate or proceedings in Parliament"; the privilege has a corporate character as a means to the effective discharge of the collective functions of the House; it does not extend to an individual Member's actions falling outside "speech … debate or proceedings in Parliament" when, for instance, the member is communicating with the public or constituents; records of speech or proceedings in Parliament have long been used in court proceedings in ways that are not considered to breach art 9; and in this case the record may be used to give meaning to a later non-privileged public statement without the "speech … or proceedings in Parliament" itself being "questioned" or the underlying purpose of the privilege being damaged. Accordingly the principal ground of appeal is dismissed.

Other grounds of appeal

[65] We now turn to the other two grounds of appeal. They challenge the findings (1) that Mr Jennings used the word "resile" in the interview with *The Independent's* reporter, and (2) that the words complained of constituted "effective repetition" or "adoption by reference" of the words spoken in Parliament.

[66] On the word "resile", the submission was that there was no conclusive evidence or no evidentiary basis for the finding that Mr Jennings used the word "resile" in the interview. The Judge dealt with this matter in this way:

> [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 no 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.

The following paragraph [16] which is also relevant to this ground of appeal is quoted in para [12] above.

[67] The Judge made a finding of fact, based on evidence given by a witness by whom he was impressed. The Judge's reference to the disavowal about "cowering [sheltering] behind Parliamentary privilege" relates to Mr Speden's evidence that that phrase in the published article was not his own. "The word 'sheltering', which clearly introduced a pejorative tone, was inserted during sub-editing," he said. Having repeated that point in cross-examination, he then immediately rejected the proposition that the word "resile" was another contribution from the sub-editor. In response to questions from the Judge, he repeated the two points, emphasising his irritation and annoyance about the parliamentary privilege phrase. We can see no basis for questioning the Judge's finding on the use of the word "resile". It appears to be plainly correct. This ground of appeal fails.

[68] On the second matter, about the effective repetition finding, the submission is that it is difficult to accept as a matter of logic and law that merely by saying that he "does not resile from" a statement made in the House, a Member has "effectively repeated" the statement. "Resile" in the Shorter Oxford English Dictionary is defined as "recoil or retreat from something with aversion". That is very different, it is said, from repeating the statements. But what is in issue is *effective* repetition or adoption *by reference*. Not recoiling or retreating from something is equivalent to standing by it, that is adopting or affirming it. It is more than a mere acknowledgement of having made an earlier statement. We can see nothing in this ground of appeal. It too fails.

Conclusion

[69] The appeal is dismissed. The respondent is entitled against the appellant to costs of $5,000 and reasonable disbursements, to be fixed by the Registrar in the absence of agreement.

TIPPING J

Introduction

[70] The appellant, Mr Jennings, is a Member of Parliament. He was ordered by the High Court to pay the respondent, Mr Buchanan, the sum of $50,000 as damages for defamation. He appeals against that award, primarily on the ground that his defence of absolute privilege was wrongly held not to apply. As is well known, and constitutionally important, defamatory words spoken by a Member of Parliament in the House of Representatives are not actionable. They are protected by the form of absolute privilege conventionally called parliamentary privilege. But an MP who repeats the defamation outside the House is liable in the ordinary way, subject to any other defences which may apply.

[71] The primary question in this case is what constitutes repetition or re-publication outside the House. If the defamatory words are repeated word for word outside the House, they are actionable in themselves, but sometimes, as in this case, the repetition is not verbatim and the words used outside the House are incapable of bearing a defamatory meaning unless they are understood in the light of the words used in the House.

[72] Mr Jennings spoke defamatory words of and concerning Mr Buchanan in the House. In circumstances to which I will refer shortly, he stated outside the House that he did not resile from what he had said in the House. Hence the words he spoke outside the House could only be regarded as defamatory if linked with what he had said in Parliament. Heron J held that in these circumstances Mr Jennings had

effectively repeated the defamatory words outside the House and was therefore liable to pay damages which he assessed at $50,000.

Background facts

[73] Mr Buchanan was and is a senior official of the New Zealand Wool Board. The Wool Board had supported a promotional tour by the Barbarians rugby team of the United Kingdom which took place over 12 months before the hearing in the High Court. From the start Mr Buchanan was actively involved in the organisation of the venture and he accompanied the team on tour.

[74] Mr Jennings was and is a list MP for Act New Zealand. During a parliamentary debate in the House of Representatives on 9 December 1997 Mr Jennings 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…
>
> … 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?…

[75] Mr Jennings was interviewed by a reporter (Graeme Speden) on behalf of *The Independent* newspaper some weeks after the debate. The first cause of action concerns a statement made by Mr Jennings during that interview which was subsequently published in an article in *The Independent* on 18 February 1998. The article recorded that Mr Jennings had said

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

[76] The full article included the following commentary:

> 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."

[77] The second cause of action is based on a letter Mr Jennings wrote to *The Independent* Newspaper and which was published on 4 March 1998. Mr Jennings dealt with his motivation in dealing with these matters, called for an audit of the expenditure on a video and made the following statements:

> I would also welcome a costs-benefit analysis on how much wool the sponsorship will sell, alternative proposals and the full audited costs, including any travel and association Mr Buchanan may have had…
>
> …Instead of focusing on my comments, *The Independent* should turn its attention on the Wool Board to uncover the truth about its activities.

The pleadings

[78] The case went to trial on the plaintiff's second amended statement of claim. It is not necessary to discuss the pleadings in any detail. The significant feature of Mr Buchanan's statement of claim was that he referred expressly to the words which Mr Jennings had spoken in Parliament. He set them out verbatim in paragraph 4, adding that he would refer to and rely on the full wording in the *Hansard* reports at trial to establish "as an historical fact" that the words in suit had been spoken by Mr Jennings. Mr Buchanan then pleaded his two separate causes of action. The first relied on Mr Jennings' words in *The Independent* article of 18 February 1998 to the effect that he did not resile from his claim about the officials' relationship, just the money. For his second cause of action, Mr Buchanan pleaded the relevant words of Mr Jennings' letter to *The Independent* published on 4 March 1998.

[79] The significant features of Mr Jennings' statement of defence were first an admission that the words attributed to him by the *Hansard* extracts had been spoken by him, coupled with a claim for the protection of parliamentary privilege. A little

later Mr Jennings expressly invoked parliamentary privilege again, referring to art 9 of the Bill of Rights Act 1688. He also expressly pleaded that the statements which he had allegedly made outside the House were meaningless without reference to the "substance and meaning" of what he had said inside the House. He concluded by saying that by virtue of the various matters to which he had referred he could not be liable to Mr Buchanan in defamation or otherwise.

The judgment under appeal

[80] Heron J dealt first with a preliminary issue as to the use of the word "resile" in the 18 February article. Mr Speden was questioned as to the use of that word, and although he could not say precisely what words Mr Jennings uttered that led him to write that sentence, he was certain that he questioned him carefully in order to secure an accurate understanding of his position. Mr Speden could not recall whether the word "resile" was uttered by Mr Jennings, himself, or both, but he was satisfied that the text was an accurate account of Mr Jennings' position. Heron J was impressed with the circumstances surrounding Mr Speden's recollection of events.

[81] His Honour then reviewed the relevant authorities. He stated the well-known proposition that a party to litigation cannot bring into question anything said or done in the House by suggesting that a member's actions or words were inspired by improper motives or amounted to untrue or misleading statements. The Judge added that this rule went as 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. He did not, however, expressly apply that proposition to the circumstances of the present case. Heron J then stated that a repetition 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. The case raised the question of what constituted 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 what he called the doctrine of adoption or incorporation.

[82] Heron J considered that the critical point in this case was Mr Jennings' knowledge that he was being interviewed about his statement and having the statement he made in the House put to him by a journalist who was likely to report the total conversation, including the allegations that he made in the House. Mr Jennings told the reporter that he did not resile from his claim and this was confirmed in his subsequent letter to the paper.

[83] The case had already come before the Full Court of the High Court on an application to review the Master's decision not to strike out the causes of action. Heron J understandably adopted the Full Court's approach and their reasoning, to which it is convenient to refer separately below.

[84] Heron J concluded that Mr Jennings had crossed what he saw as the relevant line in this case and had thereby effectively repeated the defamatory words outside the House. Mr Jennings went looking for further media attention in respect of his criticisms of the Wool Board generally, to which Mr Buchanan was necessarily attached. He was willing to discuss the issues outside Parliament and stated that he did not resile from his parliamentary statements, in the certain knowledge that those remarks would only be reported in the context of his remarks about Mr Buchanan. His Honour considered that all of those events 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.

[85] His Honour recognised the danger in inhibiting parliamentarians from speaking freely and fiercely debating the issues of the day, but thought that there was a corresponding concern that by not categorically drawing the line on statements freely made outside the House which effectively repeat the defamation there was scope for the subtle use of protected parliamentary assertions being used in a wider way. This included such assertions being fed into the mainstream media in circumstances such as occurred here.

[86] The Judge therefore ruled that the defamation was actionable. The operative defamation was the first publication in *The Independent*, although the second

publication did reinforce the defamatory material. Damages were assessed on this basis. There was no suggestion on the appeal that the second cause of action could succeed if the first was the subject of absolute privilege. I will therefore make no further reference to the second cause of action and will concentrate on the first. I note for the purposes of the identification issue to be discussed below, that Mr Buchanan was referred to by name in Mr Jennings' letter which was the subject of the second cause of action. By contrast the first publication could not have been regarded as identifying Mr Buchanan as a participant in the illicit relationship without reference to the earlier parliamentary words – hence the pleading referred to in paragraph [115] below.

Earlier judgment of the Full Court of the High Court

[87] At an earlier stage of the present proceedings in the High Court, Master Thomson had declined to strike out the two causes of action upon which Mr Buchanan went to trial. Between that ruling and the trial, the Full Court (Randerson and Neazor JJ) dealt with an application brought by Mr Jennings to reverse the Master's decision. The decision of the Full Court is reported at [2000] NZAR 113 and it is therefore necessary to refer in this judgment only to the matters of key relevance to the issues on appeal.

[88] After referring to the pleadings and to the decision of the Privy Council in *Prebble* v *Television New Zealand* [1994] 3 NZLR 1, to which I will refer separately below, the Full Court noted that it was 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. Reference was made to *Gatley on Libel and Slander* (9th ed, 1998) at para 13.28 where several cases are cited, including *Stopforth* v *Goyer* (1978) 87 DLR (3d) 373. In that case Lieff J held at 382 that there was no privilege for a statement made outside the House even though that statement was in substance the same as that already made in the House. The Full Court observed that it followed 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.

[89] Their Honours then proceeded, under the heading *Adoption by reference*, to consider the position if an MP simply refers to a statement made in the House without actually repeating the words used. They rightly said that if the MP does no more than acknowledge having made the statement he cannot be sued on that acknowledgement. In such circumstances in order to succeed the plaintiff must sue on the original statement, which may not be done. Authorities cited to this effect were *Freeman* v *Poppe* (1905) 25 NZLR 529, and *Griffiths* v *Lewis* (1845) 14 LJQB 197. This feature raises the distinction between acknowledgement and affirmation which I will address again below.

[90] The Full Court moved from there to consider the position in the present case where the MP says outside the House words to the effect that he stands by or does not resile from the remarks earlier made but without actually repeating them. They noted that this issue had arisen in the Supreme Court of Victoria in *Beitzel* v *Crabb* [1992] 2 VLR 122. In that case 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. After citing a passage from Hampel J's judgment, the Full Court noted the Judge as having concluded that it was undoubtedly arguable on the facts that although the words previously spoken in Parliament had not been repeated, there was a "sufficient temporal and substantive connection" apt to be made by the listening public between the words spoken in Parliament which were then repeated in the media and the comments made at the MP's subsequent radio interview, for there to have been a defamatory publication by adoption.

[91] The Full Court noted a submission by counsel then appearing for Mr Jennings that *Beitzel* v *Crabb* should not be regarded as good law in New Zealand and was in any event distinguishable on the facts. They also noted the further submission that *Beitzel* was inconsistent with the decision of Browne J in *Church of Scientology of California* v *Johnson-Smith* [1972] 1 QB 522 which had been approved by the Privy Council in *Prebble*'s case. Their Honours observed that neither *Prebble*'s case nor the *Church of Scientology* case had involved the issue which they called adoption by reference of remarks made in the House. They said

that in their judgment the proper analysis of an adoption by reference was that the cause of action was based upon the defendant's remarks outside the House. They suggested that reference was being made to the parliamentary remarks only to identify what it was said had been adopted. They suggested that in these circumstances a challenge to the truth of the remarks made in Parliament was not prevented, essentially on the premise that what was involved was only an indirect questioning of the parliamentary statement.

[92] Their Honours then made reference to the reasoning of Davies JA in *Laurance* v *Katter* (1996) 141 ALR 447. I shall examine this case separately below. Next they made reference to the decision of the Full Court in *Peters* v *Cushing* [1999] NZAR 241 and adopted certain views expressed by Ellis and Greig JJ in that case. They rejected a submission that those views could not stand with the decision of the Privy Council in *Prebble*'s case, a point to which I shall return.

[93] Randerson and Neazor JJ stated their conclusions in relation to the circumstances of the present case in the following terms at 122:

> Although the expressions "adoption by reference" and "repetition" are frequently used interchangeably in this context, we prefer the terminology of "effective repetition" because it better captures the rationale for denying the defence of privilege. Whether there has been an effective repetition is essentially *a question of fact and degree*. The whole of the circumstances will call for *examination, including the remarks originally made in the House*, the nature and context of the questions asked subsequently, and the defendant's response. Where the words of the Parliamentary statement are not repeated outside Parliament, the plaintiff will seek to establish some sufficient temporal or other substantive link to the Parliamentary statement. Regard may also be had where necessary to the extent of any prior reporting of the Parliamentary statement to establish whether the public could reasonably be expected to link the defendant's remarks outside the House to the Parliamentary statement. All of this is background to the central question whether what has been said outside Parliament is properly to be regarded as a repetition of the statement protected by privilege. It is not enough to avoid the privilege that there be a reference outside Parliament to a statement inside the House: there must be *sufficient* to be a repetition of it. Otherwise, the proceeding is a challenge to a statement made inside the House. (my emphasis)

[94] On that basis their Honours were of the view that there was an arguable case that Mr Jennings' parliamentary remarks had been effectively repeated outside the House. Hence they allowed the causes of action to stand and the matter went to trial accordingly.

[95] I note at this point that the Full Court thought it appropriate to rely on concepts such as "fact and degree" and whether there is "sufficient" to constitute a repetition outside the House, as the relevant touchstones. I am bound to say that I do not think considerations of this imprecision, in a field such as the present, give those involved sufficient guidance in knowing where they stand. The concepts are a recipe for undesirable uncertainty; the more so as this is a field involving the important constitutional question of the relationship between the Courts and Parliament.

Submissions in summary

[96] Mr Gilkison described the decision of the Privy Council in *Prebble*'s case as the central plank of his argument that reference to Mr Jennings' parliamentary words had been wrongly allowed and without them the case against him could not succeed. Counsel also argued that even if he were wrong in this respect, Heron J had been wrong in law and in fact to find that the words complained of constituted effective repetition. Finally, Mr Gilkison raised a point concerning whether the words sued on in respect of the first cause of action, ie. the "I do not resile" remark, had been properly proved.

[97] The Solicitor-General presented argument on behalf of the Attorney-General who had been granted leave to intervene in the appeal on account of the major public importance of the issues arising. He framed his argument on the basis that to make good his claim for damages on the basis of effective repetition, Mr Buchanan had to plead as a necessary element of his two causes of action the statements which had been made by Mr Jennings in Parliament. The Solicitor-General suggested that if Mr Jennings had given evidence he would necessarily have been cross-examined on those parliamentary statements. This, Mr Arnold contended, was contrary to the principles contained in the judgment of the Privy Council in *Prebble*'s case, and that of the House of Lords in *Hamilton* v *Al Fayed* [2001] 1 AC 395.

[98] The Solicitor-General argued that the consequence of accepting the concepts of effective repetition or adoption by reference was to allow an examination in Court of statements made in Parliament. He suggested that these parliamentary statements were thereby being treated as being made outside the House by what was really a fictional device. The Solicitor-General further contended that by applying the concept of effective repetition in the circumstances of the present case, Heron J had, by implication, allowed an individual member of the House to waive parliamentary privilege. Such an approach was contrary, he suggested, to established authority which is to the effect that privilege is the privilege of Parliament itself and cannot be waived, either directly or indirectly, by individual members. Although the appeal does not turn on this issue, there may well be force in Mr Arnold's submission.

[99] For Mr Buchanan, Mr Camp QC endeavoured to support the reasoning of the Full Court in the present case and some of the reasoning of the Full Court in *Peters* v *Cushing*. He argued that a plaintiff does not call into question what was said in the House when suing on a repetition out of the House because the plaintiff is suing on the repetition. The plaintiff is, so Mr Camp argued, only referring back to the words spoken in the House as evidence to explain how the public will have understood the effective repetition. He suggested that to hold otherwise would be to obliterate the doctrine of effective repetition. In such circumstances nothing short of a repetition sufficiently full to constitute a defamation in its own right would suffice. That proposition became very much a central feature in the case, because both Mr Gilkison and Mr Arnold argued that that is where the line should be drawn, namely repetition could only be sued on if it constituted defamation in its own right, ie. without reference back to the parliamentary words.

***Prebble*'s case**

[100] The Hon Richard Prebble MP sued Television New Zealand for defamation as a result of the screening of two programmes concerning his conduct as a Minister of the Crown. He contended that the programmes portrayed him as having secretly conspired with business leaders and public officials to sell state assets on unduly favourable terms in return for donations to the political party to which he then belonged. Television New Zealand denied the meanings alleged and also pleaded

truth, fair comment (now honest opinion) and qualified privilege. In its particulars supporting these defences, Television New Zealand referred to speeches made by Mr Prebble and others in Parliament and to other material coming within the general connotation of proceedings in Parliament.

[101] Article 9 of the Bill of Rights Act 1688 was then and still is in force in New Zealand by virtue of s242 of the Legislature Act 1908 and the Imperial Laws Application Act 1988. It provides:

> **Freedom of Speech** – That the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.

[102] The High Court had struck out the relevant particulars because they referred to parliamentary speeches and other parliamentary proceedings. This Court upheld that decision but itself raised the question whether the claim should be stayed because of the unfairness to the defendant in not being able to rely on this material when sued by an MP. In the event a stay was ordered. Mr Prebble appealed to the Privy Council. Their Lordships agreed with this Court's decision to uphold the High Court in its order striking out the particulars but considered that the proceeding should not have been stayed. The appeal was therefore allowed to this extent.

[103] Lord Browne-Wilkinson commenced the Privy Council's judgment by saying:

> Article 9 of the Bill of Rights 1688 precludes any Court from impeaching or questioning the freedom of speech and debates or proceedings in Parliament. It is well established that the article prevents a Court from entertaining any action against a member of the legislature which seeks to make him legally liable, whether in criminal or civil law, for acts done or things said by him in Parliament. Thus, an action for libel cannot be brought against a member based on words said by him in the House.
>
> In this action, the position is reversed: the libel action is brought, not against, but by a member of the legislature. The defendants wish to allege that allegedly defamatory statements made by them were true and are seeking to demonstrate such truth by relying on things said and acts done in Parliament ie the defendants wish to use parliamentary materials not as a sword but as a shield. The question is

> whether article 9 precludes such deployment of parliamentary material.

[104] After setting out the background and referring to the words of art 9 his Lordship continued:

> If article 9 is looked at alone, the question is whether it would infringe the article to suggest that the statements made in the House were improper or the legislation procured in pursuance of the alleged conspiracy, as constituting impeachment or questioning of the freedom of speech of Parliament.
>
> In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 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.

[105] Lord Browne-Wilkinson proceeded next to discuss Television New Zealand’s submissions and, in the course of doing so, disagreed with the decision of Hunt J in *R* v *Murphy* (1986) 5 NSWLR 18. He then referred to legislation passed by the Commonwealth Parliament in Australia to abrogate *Murphy* for Commonwealth purposes. That legislation is the Parliamentary Privileges Act 1987 (Cth), of which s16(3) provides:

> (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of –
>
> > (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
> >
> > (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
> >
> > (c) *drawing*, or inviting the drawing of, *inferences or conclusions* wholly or partly *from anything forming part of* those proceedings in Parliament. (my emphasis)

[106] The Privy Council observed that this Act declared what had previously been regarded as the effect of Art 9 and further that subsection (3) contained what, in their Lordships' opinion, was the true principle to be applied. What is important is that the Privy Council thereby emphasised the wide purpose and substantial reach of Art 9 and the associated wider principle which in their view went as far as para (c) of s16(3).

[107] Against that background it is helpful now to set out in full the final part of the Privy Council's judgment on the art 9 aspect of the case:

> Their Lordships are acutely conscious (as were the Courts below) that to preclude reliance on things said and done in the House in defence of libel proceedings brought by a member of the House could have a serious impact on a most important aspect of freedom of speech viz the right of the public to comment on and criticise the actions of those elected to power in a democratic society: see *Derbyshire County Council* v *Times Newspapers Ltd* [1993] AC 534. If the media and others are unable to establish the truth of fair criticisms of the conduct of their elected members in the very performance of their legislative duties in the House, the results could indeed be chilling to the proper monitoring of members' behaviour. But the present case and *Wright*'s case illustrate how public policy, or human rights, issues can conflict. There are three such issues in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the Courts. Their Lordships are of the view that the law has been long settled that, of these three public interests, the first must prevail. But the other two

public interests cannot be ignored and Their Lordships will revert to them in considering the question of a stay of proceedings.

For these reasons (which are in substance those of the Courts below) Their Lordships are of the view that *parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading*. Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception such as exists in New Zealand in relation to perjury under s 108 of the Crimes Act 1961.

However, Their Lordships wish to make it clear that *this principle does not exclude all references in Court proceedings to what has taken place in the House*. In the past, Parliament used to assert a right, separate from the privilege of freedom of speech enshrined in art 9, to restrain publication of its proceedings. Formerly the procedure was to petition the House for leave to produce *Hansard* in Court. Since 1980 this right has no longer been generally asserted by the United Kingdom Parliament and Their Lordships understood from the Attorney-General that in practice the House of Representatives in New Zealand no longer asserts the right. A number of the authorities on the scope of art 9 betray some confusion between the right to prove the occurrence of parliamentary events and the embargo on questioning their propriety. In particular, it is questionable whether *Rost* v *Edwards* [1990] 2 QB 460 was rightly decided.

Since there can no longer be any objection to the production of *Hansard*, the Attorney-General accepted (in Their Lordships' view rightly) that there could be *no objection to the use of Hansard to prove what was done and said in Parliament as a matter of history*. Similarly, he accepted that the fact that a statute had been passed is admissible in Court proceedings. Thus, in the present action, there cannot be any objection to it being proved what the plaintiff or the Prime Minister said in the House (particulars 8.2.10 and 8.2.14) or that the State-Owned Enterprises Act 1986 was passed (particulars 8.4.1). It will be for the trial Judge to ensure that the proof of these historical facts is not used to suggest that the words were improperly spoken or the statute passed to achieve an improper purpose.

It is clear that, on the pleadings as they presently stand, the defendants intend to rely on these matters *not purely as a matter of history* but as part of the alleged conspiracy or its implementation. Therefore, in Their Lordships' view, Smellie J was right to strike them out. But Their Lordships wish to make it clear that if the defendants wish at the trial to allege the occurrence of events or the saying of certain words in Parliament *without any accompanying allegation of impropriety or any other questioning* there is no objection to that course. (my emphasis)

[108] Although *Prebble*'s case did not involve questions of repetition of defamatory words outside the House, I am bound to say that the Full Court in the present case, and hence Heron J, did not in my view give enough weight to the general force and effect of the Privy Council's reasoning in relation to art 9 and the associated wider principle. I will develop my reasons below after first considering other New Zealand authority and the relevant Australian cases.

Other New Zealand authorities

[109] I propose to refer to only two other New Zealand cases: *Hyams* v *Peterson* [1991] 3 NZLR 648 and *Peters* v *Cushing* [1999] NZAR 241. I will discuss the two cases individually before considering how they relate to each other. In *Hyams* an issue arose concerning proof of what was called extrinsic evidence, essentially evidence supporting a true innuendo. During the course of delivering the judgment of this Court, Cooke P observed at 656:

> But we were urged for the appellants to adopt a new principle, one for which it was acknowledged no direct authority can be found. It is clear that an extrinsic fact known to readers of an article may be proved in order to show that the article refers to a plaintiff or bears a defamatory meaning. For instance, apart from the suggested new principle, if an article has stated that the "Gang of 20" are all fraudulent, extrinsic evidence may be given that the plaintiff was known to readers of the article as a member of the gang. The suggested new principle would place a limitation on the admissibility of extrinsic evidence for such purposes. As formulated by Mr Mathieson in his reply, it is that a prior publication on a privileged occasion is not capable of being used to afford a link between an innocent (that is to say, non-actionable) publication and the plaintiff individually.
>
> This new principle is contended to be justified for social or policy reasons pertaining to freedom of speech and the right of the media to discuss public issues. The particular contention in the present case is, in effect, that because the public naming of the plaintiff as a member of the "Gang of 20" was in reports enjoying qualified privilege of parliamentary proceedings enjoying absolute privilege, the plaintiff is debarred from showing by reference to those reports that readers of the later publications sued on would reasonably have understood them as referring to him.
>
> In *Onama* v *Uganda Argus Ltd* [1969] EA 92 the Court of Appeal at Kampala rejected a similar contention, holding that where the plaintiff

> sued on a report of a press conference he could use a prior report of parliamentary proceedings to show that he was the person referred to at the press conference. We respectfully and entirely agree.
>
> The point has nothing to do with the scope of parliamentary privilege. In *Church of Scientology of California* v *Johnson-Smith* [1972] 1 QB 522, Browne J accepted that what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action, even though the cause of action itself arises out of something done outside the House. That was a case where support for an allegation of malice to refute a plea of fair comment was sought, unsuccessfully, from a reading of *Hansard*. The limits of the principle for which the case stands do not now arise for discussion. The plaintiff in the present case is not seeking to refer to any parliamentary proceedings, only to reports of parliamentary proceedings. In no way is the plaintiff, in the word used in the Bill of Rights 1688, "questioning" what was said in Parliament. In no way does he seek, as Blackstone put it in a passage mentioned in the *Scientology* case, to have proceedings in Parliament "examined, discussed and adjudged".
>
> With regard to policy and social reasons, if a publication is proved to refer to the plaintiff in a defamatory way, the law provides various relevant defences to the media - qualified privilege, fair comment, justification. All these defences are pleaded by the defendants here, although it seems that only Wellington Newspapers Ltd is prepared, if (contrary to its contention) its articles sued on go as far as to mean that the plaintiff was in fact guilty of fraud, to undertake the burden of proving that meaning to be true. We are not now called upon to determine any question concerning these defences. It is purely a question of reference and meaning - in other words, the interpretation of the alleged libel.
>
> There is no reason of common sense or policy why some artificial legal barrier should be placed in the way of the plaintiff in proving what the public in fact would have understood from what was published to the public.

[110] In *Peters* Mr Cushing's first cause of action required reliance for identification purposes on what Mr Peters had said in Parliament. He argued that he was referring to Mr Peters' identifying words, not to question or impeach them but to accept them. Nevertheless the Full Court held that he could not do so because the cause of action depended not on a neutral or historical reference to parliamentary words but rather on their veracity, this time their truth, rather than their falsity. The Full Court (Ellis and Greig JJ) relied on *Prebble*'s case for this conclusion. The second cause of action, however, relied on words spoken by Mr Peters outside

Parliament in which he identified Mr Cushing as the subject of the earlier defamatory remarks he had made also outside Parliament. The basis of the second cause of action was the following exchange which had taken place between Mr Peters and a television interviewer:

> Interviewer: You alleged behind the privilege of Parliament that Selwyn Cushing had offered you $50,000 and the implication we were to take from that was that $50,000 . . .
>
> Peters: No hang on, hang on a minute.
>
> Interviewer: . . . was an inducement.
>
> Peters: Hang on a moment.
>
> Interviewer: Is it an inducement when Bob Jones offers it?
>
> Peters: Look, that matter is sub judice and you should not be raising it, save this. You've seen Selwyn Cushing on TV, as have the public of this country. They can take his word or they can take mine. They can believe me or believe him.

[111] It can be seen that the interviewer put to Mr Peters the name which he had mentioned in Parliament. Mr Peters himself then repeated the name of Mr Cushing. The Full Court held that Mr Peters had republished Mr Cushing's name outside the House, and thus he, Mr Cushing, had no need to invoke any parliamentary words of Mr Peters to establish his cause of action. While I would not question that decision, and it is consistent with the law as I consider it to be, because the cause of action was complete without reference to any parliamentary words, I would not accept all the Full Court's reasoning and, in particular, have difficulty with Greig J's observation set out in the present Full Court's decision at 122:

> The speech in Parliament was admissible not to support the cause of action or as a foundation for it, but to prove what had occurred in Parliament as part of the facts and the circumstances that the public would have understood and been aware of in hearing and giving meaning to what was said in October.

That seems to suggest that parliamentary words can be invoked in order to supply a defamatory meaning for words which viewed in isolation are not defamatory. If that is what Greig J meant, I must disagree.

[112] In *Peters* v *Cushing* only Greig J referred to *Hyams* v *Peterson*. The ratio of that case concerned reference to a statement made under qualified privilege rather than absolute privilege. The fundamental question is whether identity can be established by extrinsic parliamentary words when the plaintiff is not identified as the subject of the defamatory words without reference to the parliamentary words. *Hyams*' case suggests that the identity link can be provided by reference to the parliamentary words on the basis that to do so does not amount to questioning or impeaching those words. On the other hand *Peters* v *Cushing* held that the parliamentary words of Mr Peters could not be used by Mr Cushing to show that he was the person referred to in Mr Peters' earlier statement.

[113] To complete the picture reference should be made to the decision of this Court on the question whether *Peters* v *Cushing* should be tried at first instance in the District Court or the High Court: see [1994] 3 NZLR 30. This Court's extempore judgment was given a few days before the decision of the Privy Council was announced in *Prebble*'s case. In delivering the judgment Cooke P said at 31:

> We agree with the learned Judge in the High Court that the issue raised by the plea of parliamentary privilege in the present case is different from the issues raised in *Hyams* v *Peterson* [1991] 3 NZLR 648 and *Television New Zealand Ltd* v *Prebble* [1993] 3 NZLR 513, and is not determined by the decisions in either of those cases. It is obviously seriously arguable - we need say no more - that the parliamentary identification is essential to the plaintiff's cause of action but is protected by parliamentary privilege. Otherwise a member's freedom of speech in Parliament might be said to be inhibited by apprehension that his or her remarks made inside the House might be linked with his or her remarks made outside the House in order to establish liability on the part of the member for defamation.

[114] With respect to the view there expressed, I am not sure that the plea of parliamentary privilege raised in *Peters* v *Cushing* was materially different in its essence from the issues discussed, albeit perhaps not strictly raised in *Hyams*, or indeed in *Prebble*. But that does not have to be explored, particularly in the light of the Privy Council's subsequent judgment in *Prebble*.

[115] Although it was not a significant feature of the argument, the question of proof of extrinsic facts to establish identity is a feature of the present case. Indeed in

paragraph 10 of his statement of claim Mr Buchanan pleaded a series of extrinsic facts, to demonstrate why Mr Jennings' words spoken out of Parliament would have been understood to refer to him. Those facts necessarily referred to matters to which Mr Jennings had alluded in his speech in the House. So it is a case in which Mr Buchanan had to refer to Mr Jennings' parliamentary words both to establish identity and to establish defamatory meaning.

[116] Whereas to establish a defamatory meaning by reference to parliamentary words the plaintiff must, for reasons I will develop below, be impeaching or questioning those words, the position is not as straightforward in a case in which the parliamentary words are invoked simply to provide an identity link. Identity (ie. proof that the defamatory words were published "of and concerning" the plaintiff) is however a necessary aspect of a cause of action in defamation. Absent such proof, the plaintiff will fail. Whether identity should be treated in the same way as defamatory meaning depends substantially on the true compass of art 9 and the associated wider principle. As already noted it is evident from the Privy Council's approach to the subject in *Prebble*'s case that their Lordships saw art 9 simply as one manifestation of that wider principle which rests on the constitutional relationship between the Courts and Parliament. The concept of that principle being wider than art 9 does not of itself suggest that art 9 should be seen as covering circumstances which go beyond cases which involve questioning or impeaching. But nevertheless the Privy Council by reference to the combination of art 9 and the wider principle held that para (c) of the Australian Statute represents the law in New Zealand. Furthermore the tenor of Lord Browne-Wilkinson's speech in *Hamilton* v *Al Fayed* is also to the effect that the "as a matter of history" exception should not be viewed expansively.

[117] For reasons I will give below, I consider that in identity cases as well as in meaning cases the plaintiff should not be able to make reference to parliamentary words in order to establish a cause of action against an MP. The purpose and policy behind parliamentary privilege viewed as a whole persuades me that use of parliamentary words as a necessary step in establishing a cause of action should be regarded as inconsistent with parliamentary privilege and therefore impermissible.

To that extent I would regard as incorrect any contrary proposition that may be implicit in *Hyams*' case.

Australian authorities

[118] I do not propose to spend long on the Australian cases to which the Full Court referred. In short, I do not consider the judgments relied on by the Full Court, including that of Hampel J in *Beitzel* v *Crabb*, gave enough weight to the policy and purpose of art 9. I will refer specifically only to the judgment of Davies JA in *Laurance* v *Katter* because the Full Court found it particularly persuasive. *Laurance*'s case involved parliamentary words and the question was whether they had been adopted in radio and television interviews two days later. The plaintiff accepted he could only establish a cause of action if permitted to prove both what the defendant had said in Parliament and that his parliamentary words were false. Hence one would have thought that the plaintiff must necessarily have been questioning and seeking to impeach what the defendant had said in Parliament.

[119] The primary argument in *Laurance* concerned the constitutional validity of s16 of the Parliamentary Privileges Act 1987 (Cth) to which reference has already been made. Fitzgerald P did not touch directly on the present issue. Pincus JA considered s16(3) did not validly operate with respect to the conduct of defamation suits. Davies JA, in distinguishing *Prebble*'s case, held that the plaintiff's allegations were not capable of impeaching or questioning freedom of speech in Parliament because they were made solely for the purpose of proving what was incorporated in statements made by the defendant out of Parliament. I regret I cannot accept that analysis. I have already indicated briefly why that is so and will discuss the matter more fully below. In substance a plaintiff in such circumstances as these must be regarded as questioning and impeaching what has been said in Parliament. Without doing so the plaintiff could not succeed.

The Faulks Report

[120] Mr Camp relied on statements in the United Kingdom Report of the Committee on Defamation (1975: Cmnd 5909) generally referred to as the Faulks

Report, after the Chairman of the Committee, the Hon Mr Justice Faulks. At paragraph 204 (page 52) the Committee stated that no parliamentary privilege attaches to the repetition outside Parliament of statements previously made in the course of parliamentary proceedings. This statement is uncontroversial if repetition is understood in the sense of full repetition. The authorities cited in support are the standard ones; namely the early cases of *R* v *Lord Abingdon* (1794) 1 Esp. 226 and *R* v *Creevy* (1813) 1 M. & S.273.

[121] The Committee then suggested that the same principle must clearly apply to an MP who verifies such a statement outside Parliament; for example by saying "every word I spoke in yesterday's debate was true". While no parliamentary privilege may attach to such a statement, it is not actionable without reference to the parliamentary words and hence one arrives at the issue with which the present case is concerned. The lack of privilege pertaining to the innocuous words does not of itself assist the plaintiff. The Committee then continued:

> 206. A possible difficulty in this connection was drawn to our attention in evidence. To found a claim on either of the two above-cited examples, it would often be necessary for the plaintiff to refer to the terms of the Member's original speech in Parliament to support a legal innuendo. Is this in any way objectionable, …?
>
> 207. In *Church of Scientology of California* v *Johnson-Smith*, Browne J, held that the terms of a speech made by a Member in the course of Parliamentary proceedings could not be relied on against that Member in support of a plea of malice in a defamation action. In the course of his judgment he said:
>
> > "I accept the Attorney-General's argument that the scope of Parliamentary privilege extends beyond excluding any cause of action in respect of what is said or done in the House itself. And I accept his proposition … that what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House."
>
> 208. It is abundantly clear from other passages in his judgment that Browne J, in no way intended this *dictum* to apply outside the scope of the issue before him. Indeed later in his judgment he accepted the Attorney-General's submission that *Hansard* could be referred to "simply as evidence of fact, what was in fact said in the House, on a particular day by a particular person."

> 209. We have no doubt that for a plaintiff to rely on such a statement made within Parliament for the purpose of supporting an innuendo in the manner described in paragraph 206 above would be fully in accord both with the latter *dictum* and with the established practice.
>
> 210. We should add that the same situation would arise if a Member of Parliament took defamation proceedings against a defendant who impugned one of his speeches in Parliament, for example, by saying "Mr X's speech in the House of Commons yesterday was a pack of lies," since in such a case the Member himself would probably need to rely on the terms of his speech to support a legal innuendo.

[122] I confess I have difficulty with paragraphs 209 and 210. Paragraph 209 seems to me to overlook the impact of art 9 and the fact that in the circumstances there posited the plaintiff must necessarily be questioning and seeking to impeach what the MP has said in Parliament. It is noteworthy that the Committee did not cite any authority in support of its paragraph 209.

[123] Paragraph 210 also suffers from the difficulty of being hard to reconcile with art 9 and the thrust of what the Privy Council said in *Prebble*'s case. Furthermore, as Mr Arnold submitted, the paragraph is even harder to reconcile with the decision of the House of Lords in *Hamilton* v *Al Fayed* which dealt with a situation similar to that envisaged by the Committee in paragraph 210.

[124] It is also difficult to see how, on the facts suggested in that paragraph, the MP would have any need to rely on the terms of his speech in Parliament to support a "legal" (usually called a true) innuendo. The MP's cause of action would be complete without reference to his speech because he would simply plead the defendant's words to the effect that he had lied in the House. Those words are defamatory without any need for an innuendo, whether true or false. The problem in the case would be that the defendant could not refer to the parliamentary words to support a plea of truth, ie. that the MP's parliamentary words were indeed a pack of lies. All in all therefore I do not find the Faulks Committee's Report on the present point sufficiently convincing or persuasive to overcome the force of the points which lead me to the conclusion which I have reached as to the proper disposition of the present appeal.

[125] I am fortified in my views by the approach taken to this topic by the learned editors of *Gatley on Libel and Slander* (9th ed, 1998) at para 13.28. They say:

> Statements made outside Parliament are not protected by absolute privilege even if they simply repeat what has been said therein. What is less clear is whether words such as "I stand by what I said in the House yesterday" could give rise to a claim founded on republication by adoption or repetition. Arguably, such a claim would, in practical terms, involve "calling in question" what happened in Parliament.

[126] In footnote 7 the editors say that their doubt is advanced with some diffidence since the Faulks Committee, in the passage already cited, were firmly of the opposite opinion.

The correct position in New Zealand

(a) Establishing a defamatory meaning

[127] It is important to be clear what use Mr Buchanan seeks to make of the words which Mr Jennings spoke in Parliament. Mr Buchanan accepts that the words spoken by Mr Jennings outside the House are not in themselves defamatory. For an MP to say that he does not resile from what he said in the House is not on its own capable of bearing a defamatory meaning. Hence Mr Buchanan seeks to show that the meaning of those apparently innocuous words would have been understood in a defamatory sense by those who were aware of what Mr Jennings had said in the House.

[128] The critical first question is therefore whether, by referring to Mr Jennings' words in the House for this purpose, Mr Buchanan is thereby impeaching or questioning them so as to come within the compass of art 9 without reference to the wider principle and a fortiori when that principle is recognised. In my view he must be regarded as doing so. He is making reference to the defamatory words so as to show that the words which Mr Jennings spoke outside the House would have been understood in a defamatory sense. That is the only way the apparently innocuous words spoken outside the House can take on a defamatory meaning. It is axiomatic therefore that Mr Buchanan must be contending that what Mr Jennings said in the House was defamatory of him; ie. that it was spoken "falsely and maliciously", in the

words of the conventional pleading. Mr Buchanan is therefore necessarily saying that Mr Jennings spoke falsely in the House and that is exactly what art 9 says may not be done.

[129] If reference to the parliamentary words was permitted and the proceedings were allowed to be brought on that basis, any defence by the MP based on truth or honest opinion would obviously involve an examination of the parliamentary words against those issues. How that could be reconciled with art 9 escapes me. If absolute privilege is not available in such circumstances qualified privilege would be difficult to assert, unless such were allowed on some novel basis. No suggestion was made by any party that the absence of absolute privilege for effective repetition might be matched by any development of the law of qualified privilege. There is no such privilege under current law for any repetition of defamatory remarks outside the House. I mention this simply to point out that no one suggested the answer was anything other than absolute privilege or no privilege at all.

[130] The consequence, in my view, is that repetition, to whatever extent, by an MP of words spoken in the House becomes actionable only if the words spoken or written outside the House are defamatory in themselves, ie. on a stand-alone basis. If that is so, the plaintiff has no need to make reference to any words spoken in the House. The cause of action is complete without them. To the extent that in these circumstances the plaintiff could be viewed as questioning or impeaching what was said in the House, that is only incidentally so, as Doyle CJ put it in *Rann* v *Olsen* (2000) SASR 450, 462. The difference is between *incidentally* questioning what was said in the House by means of suing on a repetition which is defamatory in itself, and *necessarily* questioning words spoken in the House because the plaintiff has to refer to them in order to establish that the words spoken elsewhere would have been understood in a defamatory sense.

[131] It is appropriate to examine this approach against Mr Camp's two main arguments. He contended first that in present circumstances the words spoken by Mr Jennings in the House were being referred to simply "as a matter of history" as the Privy Council acknowledged was permissible in *Prebble*'s case at 11. The words used by Mr Jennings in the House were being proved, so Mr Camp argued, for no

other purpose than to show they were spoken. Their truth or falsity was beside the point. As was suggested from the Bench the admissibility of hearsay evidence rests on a similar distinction.

[132] This argument founders because the words spoken in Parliament by Mr Jennings are not being referred to by Mr Buchanan simply to show they were spoken and nothing more. Mr Buchanan is necessarily claiming that they were spoken falsely. If it were otherwise he would not be able to contend that the words sued upon would have been understood in a defamatory sense. When the Privy Council indicated in *Prebble*'s case that there could be no objection to the use of *Hansard* to prove what was done and said in Parliament as a matter of history, their Lordships were in context positing a situation where, in the case of words spoken, no issue arose as to their veracity. That cannot be said of circumstances like the present.

[133] As part of his argument Mr Camp suggested that there was an analogy with the position when an innuendo is relied on by the plaintiff. In such circumstances the words complained of are not defamatory in themselves. Reference has to be made to extrinsic facts or circumstances known to the reader or hearer to show that the words would have been understood in a defamatory sense (or indeed to identify the plaintiff, albeit that was not the focus of Mr Camp's argument). In an innuendo case the facts or circumstances giving rise to the innuendo, of which particulars must be given, are not normally controversial in themselves. That is where Mr Camp sought to place the force of the analogy which does have some partial validity. But in a case such as the present the extrinsic materials, ie. the words spoken in Parliament, are at the heart of the controversy. As we have seen, it is in substance their truth or falsity which is at the heart of the case and the plaintiff necessarily must impeach them to establish his case. Thus Mr Camp's suggested analogy breaks down at this point and in any event cannot withstand art 9 considerations.

[134] Mr Camp suggested as a second point that Mr Buchanan was not strictly seeking to prove words spoken by Mr Jennings in the House, because he could rely on the fair and accurate report of those words which appeared in the same article as the words in suit. For such a report the publisher has qualified privilege under the

First Schedule to the Defamation Act 1992, hence the publisher of *The Independent* was not sued, albeit on the conclusion reached by the majority it could have been on the basis of the "I do not resile" words alone. Ex hypothesi on the majority's view the necessary combination of those words and the parliamentary words cannot be regarded as proceedings in Parliament so as to make a fair and accurate report of them an occasion of qualified privilege.

[135] I am unable to accept Mr Camp's submission that art 9 and the wider principle are not infringed because Mr Buchanan can rely, to the extent necessary, not on the parliamentary words as recorded in *Hansard*, but on a report of them published under qualified privilege. It may be true that in these circumstances no reference to the primary source, *Hansard*, may have been necessary, because a secondary source was available. But I do not consider it can matter in principle what the source of the parliamentary words may be, whether primary or secondary. With respect to the contrary view, the substance is the same; the plaintiff is necessarily questioning what an MP has said in the House, and that may not be done.

[136] It is unduly artificial to say that art 9 is breached if reference has to be made to *Hansard*, but not if the parliamentary words can be proved by other means. No such distinction could possibly be justified if the whole of the defamatory statement had been made in the House. I have difficulty in identifying a material difference in a case such as the present where the substance of the defamation comprises words spoken in the House; albeit the cause of action can strictly be said to derive from words spoken elsewhere. Furthermore public knowledge of parliamentary words almost always derives from a report under qualified privilege rather than from *Hansard*.

[137] Mr Buchanan had another argument, not much developed by Mr Camp, upon which the majority have relied for their conclusion. The point focuses on the important policy aspect of parliamentary privilege that MPs, at the time they speak in the House, should not be inhibited in what they say. A subsequent repetition out of Parliament of earlier defamatory words spoken in Parliament cannot logically inhibit what was said on the earlier occasion. Therefore, so the argument proceeds, to allow proceedings to be brought on that subsequent repetition, even if in substance this

involves a questioning of the earlier words, does not run counter to the rationale of art 9. There is obvious force in this argument if one confines the reason for parliamentary privilege to that stated above.

[138] I cannot, however, subscribe to so confined a view. I regard the purpose and policy of art 9, in combination with the wider principle, as being additionally to avoid the courts becoming involved in any inquiry concerning, inter alia, the truth of what MPs say in the House, and their motives in speaking. For me the inhibition issue is only part of the concern which underpins the important constitutional relationship between Parliament and the Courts.

[139] Furthermore, even if the issue were confined to the text of art 9, fairly construed, I would have difficulty in seeing how, in present circumstances, Mr Buchanan is not necessarily "questioning" what Mr Jennings said in the House. I have further difficulty in accepting that the reasoning which commends itself to the majority is open in the light of the Privy Council's conclusion that s16(3) of the Australian Statute represents the law in New Zealand.

[140] I mention again in this context the decision of the House of Lords in *Hamilton's* case (supra). Lord Browne-Wilkinson delivered the leading speech. Lord Steyn, Lord Hope and Lord Clyde each expressed their agreement with what he had said. Lord Cooke's concurrence was limited to one aspect of the decision based on s13 of the Defamation Act 1996 (UK) which has no counterpart in New Zealand and concerns waiver of privilege. Their Lordships made several general points which I consider to be important in resolving the present issue. The first is that it is well established that art 9 does not of itself provide a comprehensive definition of parliamentary privilege. Lord Browne-Wilkinson referred to the wider principle to which he had drawn attention in *Prebble*, referring in the process to "the wide scope" of parliamentary privilege.

[141] His Lordship referred again to s16(3) of the Australian Statute as containing the true principles to be applied and mentioned that the Joint Committee on Parliamentary Privilege (HL Paper (1998-1999) 43-I) held the same view. Hence

Hamilton's case confirms that the Australian Statute represents the law in the United Kingdom as well as in Australia and New Zealand.

[142] His Lordship then said:

> It is in my judgment firmly established that courts are precluded from entertaining in any proceedings (whatever the issue which may be at stake in those proceedings) evidence, questioning or submissions designed to show that a witness in parliamentary proceedings deliberately misled Parliament. To mislead Parliament is itself a breach of the code of parliamentary behaviour and liable to be disciplined by Parliament: see *Church of Scientology of California* v *Johnson-Smith* [1972] 1 All ER 378, [1972] 1 QB 522, *British Railways Board* v *Pickin* [1974] 1 All ER 609 at 629, [1974] AC 765 at 800 per Lord Simon of Glaisdale. For the courts to entertain a question whether Parliament had been deliberately misled would be for the courts to trespass within the area in which Parliament has exclusive jurisdiction.

A little later His Lordship put the matter thus:

> The normal impact of parliamentary privilege is to prevent the court from entertaining any evidence, cross-examination or submissions which challenge the veracity or propriety of anything done in the course of parliamentary proceedings.

[143] Lord Browne-Wilkinson's reference in the first of these citations to the area in which Parliament has exclusive jurisdiction involves the principle that there cannot be any parallel proceedings in the Court which proceedings necessarily involve matters within Parliament's exclusive jurisdiction. The Courts may not adjudicate on any matter if it is of a kind which falls within the exclusive jurisdiction of Parliament. The avoidance of conflicting decisions is one of the obvious reasons for the rule.

[144] To lie to the House or otherwise intentionally to mislead it are matters which are subject to parliamentary control: see P A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) at 428. If Mr Jennings' words spoken in the House were defamatory, as Mr Buchanan necessarily claims, it must have been arguable that Mr Jennings intentionally misled the House by speaking falsely of Mr Buchanan. While it is not necessary for a plaintiff in a defamation case to show that the defendant intended to defame him or her I do not see this as

weakening the force of the present point to any significant extent. Intention can be relevant to certain aspects of defamation proceedings, such as the honesty of opinion and damages. In any event the bringing of defamation proceedings which are based necessarily on parliamentary words must be regarded as questioning the credibility of the person who spoke them. This is not allowed by analogy with s16(3)(b) of the Australian Statute.

[145] That last point aside, the immediate consideration is that Court proceedings may not address matters which are or are capable of being inquired into by Parliament under its own internal procedures as breaches of privilege or contempt of Parliament. I consider there is, in these terms, sufficient identity between a parliamentary inquiry, actual or possible, into misleading the House and a judicial inquiry into the making of untrue statements in the House to make it inappropriate and thus a breach of parliamentary privilege for the Courts to investigate, as a necessary part of the proceedings, whether an MP did speak falsely in the House. To do so is apt to cause the kind of constitutional conflict which the rules of comity and mutual restraint between the two branches of government are designed to avoid.

[146] As Lord Simon of Glaisdale said in *Pickin* v *British Railways Board* [1974] AC 765 at 799:

> It is well known that in the past there have been dangerous strains between the law courts and Parliament – dangerous because each institution has its own particular role to play in our constitution, and because collision between the two institutions is likely to impair their power to vouchsafe those constitutional rights for which citizens depend on them. So for many years Parliament and the courts have been each been astute to respect the sphere of action and the privileges of the other … A further practical consideration is that if there is evidence that Parliament may have been misled into an enactment, Parliament might well – indeed, would be likely to – wish to conduct its own enquiry. It would be unthinkable that two enquiries – one parliamentary and the other forensic – should proceed concurrently, conceivably arriving at different conclusions; and a parliamentary examination of parliamentary procedures and of the actions and understandings of officers of Parliament would seem to be clearly more satisfactory than one conducted in a court of law quite apart from considerations of parliamentary privilege.

[147] To similar effect are the words of Lord Browne-Wilkinson in *Prebble* at 8:

> Moreover to allow it to be suggested in cross-examination or submission that a member or witness was lying to the House could lead to exactly that conflict between the Courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House: if a Court were also to be permitted to decide whether or not a member or witness had misled the House there would also be a serious risk of conflicting decisions on the issue.

[148] Even if to allow the bringing of proceedings of the present kind will not logically inhibit MPs in what they say in the House at the time they speak, I am of the view that the Courts should not become involved in proceedings which must necessarily rather than incidentally represent an inquiry into the truth or falsity of parliamentary words. Such proceedings may also, depending on the nature of the MP's defence, involve an inquiry into the motives with which those words were spoken.

[149] Finally, it is instructive to note that in earlier editions of *Erskine May's treatise on the law, privileges and usage of Parliament* (see 18th ed, 1971 at 81-82) three separate strands are identified as having contributed to the principle of Parliament's exclusive jurisdiction in certain areas. The first is the notion of the judicial pre-eminence of the High Court of Parliament as a court from which there is no appeal. The second is the allied notion that members of such a court had the right to be tried exclusively by that court; trial by one's peers, literally as well as metaphorically for members of the House of Lords. Hence Members of Parliament should not be punished or held accountable at law in any inferior court. Freedom of speech in Parliament is the third consideration mentioned. The first two aspects developed alongside freedom of speech and were conventionally regarded as no less important. Erksine May counselled against taking the view that art 9 captures the whole of the law of parliamentary privilege, a caution fully borne out by the judgments in *Prebble* and *Hamilton*.

[150] It follows from my inability to accept Mr Camp's primary arguments, and the further matters which I have addressed, that I do not consider there can properly be any doctrine of effective repetition**,** as discussed in some of the authorities and in

particular by the Full Court in the present case. A plaintiff should not be able to rely on parliamentary words to establish a defamatory meaning for words spoken or written by an MP outside the House. To do so necessarily involves questioning the veracity of the parliamentary words. If the words spoken or written outside the House are defamatory without reference to any parliamentary words, the cause of action can be established independently of those words which are then only incidentally questioned. That seems to me to be the only principled and clear line which can be drawn in this context.

(b) Establishing identity

[151] As noted earlier, I consider the same approach should be taken to the use of parliamentary words to establish identity. The different approaches of Judge Dalmer at first instance and the Full Court on appeal in *Peters* v *Cushing* have been the subject of differences of opinion in academic commentary. Joseph in [1996] NZLJ 287 and [1998] NZ Law Rev 197 has supported Judge Dalmer's view that reference to the parliamentary words was permissible as there was no questioning or impeachment involved. Allan in (1996) 6(2) Canta LR 324 has supported the High Court's contrary view, albeit on a more persuasively reasoned basis.

[152] Before discussing the competing views it is helpful first to examine the true compass of the decision of this Court in *Hyams* v *Peterson*. In that case neither the plaintiff nor the defendant was an MP. The defendant was a Justice Department Official who had conducted an investigation of so called "white collar" fraud. He made allegations against a group of business people none of whom he named (the "Gang of 20"). He supplied a memorandum to his superior in the Department which did give names. His memorandum was tabled in Parliament and then widely reported under qualified privilege. The plaintiff was allowed to refer to a newspaper report containing his name as a person referred to in the tabled memorandum in order to establish that he was one of the "Gang of 20". Hence the case, as the Court recognised, did not touch in any direct way on the parliamentary privilege of MPs for what they say in the House. To build on *Hyams* v *Peterson* to reach the conclusion to which Judge Dalmer came in *Peters* v *Cushing* was, with respect, to build on a rather insecure foundation.

[153] But, more importantly, the matter should be examined from the point of view of the policy and purpose of all aspects of parliamentary privilege. The normal sequence of events will be, as in *Peters* v *Cushing*, a general allegation made outside the House followed by naming in the House. To allow the naming in Parliament to be used in evidence would directly cut across the principle that MPs should not be inhibited in what they say in the House. The inhibition comes from knowing that their naming in Parliament can be used in evidence to create a cause of action where, ex hypothesi, none existed before. If the sequence were reversed and the naming in Parliament occurred first, as in *Hyams*' case, that naming will usually have been in some defamatory context for the problem to arise. The issue then effectively becomes repetition later outside Parliament in respect of which the same considerations as those earlier discussed seem to me to arise. The possibility of a naming in a bland context followed by a general defamatory allegation seems so remote as not to require present discussion.

[154] In this case the parliamentary words did not name Mr Buchanan. The repetition outside the House is said to identify him as a result of what was said in the House. It is so difficult to disentangle the words spoken in and out of the House that in my view parliamentary privilege in the sense of respecting the exclusive jurisdiction of Parliament should be regarded as precluding the use of the parliamentary words for identification purposes also.

[155] For completeness I add that in the *Peters v Cushing* situation where a general allegation is followed by naming in Parliament I consider there is a breach of art 9 in the sense of a questioning of proceedings in Parliament. It is in my view altogether too facile to say that the words spoken in Parliament are not in these circumstances being challenged, rather they are being accepted as true. What a plaintiff is seeking to do in present circumstances is not to question the words in the sense of challenging their veracity; but to question the fact that the MP has defamed the plaintiff by the combined effect of the words spoken in and out of Parliament. As Allan says, it is the fact that the parliamentary words have been spoken at all of which the plaintiff complains. Without them there would be no defamation for want of identification. If no one knows that the plaintiff is the unnamed person, no harm is done. That view is both valid in itself and coincides with the vital point that

otherwise the purpose of the privilege would be frustrated in such circumstances as these.

[156] The idea that a plaintiff, in referring to identifying words in Parliament, is simply proving what was said there as a matter of history suffers from the problem that "questioning" and "proving as a matter of history" are not mutually exclusive concepts. In some circumstances to prove that words were said in Parliament necessarily involves questioning them. It will depend on what the plaintiff's purpose is in proving that the words were spoken. If the purpose is to demonstrate that non parliamentary words spoken by an MP have now become actionable by dint of what the MP has said in Parliament, the plaintiff is in substance questioning the fact that the MP has chosen to name him and thus create what, but for privilege, would be an actionable wrong. The plaintiff is not relying on the words spoken in Parliament *purely* as a matter of history, as the Privy Council put it in *Prebble*. The MP's conduct in the House is in a real sense being questioned and in my view it would be inconsistent with the purpose and policy of parliamentary privilege to allow evidence to be given of the parliamentary words.

[157] As a check on this reasoning I would go back to Blackstone's statement that matters in Parliament "ought to be examined, discussed and adjudged [in Parliament] and not elsewhere". To allow reference to parliamentary words to identify the plaintiff as the subject of defamatory words spoken outside Parliament is essentially to examine, discuss and adjudge those words elsewhere than in Parliament. In this respect I note that in *Bradley & Ewing: Constitutional and Administrative Law* (12th ed.) the authors say, at 235, that what is said in Parliament may not be "examined by a Court" for the purpose of deciding whether it supports a cause of action in defamation which has arisen outside Parliament. They cite the decision of Browne J in the *Church of Scientology* case in support.

[158] In cases such as the present it is necessary to reconcile two competing values; the value to plaintiffs of vindicating their reputations against the value to society of allowing MPs to speak freely and fearlessly in the House. The latter generally prevails as a matter of policy – hence the absolute privilege accorded to MPs for what they say in the House. If all the defamatory words are spoken inside or outside

the House no question of a dividing line arises. Where defamatory words are spoken outside the House, but they are harmless and not actionable for want of identifying the plaintiff, the law is not engaged. That engagement comes only from the creation of the wrong by what is said in Parliament. In a sense the out of Parliament words are incorporated by reference into the naming words spoken in the House. This is the reverse of the incorporation by reference said to have occurred in the "I do not resile" situation earlier discussed. But for present purposes the wrong arises by dint of the parliamentary naming which necessarily carries with it the otherwise non actionable words and thereby creates a cause of action. In substance therefore the MP is being sued and thereby "questioned" for what has been said in the House. It is essentially for these reasons that I would preclude reference to identifying words spoken in the House as well as reference to words spoken there which give words spoken outside the House a defamatory meaning.

General observations

[159] Before reaching these conclusions I have reflected on the risk of abuse of parliamentary privilege which may thereby be engendered. I take as an example the set of circumstances which I suggested during argument. An MP defames the plaintiff during proceedings in the House. The plaintiff has no cause of action. The television news that evening publishes a fair and accurate report of what the MP has said about the plaintiff in the House. Qualified privilege attaches to that publication and it is unlikely that the plaintiff will be able to sue thereon. The television reporter, as part of the same news item, interviews the MP on the steps of the House. His parliamentary words are not put to him but everyone knows what he said and why he is being interviewed. He says words to the effect that he stands by what he said in the House. Those words cannot be sued upon without reference to the parliamentary words. To do so is necessarily to question them and that is not allowed. Hence the plaintiff still has no cause of action, albeit the defamatory words have been given nation-wide currency and everyone knows what they were, and that the MP stands by them.

[160] If the facts were altered slightly and the television reporter directly puts the defamatory words to the MP, and asks for his comment, and the MP again replies, I

stand by what I said (rather than no comment), then it could be said that the MP has adopted the reporter's words as his own and is therefore repeating them outside the House. Should it matter that the words have not come out of the MP's own lips? Here we have in bold relief the issue raised by Mr Camp's second argument that it is not *Hansard* to which reference is being made for the crucial words but a fair and accurate report of them published under qualified privilege.

[161] But, as discussed, the report under qualified privilege is no more than a limited extension of the parliamentary privilege itself and it would seem to invoke legal nicety rather than substance to say that in these circumstances the parliamentary privilege is lost simply because reference can be made to a permitted secondary source rather than to *Hansard*. Such a distinction would lead to awkward differences between those who first heard the defamatory words on live radio or in a contemporaneous telecast as against those who heard or read them first from the secondary source. Awkward difficulties could also arise over matters of degree, ie. to what extent were the defamatory words adopted by the MP outside the House.

[162] I mentioned earlier the distinction between an acknowledgement that a certain statement had been made in the House and an affirmation outside Parliament of that statement – see paragraph [89] above. It is clear law that a plaintiff cannot sue on a mere acknowledgement. This case raises the issue whether the plaintiff can sue on an affirmation, whatever form that affirmation may take. One of the reasons I am not attracted to Mr Camp's argument which endeavoured to support the so called doctrine of effective repetition is that the line between acknowledgement and affirmation is liable to be so fine that to make everything turn on the distinction between the two would be unsatisfactory and productive of potential uncertainty. An acknowledgement may implicitly amount to an affirmation, depending on subtle issues of context and inflection.

[163] In any event what really is the difference between acknowledgement and affirmation unless the acknowledgement is coupled with words of retraction? What is the difference in substance between – "Yes I did say that in the House" and "I do not resile from what I said in the House"? Each is apt to give the ordinary reader or listener the message that the speaker is confirming what was said in the House. It is

a commonplace of defamation law that meaning is approached, not from the standpoint of a legal analyst but from that of the ordinary reader or listener: see for example *Lewis* v *Daily Telegraph* [1964] AC 234, at 28 per Lord Reid and *Morgan* v *Odhams Press Ltd* [1971] 1 WLR 1239, HL If the law were as suggested, not only those speaking in these circumstances but also those publishing their words would often find themselves in real difficulty in knowing whether the occasion was the subject of absolute or qualified privilege respectively.

[164] All this reinforces me in the view that the only secure and principled approach is to limit the plaintiff, for the purpose of establishing the necessary ingredients of his cause of action, to words which have been spoken or written outside the House by the MP personally. That will give a clear line which is reasonably capable of understanding and application, whether in the heat of the political moment, or in more reflective circumstances.

[165] Parliament can and should be relied on to deal appropriately with any abuse of parliamentary privilege, such as where an MP contrives to avoid use of defamatory words outside the House while in substance repeating the defamation, thereby misusing the privilege. In such circumstances qualified privilege might well be unavailable to anyone publishing what was said, either because the occasion was not one of qualified privilege in the first place or because, if originally privileged, the publication would be a misuse of the occasion.

[166] Furthermore mechanisms are available under Parliamentary standing orders to allow persons who consider they have been defamed the right to be heard in Parliament: see for example Standing Order 161. In *Prebble*'s case at 10 the Privy Council pointed out that in cases such as these, there are three public policy issues in play: legislative freedom and access to all relevant information; protection of freedom of speech; and the interests of justice in ensuring all relevant information is available to the Courts. Their Lordships observed that the law had long been settled that of these three the first, ie. parliamentary privilege, should prevail.

[167] The law's approach to repetition of privileged words outside the House should in its turn be informed by three things: parliamentary privilege is the

dominant principle; the law should be as straightforward as possible to understand and apply; and the principles should be driven by substance rather than legal niceties. Each of these three considerations and, a fortiori, their combination, suggests that the line should be drawn on the basis indicated above. The risk that from time to time citizens may be defamed without the ability to seek redress must be acknowledged, but that risk is the price society pays for parliamentary privilege. It must, in any event, be doubted whether the risk is significantly increased by where I would draw the line from the level of risk already inherent in the capacity for fair and accurate reporting of parliamentary proceedings under qualified privilege.

Conclusion

[168] Because Mr Buchanan had no cause of action without reference to Mr Jennings' parliamentary words for both meaning and identification purposes, I would allow the appeal, set aside the judgment entered for Mr Buchanan in the High Court and order that judgment be entered there for Mr Jennings.

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