

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2004-404-003311

BETWEEN WINSTON RAYMOND PETERS
 Plaintiff

AND TELEVISION NEW ZEALAND
 LIMITED
 First Defendant

AND YVONNE TERESA DOSSETTER
 Third Defendant

Hearing: 15 April 2010

Appearances: B Henry and M Church for Plaintiff
 W Akel and T Walker for First Defendant

Judgment: 8 June 2010

**(RESERVED) JUDGMENT (No. 2) OF ANDREWS J
[Application by First Defendant to strike out cause of action]**

*This judgment is delivered by me on 8 June 2010 at 1:30pm
pursuant to r 11.5 of the High Court Rules.*

.....
Registrar / Deputy Registrar

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Introduction

[1] In his fifth amended statement of claim the plaintiff, Mr Peters, pleads three causes of action in defamation against the third defendant, Television New Zealand Limited (“TVNZ”). The second cause of action is founded on the content of a broadcast on the *Holmes* programme on 23 June 2004 (“the *Holmes* programme”).

[2] TVNZ has applied for determination as a preliminary question whether the words published by TVNZ in the *Holmes* programme and referred to in para 9 of the fifth amended statement of claim are reasonably capable of bearing the meanings pleaded by Mr Peters, and for an order striking out Mr Peters’ second cause of action on the grounds that the words are not reasonably capable of bearing the meanings pleaded. Mr Peters opposes TVNZ’s application.

Background

[3] In 2004 Mr Peters was a Member of Parliament, and had been an alternate member of a parliamentary Select Committee inquiring into the scampi fishing industry in New Zealand and, in particular, the involvement of Simunovich Fisheries Limited (“Simunovich”) in that industry. The inquiry had begun in February 2003.

[4] On 22 June 2004 TVNZ’s *One News* contained an item reporting on the disclosure in Parliament of an affidavit sworn by the third defendant, Ms Dossetter, in relation to matters affecting the scampi inquiry. Ms Dossetter had sworn the affidavit on 29 January 2004. *One News* reported that a Member of Parliament had referred the affidavit to the chair of the Select Committee (Mr Carter), who had in turn referred it to the Speaker, calling for an investigation. Mr Peters’ first cause of action in the fifth amended statement of claim is founded on the *One News* item.

[5] The *Holmes* programme on 23 June 2004 reported on allegations contained in Ms Dossetter's affidavit. The programme was structured as follows:

- a) An introduction by the presenter, Mr Holmes. Mr Holmes first said that "serious allegations" had been made in Parliament that day "under the protection of Parliamentary privilege". Mr Holmes then set out what a Member of Parliament, Mr Shirley, had said in Parliament in relation to Ms Dossetter's affidavit. Mr Shirley is reported as having said that Ms Dossetter had said in her affidavit that a proposal had been made at a meeting attended by Mr Peters and Mr Meurant (a former Member of Parliament) that a payment of \$300,000 to Mr Meurant would be a good investment for the Simunovich business. Ms Dossetter had also said that Mr Meurant was working for both Mr Peters' political party and for Simunovich during the scampi inquiry. Mr Holmes then said that Ms Dossetter was the former partner of Mr Meurant;
- b) Background information by a reporter, Ms Janes, in relation to the scampi industry and the Select Committee inquiry, including extracts from an interview of Ms Dossetter by Ms Janes, an outline given by Ms Janes of alleged telephone calls from Mr Meurant to Mr Peters and to Simunovich representatives at the time of the Select Committee inquiry, and footage of Mr Shirley referring to Ms Dossetter's affidavit in Parliament together with a report by Ms Janes of two further statements made by Mr Shirley in Parliament;
- c) A report by Mr Holmes of a statement made by the Managing Director of Simunovich denying any illegal or inappropriate behaviour, proceeded by Mr Holmes noting that Mr Meurant had not answered calls and that Mr Peters was overseas; and
- d) A live studio interview of Mr Shirley by Mr Holmes.

A full transcript of the *Holmes* programme is annexed to this judgment.

[6] Mr Peters issued proceedings on 29 June 2004, initially claiming against five defendants. His fifth amended statement of claim was filed on 30 June 2009. It is appropriate to record that the following interlocutory judgments in the proceeding are relevant to this application:

- a) In a judgment given on 5 November 2004,¹ Paterson J struck out the causes of action against Mr Carter, on the grounds that the statements made by Mr Carter were not reasonably capable of bearing the defamatory meanings alleged by Mr Peters (that he was guilty of serious misconduct or contempt of Parliament). Mr Peters was given leave to replead.
- b) In a judgment given on 30 August 2006,² Associate Judge Christiansen struck out causes of action alleged against Mr Carter and TVNZ in Mr Peters' third amended statement of claim:
 - i) Mr Carter had applied for an order striking out Mr Peters' amended pleading which was that Mr Carter's statements contained allegations that Mr Peters was suspected of being a party to serious misconduct. The Associate Judge struck out the amended pleading against Mr Carter, on the grounds that Mr Carter's statements were not reasonably capable of bearing the alleged meaning. Leave was not given to replead.
 - ii) TVNZ had applied to strike out Mr Peters' second cause of action, relating to the *Holmes* programme, also on the grounds that the programme was not reasonably capable of bearing the alleged defamatory meaning. The Associate Judge held that the programme was not capable of meaning that TVNZ had itself adopted the allegations made as true

¹ *Peters v Television New Zealand & Ors* HC Auckland CIV-2004-404-3311 5 November 2001.

² *Peters v Television New Zealand & Ors* HC Auckland CIV-2004-404-3311 30 August 2006.

and was itself alleging that Mr Peters was involved in serious misconduct, that his conduct was potentially criminal, or that he was in contempt of Parliament. Accordingly, the claim against TVNZ was struck out.

c) In a judgment given on 20 December 2007,³ Woodhouse J dismissed an application for review of the judgment of Associate Judge Christiansen. With respect to Mr Peters' second cause of action against TVNZ, Woodhouse J found that Associate Judge Christiansen was correct in his conclusion that the *Holmes* programme was not capable of meaning that TVNZ itself was asserting that Mr Peters was guilty of misconduct. However, at [49], he gave leave for Mr Peters to file an amended statement of claim which included pleadings that:

- (a) By the *Holmes* broadcast on 23 June 2004, TVNZ itself asserted that there was cause for suspicion that Mr Peters may have been guilty of serious misconduct.
- (b) TVNZ broadcast allegations by Mrs Dossetter which:
 - (i) affirmed the report by TVNZ in the same programme of what was recorded in her affidavit; and
 - (ii) if such be the case, affirmed express allegations in her affidavit, with a pleading in this regard to articulate the matters referred to in [29] of this judgment.

The fifth amended statement of claim – the second cause of action

[7] The second cause of action begins at para 8 of the fifth amended statement of claim in which the official record of Parliament of Mr Shirley's disclosure of Ms Dossetter's affidavit is set out. Paragraph 9 sets out the transcript of the *Holmes* programme, excluding the live studio interview of Mr Shirley. That is, the pleaded transcript ends at the end of the report of a statement by Mr Peter Simunovich, on the third page of the transcript. The transcript of the interview of Mr Shirley is underlined in the annexed transcript of the *Holmes* programme.

³ *Peters v Television New Zealand Ltd* [2008] NZAR 411(HC).

[8] At para 10 Mr Peters pleads that he “expressly does not rely on any words spoken in Parliament”, in particular the words set out at para 8, or reports of statements made by Mr Shirley in Parliament included in the *Holmes* programme, “except for the purpose of understanding the meaning of the words spoken outside Parliament” set out in para 9. The reports of statements made by Mr Shirley in Parliament are highlighted in the annexed transcript of the *Holmes* programme.

[9] Paragraphs 11 and 12 set out the alleged meanings of the words spoken during the *Holmes* programme. At para 12 it is alleged that the words in para 9 would be understood as Ms Dossetter stating that Mr Peters had accepted and acted on a bribe and was corrupt.

[10] At paragraph 13 it is pleaded:

That the first defendant by:

- (i) Repeating and publishing the statements in paras 8, 9 and 10 by the said Dossetter; or in the alternative:
- (ii) Publishing a mosaic of its own comments at the same time as repeating the said statements of Dossetter

defamed the plaintiff.

[11] It is apparent that Mr Peters has chosen not to include a pleading that TVNZ itself asserted that there was cause for suspicion that Mr Peters had been guilty of misconduct (pursuant to leave given at [49](a) of Woodhouse J’s judgment). The second cause of action against TVNZ in the fifth amended statement of claim follows the second basis on which leave was given to replead, in [49](b) of the judgment of Woodhouse J.

Principles as to strike out

[12] Counsel were agreed as to the principles to be applied when considering an application to strike out pleadings. First, I must assume that the facts as pleaded in the statement of claim are correct. Secondly, a pleading should only be struck out if the cause of action is so clearly untenable that it cannot possibly succeed. The jurisdiction to strike out is to be exercised sparingly, and only in a clear case

where the Court is satisfied that it has the requisite material and the cause of action cannot succeed.⁴

Principles as to determining whether words are reasonably capable of bearing an alleged defamatory meaning

General principles

[13] Counsel were also agreed as to the general principles to be applied when determining whether words are reasonably capable of bearing an alleged defamatory meaning. The leading authority is the judgment of the Court of Appeal in *New Zealand Magazines Limited v Hadlee (No 2)*,⁵ where Blanchard J said:

In determining whether words are capable of bearing an alleged defamatory meaning:

- (a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?
- (b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
- (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
- (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
- (e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
- (f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that a jury cannot be asked to proceed on

⁴ See *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

⁵ *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.

the basis that different groups of readers may have read different parts of an article and taken different meanings from them: ...

(citation omitted)

[14] Blanchard J went on to say that the notional ordinary reader is “... someone ‘not avid for scandal’ and ‘fair minded’ ... ‘not unduly suspicious’ and ‘not prone to fasten on one derogatory meaning when other innocent or at least less suspicious meanings could apply’”.

Can material covered by parliamentary privilege be referred to when considering whether a publication is capable of bearing an alleged defamatory meaning?

[15] While both counsel agreed that the whole of the *Holmes* programme must be considered, they differed as to whether privileged material included in the item should be considered.

Submissions

[16] On behalf of TVNZ, Mr Akel submitted that para 10 of the fifth amended statement of claim should be struck out, as the pleading that “words spoken in Parliament” can be relied on “for the purpose of understanding the meaning of the words spoken outside Parliament in para 9” is not sustainable as a matter of law.

[17] In support of that submission Mr Akel referred to the judgment of the English Court of Appeal in *Curistan v Times Newspapers Ltd*,⁶ rejecting a submission that the meaning of non-privileged words is to be found by taking the cumulative effect of non-privileged and privileged words. Mr Akel acknowledged that reference could be made to privileged words, such as words spoken in Parliament to establish historic facts (for example that the words were spoken), but submitted that a distinction must be drawn between that and using privileged words to establish the meaning of non-privileged words. He submitted that the latter would breach the rules of parliamentary privilege by calling into question parliamentary proceedings.

⁶ *Curistan v Times Newspapers Ltd* [2009] QB 231 (CA).

[18] Mr Henry submitted on behalf of Mr Peters that *Curistan* does not represent the law in New Zealand. He cited the judgment of the Court of Appeal in *Hyams v Peterson*,⁷ which Woodhouse J referred to in his judgment of 20 December 2007.

[19] Mr Henry submitted that while parliamentary privilege means that what is said by a Member of Parliament in the House cannot be used to determine the meaning of what the Member says outside the House, that principle does not extend to those who are not Members of Parliament. He submitted that the meaning of words spoken by someone who is not a Member of Parliament may be understood by reference to words spoken in Parliament. Thus in the present case, he submitted, because Ms Dossetter's affidavit had been tabled in Parliament, and she spoke to it outside Parliament, the Court is entitled to look to what Mr Shirley was reported as saying in Parliament to understand the meaning of what Ms Dossetter said outside Parliament.

[20] Mr Henry submitted that a distinction is to be made on the basis of whether it is a Member of Parliament claiming parliamentary privilege, or some other person. Privilege (and thus the inability to refer to words spoken in the House), only applies to a Member of Parliament.

Discussion

[21] It is necessary to refer to a series of judgments in which the Courts have considered when reference may be made in Court proceedings to proceedings in Parliament.

(a) Hyams v Peterson

[22] Mr Peterson prepared a report for the Securities Commission in which he made allegations of "white collar crime" against several people. The report was publicised, but the names of the people against whom allegations were made were not disclosed. The full report, including names, was then tabled in Parliament

⁷ *Hyams v Peterson* [1991] 3 NZLR 648 (CA).

under parliamentary privilege, and subsequently received wide publicity. Mr Hyams was one of those whose name was disclosed following tabling of the report.

[23] The defendants applied to strike out Mr Hyams' defamation proceedings. In the High Court all but one application were dismissed.⁸ The defendants appealed.

[24] The issue for the Court of Appeal was whether reference could be made to privileged material (the disclosure of Mr Hyams' name in Parliament) in order to prove that there had been a publication of words of or concerning Mr Hyams that defamed him in the alleged manner. The Court of Appeal observed that:⁹

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 the plaintiff or bears a defamatory meaning.

[25] The Court of Appeal then rejected the submission that there was a limitation on that principle, such that a prior publication on a privileged occasion could not be used to make a link between an innocent (that is, non-actionable) publication and the plaintiff. The Court held that the plaintiff could use a prior report of parliamentary proceedings to show that he was a person referred to in the report disclosed in the publicity given to the report after it was tabled in Parliament.¹⁰

[26] The Court of Appeal in *Hyams v Peterson* commented that its decision did not challenge the scope of parliamentary privilege – the principle that the Courts cannot examine what is said or done in Parliament for the purpose of supporting a cause of action. It observed that what Mr Hyams sought to do was to refer to a report of parliamentary proceedings only, and was not “questioning” what was said in Parliament.

⁸ *Hyams v Peterson* [1991] 1 NZLR 711 (HC).

⁹ *Hyams v Peterson* [1991] 3 NZLR 648 (CA) at 656.

¹⁰ At 656, citing *Onama v Uganda Argus Ltd* [1969] EA 92 (East Africa CA).

(b) *Prebble v Television New Zealand Ltd*

[27] Mr Prebble sued TVNZ in respect of a *Frontline* programme, broadcast when he was Minister for State-Owned Enterprises. As part of defences of truth, qualified privilege, and fair comment on matters of public interest, TVNZ set out particulars including words from speeches in the House by Mr Prebble and other Ministers. In the High Court Smellie J struck out the particulars as being in breach of parliamentary privilege.¹¹

[28] On appeal, as relevant to the present issue, the Court of Appeal accepted a submission made on behalf of the Attorney-General as intervenor that evidence of debates or proceedings in Parliament is admissible when used (amongst other things) to prove material facts, such as that a statement was made in Parliament at a particular time, or that it referred to a particular person.¹² The Court held (McKay J dissenting) that statements made by Mr Prebble and other Members in the House were absolutely protected from defamation proceedings. The proceedings were stayed, on terms.

[29] Mr Prebble appealed to the Privy Council against the stay of proceedings. The Privy Council allowed the appeal against the stay.¹³ In the course of its judgment their Lordships observed:¹⁴

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 words in Parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course.

(c) *Peters v Cushing*

[30] Mr Cushing claimed that he was defamed by Mr Peters in a *Holmes* programme, in June 1992. In that programme Mr Peters said that he had been offered money by a businessman for his political support. The “businessman” was not named. One week later Mr Peters named Mr Cushing during proceedings

¹¹ *Prebble v Television New Zealand Ltd* (1992) 8 CRNZ 439 (HC).

¹² *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA) at 518 L.21-25, citing *Hyams v Peterson*.

¹³ *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC).

¹⁴ At 11.

in the House. Mr Cushing denied Mr Peters' allegation. In October 1993 Mr Peters appeared on a *Frontline* programme, in which he named Mr Cushing and said viewers could believe either himself or Mr Cushing.

[31] Mr Cushing's first cause of action was based on the June 1992 *Holmes* programme. On appeal against an interlocutory decision of the High Court, the Court of Appeal observed:¹⁵

We agree with the learned Judge in the High Court that the issues raised by the plea of parliamentary privilege in the present case is different from the issues raised in *Hyams v Peterson* and *Television New Zealand Ltd v Prebble*, 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.

(citations omitted)

[32] Subsequently the High Court, on appeal from a decision of the District Court in the substantive proceeding, held that Mr Peters was protected by parliamentary privilege. That is, Mr Cushing could not use Mr Peters' privileged statement in the House to prove an element of the cause of action – the identity of the person referred to in the earlier non-privileged statement.¹⁶

[33] However, the High Court held that Mr Peters' identification of Mr Cushing in the House could be relied on as part of the "historical train of events" leading up to the *Frontline* programme in 1993.¹⁷

(d) *Jennings v Buchanan*

[34] Mr Jennings was a Member of Parliament who made comments about Mr Buchanan in the House. Had those comments been made outside the House they may have been defamatory. Mr Jennings was subsequently interviewed by a journalist and was reported as saying that he did not resile from his claim about Mr Buchanan. In his statement of claim in proceedings for defamation Mr Buchanan said that he would refer to and rely on the full wording of the *Hansard*

¹⁵ *Peters v Cushing* [1994] 3 NZLR 30 (CA) at 31.

¹⁶ *Peters v Cushing* [1999] NZAR 241 (HC) at 245.

¹⁷ At 251.

report of parliamentary proceedings at trial to establish that Mr Jennings made the alleged comments.

[35] In *Buchanan v Jennings*,¹⁸ the Court of Appeal considered (amongst other issues) whether the *Hansard* record could be used to complete the substance of the unprivileged statement that Mr Jennings “did not resile from” the privileged statement. The Court of Appeal held that in the case before it, as in *Hyams v Peterson*, that:¹⁹

The parliamentary record is merely a step in the proof of the meaning the later non-privileged statement will have conveyed. ... 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.

[36] Mr Jennings appealed to the Privy Council.²⁰ The Solicitor-General made submissions as intervenor on the issue of whether the record of parliamentary proceedings could be used to provide a necessary component of the cause of action. He submitted that it was untenable to describe the use of *Hansard* material as simply part of the background.

[37] Their Lordships upheld the conclusion reached by the majority of the Court of Appeal. In the course of his judgment on behalf of their Lordships, Lord Bingham observed:²¹

In a case such as the present, however, reference is made to the parliamentary record *only to prove the historical fact that certain words were uttered*. The claim is founded on the later extra-parliamentary statement. The propriety of the member’s behaviour as a parliamentarian will not be in issue. Nor will his state of mind, motive or intention when saying what he did in Parliament.

(emphasis added)

¹⁸ *Buchanan v Jennings* [2002] 3 NZLR 145 (CA).

¹⁹ At [57] per Richardson P, Gault, Keith and Blanchard JJ (Tipping J dissenting).

²⁰ *Jennings v Buchanan* [2005] 2 NZLR 577 (PC).

²¹ At [18].

(f) *Curistan v Times Newspapers Ltd*

[38] Mr Curistan claimed in defamation proceedings that an article published in the *Sunday Times* was defamatory of him. The article was in part based on statements made in Parliament. A pre-trial hearing was held as to the meaning of the words complained of, and as to whether qualified privilege applied. The plaintiff appealed against the lower Court's ruling.

[39] Determination of the "meaning" issue included considering whether the meaning of the non-privileged parts of the article was to be found by applying the "single meaning" rule, and taking the cumulative effect of privileged and non-privileged words, or whether the allegations in the privileged passages should be treated only as forming the context in which the non-privileged parts of the article were written. Put another way, could the privileged passages be referred to for the purpose of determining the meaning of the non-privileged passages?

[40] The English Court of Appeal was unanimous in holding that, in the case of an article containing both privileged and non-privileged passages, the privileged passages merely provided the context in which the non-privileged passages were made. Laws LJ said:²²

The court's approach to a defamation claim relating to the whole publication must in my judgment be as follows. (i) The report of what was said in Parliament is subject to qualified privilege. This necessarily involves a disapplication of, or an exception to, the repetition rule as regards that part of the publication. If the rule were applied, the privilege would be nullified. The privilege allows the publisher to rely on the fact that he is reporting what another has said. That other is a legislator speaking in Parliament. The very purpose of the privilege is to facilitate what s/he has said. It can only be done if the repetition rule is set aside. (ii) *The meaning of the publisher's own comments is to be ascertained separately from the meaning of the report of parliamentary speech.* This necessarily involves a disapplication of, or an exception to, the single meaning rule. So much follows from proposition (i): once it is accepted that those parts of the publication consisting in the report of parliamentary speech, being covered by qualified privilege, must be understood without reference to the repetition rule, the publisher's own comments must necessarily be interpreted according to their own terms and no special rule

²² *Curistan v Times Newspapers Ltd* [2009] QB 231 (CA) at 84.

applies. Accordingly, the relation between the report and the comments is that the first sets the context for the second; no more.

(emphasis added)

[41] The judgment in *Curistan* was mentioned in the recent judgment of the Supreme Court in *APN New Zealand Ltd v Simunovich Fisheries Ltd*.²³ The Court noted that *Curistan* turned on issues concerning the meaning of words and the application of privilege to a “hybrid” publication, part of which was privileged and part was not.²⁴

[42] I am satisfied that the principle to be taken from the judgments referred to is that material that is subject to parliamentary privilege may only be referred to for the purpose of establishing an historic fact, or for identification. I accept Mr Akel’s submission that a distinction must be made between use of privileged material for that purpose, which is permissible, and use of privileged material to support a hypothesis – in this case, the meaning of the *Holmes* programme to a hypothetical reasonable reader or viewer. I accept that to do the latter would be to question what was said in Parliament.

[43] I do not accept Mr Henry’s submission that para 10 of the fifth amended statement of claim clearly reflects the *Hyams v Peterson* approach. Paragraph 10 expressly pleads that the privileged material is relied on “for the purpose of understanding the meaning of” the non-privileged material, whereas in *Hyams v Peterson* privileged material was relied on only for the purpose of identifying the plaintiff as a person referred to in the alleged defamatory publication.

[44] Nor do I accept his submission that the reference to privileged material merely “sets the scene” for the alleged defamation. Quite simply, that is not what the pleading at para 10 says. Further, in the pleaded meaning as set out in para 11, reference is made to the privileged material. For example, para 11(iv) refers to statements as to a sum of money, to that sum having been “paid from an Australian bank account”, to that money having been “in a brown paper bag”, and

²³ *APN New Zealand Ltd v Simunovich Fisheries Limited* [2010] 1 NZLR 315 (SC).

²⁴ At [29].

to “the deed” being “done”. Mr Henry also referred to these statements in his submissions as to meaning. The statements appear only in the privileged material.

[45] Accordingly, I conclude that the meaning of the statements made in the *Holmes* programme in the present case is to be determined without reference to any statements made in Parliament. I therefore conclude that para 10 of the fifth amended statement of claim is not sustainable as a matter of law, as words spoken in Parliament cannot be relied on for the purpose of understanding the meaning of words spoken outside Parliament.

[46] In this I have reached a different conclusion from Woodhouse J who, citing *Hyams v Peterson*, at [29] of his judgment expressed the view that what was disclosed in the House of Representatives could be extrinsic evidence to show that a publication bears a defamatory meaning.

[47] In my judgment, *Hyams v Peterson* held only that privileged material could be referred to for the purposes of identification. That is how it has been interpreted in subsequent judgments such as *Television New Zealand Ltd v Prebble*²⁵ and *Peters v Cushing*.²⁶ The Privy Council in *Jennings v Buchanan* also observed that “*Hyams v Peterson* raised a number of points relevant to identification of the plaintiff, but none relevant to this appeal”.²⁷

[48] Further, I have concluded that *Jennings v Buchanan* is not of assistance in the present case. The issue before the Court of Appeal in *Buchanan v Jennings* was whether absolute privilege applied. As stated by Keith J when delivering the judgment of the Court of Appeal:²⁸

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 (Imp) – and later affirms the statement (but without repeating it) on an occasion which is not protected by privilege.

²⁵ *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA).

²⁶ *Peters v Cushing* [1994] 3 NZLR 30 (CA).

²⁷ *Jennings v Buchanan* [2005] 2 NZLR 577 (PC) at [11].

²⁸ *Buchanan v Jennings* [2002] 3 NZLR 145 (CA) at [1].

[49] The question of whether a statement made by a Member of Parliament inside the House of Representatives could be used to establish what the Member was referring to in a statement outside the House that he did not resile from what he had said earlier (the “historical fact” of what was said) is a different situation from the present. Here, the reference to privileged material Mr Peters seeks is not to what Ms Dossetter said in her affidavit, but to what a Member of Parliament is recorded as saying she said. Accordingly, it is not merely the “historical fact” of what was said.

[50] The issue here is not whether privilege applies, but what meaning a television programme is capable of bearing. The judgment in *Curistan* is directly on point. As noted earlier, that case turned on issues concerning the meaning of words and the application of privilege to a “hybrid” publication, part of which was privileged and part was not. As the English Court of Appeal held in *Curistan*, the meaning of the programme is to be ascertained separately from the meaning of the report of parliamentary proceedings.

[51] It is clear from all of the authorities referred to that the foundation of parliamentary privilege is art 9 of the Bill of Rights:

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.

[52] I am satisfied that to refer to that part of the *Holmes* programme that is privileged material (the report of Mr Shirley’s statements about Ms Dossetter’s affidavit) would inevitably require an examination of proceedings in the House, and would therefore call into question proceedings in Parliament.

[53] The parts of the *Holmes* programme that were reports of parliamentary proceedings, and thus privileged, were as follows:

Holmes: First tonight ... serious allegations were made in Parliament today under the protection of parliamentary privilege.

ACT MP Ken Shirley has read some of an affidavit. The affidavit says that a proposal was made at a meeting at the Simunovich Olive Farm that a payment of \$300,000 to Ross Meurant would be a good investment for the Simunovich

business. Mr Shirley said, in Parliament, the affidavit says at the meeting were Ross Meurant and Winston Peters.

...

Shirley: Ross Meurant met at Simunovich's olive farm following the infamous Kermadec restaurant meal and the proposal was put that the payment of \$300,000 to Meurant would be a good investment for Simunovich's business.

Janes: Mr Shirley went on to say that the affidavit said that Winston Peters was also at the meeting at the Simunovich's olive farm and Mr Shirley told Parliament the affidavit alleged the deed was done and the money was to be available from an Australian bank account.

Those portions are not to be referred to for the purpose of determining whether the remainder of the item was capable of bearing the alleged defamatory meaning.

[54] I turn, therefore, to the submissions of the parties as to the meanings of statements in the *Holmes* programme.

Are the statements in the *Holmes* programme capable of bearing the alleged defamatory meaning?

The claimed meanings

[55] Paragraphs 11 and 12 of the fifth amended statement of claim plead as follows:

11. That the public would have understood from the words spoken during the broadcast in paragraph 9 that:
 - (i) Allegations of wrong doing had been made against the Simunovichs.
 - (ii) The select committee had cleared the Simunovichs of any wrong doing.
 - (iii) That Dossetter was stating that the select committee process was not impartial in reaching the conclusion in (i) due to the serious misconduct of the plaintiff.
 - (iv) That Dossetter was stating that the plaintiff's misconduct was:
 - That he employed Ross Meurant.

- That the plaintiff and Ross Meurant were at a meeting with the Simunovichs, where the Simunovichs agreed to pay \$300,000 to Ross Meurant as a good business investment.
- That the sum of \$300,000 was paid from an Australian Bank to Ross Meurant.
- That the \$300,000 was in a brown paper bag.
- That Ross Meurant received the payment of \$300,000 for and on behalf of the plaintiff.
- That the plaintiff due to the payment of \$300,000 to his staff member Ross Meurant compromised the outcome of the select committee so as to clear the allegations being made against Simunovich.

12. That the words in para 9 would be understood that Dossetter was stating that the plaintiff accepted and acted on a bribe and was corrupt.

[56] Mr Akel submitted that these pleadings amount to a pleading of a “tier one” meaning, imputing actual misconduct on the part of Mr Peters.²⁹ He submitted that the *Holmes* programme is not reasonably capable of bearing the alleged meaning. He made this submission on two bases.

(a) “*Single Meaning*”

[57] First, Mr Akel submitted that Mr Peters is attempting to rely solely on what Ms Dossetter says, in isolation of the rest of what was said during the programme. He submitted that this is contrary to established principles and authority. In support of this submission Mr Akel referred to the principles for ascertaining meaning set out in *New Zealand Magazines Limited v Hadlee*.

[58] Mr Akel submitted that it is well established that the plaintiff in defamation proceedings cannot pick and choose parts of a publication to ascertain meaning, referring to the judgment of the House of Lords in *Charleston v News Group Newspapers Limited*.³⁰ Mr Akel’s submission that the *Holmes* programme must be considered as a whole to ascertain its meaning was expressly subject to

²⁹ See *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2010] 1 NZLR 315 (SC) at [15] as to “tiers” of meaning.

³⁰ *Charleston v News Group Newspapers Limited* [1995] 2 AC 65 (HL).

his submission that privileged material included in the programme should not be referred to in considering meaning.

[59] Mr Henry also submitted that the whole of the *Holmes* programme must be considered to ascertain whether it was capable of bearing the alleged defamatory meaning. However, as noted earlier, he submitted that privileged material could also be referred to.

[60] As set out earlier in this judgment, I accept Mr Akel's submission that for the purposes of ascertaining meaning, the entire programme must be considered, without reference to the privileged material. That means that the statements to be considered are those from the paragraph beginning: "The affidavit was originally sworn and provided to the Holmes programme by Yvonne Dossetter" on the first page of the transcript to the end of the paragraph: "Today some of those were raised under Parliamentary Privilege by ACT MP Ken Shirley" on the second page, and from: "Yvonne Dossetter says she still stands by her claims in the affidavit" on the third page to the end of the transcript on the fifth page.

(b) *No imputation of guilt*

[61] The second basis of Mr Akel's submission was that the pleading in the fifth amended statement of claim is an attempt to circumvent the Court's previous rulings that the *Holmes* programme was not capable of making any imputation that Mr Peters was guilty of misconduct.

[62] Mr Akel submitted that as it has been held by Associate Judge Christiansen, and confirmed by Woodhouse J on review, that the *Holmes* programme is not capable of bearing the meaning that TVNZ is alleging guilt, it must be that the programme as a whole cannot bear the alleged meaning that Mr Peters was guilty of misconduct.

[63] Mr Akel submitted that this is so, regardless of whether it is pleaded that TVNZ itself alleged guilt, or that Ms Dossetter alleged guilt and TVNZ repeated her allegations. He submitted that in either case it is the gist of the programme

that must be considered when determining whether the programme is capable of bearing the pleaded meaning.

[64] In submitting that TVNZ could be liable in defamation on the basis that it broadcast allegations made in Ms Dossetter's affidavit, Mr Henry referred to the speech of Lord Hodson in *Lewis v Daily Telegraph Limited*,³¹ where his Lordship said:

If one repeats a rumour one adds one's own authority to it and implies that it is well founded, that is to say, it is true.

[65] The tenor of Mr Henry's submissions was that TVNZ had broadcast a rumour (in the form of Ms Dossetter's affidavit) and had added its own authority to it.

[66] I accept Mr Akel's submission that whether it is pleaded that TVNZ itself alleged that Mr Peters was guilty of misconduct, or that TVNZ repeated an allegation by Ms Dossetter, the issue for the present application is whether what was said in the *Holmes* programme (without reference to privileged material) is capable of bearing the alleged defamatory meaning.

[67] The Court's concern in the present application is not with issues as to repetition of allegations made in Ms Dossetter's affidavit. The issue is, regardless of how the statements came to be made, whether the statements made in the *Holmes* programme are capable of bearing the meaning pleaded at para 12 of the fifth amended statement of claim. I accept Mr Akel's submission that it would not be the correct approach to focus on the pleading at para 11 that "Dossetter was stating that the plaintiff accepted and acted on a bribe and was corrupt". The Court must consider the underlying statements.³²

[68] The underlying statements have been considered in the judgments of Associate Judge Christiansen and Woodhouse J.

[69] At [30] and [31] of his judgment Associate Judge Christiansen said:

³¹ *Lewis v Daily Telegraph Limited* [1964] AC 234 (HL) at 275.
³² *APN New Zealand v Simunovich Fisheries Ltd* at [11].

[30] Allegations of guilt, or statements supporting claims that the conduct alleged actually occurred, are not supported or supportable for the following reasons:

- i) Constant repetition of the words “allegations” put the conduct into a category of “suspicion” rather than guilt or actual involvement;
- ii) The Holmes show clearly reported the rebuttal and denial by Mr Simunovich of the allegations or any connection by Mr Peters to them;
- iii) Merely because the affidavit deponent expressed concerns of the Government select committee’s impartiality;
- iv) Because Mr Shirley stressed he was not making allegations but rather because of their serious nature was looking for a process for resolution of them;
- v) Mr Shirley said Mr Simunovich’s denial may well be the truth, and that is why a process of clarification was needed.

[31] I consider these other parts of the programme, taken together with the full text of Mr Simunovich’s denial and rejection, provide proper context in consideration of which claims of guilt of unlawful conduct or contempt of Parliament are not supportable by reference to any meaning contained in the Holmes show. TVNZ at no time said it adopted the allegations, much less that it was making them.

[70] At [24] and [25] of his judgment, Woodhouse J said, with respect to the issue of whether the *Holmes* programme was capable of bearing the meaning that TVNZ was alleging that Mr Peters was guilty of misconduct:

[24] I am satisfied that the Associate Judge was, with respect, correct in his conclusion that the TVNZ broadcast is not capable of meaning that TVNZ itself was asserting that Mr Peters was guilty of misconduct. ...

[25] Because of the shift in emphasis of submissions for Mr Peters from the submissions to the Associate Judge and those to me, it is unnecessary to discuss the Judge’s conclusion on meaning. A reasonable reading of the text of the broadcast, with full allowance for what may have been discerned aurally and visually, does not convey an assertion by TVNZ itself of misconduct.

[71] The same matters considered by Associate Judge Christiansen are relevant to the present application. I am satisfied, for similar reasons, that the *Holmes* programme is not capable of bearing the meaning that it is alleged, by way of

TVNZ repeating Ms Dossetter's allegations, that Mr Peters is guilty of misconduct.

[72] It is, as Mr Akel submitted, necessary to make a distinction between "rumour" and "suspicion". This is clear from the speech of Lord Hodson in *Lewis v Daily Telegraph*, referred to by Mr Henry in his submissions. It is helpful to set out a longer portion of the speech than was cited by Mr Henry:³³

The principle as stated by Blackburn J in *Watkin v Hall* is that a party is not the less entitled to recover damages from a Court of law for injurious matter published concerning him because another person previously published it. It is wholly different with suspicion. It may be defamatory to say that someone is suspected of an offence, but it does not carry with it that that person has committed the offence, for this must surely offend against the ideas of justice which reasonable persons are supposed to entertain. If one repeats a rumour one adds one's own authority to it and implies that it is well founded, that is to say, that it is true. It is otherwise when one says or implies that a person is under suspicion of guilt. This does not imply that he is in fact guilty but on that there are reasonable grounds for suspicion, which is a different matter.

(citation omitted)

[73] I accept Mr Akel's submissions that the following references in the broadcast defeat the meaning of guilt of misconduct, pleaded by Mr Peters at para [12] of the fifth amended statement of claim:

- a) The numerous references to "allegations" which put the conduct into the category of suspicion rather than guilt, or actual involvement;
- b) The rebuttal and denial of the allegations contained in the broadcast, in particular the denial by Mr Simunovich who was said to be involved in the misconduct;
- c) It is clear from several statements in the course of the programme that the conduct referred to was "alleged" and needed to be "investigated", not that it had been established that misconduct had occurred. In particular, I note:

³³

At 275.

- i) Ms Dossetter's statement that she had "some major concerns at the impartiality at the government select committee inquiry";
- ii) Ms Janes' report that Ms Dossetter had said she believed the integrity of the select committee inquiry "could have been compromised";
- iii) Ms Dossetter's further comment that if there were a fresh hearing there would be the opportunity to "expose my information along with that of other interested parties";
- iv) Ms Janes' report that Ms Dossetter's affidavit contained "more serious allegations that have never been independently verified";
- v) Mr Shirley's statements, in the live interview, in which he stressed that he was "making no allegation", "looking for a process where it can be resolved", that the "very serious allegations ... need clarifying", and that there needed to be "a process to establish" the truth of Mr Simunovich's denial of wrongdoing.

[74] In the light of the matters just referred to, I am satisfied that the *Holmes* programme is not capable of bearing the meaning that TVNZ was repeating and publishing statements made by Ms Dossetter to the effect that Mr Peters had accepted and acted on a bribe and was corrupt. Accordingly, the second cause of action against TVNZ must be struck out.

[75] I add that I would have reached the same conclusion, even if I had reached the conclusion that it was permissible to have reference to privileged material included in the *Holmes* programme.

[76] Mr Henry submitted that if the Court ruled that the programme was not capable of having a “tier one” meaning (imputing guilt of misconduct) then a further amended pleading would be filed, reducing it to a “tier two” pleading. As was noted earlier in this judgment, Woodhouse J in his judgment of 20 December 2007 gave leave for Mr Peters to file an amended pleading asserting defamation on the basis that TVNZ asserted “that there was cause for suspicion that Mr Peters may have been guilty of serious misconduct”. That option was not exercised on behalf of the plaintiff. I do not consider it to be in the interests of justice for leave to be given for yet a further pleading to be filed in this proceeding, which was commenced in June 2004. Leave to replead is declined.

Result

[77] The words published by TVNZ in the *Holmes* programme and referred to in para 9 of the fifth amended statement of claim are not reasonably capable of bearing the meanings pleaded by the plaintiff.

[78] There will be an order striking out the plaintiff’s second cause of action in the fifth amended statement of claim. Leave is not given for an amended pleading to be filed.

[79] TVNZ is entitled to costs. If costs cannot be agreed between the parties then memoranda are to be filed, that on behalf of TVNZ within 20 days of the date of this judgment and that on behalf of Mr Peters within a further 20 days. Counsel should include in their memoranda an indication as to whether a hearing is required or whether the matter can be determined on the papers.

Andrews J

HOLMES

23 JUNE 2004

Holmes: First tonight... serious allegations were made in Parliament today under the protection of parliamentary privilege.

ACT MP Ken Shirley has read some of an affidavit. The affidavit says that a proposal was made at a meeting at the Simunovich Olive Farm that a payment of \$300,000 to Ross Meurant would be a good investment for the Simunovich business. Mr Shirley said, in Parliament, the affidavit says at the meeting were Ross Meurant and Winston Peters.

The affidavit was originally sworn and provided to the Holmes programme by Yvonne Dossetter, she is the former partner of Ross Meurant. Mr Meurant worked for both Mr Peters and Simunovich Fisheries during the scampi inquiry.

The story so far. This from Robyn Janes.

Janes: It's a story that involves a small prawn like crustacean... and four major players.

Simunovich Fisheries executives Peter Simunovich and Vaughan Wilkinson. New Zealand First leader Winston Peters. And advisor to both Simunovich and Mr Peters... former MP Ross Meurant.

Back in the early nineties Simunovich Fisheries cornered the lions share of the One Hundred Million Dollar scampi market.

It's that historical catch record that will be used to allocate scampi quota.

One inquiry has found that Simunovich Fishers was treated more favourably than other scampi fishers by the Ministry of Fisheries.

In February 2003 a Select Committee inquiry into the scampi industry began.

New Zealand First leader Winston Peters often sat on that Committee.

In December the Committee cleared Simunovich Fisheries of any wrong doing.

In January of this year scampi was back in the headlines... Winston Peters was accused of having a series of free meals at Kermadec Restaurant ... which is owned by Simunovich Fisheries... Mr Peters strenuously denied the accusations.

But the story just wouldn't go away...

Dossetter: I have some major concerns at the impartiality at the Government Select Committee inquiry regarding scampi issues due to the relationship between Mr Peters, Mr Meurant and the Simunovich family companies.

Janes: Ross Meurant's former partner Yvonne Dossetter swore in an affidavit to TVNZ that Mr Meurant was working with both Winston Peters and Simunovich Fisheries during the time of the inquiry.

Dossetter: Ross would often talk to Simunovich Fisheries, Peter Simunovich, and then he would often talk on the phone then to Winston Peters.

Janes: In a relatively quick succession?

Dossetter: Yes.

Janes: Ross Meurant resigned as Mr Peters adviser... the New Zealand First leader saying he had not known he was also working with Simunovich Fisheries.

Since then Holmes has obtained copies of Yvonne Dossetter and Ross Meurant's home phone bill.

It shows many instances where calls were made in quick succession to Simunovich executives and Winston Peters.

One example on the 15th of February last year... just two days before a Select Committee hearing:

12.38pm – Rings Peter Simunovich speaks for 3 minutes.

12.49pm – Rings Vaughan Wilkinson speaks for 6 minutes.

12.55pm – Rings Winston Peters speaks for 2 minutes.

12.59pm – Rings Winston Peters speaks for 1 minute.

Another example... the 18th of March... a day the Committee met:

7.37am – Rings Winston Peters speaks for 3 minutes.

7.42am – Rings Vaughan Wilkinson speaks for 5 minutes.

7.59am – Rings Vaughan Wilkinson speaks for 7 minutes.

8.19am – Rings Winston Peters speaks for 1 minute.

Yvonne Dossetter's affidavit also contained more serious allegations that have never been independently verified.

Today some of those were raised under Parliamentary Privilege by ACT MP Ken Shirley.

Shirley: Ross Meurant met at Simunovich's olive farm following the infamous Kermadec restaurant meal and the proposal was put that the payment of \$300,000 to Meurant would be a good

investment for Simunovich's business.

Janes: Mr Shirley went on to say that the affidavit said that Winston Peters was also at the meeting at the Simunovich's olive farm and Mr Shirley told Parliament the affidavit alleged the deed was done and the money was to be available from an Australian bank account.

Yvonne Dossetter says she still stands by her claims in the affidavit.

Back in February she told *Holmes* she believes the integrity of the scampi Select Committee inquiry could have been compromised.

Dossetter: I feel if there was to be a fresh hearing there would be the opportunity to expose my information along with that of other interested parties with regards to the impartiality of the original inquiry.

Holmes: So Ross Meurant first of all did not return our calls today. Winston Peters is overseas.

In a statement issued tonight, just before the news at 6 o'clock, Simunovich Fisheries managing director Peter Simunovich says "any allegation that the company has acted inappropriately in relation to Mr Peters, or any other politician for that matter, is without any foundation whatsoever and we reject it categorically."

He also says "previous allegations of corrupt behaviour and illegal behaviour made against Simunovich have been dismissed and this latest allegation is no different."

He says "the success of our business is based on hard work and risk taking – no one at Simunovich has ever resorted to illegal behaviour.

He says "the allegations are so serious I am considering what legal options are available."

Alright then with us now is ACT MP Ken Shirley who read from the affidavit in Parliament today.

Holmes: Ken Shirley, good evening.

Shirley: Good evening Paul.

Holmes: How did you get the affidavit?

Shirley: No, I am not prepared to divulge how I came by the affidavit.

Holmes: Did it come from another MP?

Shirley: No, I am not prepared to divulge how I acquired the affidavit.

Holmes: In reading the affidavit, or from the affidavit, today in Parliament are you making an allegation?

Shirley: No I stress I am making no allegation. What I am aware of is the incredibly serious nature of these allegations that are contained in the affidavit and I am looking for a process where it can be resolved. Possibly...

Holmes: The serious nature, the serious nature of what you're not telling us, I mean what is the point...

Shirley: Paul, I understand that TVNZ has a copy of the affidavit and have had it for a good long while so I take it you're in a position to divulge its content.

Holmes: Let me ask you this way, what concerns do you have about what you saw in the affidavit might indicate?

Shirley: Um, they are very serious allegations which I am sure you are aware of. We can't just leave those unresolved. They have been swirling around. It actually reflects on the Parliament as a whole and I think there are a number of courses of action required. Possibly Winston Peters needs to make a personal statement to the Parliament, perhaps it needs to go before the Privileges Committee, perhaps it needs a Commission of Inquiry, perhaps it needs to be referred to the Police. I think all of those are courses of action which need to be considered.

Holmes: Did you spell out in Parliament, however, what the principal allegation, concerns you had?

Shirley: I read out the...and revealed the contents of the affidavit.

Holmes: The affidavit of course, albeit a sworn affidavit therefore to lie in such an affidavit is perjury. The affidavit is one person's word, why put it in the public domain?

Shirley: Well I think its been swirling around, TVNZ has actually put it in the public domain previously as recently as last night again. Its very serious allegations that do need clarifying.

Holmes: Mr Simunovich denies any wrongdoing.

Shirley: Well that may well be, and that may well be the truth, and that's why we need a process to establish that.

Holmes: And you would prefer which process?

Shirley: Well its not a question of what I would prefer, it's a question of what's most appropriate.

Holmes: And you have spelt out a number of options, or is this just politics?

Shirley: No its not. It's a very serious allegation. You can't just leave allegations like this floating in the air, as it were, it does need

resolving.

Holmes: Ken Shirley, the ACT MP, thank you very much for your time.

Shirley: Thank you.