IN THE COURT OF APPEAL OF NEW ZEALAND

CA387/2010
[2011] NZCA 231

BETWEEN	WINSTON RAYMOND PETERS Appellant
AND	TELEVISION NEW ZEALAND LIMITED First Respondent
AND	YVONNE TERESA DOSSETTER Second Respondent

Hearing: 24 March 2011

Court: O'Regan P, Ellen France and Stevens JJ

Counsel: B P Henry and P J Knapp for Appellant
W Akel and H Wild for First Respondent
No appearance for Second Respondent

Judgment: 27 May 2011 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed to the extent that leave to amend the second cause of action in the fifth amended statement of claim to plead a "tier two" meaning is granted. The appeal is otherwise dismissed.

B The appellant must pay the first respondent 85 per cent of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] Mr Peters has brought proceedings which include claims that television programmes broadcast by Television New Zealand Limited (TVNZ), based in part on statements made in Parliament, were defamatory of him. A key issue in this appeal is the extent to which the words initially spoken in Parliament can be considered in determining whether one of the television programmes, the *Holmes* programme, is capable of bearing a "tier one" meaning, that is, one imputing actual misconduct on the part of Mr Peters.

[2] In the High Court, Andrews J struck out the part of Mr Peters' claim that is the subject of this appeal on the basis that the *Holmes* programme was not capable of bearing the alleged defamatory meaning. The Judge refused to grant leave to amend the pleadings to allege a "tier two" meaning, namely, that there are grounds to suspect misconduct.[1] Mr Peters appeals against both decisions.[2]

Background

[3] We adopt the description of the background set out by Andrews J.[3]

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1 *Peters v Television New Zealand* HC Auckland CIV-2004-404-3311, 8 June 2010.
2 Ms Dossetter, the second respondent, abides the decision of the Court.
3 At [3]–[11].

[4] In 2004 Mr Peters was a Member of Parliament. He had been an alternate member of a parliamentary select committee inquiring into the scampi fishing industry in New Zealand with a particular focus on the involvement of Simunovich Fisheries Limited in that industry. The committee's inquiry began in February 2003.

[5] On 22 June 2004 TVNZ's *One News* reported on the disclosure in Parliament of an affidavit sworn by the second respondent, Ms Dossetter, on or about 29 January 2004 concerning matters affecting the scampi inquiry. The *One News* report said that a Member of Parliament had referred the affidavit to the chair of the select committee (Mr Carter), who had then referred it to the Speaker, calling for an investigation. Mr Peters' first cause of action against TVNZ is founded on this television news item. The third cause of action against TVNZ is based on a summary of this programme which appeared on TVNZ's website. Neither of these causes of action is in issue on the present appeal.

[6] On 23 June 2004, the *Holmes* programme reported on the allegations in Ms Dossetter's affidavit. The second cause of action, which is the part of the claim in issue on the appeal, is founded on the *Holmes* programme. Andrews J outlined the structure of the programme as follows:[4]

> 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;
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> 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

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4 At [5].

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, [preceded] 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.

[7] A full transcript of the *Holmes* programme is attached as Appendix 1 to this judgment.

[8] Mr Peters issued defamation proceedings in June 2004. The initial claim related to five defendants. The current statement of claim, the fifth amended statement of claim, was filed in late June 2009. A number of interlocutory matters were dealt with subsequently.[5] The end result of various interlocutory skirmishing is that the number of defendants has been reduced to two and the pleadings have changed.

[9] In terms of the current relevant pleading, the second cause of action in the fifth amended statement of claim, Mr Peters pleads that he "expressly does not rely on any words spoken in Parliament" or reports of statements made by Mr Shirley referred to in the *Holmes* programme "except for the purpose of understanding the meaning of the words spoken outside Parliament". Paragraphs 11 and 12 of the statement of claim set out the alleged meanings of the words spoken during the *Holmes* programme. At paragraph 12 it is alleged that the pleaded words from the *Holmes* programme would be understood as Ms Dossetter stating that Mr Peters had accepted and acted on a bribe and was corrupt. Paragraph 13 avers that TVNZ has defamed Mr Peters 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... .

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5 *Peters v Television New Zealand Ltd* HC Auckland CIV-2004-404-3311, 5 November 2004, Paterson J; *Peters v Television New Zealand Ltd* HC Auckland CIV-2004-404-3311, 30 August 2006, Associate Judge Christiansen; and *Peters v Television New Zealand Ltd* [2008] NZAR 411 (HC), Woodhouse J.

The High Court Judgment

[10] Andrews J, as we have noted, struck out the second cause of action relating to the *Holmes* programme. In doing so, the Judge concluded that the meaning of the statements made in the programme was to be determined without reference to any of the statements made in Parliament. To do otherwise, Andrews J said, would call into question the proceedings in Parliament and so breach the privilege attached to those proceedings.

[11] The Judge decided that there were a number of references in the broadcast which defeated the meaning of guilt of misconduct pleaded by Mr Peters, in particular, the description throughout of the "claims" in the affidavit as "allegations", and the focus on the need for a process for investigation emerging from the live interview with Mr Shirley. In view of these matters, Andrews J was satisfied that the *Holmes* programme was 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. The Judge said she would have reached the same conclusion even if it was permissible to refer to the privileged material included in the *Holmes* programme.

[12] Finally, the Judge refused leave to amend the pleading to assert a tier two meaning, namely, that there was cause for suspicion that Mr Peters may have been guilty of serious misconduct.[6] The Judge said this was not in the interests of justice given the history of the proceedings and the delays to date.

The appeal against strike out

[13] The nature and scope of Mr Peters' claim has been something of a moveable feast. This is a point we come back to when considering the appeal from the decision declining leave to amend the pleadings. Before us, the focus is on the effect

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[6] In *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [15], the Supreme Court discussed English authorities distinguishing between what has come to be termed "tier one", "tier two" and "tier three" meanings: "A 'tier one' meaning imputes to the plaintiff actual misconduct; a 'tier two' meaning asserts that there are grounds to believe or suspect the plaintiff is guilty of misconduct; and a 'tier three' meaning asserts that there are grounds for investigating whether the plaintiff is guilty of misconduct".

of TVNZ's reporting of Ms Dossetter's statement, "Yvonne Dossetter says she still stands by her claims in the affidavit". Mr Henry, on behalf of Mr Peters, says that Ms Dossetter's affidavit was capable of bearing a tier one defamatory meaning. TVNZ, by reporting Ms Dossetter's effective repetition of her claims, has repeated the defamatory statement and is accordingly liable in defamation. Mr Henry says that in these circumstances, in determining the possible defamatory meaning, the material otherwise subject to parliamentary privilege can be considered because the audience understands the non-privileged statements by Ms Dossetter and the journalist by reference to the parliamentary material. For completeness, we interpolate here that it is not at all clear that this approach is captured in the current pleading.

[14] TVNZ submits that the programme cannot bear a tier one meaning. TVNZ is not adopting anything Ms Dossetter has said. In determining the meaning of a particular publication, the Court has to disregard what was said in Parliament and then find a single meaning of the non-privileged material. That is because the repetition rule does not apply when it comes to the reporting of parliamentary proceedings.

[15] There is no dispute that the relevant principles to be applied when determining whether words are reasonably capable of bearing a defamatory meaning are as set out by Blanchard J in *New Zealand Magazines Limited v Hadlee (No 2).*[7]

The ability to determine meaning by reference to statements made in Parliament

[16] It is critical to the appellant's case to establish that Andrews J was wrong not to refer to the parliamentary statements in determining meaning. Mr Henry relies on a combination of *Hyams v Peterson* and *Jennings v Buchanan* as support for his approach.[8] TVNZ, by contrast, says the proper approach is that of the Court of

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7 *New Zealand Magazines Limited v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625. This is the approach adopted by Andrews J in the present case: at [13].

8 *Hyams v Peterson* [1991] 3 NZLR 648 (CA) and *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577.

Appeal of England and Wales in *Curistan v Times Newspapers Ltd*.[9] We discuss these cases in turn.

[17] We take first this Court's decision in *Hyams*. Mr Hyams was named in a memorandum published in Parliament as part of the "Gang of 20" said to have been involved in fraudulent and unlawful commercial activities. Numerous media reports followed reporting on these allegations. It was argued for the defendant that the reports that named Mr Hyams as a member of the "Gang of 20" enjoyed qualified privilege of parliamentary proceedings, as they were reporting on parliamentary proceedings which in turn were entitled to absolute privilege. Therefore, Mr Hyams was debarred from showing by reference to parliamentary proceedings that readers of the later publications sued on would reasonably have understood them as referring to him. The Court rejected that argument and held that statements that did not refer directly to Mr Hyams by name could be capable of defaming him, because an ongoing story had been kept before the public. On the parliamentary privilege point, Cooke P observed:[10]

> 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.

[18] The observations made in *Hyams* about the effect of parliamentary privilege were not central to the Court's reasoning. Some of the further media publicity subsequent to the disclosure in Parliament did identify Mr Hyams as a member of the "Gang of 20". In any event, subsequent cases have treated *Hyams* as having more limited application.

[19] We refer in particular to two decisions arising out of an action for defamation brought by Mr Cushing, a businessman, against Mr Peters MP.[11] In the High Court in *Cushing v Peters*, Neazor J observed that the Court in *Hyams* decided that an earlier statement identifying the plaintiff but which is protected by parliamentary privilege

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9 *Curistan v Times Newspapers Ltd* [2008] EWCA Civ 432. On 30 July 2008 the Appeal Committee of the House of Lords dismissed a petition by the claimant for leave to appeal (Session 2007-08) 241 *House of Lords Journal* 806.

10 At 656–657.

11 *Cushing v Peters* HC Wellington CP 257/93, 8 September 1993; *Peters v Cushing* [1994] 3 NZLR 30 (CA).

may be relied on to identify the plaintiff as the person referred to in later statements made outside Parliament which are being sued on.[12] Neazor J said:[13]

> The decision in *Prebble* [*Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513] establishes the strength of Parliamentary privilege and its ambit and the decision in *Hyams* establishes that what has been made public in Parliament may be proved as part of the background of public knowledge at the time a statement sued on as defamatory was made. The application of those principles will give rise to a, with respect, reasonably straightforward determination to be made by the trial Court of whether what is alleged to have been defamatory of the plaintiff is to be found in the statements made outside the House with the statement inside the House serving as background material which would have enabled persons becoming aware of the statements to make the connection with the plaintiff, or whether to succeed the plaintiff must rely on the combination of the statements made outside the House and the statement made inside the House as making up the defamation. If the latter proves to be the case, it would appear that the plaintiff is suing on and "calling in question" in part what the plaintiff said inside the House, where he would have Parliamentary privilege.

[20] On appeal, in *Peters v Cushing*, Cooke P said:[14]

> 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* ... and ... *Prebble* [1993] 3 NZLR 513, and is not determined by the decisions in either of those cases. It is obviously seriously arguable ...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.
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> The question is of constitutional importance but can hardly be described as complex. It appears to be a question of law which could and should be determined before trial, for instance on the striking-out application.

[21] The distinction drawn by the authors in *The Law of Torts in New Zealand* is between those cases where the "naming in the House is an integral part of the cause of action" and those where the material in the House comprises "a background fact to demonstrate public knowledge."[15] As Mr Akel on behalf of TVNZ submits, identity can be characterised as a background, or historical, fact.

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12 *Cushing v Peters* HC Wellington CP 257/93, 8 September 1993 at 7.

13 At 8–9.

14 *Peters v Cushing* [1994] 3 NZLR 30 at 31.

15 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [16.4.01], fn157.

[22] We agree with the conclusion of Andrews J that *Hyams* "held only that privileged material could be referred to for the purposes of identification".[16] As Lord Bingham in *Jennings v Buchanan* observed, *Hyams* "raised a number of points relevant to identification of the plaintiff, but none relevant to [the appeal in *Jennings*]".[17] Mr Henry accepts that his approach involves some expansion of *Hyams*. The logic behind a more expansive approach would be to reflect the likely reality that the audience would have derived its interpretation of the non-privileged material from the privileged statements. However, an expansion of *Hyams* to cover the present case would further dilute parliamentary privilege protected by Article 9 of the Bill of Rights 1688 and we are not convinced the case for doing so has been made out.

[23] We deal next with *Jennings v Buchanan.* In that case, Mr Jennings MP was unsuccessful in seeking to have a defamation claim against him struck out. He made a statement in Parliament defamatory of Mr Buchanan. Afterwards, Mr Jennings was interviewed for a newspaper which reported him saying that he did not resile from the claim made in the House. Lord Bingham observed:[18]

> ... It is clear that at common law every republication of a libel is a new libel and a new cause of action. The republisher of the libel may or may not be the same as the original publisher. The republication may or may not be made on an occasion enjoying any privilege (whether absolute or qualified) attaching to an earlier publication or republication. It is further clear (see *Gatley on Libel and Slander*, 10th ed (2004) paragraph 6.33) that a defendant may be liable for republishing by reference to a statement originally published on another occasion by himself or another. Thus Mr Buchanan's claim in the present case is based not on what Mr Jennings said in the House on 9 December 1997 but on what he said to Mr Speden shortly before 18 February 1998, publication in the newspaper being the natural and foreseen consequence. The judge has found that on the latter occasion Mr Jennings republished by reference what he had said on the earlier occasion. There is no doubt at all that what Mr Jennings said in the House was protected by absolute privilege. The question is whether that privilege extends to cover Mr Jennings' republication of that statement by reference outside the House.

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16 At [47]. Contrast Woodhouse J in one of the earlier decisions in the present case who applied *Hyams* as authority for the proposition that parliamentary material may be referred to as extrinsic evidence for the purpose of determining the meaning of a non-privileged statement: *Peters v Television New Zealand Ltd* [2008] NZAR 411.

17 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 577 at [11] cf *Buchanan v Jennings* [2002] 3 NZLR 145 (CA) at [57] per Keith J for the majority, and see also at [112] and [117] per Tipping J.

18 At [12].

[24] Lord Bingham referred to the need for comity between the courts and Parliament but concluded that in that case the reference was made to the parliamentary record only to prove the historical fact that certain words were spoken. His Lordship continued:[19]

> ... 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. The situation is analogous with that where a member repeats outside the House, in extenso, a statement previously made in the House. The claim will be directed solely to the extra-parliamentary republication, for which the parliamentary record will supply only the text.

[25] Mr Henry argues that this case falls to be decided on the same basis as *Jennings v Buchanan* because the parliamentary statements are immediately juxtaposed with Ms Dossetter's effective repetition of the claims in her affidavit and other content in the programme.

[26] It is, however, important to see *Jennings v Buchanan* in its context, namely, a Member of Parliament effectively repeating his own statement outside the House. The examples used by Lord Bingham in developing their Lordships' reasoning accordingly all focus on the effect on parliamentary privilege of repetition by a Member of Parliament.[20] The judgment, not surprisingly, does not purport to deal with a different factual scenario such as the present. In this case, Ms Dossetter did not say, nor was she reported as saying, that she repeated what Mr Shirley had said in Parliament. Rather, what she did was to confirm the contents of her affidavit. As pleaded, what was said in Parliament went beyond that. Unlike Mr Jennings MP, Mr Shirley in his interview on the *Holmes* programme was very careful to stress that he was making no allegation.

[27] The situation being dealt with in *Jennings v Buchanan* was also different from the present case which involves a hybrid publication. That is, a publication which includes both privileged material and some further additional material added by the journalist. In *Jennings v Buchanan*, by contrast, no inquiry was required as to the meaning to be taken from the publication as a whole, which purported to be a fair

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19 At [18].

20 *Beitzel v Crabb* [1992] 2 VR 121 (SC), cited at [14] in *Jennings v Buchanan; Laurance v Katter* (1996) 141 ALR 447 (CA), cited in *Jennings* at [15].

and accurate report of parliamentary material. Another way of putting it is that Ms Dossetter's statement was made as part of a report on parliamentary proceedings in respect to which a claim of privilege could be made by TVNZ. Further, Mr Henry accepts that if the parliamentary statements are set to one side in determining meaning, as they would be if *Curistan* applies, that cuts the heart out of the pleading on this point.

[28] We accept that the logic of *Jennings v Buchanan* as expressed in the excerpt cited at [23] above could be extended to apply to this case.[21] But *Curistan*, which dealt with the approach to the determination of meaning in a hybrid publication[22] persuades us against that course. That case dealt with a report in *The Sunday Times* newspaper about allegations by a Member of Parliament made in the House that the plaintiff had been involved in money-laundering for the IRA. The article also reported on a false claim by the plaintiff that his company's accounts had never been qualified by its auditors. The article included both statements made in the House and the journalist's own research. The effect of *Curistan* is that in determining the meaning of such a hybrid publication, the correct approach is to disregard what was said in Parliament (except as part of the context) and then determine the single meaning of the non-privileged passages. The Court of Appeal in *Curistan* made it clear that the media do not lose the protection of their ability to publish a fair and accurate report of proceedings in Parliament unless the publication either adopts the parliamentary material or embellishes it to such an extent that the quality of fairness is lost.[23]

[29] The Court of Appeal examined whether the newspaper was entitled to rely on qualified privilege. In each of the three judgments there is some difference in emphasis in reasoning particularly in terms of whether the concept of adoption,

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[21] Phillip Joseph, "Parliament's attenuated privilege of freedom of speech" (2010) 126 LQR 568 at 579 observes that "[p]otential liability does not stop with the speaker of the Parliamentary statement but attaches to any third party who affirms or endorses the Parliamentary statement"; see also John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, Lexis Nexis, Wellington, 2010) at [3.1.1] where the authors discuss the concern engendered among parliamentarians by the *Jennings* decision and the fact the Privileges Committee has twice recommended amendment to the Legislature Act 1908 to reverse the effect of the decision.

[22] *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [29].

[23] See the Defamation Act 1996 (UK), s 15 and the Defamation Act 1992 (NZ), s 16.

applied in *Jennings v Buchanan*, was relevant. But there was agreement that meaning was not to be determined by reference to the parliamentary statements.

[30] Arden LJ said that the quality of fairness in a fair and accurate report of privileged proceedings could be lost. The privilege would not apply if the privileged material was so intermingled with extraneous material or where the publication adopted the privileged material as its own. In terms of intermingling, Arden LJ cited from the judgment of Lord Denning in *Dingle v Associated Newspapers Ltd*[24] as follows:

> But if [the publisher] adds its own spice and prints a story to the same effect as the parliamentary paper and garnishes and embellishes it with circumstantial detail it goes beyond the privilege and becomes subject to the general law. None of its story on that occasion is privileged. It has "put the meat on the bones" and must answer for the whole joint.

[31] As to adoption, Arden LJ said it was common ground that there was a concept of adoption in this area. Arden LJ referred in this respect to *Jennings v Buchanan*. Arden LJ said that adoption could be, as in *Jennings,* by express words but also by conduct or implication from the express words used. Arden LJ continued:[25]

> Whether adoption has occurred in any case, depends on the meaning of the statement whereby adoption is said to have occurred.

[32] Arden LJ did not consider that the newspaper had adopted the parliamentary statements. She emphasised that *The Sunday Times* did not expressly or by implication express any view on the statements, their truthfulness, gravity or otherwise. Rather, Arden LJ considered that the real case was one of intermingling. Arden LJ said:[26]

> ... On that basis, the only questions are (1) whether there was a recognisably distinct report of Parliamentary proceedings, (2) how far Mr Robinson [MP] went, and (3) whether the excessive extraneous material deprived the report of the parliamentary proceedings of its quality of fairness.

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24 *Dingle v Associated Newspapers Ltd* [1964] AC 371 at 411 (cited in *Curistan* at [33], and see also per Laws LJ at [87]).

25 At [38].

26 At [47].

[33] Arden LJ concluded that the parliamentary material could be distinguished from the extraneous material. While there was some material additional to those statements the material was factual rather than commentary.

[34] The next part of Arden LJ's reasoning was founded on the proposition that:[27]

> *... [I]n the case of an article consisting in part only of passages entitled to reporting privilege, the meaning of the non-privileged passages is to be ascertained on the basis that (1) the privileged passages merely provide the context in which the statements in the non-privileged passages were made, and (2) the repetition rule has no application to the privileged passages.*

[35] Arden LJ considered that to apply the repetition rule (that the reporter of an allegation is treated as having made that allegation)[28] would be inconsistent with the protection for fair and accurate reporting. On this approach, the law of statutory privilege pre-supposes the existence of the repetition rule. To put it another way, the clear intention of the statutory provision was "at a minimum to disapply the repetition rule as it would otherwise apply to the fair and accurate" reports of privileged material.[29] Arden LJ stated that:[30]

> What Mr Curistan contends is that the single meaning rule applies to the article as a whole, and that the meaning of the non-privileged words is to be found by taking the cumulative effect of the privileged words and the non-privileged words together and applying the repetition rule. There is no "antidote" in the article to the bane of Mr Robinson [MP's] allegations. The existence of a defence of privilege would be relevant only to the assessment of damages and not meaning. As I see it, this is merely an indirect way of applying the repetition rule to the privileged words. The non-privileged words have on this analysis to be interpreted (from the standpoint of the hypothetical reasonable reader) on the footing that the defendant is himself making the allegations which in the report are attributed to someone else. In my judgment, this infringes the privilege given to the fair and accurate report since it imposes a sanction on its author for what it is said in that report. Moreover, it is bound to have a chilling effect on the addition of factual material to a report, as is commonly expected from the responsible press today, and may have the same effect on the addition of comment, even though the defence of fair comment is not affected.

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27 At [51].

28 See *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [24].

29 At [59].

30 At [59].

[36] Finally, Arden LJ said that it was not disproportionate to disapply the repetition rule when determining the meaning of the non-privileged parts of the article. Arden LJ took the view that: [31]

> Mr Curistan's private interest in the protection of his reputation has to give way to the public interest in knowing what was said in Parliament.

[37] Laws LJ agreed that privilege would be lost if the publisher so embellished a report that it could not be said to be a fair and accurate report of the privileged proceedings. Laws LJ did not however see it as appropriate to characterise such a case as one of adoption. Instead of adopting, the publisher has produced a "critically different text". [32]

[38] The approach of Lord Phillips CJ is summarised as follows:[33]

> Where, as here, the repetition rule does not apply to the reporting passages, because these are protected by reporting privilege, the publisher is only liable in respect of the comments that have been added to those passages. The meaning of the added comments has, however, to be determined having regard to their context, and the most significant element of that context is likely to be the privileged passages to which the comments are added. If the meaning of the added comments is that the reported allegations are true, then the publisher of the added comments can be said to have 'adopted the reported allegations as his own'. In those circumstances the publisher will, however, be liable (subject to any defences such as justification or fair comment) in respect only of the added comments. Reporting privilege will still attach to the reporting passages, but because he has adopted them in un-privileged commentary, this will be of little comfort to the publisher.

[39] This Court's approach to *Curistan* does have to be considered against the development in England and other jurisdictions of the concepts of responsible journalism and neutral reportage.[34] Put broadly, as Mr Akel's submissions note, the effect of these concepts is to give "greater leeway" to political speech and rhetoric on public interest issues so as to maintain the media's freedom of expression. That difference acknowledged, largely for the reasons given by Arden LJ, we consider that the approach taken in *Curistan* achieves an appropriate balance between the

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31 At [64].

32 At [88].

33 At [102].

34 See, for example, *Reynolds v Times Newspapers Limited* [2001] 2 AC 127 (HL); *Jameel v Wall Street Journal Europe SPRL* [2007] 1 AC359 (HL); *Roberts v Gable* [2007] EMLR 457 (CA); *Charman v Orion Group* [2008] 1 All ER 750 (CA); *Seaga v Harper* [2008] 1 All ER 965 (PC); and see *Grant v Torstar Corporation* 2009 SCC 61, 22 December 2009, [2009] 3 SCR 640.

various interests at stake in the present case. The logic is that if the report of proceedings is a fair and accurate one, the privilege attaching to such reports should not be lost by a sidewind. As Laws LJ said, the purpose of the qualified privilege is to allow the publisher to rely on the fact he or she is reporting what another, the legislator speaking in Parliament, has said. The "very purpose of the privilege" is to facilitate what he or she has said and that can only be done if the repetition rule is set aside.[35]

[40] Mr Henry says that *Curistan* can be distinguished because it concerned the repetition of matters spoken in Parliament. Here, by contrast, the repetition is of Ms Dossetter's allegation. However, that argument ignores the fact that the real sting is in what was said in Parliament and the reporter's reference to the reiteration by Ms Dossetter of the truth of the contents of her affidavit.

[41] We do not consider the additional material in the *Holmes* programme is such as to amount to adoption or undue embellishment. On this point we see no significant difference between the programme and the article in issue in *Curistan* in which the privilege was maintained.

[42] The structure of the article in issue in *Curistan* was not dissimilar to that of the *Holmes* programme. The article began by referring to the statements in Parliament to the effect Mr Curistan was money-laundering for the IRA. There followed a reference to Mr Curistan's "horrified" reaction to the "scandalous allegations" and his invitation to the Member of Parliament who made the statements to inspect his books and accounts. The article then set out what *The Sunday Times* had discovered after obtaining the accounts, particularly, that the auditors had heavily qualified the accounts on audit. The article then reverted back to the parliamentary statements. That discussion included a reference to the prosecution of seven companies, in which Mr Curistan had interests, for failing to keep proper accounts. The article explained the outcomes of the prosecution and concluded that Mr Curistan could not be contacted.

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[35] At [84].

[43] The reference back to Ms Dossetter is the main difference between the *Holmes* programme and the article in issue in *Curistan*. But the phraseology used here, by the reporter saying of Ms Dossetter that "she still stands by her claims in the affidavit" does not, as Mr Henry accepts, amount to adoption by TVNZ. The wording used can be contrasted with the following example given by *Gatley on Libel and Slander*:[36]

> ... the privileged material forms part of the context in which the non-privileged material is to be interpreted. So if the article having reported the direct allegation, were to continue, "That is exactly what The Trumpet has believed for years and furthermore we think the following material is worthy of investigation by the police ..." the privileged material would show what allegation the newspaper was "adopting" as its own statement.

[44] The other material in the programme which appears to reflect independent research (the information about Ms Dossetter and Mr Meurant's home telephone bill and Mr Simunovich's denial) is largely factual (the telephone call details) or does not amount to any positive embellishment of the claims (the denial).

Is the programme capable of bearing a tier one meaning?

[45] In any event, the meaning of the programme must still be considered in light of the single meaning rule.[37] On that basis, if the parliamentary material is put to one side, it cannot be said the programme is capable of bearing a tier one meaning. The factors emphasised by Andrews J lead us to the same conclusion on this point as reached by her Honour.[38] Those factors are as follows:[39]

> (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",

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36 Patrick Milmo and WVH Rogers *Gatley on Libel and* Slander (11th ed, Sweet and Maxwell, London 2008) at [3.33].

37 See, for example, *Charleston v News Group Newspapers Limited* [1995] 2 AC 65 (HL) at 71 and see *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA) at 238.

38 The same conclusion was reached by Associate Judge Christiansen and by Woodhouse J in the earlier decisions in the current proceedings. See also Paterson J at [36].

39 At [73].

not that it had been established that misconduct had occurred. In particular, ...:

> (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.

[46] The position is slightly less clear cut if the parliamentary material is taken into account. However, even then, because of the overall emphasis in the programme on allegations being made (the more serious allegations never having been "independently" verified) and on the need for a process to investigate claims, we agree with Andrews J's assessment that the programme is not capable of bearing a tier one meaning. Accordingly, we agree with Andrews J that the second cause of action as currently pleaded should be struck out.

Appeal against decision declining leave to amend

[47] If unsuccessful on the appeal on meaning, Mr Peters says the Judge should have granted leave to amend the statement of claim to plead a tier two meaning.

[48] TVNZ resists this part of the appeal on the basis there has been more than sufficient opportunity to "articulate in a proper way" a defamatory meaning in respect of the *Holmes* programme.

[49] TVNZ emphasises the following aspects of the history of the proceedings:

(a) Mr Peters' claim against Mr Carter has been struck out with costs. The claims against Mr Shirley and Radio New Zealand have been discontinued on the basis Mr Peters does not pursue any claim against either and each bears their own costs.

(b) Woodhouse J gave leave to file an amended pleading asserting defamation on the basis that TVNZ asserted there was cause for suspicion that Mr Peters may have been guilty of misconduct. This option was deliberately not pursued.

(c) The meaning paragraphs in the statement of claim have been changed since the claim commenced.

(d) The appellant has been responsible for the delays due to deficiencies in the pleadings and belatedly abandoning an appeal to this Court.[40]

[50] We have some sympathy for the position in which TVNZ finds itself. However, we do not consider it would be in the interests of justice to deprive Mr Peters of a final opportunity to replead. While there have been considerable delays it is not suggested TVNZ would face specific prejudice in the sense of witnesses not being available or other similar problems. The matter is going to trial against TVNZ on two other causes of action. In these circumstances, we consider Mr Peters should be given leave to amend.

Disposition

[51] For these reasons the appeal is allowed only to the extent that leave is granted to amend the fifth amended statement of claim to plead a tier two meaning in respect of the *Holmes* programme. Mr Peters was given that opportunity by Woodhouse J and did not take it up. His counsel should accordingly provide a memorandum to the High Court indicating whether or not this part of the claim will be repleaded. The matter is referred back to the High Court for timetabling orders to be made to avoid any further delays in settling the pleadings. The appeal is otherwise dismissed.

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[40] *Peters v TVNZ* (2005) 18 PRNZ 149.

[52] The appellant has succeeded in only one respect on appeal. The approach to leave to amend formed a minor part of the argument. The first respondent is otherwise entitled to costs for a standard appeal on a band A basis and usual disbursements. To reflect the appellant's success on the leave point, we reduce the costs award by 15 per cent. We certify for second counsel.

Solicitors:
D J Gates, Whangaparaoa for Appellant
Simpson Grierson, Auckland for First Respondent
Till Henderson, New Plymouth for Second Respondent

APPENDIX 1

The highlighted passages comprise parliamentary material, or reports on parliamentary material. The underlined section is the interview with Mr Shirley, MP.[41]

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.

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41 The interview with Mr Shirley does not appear in the statement of claim.

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.