IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-000309
[2021] NZHC 3237

BETWEEN	BRYAN DOUGLAS STAPLES First Plaintiff
AND	CLAIMS RESOLUTION SERVICES LIMITED Second Plaintiff
AND	RICHARD LOGAN FREEMAN First Defendant
AND	MEDIAWORKS TV LIMITED Second Defendant
AND	KATE MCCALLUM Third Defendant
AND	TRISTRAM CLAYTON Fourth Defendant

Hearing:	1 November 2021 (together with supplementary submissions on 8 November 2021)
Counsel:	S D Carter for Plaintiffs B P Henry and S T Patterson for Rt Hon Mr Peters PC (Non-Party) P J Gunn and C P C Wrightson for Attorney-General (Non-Party) (by VMR) B J R Keith as Amicus Curiae (Non-Party) (by VMR)
Judgment:	30 November 2021

JUDGMENT OF DOOGUE J
[Application for Recall]

This judgment was delivered by me on 30 November 2021 at 3.30 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] This proceeding arises from an action in defamation brought by Mr Staples against the defendants. The first defendant, Mr Freeman, did not file a statement of defence to the claim made against him and it proceeded by way of formal proof. The plaintiffs' counsel did not refer the Court to the Parliamentary Privilege Act 2014 (the Act). The Court gave judgment by default against Mr Freeman for $350,000 together with interest and costs. The judgment was sealed.

[2] In determining the application, the Court found for the purpose of quantifying damages that a speech made by the Rt Hon Mr Peters PC in Parliament was defamatory of Mr Staples. The Court found that Mr Freeman arranged for certain District Court documents to be provided to Mr Peters and encouraged Mr Peters to use absolute privilege to make allegations about Mr Staples in the speech in Parliament. Mr Freeman was found liable for the harm stemming from that speech and, in addition, a television programme that replayed the speech.

[3] Mr Peters, who was not a party to the proceeding, was granted leave to apply for recall of the judgment on the basis that neither counsel for the plaintiffs nor the Court referred to the provisions of the Act and the Court would have proceeded differently had it been made aware of the Act. Mr Peters says the judgment is a breach of natural justice because he did not have the right to be heard before adverse comment was made about him.

[4] I shall deal with the latter point first.

Extent of natural justice obligations in respect of adversarial proceedings

[5] The question is whether the Court was obliged by natural justice to accord Mr Peters a right to be heard before receiving evidence said to concern him and/or before findings were made concerning his actions.

[6] Mr Henry, counsel for Mr Peters, relied upon the *Erebus Royal Commission* judgments for the proposition that, prior to the making of adverse findings, notice was required.[1] However, that is not the standard applicable to court proceedings.

[7] First, as was said by the Privy Council in *Brinds Ltd v Offshore Oil NL*, shortly after and in respect of its own decision in the *Erebus* proceedings, in response to an attack on adverse comment by a court on a non-party witness:[2]

> [In] *Mahon v Air New Zealand Ltd* [1984] AC 808; 50 ALR 193, and in particular … (AC at p 821; ALR at p 207) … it was said that, in circumstances such as existed in that case, a person who might be adversely affected by a decision to make a particular finding should not be left in the dark as to the risk of the finding being made, and thus deprived of an opportunity to adduce evidence which, had it been placed before the decision maker, might have deterred him from making the finding.
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> The decision in the *Mahon* case has nothing whatever to do with the instant appeal. The *Mahon* case was concerned with the proper exercise of an investigatory jurisdiction, not with the conduct of litigation between adversaries.

[8] The question has, however, been further canvassed in a number of recent decisions of this Court, notably *Quantum Laboratory Ltd v Dunedin District Council*[3] and *Hampton v Christchurch District Court*.[4]

[9] In *Quantum*, which sought declarations of breach of natural justice arising from adverse comment made concerning third parties not called as witnesses, the Court extensively canvassed authority and found:[5]

> … the absence of a rule favouring procedural fairness in favour of non-parties in an adversarial process has arisen for good reason.

[10] However, and more recently, in *Hampton*, which concerned a claim by a witness, the Court noted strong objections in terms of adversarial procedure and the Evidence Act 2006 but accepted some very limited potential scope for challenge:[6]

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1 *Re Erebus Royal Commisison; Air New Zealand Ltd v Mahon* [1981] 1 NZLR 614 (CA), *Re Erebus Royal Commission (No 2); Air New Zealand Ltd v Mahon* [1981] 1 NZLR 618 (CA); *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662, [1984] 3 All ER 201 (PC).

2 *Brinds Ltd v Offshore Oil NL* (1985) 63 ALR 94 at 101.

3 *Quantum Laboratory Ltd v Dunedin District Council* [2008] 2 NZLR 541.

4 *Hampton v Christchurch District Court* [2014] NZHC 1750, [2014] NZAR 953.

5 *Quantum Laboratory Ltd v Dunedin District Council*, above n 3, at [64].

6 *Hampton v Christchurch District Court*, above n 4, at [35].

> … First a witness has no general right to be heard about prospective criticisms in a judgement. The scheme of the Evidence Act 2006 precludes the existence of such a right in a civil hearing. Second, a witness make seek to review defamatory comments made by a Judge only in circumstances where the Judge did not ask questions about matters relating to the comments and where the omission was plainly wrong. Bearing in mind the overarching duty of a judge to be and to appear to be impartial, the prospect of this Court finding that the judge erred in this way must be limited to cases where there was no evidence at all (circumstantial or otherwise) supporting a defamatory observation. Third, the review proceeding must not seek to collaterally challenge the outcomes of the judgment. A corollary of this is that in most, if not all cases, the only relief will be by way of declaration that the defamatory comments had no proper basis in the evidence.

[11] *Hampton* and *Quantum* each concerned statements in courts of limited jurisdiction susceptible to judicial review. In the present case that mechanism is not available and, instead, it would be necessary to find some jurisdiction in this Court.

[12] Further, it might then be argued that the limited scope accepted in *Hampton*, above, includes the determination by the Court that Mr Peters' speech in Parliament was defamatory.

[13] If the approach taken in *Hampton* could be followed here despite the absence of judicial review jurisdiction, that would leave scope for argument for the narrow relief framed in that case. It would not, however, extend to "collateral challenge" to the judgment. If the Court accepts the determination the speech was defamatory and ought to be recalled by reason of the Act that point falls away. If that determination is recalled that is a stronger remedy than that available in terms of *Hampton* and, in any case, makes any question of natural justice concerning the determination moot.

[14] Aside from that central adverse comment, the scope found in *Hampton* – even if the jurisdictional difficulty can be overcome so as to apply that reasoning to decisions of this Court – does not appear to extend to the references to, for example, evidence about Mr Peters elsewhere in the judgment. To the contrary, these engage the objections canvassed in *Hampton* and *Quantum.*

[15] As a result, the remedy available to Mr Peters appears to be limited to that provided by the accepted recall jurisdiction of the Court and by the law of parliamentary privilege.

[16] I observe that, as Mr Henry has identified, the formal proof procedure may not be viewed as adversarial so as to invoke the safeguards expressed in *Hampton* and *Quantum*.

[17] In *Hampton*, the Court found:[7]

> … Any wider basis for review could imperil the integrity of the adversarial process by placing a burden on the Judge to inquire on matters properly left to the litigant parties.

And in *Quantum*:[8]

> … Only rarely do the available safeguards inherent in the adversary process fail to deliver a less than satisfactory outcome. This case may be one such example.

[18] In *Quantum* two adversarial safeguards were expressly noted:[9]

(a) the ability of a party to call the non-party as a witness so that he or she may respond; and

(b) the role of the Judge in assuring fairness both through exercising a supervisory control over the conduct of the proceeding and "ultimate control", the ability to "couch a judgment in terms which recognise that a non-party may not have had a fair crack of the whip".

[19] Here, the Court had submissions and evidence from only one party, so the level of inquiry and safeguard created by the adversarial process was undoubtedly less. This also made it more difficult for the Court to exercise its supervisory control and exacerbated the existing challenge of "[d]rawing the line between a necessary finding, and a gratuitous one".[10]

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7 *Hampton v Christchurch District Court*, above n 4, at [29].
8 *Quantum Laboratory Ltd v Dunedin District Council*, above n 3, at [63].
9 At [55].
10 *Quantum Laboratory Ltd v Dunedin District Council*, above n 3, at [60].

[20] Ultimately, this may be a matter for another day as the remedies under the Court's inherent recall jurisdiction appear to address Mr Peters' concerns as to natural justice in this case.

[21] I now turn to the application for recall and whether or not the Act applies as it is the infringement against that Act that informs the alternative basis for the recall of the judgment. In coming to that view, I do not ignore the Attorney-General's submissions that irrespective of the Act the judgment, as it presently exists, infringes upon aspects of general privilege.

Preliminary issue - does the Act apply?

[22] When Mr Peters first signalled his intention to apply for recall of the judgment, counsel who appeared for the plaintiffs at the formal proof hearing filed a memorandum in which he submitted the Act is not relevant in this case.

[23] Counsel who appeared for the plaintiffs at this hearing, Ms Carter, made a different submission, namely that the Act does not apply in this case because the proceedings were commenced before the Act came into force on 8 August 2014. Therefore, an initial question for the Court is whether or not the Act applies to the present proceedings.

[24] The question arises because the Act is impliedly, if not expressly, retrospective. Although there is an operative presumption against retrospectivity, established by s 12 Legislation Act 2019 (replacing s 7 Interpretation Act 1999), the Courts will find an Act retrospective even in the absence of express words if Parliament's intention is clear.[11] Here, s 16 states, referring to subpart 2 of part 2 where "proceedings in Parliament" is defined:

> **16 Subpart is for avoidance of doubt, and does not apply to existing court or tribunal proceedings**
>
> (1) This subpart declares and enacts, for the avoidance of doubt, the effect that Article 9 of the Bill of Rights 1688 had, on its true construction, before this Act's commencement.

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[11] Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 818-820.

(2) However (in accordance with section 32) this subpart does not apply to proceedings—

(a) in a court or a tribunal; and

(b) that commenced before this Act's commencement.

[25] A further saving is contained in s 32, which states:

32 Existing court or tribunal proceedings

This Act's provisions (other than this section) do not apply to proceedings—

(a) in a court or a tribunal; and

(b) that commenced before this Act's commencement.

[26] The Act declares the meaning of art 9 of the Bill of Rights 1688. Such declaratory provisions are normally deemed to relate back to the time of commencement of the principal Act, in this case the Bill of Rights 1688, and thus cover all matters that happened after that time.[12]

[27] However, the Act does more than declare. It specifically provides, through ss 3(2)(c), 3(2)(d), 10(7) and 11(d), that it is intended to alter the law from that stated in *Attorney-General v Leigh*[13] and *Buchannan v Jennings*.[14] By s 4, the Act provides it must be interpreted in a way that promotes these purposes. It also states the meaning of art 9 must be taken to have, in addition to any other operation, the effect required by subpart 2, unless a different effect is required for prosecution of specific offences.[15] Legislative drafting must achieve the wanted outcome (including any retrospectivity), which is plainly to alter the law in these cases.[16]

[28] The Act, through ss 16(1) and 32, saves proceedings already commenced, which would be unnecessary were it not intended to have retrospective effect.

[29] I find, considering all the above points, Parliament's intention was that the Act retrospectively declare the meaning of art 9, expressly overruling cases inconsistent

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12 Carter, above n 11, at 821.
13 *Attorney-General v Leigh*, above n 13.
14 *Buchanan v Jennings* [2004] UKPC 36, [2005] 2 All ER 273 (PC).
15 Parliamentary Privilege Act 2014, s 9.
16 Carter, above n 11, at 824.

with that meaning. The recognised exception to that broad declaration is contained in the savings provisions. The question arising here then is whether the claim fell into a savings provision.

[30] I note all counsel appear to have operated and submitted on this basis.

[31] The relevant timeline of these proceedings is as follows:

(a) 11 April 2014 – first statement of claim was filed in the District Court by Mr Staples and Claims Resolution Service Ltd (CRS) for defamation against Ironclad Securities Ltd (the company Mr Freeman worked for) and the directors of that company at the time.

(b) 23 June 2014 – the plaintiffs made an application for joinder of Mr Freeman as a party to the District Court proceedings. Mr Freeman agreed to the joinder.

(c) 23 July 2014 – Mr Peters made the relevant speech in Parliament.

(d) 8 August 2014 – the Act came into force.

(e) 12 August 2014 – an order was made joining Mr Freeman as a party to the District Court proceeding by consent.

(f) 3 May 2016 – Mr Staples and CRS filed a statement of claim in the High Court against Mr Freeman, Mediaworks and two Mediaworks' staff members for defamation and contempt of court. The statement of claim included, for the first time, pleadings regarding Mr Peters' speech and the Campbell Live programme.

(g) 4 May 2016 – an application was made for the District Court proceeding against Ironclad Securities Ltd, directors of the company and Mr Freeman to be transferred to the High Court and joined to the High Court proceeding (the transfer was made in June 2016).

(h) 31 July 2017 – a second amended statement of claim was filed.

(i) 24 March 2020 – a third amended statement of claim was filed.

[32] Mr Henry submitted the proceeding could not have "commenced" against Mr Freeman until he was joined by consent orders in August 2014 and that this post-dates the commencement of the Act.

[33] The plaintiffs' position was that the proceeding "commenced" on 11 April 2014, when the first statement of claim was filed in the District Court in terms of ss 16(2) and 32 of the Act.

[34] The Attorney-General submitted the proceeding "commenced" for the purposes of the Act in May 2016, when an amended statement of claim was first filed raising issues as to Mr Peters' speech in Parliament.

[35] Mr Keith, as Amicus Curiae, submitted it is difficult to reconcile ss 16(2) and 32, as applying the pre-existing law in respect of a claim that did not involve parliamentary matters, with the evident purpose of the Act and ss 16(2) and 32 in particular.

Plaintiffs' submissions

[36] Counsel for the plaintiffs referred to r 5.25 of the High Court Rules 2016, which provides:

> **5.25 Proceeding commenced by filing statement of claim**
>
> (1) A proceeding must be commenced by filing a statement of claim in the proper registry of the court.
>
> …

[37] Ms Carter argued it follows that all amendments subsequent to the statement of claim being filed in the District Court on 11 April 2014 are deemed to date back to 11 April 2014. She maintained that aligned with the ordinary meaning of the term "commenced" and that to find any later date was when the proceedings "commenced" would require placing an artificial gloss on the natural meaning of the term.

[38] Ms Carter also relied on r 7.77(4), which arises in the limitation context, and provides:

> [i]f a cause of action has arisen since the filing of the statement of claim … the amended pleading must be treated, *for the purposes of the law of limitation defences*, as having been filed on the date of the filing of the application for leave to introduce that cause of action.
>
> (emphasis added)

[39] *McGechan on Procedure* comments on this rule, opining:[17]

> [t]he provision may also be designed to overcome the technical rule that amendment, when allowed, is deemed to date back to the date on which proceedings originally issued (see *Warner v Sampson* [1959] 1 QB 297 (CA) at 321-322), a rule obviously nonsensical where a cause of action arises after commencement of the original proceedings.

[40] *McGechan* is correct that the *Warner* rule is nonsensical in the circumstances described for limitation. Ms Carter submitted it is not nonsensical in the present context. She submitted this case can be distinguished from a limitation situation where it is determinative when certain facts or causes of action were pleaded (not when a cause of action accrued). She submitted the timing of Mr Freeman's joinder as a party and the filing of the High Court statement of claim is irrelevant. The proceeding had already commenced; those events were simply amendments to the ongoing proceeding.

Contrary submissions

[41] Mr Henry, Mr Gunn for the Attorney-General, and Mr Keith, the Amicus, by separate, sometimes overlapping and supplementary routes all submitted that the Act is to be applied in this case. In this section I summarise their submissions.

[42] The part of the claim relevant to parliamentary privilege was added in May 2016. This part of the claim arose from new underlying facts. Mr Peters' speech had not been made when the claim was first filed, and the amendment was not simply a new legal argument on the same facts. No earlier statement of claim put in issue Mr

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[17] Robert Osborne (ed) *McGechan on Procedure* (online ed, Thomson Reuters) at [HR 7.77.06].

Freeman's provision of documents to Mr Peters, Mr Peters' speech and the Campbell Live programmes.

[43] The purpose of ss 16 and 32 is to prevent the Act affecting proceedings already before the Court. However, there were no issues of parliamentary privilege before the Court in this proceeding when the Act commenced. Indeed, when the proceeding was filed Mr Peters' speech had not even been given. The proceeding was then a defamation action against Ironclad Securities Ltd in respect of allegedly defamatory statements about the plaintiffs on its Facebook page. That claim was not (and could not have been) affected and nor was any party prejudiced by the commencement of the Act.

[44] In addition, the proceeding in question could not have been commenced before 12 August 2014 when Mr Freeman was added as a party. As stated in the *Laws of New Zealand* under both the High Court Rules 2016 and the District Court Rules 2014, a proceeding is commenced when a statement of claim is filed. It would seem to follow that a proceeding is commenced against an added defendant when an amended statement of claim is filed against that party.[18]

[45] Further, as reflected in s 33 of the Legislation Act 2019, amendment or repeal of legislation does not, in general, affect proceedings commenced, in progress or "existing legal positions". Here, however, the need for an express savings provision in s 32 can be understood to arise because of the strongly worded terms of the declaratory provision in s 16.

[46] Materially, ss 16(2) and 32 are not expressed in terms of "existing legal positions", as in s 33 of the Legislation Act. Similarly, ss 16(2) and 32 are not expressed in terms of causes of action accrued before a given date. That can be contrasted with, for example, the savings provision in s 59(2) of the Limitation Act 2010, which provides that any claim concerning acts or omissions before 1 January 2011:

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[18] J C Corry *The Laws of New Zealand* Limitation of Civil Proceedings (online ed) at [4(28)], citing High Court Rules 2016, r 5.25(1) and District Court Rules 2014, r 5.25.

> … must, despite the repeal of the Limitation Act 1950 and unless the parties agree otherwise, be dealt with or continue to be dealt with in accordance with the Limitation Act 1950 as in force at the time of its repeal.

[47] The difference between the two forms of savings provisions was, in the context of narrower provision in s 20 of the Acts Interpretation Act 1924 and s 18 of the Interpretation Act 1999, considered by the Court of Appeal in *Foodstuffs (Auckland) Ltd v Commerce Commission*.[19]

[48] That case concerned a transitional provision in legislation amending the Commerce Act 1986. Under s 47(1) of that Act "a person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market". That was a more stringent test, introduced by the Commerce Amendment Act 2001 (the amending Act) which came into force on 26 May 2001. The previous test prohibited an acquisition only if the person would be, or "would be likely to be, in a dominant position in a market or [their] dominant position … would be, or would be likely to be, strengthened".

[49] On 25 May 2001, the day before the amending Act commenced, Progressive Enterprises Ltd (Progressive) gave notice to the Commerce Commission seeking clearance to acquire Woolworths (New Zealand) Ltd (raising an issue under s 47 due to their significance in the market). In mid-June 2001, Foodstuffs (Auckland) Limited (Foodstuffs) applied to the High Court for a declaration that the Commission, in determining Progressive's application, should apply the new, more stringent, test. The question was whether Progressive's application should be decided under the law in force at the time it was made or whether, on Foodstuffs' view, at the time the Commission came to decide.

[50] Section 18 of the Interpretation Act 1999, in force at the time, stated:

> **18 Effect of repeal on enforcement of existing rights**
>
> (1) The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity or duty.

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19 *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353.

> (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity or duty.

[51] Progressive argued their application was an uncompleted "matter or thing" for the purposes of that section. They submitted it should be read in a divided way meaning the repealed enactment would be saved "for the purpose of completing the matter or thing".[20]

[52] The Court of Appeal found such a broad denial of the effect of new provisions would be "often impossible in practice", and "be contrary to regular practice and principle".[21] They noted new provisions of the type mentioned are routinely understood as applying to pending matters. Section 18 was found to be concerned primarily with processes for completing or enforcing existing rights or existing legal positions.[22]

[53] That Court drew a distinction between the wide provision in s 18 and the narrow provision in s 20, which protected only "matters which are already underway at the date of repeal", and found "while both provisions have in common that matters already underway are to be saved despite the repeal of the enactment under which they began" s 20 was no help on the current issue.[23]

[54] Finally, the Court of Appeal considered the competing policy considerations. Those were, on one hand, "giving effect to Parliament's will, aimed at changing the law and introducing new policies" and on the other, "[protecting], for reasons of justice and fairness, positions already established under the old law". They found "if, broadly speaking, no existing, vested or accrued legal interests are put in jeopardy the new manifestation of Parliament's will is to be given full effect".[24]

[55] The meaning "of a matter or thing" was limited by "[relating] to an existing right, interest, title, immunity or duty", meaning Progressive had to show their

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20 At [9].
21 At [15].
22 At [16].
23 At [17]-[19].
24 At [20].

application related to "an existing right, interest … or duty".[25] This finding of the majority was endorsed by Thomas J in his concurring decision.[26]

[56] The Court of Appeal found Progressive did not have, at the moment of replacement, an existing right or interests in terms of the old s 47, nor did the Commission have a correlative existing duty. Any determination of rights and duties under s 47 would instead be by reference to its text as in force at the time any acquisition occurred which, in this case, would have been the new test.

[57] They referred to the authorities that emphasised, first, "the manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given",[27] and second, noting the relevance of the policy of the amended legislation:[28]

> Parliament's decision to introduce new policies – as emphasised in this case by the new statement of purpose in the Commerce Act – is not to be frustrated by allowing the old law to cast an inappropriately lengthy shadow over activities in the future

[58] The Court of Appeal concluded by accepting arbitrary consequences may appear to occur when new law is brought in with instantaneous effect but found that changes in law may, and do, advantage some while disadvantaging others. While applications based on administrative understandings "may have been dashed", no existing rights or interests based on the old test were denied.[29] The Court found administrative convenience cannot be preferred to proper legal interpretation.

Conclusion

[59] The literal effect of the words of ss 16(2) and 32 is that, because this proceeding was filed before the Act came into force, it should be dealt with according to the law existing at that time. However, the proceeding had no application or connection to parliamentary proceedings in the form then filed.

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25 At [21] and [22].
26 At [56].
27 At [40], citing *Director of Public Works v Ho Po Sang* [1961] AC 901,922 (JC).
28 At [41].
29 At [42].

[60] The question is therefore whether ss 16(2) and 32 displace the Act from the present claim either because:

(a) consistent with those literal words, the claim was in some form then extant; and/or

(b) the connection to proceedings in Parliament arose before the new Act was in force.

[61] There is difficulty in both arguments. While there is a connection between the claim involving the Facebook publications and the matters relating to Parliament, the two claims are factually and legally distinct; it is not as though, for example, the parliamentary proceedings disclosed further elements of the claim as it stood earlier in 2014.

[62] Similarly, the emphatic declaratory terms of s 16(1) – that is, that the operative provisions of the Act "for the avoidance of doubt" set out the "true construction" of art 9 of the Bill of Rights 1688 – do not support an expansive reading.

[63] As noted, the terms of ss 16(2) and 32 are express and qualified. Unlike, for instance, the Limitation Act provisions, they do not provide for a claim that accrued but that had not been lodged prior to the entry into force of the Act.

[64] Noting the policy approach of the Court of Appeal in *Foodstuffs (Auckland)*, it is difficult to reconcile an interpretation of ss 16(2) and 32 as applying the pre-existing law applicable to parliamentary privilege in respect of a claim that did not involve parliamentary matters with the evident purpose of the Act and of those provisions in particular.[30]

[65] I find the Act is the relevant applicable law. It is helpful at this juncture to refer to some of the relevant provisions of the Act to put the application for recall in better context.

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[30] *Foodstuffs (Auckland) Ltd v Commerce Commission*, above n 19.

The Act

[66] The main purpose of the Act is to reaffirm and clarify the nature, scope and extent of the privileges, immunities and powers exercisable by the House of Representatives, its committees and its members and to ensure adequate protection from civil and criminal legal liability for communication of, and documents relating to, proceedings in Parliament.[31]

[67] One of the subsidiary purposes of the Act is to define, for the avoidance of doubt, " proceedings in Parliament" for the purposes of art 9 of the Bill of Rights 1688; and in particular to alter the law in the Supreme Court's decision in *Attorney-General v Leigh*.[32] The Supreme Court held in that case that a public servant briefing a Minister in preparation for a Parliamentary Question was not protected by parliamentary privilege.

[68] Section 10 of the Act defines "proceedings in Parliament", for the purposes of art 9 and the Act itself, as " all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee".[33] "Reasonably apprehended" business of the House is included.[34] The definition includes a wide range of parliamentary activity and must, in particular, be taken to include:

> **10 Proceedings in Parliament defined**
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> …
>
> (2) The definition in subsection (1) must be taken to include the following:
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> (a) the giving of evidence (and the evidence so given) before the House or a committee:
>
> (b) the presentation or submission of a document to the House or a committee:
>
> (c) the preparation of a document for purposes of or incidental to the transacting of any business of the House or of a committee:

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31 Parliamentary Privilege Act, s 3(1)(a).
32 *Attorney-General v Leigh*, above n .
33 Parliamentary Privilege Act, s 10(1).
34 Parliamentary Privilege Act, s 10(3).

(d) the formulation, making, or communication of a document, under the House's or a committee's authority (and the document so formulated, made, or communicated):

(e) any proceedings deemed by an enactment to be (or a thing said or produced, or information supplied, in an inquiry or proceedings, if an enactment provides the thing or information is privileged in the same way as if the inquiry or proceedings were) for those purposes proceedings in Parliament.

[69] The words "incidental to" must be interpreted in context; "the impugned material" must have more than just a passing reference to proceedings in Parliament in order for the material to be considered proceedings in Parliament.[35]

[70] The prohibition on "impeaching or questioning" proceedings in Parliament in art 9 is further clarified by s 11 of the Act:

> **11 Facts, liability, and judgments or orders**
>
> In proceedings in a court or tribunal, evidence must not be offered or received, and questions must not be asked or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, all or any of the following:
>
> (a) questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament:
>
> (b) otherwise questioning or establishing the credibility, motive, intention, or good faith of any person:
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament:
>
> (d) proving or disproving, or tending to prove or disprove, any fact necessary for, or incidental to, establishing any liability:
>
> (e) resolving any matter, or supporting or resisting any judgment, order, remedy, or relief, arising or sought in the court or tribunal proceedings.

[71] Using the language of art 9, freedom of speech is "impeached" where civil or criminal liability is sought to be imposed for what a person has said or done in

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35 *Financial Services Complaints Ltd v Chief Ombudsman* [2021] NZHC 307 at [49].

Parliament, whereas it is "questioned" where legal proceedings critically examine what a person has said or done in Parliament.[36]

[72] The prohibition on impeaching or questioning reflects the constitutional separation of powers. Its purpose is to avoid conflict between the legislature and the judiciary and to preclude judicial questioning of proceedings in Parliament, as "a court has no legitimate occasion to pass judgement on parliamentary proceedings".

[73] Section 15 must be considered together with s 11. Section 15 provides:

> **15 Use of proceedings to establish, without impeaching or questioning, historical events or other facts**
>
> (1) In relation to proceedings in a court or tribunal, neither this subpart nor the Bill of Rights 1688 prevents or restricts evidence being offered or received, questions being asked, or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, establishing with no impeaching or questioning of the proceedings in Parliament a relevant historical event or other fact.
>
> (2) This section is explanatory only, and does not limit or affect the prohibition in Article 9 of the Bill of Rights 1688 (operating as this subpart requires, or independently) on impeaching or questioning proceedings in Parliament.

[74] Parliamentary proceedings can be considered and commented on in Court for the purpose of establishing a relevant historical event or other fact. The embargo is only triggered if the parliamentary proceedings are impeached or questioned.[37]

[75] I now turn to determine the application for recall in light of the finding that the Act is the relevant applicable law.

Recall – general principles

[76] Rule 11.9 of the High Court Rules 2016 provides:

> **11.9 Recalling judgment**
>
> A Judge may recall a judgment given orally or in writing at any time before a formal record of it is drawn up and sealed.

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36 Mary Harris and David Wilson (eds) *McGee: Parliamentary Practice in New Zealand* (4th ed, Oratia, Auckland, 2017) at 738.

37 Harris and Wilson, above n 36, at 738.

[77] The categories of cases justifying recall are mainly those set out by Wild CJ in *Horowhenua County v Nash (No 2)*:[38]

(a) where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority;

(b) where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and

(c) where for some other very special reason justice requires that the judgment be recalled.

[78] A wider test was set out by Neuburger J in *Re Blenheim Leisure (Restaurants) Ltd (No 3)*,[39] cited with approval by the English Court of Appeal,[40] referred to by the New Zealand Court of Appeal,[41] and applied recently in the New Zealand High Court:[42]

> [A] plain mistake on the part of the courts; a failure of the parties to draw to the court's attention a fact or point of law that was plainly relevant; or discovery of new facts subsequent to the judgment being given. Another good reason was if the applicant could argue that he was taken by surprise by a particular application from which the court ruled adversely to him and that he did not have a fair opportunity consider.

[79] The purpose of limiting the grounds for recall of a judgment is to reconcile the broad ends of justice in the particular case, taking exceptional situations into account, against the desirability of finality in litigation.[43]

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38 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 at 633.
39 *Re Blenheim Leisure (Restaurants) Ltd (No 3)*, The Times, 9 November 1999 (Ch).
40 *Stewart v Engel* [2000] 1 WLR 2268 (EWCA) at 2274.
41 *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49 at [22].
42 *Deliu v Independent Police Conduct Authority* [2021] NZHC 10 at [6].
43 Robert Osborne (ed) *McGechan on Procedure* (online ed, Thomson Reuters) at HR11.9.01(2), citing *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [28] and *Ashe v Tauranga Marina Soc* (1991) 4 PRNZ 89 (HC).

Recall of a sealed judgment under inherent powers

The law

[80] Rule 11.9 of the High Court Rules 2016 does not authorise recall of a sealed judgment. However, the Court retains an inherent power to correct errors, in exceptional circumstances, in the interests of justice.[44] The ability to recall a sealed judgment relies on a Court's inherent power to control its own proceedings rather than the inherent jurisdiction exclusive to the High Court.[45]

[81] In *Herron v Wallace*, Faire J conducted a full review of the authorities, concluding that the starting point for recall of sealed judgments must be the public interest in finality in litigation but that absolute finality is unsafe.[46] The power to recall a sealed judgment exists but the situations in which the Court will exercise the power are "very limited and have been described as exceptional".[47] Established categories of the use of the power include rectifying slips,[48] judgments being obtained by fraud and material fresh evidence becoming available.[49]

[82] The grounds for recall of a sealed judgment are narrower than those set out in *Horowhenua County* but that does not mean those grounds are not relevant.[50] Rather, in assessing a claim for recall of a sealed judgment the Court may, if it considers one or more of those grounds are made out, further consider whether there are exceptional circumstances requiring recall in the interests of justice.

[83] *Herron v Wallace* has been considered by later cases, including at least twice by the Court of Appeal.

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44 *R v Smith* [2003] 3 NZLR 617 (CA) at [28]-[36].

45 See *Farquhar v Property Restoration Ltd* CA 186/89, 27 May 1991. For a discussion of inherent powers see *District Court at Christchurch v McDonald* [2021] NZCA 353 at [27]-[31] and I H Jacob "The Inherent Jurisdiction of the Court" (1970) CLP 23.

46 *Herron v Wallace* [2016] NZHC 2426, (2016) 23 PRNZ 620. The Court of Appeal refers to the overview in *Herron v Wallace* in *Slavich v Attorney-General* [2020] NZCA 32 at [7] and *Sisson v Chesterfields Preschools Ltd (in liq)* [2020] NZCA 687 at [18].

47 At [38].

48 Although this is also provided for by r 11.10 of the High Court Rules 2016.

49 *Herron v Wallace*, above n 46, at [33].

50 *Horowhenua County v Nash (No 2)*, above n 38.

[84] In *Slavich v Attorney-General*, the Court of Appeal acknowledged "the existence of authority that a court can exercise its inherent jurisdiction to recall a judgment if fresh evidence not previously available has come to light which is material to the outcome of the case", citing *Herron v Wallace*.[51]

[85] In *Sisson v Chesterfield Preschools Ltd (in liq)*, the Court of Appeal recognised "[the] Court does however have an inherent jurisdiction to recall a sealed judgment, for example when the underlying agreement is tainted by duress, undue influence, unconscionability or mistake", again citing *Herron v Wallace*.[52]

[86] In *Craig v Stringer*, Associate Judge Osborne followed *Herron v Wallace*, citing the principles expressed above at [81].[53] He was dealing with an application for an order that the judgment be recalled, set aside on the basis of fraud and that the proceeding be struck out, or an order that the judgment be recalled and reworded. The Associate Judge found:

> [49] I am satisfied that this is a case in which it would be inappropriate to apply the principle of finality of litigation. The parties had engaged in good faith through the settlement conference process to endeavour to settle the issues between them without resort to trial. Mr Stringer ought not to be held to account through the consent judgment to the extent that the consent judgment contains concessions on the part of Mr Stringer on matters of which he was not fully informed by reason of a failure of discovery.
>
> [50] As the judgment will no longer contain judgment in relation to the publication alleging that Mr Craig sexually harassed Ms MacGregor, the terms of the judgment as to the dismissal of the plaintiff's claims (para [2](b) of the consent judgment) also require alteration to recognise that there is now no longer a conclusion in relation to that particular allegation. The order made below will reflect a saving in that regard. It will be for Mr Craig to decide whether to discontinue that single, remaining aspect of his claims so that this proceeding can be finally resolved as the parties intended. The Court will make case management directions in that regard in a separate Minute.
>
> [51] This conclusion affects only the first aspect of the consent judgment at [2](a)(i), set out above at [6], whereby judgment was entered for Mr Craig in relation to the allegation that the plaintiff had sexually harassed Ms MacGregor. The information unavailable to Mr Stringer through the non-discovery of the 12-page letter would not have affected the evaluation made by the parties in relation to the other allegations which were the subject matter of the judgment. It would be inappropriate to rescind any aspect of the judgment other than that relating to the first-mentioned allegation.

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51 *Slavich v Attorney-General* [2020] NZCA 32 at [7].
52 *Sisson v Chesterfield Preschools Ltd (in liq)* [2020] NZCA 687 at [18].
53 *Craig v Stringer* [2017] NZHC 3221.

Are grounds for recall made out in this case?

[87] I now consider whether grounds for recall have been made out in this case.

[88] One of the purposes of the Act is to abolish and prohibit evidence being offered or received, questions being asked, or statements, submissions or comments made concerning proceedings in Parliament to inform or support "effective repetition" claims and liabilities in proceedings in a court or tribunal and exemplified by the decision in *Buchanan v Jennings*.[54] The Act also replaces with modern legislation the law formerly contained in certain provisions of the Defamation Act 1992.

[89] In these proceedings, Mr Staples submitted Mr Freeman should compensate him for Mr Peters' republication of certain District Court documents in his speech in Parliament, Mr Peters' alleged subsequent republication to Mediaworks and for the harm stemming from Mediaworks' subsequent republication on two Campbell Live programmes. Such submissions inexorably engage the Act, which is therefore "central to the disposition of the case".[55] Accordingly, the second ground of recall set out in *Horowhenua County* is made out, in that counsel failed to direct the Court's attention to relevant law. It is responsibly accepted by counsel for the plaintiffs that this ground has been made out.

[90] The third ground for recall in *Horowhenua County* is also relevant here, in that there is a very special reason justice requires that the judgment be recalled. These proceedings centred on a speech in Parliament and whether someone might be liable for providing material on which that speech was based. The judgment cited *Buchanan v Jennings*. However, counsel did not direct the Court's attention to the Act which materially changed the law as set out in that case. Counsel for the plaintiffs accepts this ground may have been made out.

[91] The constitutional importance of parliamentary privilege, and the importance of full and proper argument on the application of the privilege in any case where it is

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54 Parliamentary Privilege Act, ss 3(2)(d) and 3(2)(e); *Buchanan v Jennings*, above n 14.
55 *Unison Networks Ltd v Commerce Commission*, above n 41.

engaged, or potentially engaged, means the third *Horowhenua County* ground is also met and that justice requires the judgment be recalled.

[92] This Court has previously distinguished between cases where a Judge does not refer to a matter at all and one where they refer to the matter but make an erroneous decision. The former situation lends itself to recall but the latter does not.[56]

[93] In this case, the Court has not referred to the Act in a matter where the Act is relevant to the claim and its disposition. This omission potentially has wider constitutional consequences, impacting on the relationship between the Courts and Parliament.

[94] Recall is the most appropriate remedy for resolving these issues. There is a clear public interest in advocacy for the principles underpinning parliamentary privilege. However, the representative of the public interest, the Attorney-General, as a non-party, is not able to appeal the judgment. Thus, while acknowledging the third *Horowhenua County* ground is intended to be narrow, there is a very special reason in this case as to why justice requires the judgment be recalled.[57]

[95] In summary, the Court is able to, and should, recall the judgment on the application of a non-party despite it being sealed. There are exceptional circumstances in this case requiring recall in the interests of justice.

[96] Having found there are grounds for recalling the judgment, the question arises of how the jurisdiction should be exercised.

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[56] *Clark v Central Lakes Homes Ltd* [2016] NZHC 2164 at [10], referring to *Roc Mac Ltd v Buxton* HC Christchurch CIV-2006-409-2062, 12 October 2007.

[57] *Unison Networks Ltd v Commerce Commission*, above n 41.

How should the jurisdiction be exercised?

The law

[97] The recall jurisdiction is to be exercised cautiously and scrupulously, so as to balance the accepted scope for recall where necessary against the broad principle of finality in litigation.[58]

[98] The question of the exercise of the jurisdiction was usefully and at some length discussed by the Australian Federal Court in *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 4)*:[59]

> [69] It has been said that the exercise of the power … is "exceptional" and is to be exercised "with great caution" … It is evident that many of the cases reflecting this approach are cases where final orders have been made, including on appeal, where the principle of finality of litigation has been stressed. … It is to be borne in mind that the civil practice and procedure provisions respecting this court, including its rules made under the Federal Court of Australia Act, must be interpreted and applied, and every power conferred by them must be exercised or carried out, in the way that best promotes the overarching purpose identified in s 37M of the Act of facilitating the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible. That overarching purpose will not be achieved, but will be subverted, by a too-ready resort to, or incautious application of, the power to vary or set aside orders that have been made and entered …

[99] In keeping with the approach in *Horowhenua County* and *Campaign Master*, even once grounds for recall are made out the recall jurisdiction itself is to be exercised in as restrained a manner as the interests of justice require.

[100] By way of very recent and prominent example, the Supreme Court accepted in *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council* that a statement contained in its earlier substantive judgment risked misinterpretation and, if misinterpreted, would not be accurate.[60] The Court therefore recalled and restated the relevant passage to address the applicant's concern. The reissued judgment was thereby amended.

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58 *Horowhenua County v Nash (No 2)*, above n 38.

59 *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 4)* [2010] FCA 398, (2010) 269 ALR 76.

60 *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council* [2021] NZSC 124.

Discussion

[101] There are five distinct relevant aspects of the judgment to be examined on the recall given that the Act applies. Mr Freeman's provision of certain District Court documents to Mr Peters, recordings of telephone conversations between Mr Freeman and Mr Peters, Mr Peters' speech in Parliament, the Campbell Live programme covering the speech in Parliament and the consequential damages awarded.

[102] The judgment concludes that Mr Freeman's republication of District Court documents to Mr Peters was an aggravating factor justifying a large award of aggravated damages. The judgment analyses whether Mr Freeman did provide the information to Mr Peters and finds that he did, relying in part on recordings of telephone conversations apparently between Mr Freeman and Mr Peters.

[103] Whether Mr Freeman's provision of information (certain District Court documents) to Mr Peters and the Campbell Live programme is, or is inextricably linked to, a proceeding in Parliament is a question of legal and evidential analysis for this Court.

[104] Unsolicited provision of information to Members of Parliament by members of the public in their personal capacity, including the Member's constituents, is not afforded the same protection as information provided through formal processes.[61] For example, in *Rivlin v Bilainkin*, communication of an allegedly defamatory nature repeated to a Member of Parliament contrary to an injunction against repetition, being in no way connected with any proceeding in Parliament, was not protected by parliamentary privilege so as to oust the jurisdiction of the Court.[62] Also, unsolicited mail will not, merely by its being delivered, attract privilege of Parliament.[63]

[105] Whether the information is unsolicited and, even if it is, what the Member does with the information provided then will be material in determining whether the privilege applies. Parliamentary privilege extends to words spoken and acts done for

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61 Natzler and Hutton (eds) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (25th ed, LexisNexis, London, 2019) at [15.25]; Harris and Wilson, above n 36, at 728. See also *R v Chaytor* [2011] 1 AC 684.

62 *Rivlin v Bilainkin* [1953] 1 QB 485, [1953] 1 All ER 534.

63 *Rowley v O'Chee* [2000] 1 Qd R 207 at 221.

purposes of or incidental to the transaction of "reasonably apprehended" business of the House as well.[64] Thus, as soon as information provided to a Member leads to business, or reasonably apprehended business, of the House, parliamentary privilege is engaged. There is a question, however, over whether the privilege can reach back to protect the original communication. The authors of *McGee* think not,[65] but some Australian cases consider it possible.[66]

[106] If, as *McGee* suggests, the original communication is not protected by parliamentary privilege, the person making that communication may still have a common law defence of qualified privilege. On that basis the communication would not be protected if motivated by malice[67] or in contempt of court.[68] These vitiations of qualified privilege may apply in this case.

[107] The Attorney-General raises these matters in support of a submission that the Court here is obliged to undertake an examination of the way in which the District Court documents came to be communicated to Mr Peters to consider whether that communication is protected by parliamentary privilege. That is because, before the Court can rely on Mr Freeman's communication of information to Mr Peters in support of a claim for damages in defamation, it must analyse whether that communication is privileged under the Act. The absence of any such analysis to date justifies recall of the judgment.

[108] That is especially so, in the Attorney-General's submission, when there is evidence before the Court suggesting Mr Freeman was encouraging Mr Peters to make a speech in Parliament about Mr Staples, and that Mr Peters was intending to make

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64 Parliamentary Privilege Act, s 10(3).

65 Harris and Wilson, above n 36, at 729.

66 *Erglis v Buckley* [2005] QSC 25 at [36]-[37], upheld in *Erglis v Buckley* [2005] QCA 404, [2006] 2 Qd R 407 at [31] and [100]; *Belbin v McLean* [2004] QCA 181 at [39]. See also, however, *R v Grassby* (1991) 55 A Crim R 419. For recent discussions of the issue, see *Law Society Northern Territory v Legal Practitioners Disciplinary Tribunal (NT)* [2020] NTSC 79 and *Carrigan v Cash* [2016] FCA 1466.

67 Natzler and Hutton (eds) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (25th ed, LexisNexis, London, 2019) at [15.25], citing *Dickson v Earl of Wilton* (1859) 175 ER 790, *R v Rule* [1937] 2 KB 375, *Re Parliamentary Privilege Act 1770* [1998] AC 39 and *Beach v Freeson* [1971] 2 All ER 854.

68 Harris and Wilson, above n 36, at 756, citing *Street v Hearne* [2007] NSWCA 113.

such a speech.[69] Such evidence is supportive of the communication being protected by parliamentary privilege.

[109] Further submissions will need to be made on these aspects of the matter once all present interested parties have access to all the evidence. If Mr Freeman's provision of information (the District Court documents and the telephone conversations) to Mr Peters does amount to "proceedings in Parliament" the judgment will need to be amended to reflect the privilege attaching.

[110] The judgment refers to Mr Peters' speech in Parliament on 23 July 2014 at numerous points and sets out the substance of the speech. The speech clearly falls within the definition of "proceedings in Parliament". The judgment analyses the content of the speech and uses it solely for the purpose of determining Mr Freeman's liability for defamation and quantification of damages.

[111] Certain issues arise that need further argument:

(a) What is the scope and reach of the prohibition against "questioning" of "proceedings in Parliament"? (This brings into play an analysis of ss 11 and 15.)

(b) Whether, and to what extent, a defendant who provides material to a Member of Parliament is themselves also within the scope of privilege.

(c) Whether:

(i) a parliamentary statement may be taken to show the extent of publication and whether that is affected by s 15 of [the Act]; and/or

(ii) the prohibition in s 11(d) against establishing "any liability" extends to the extent of separately establishing liability.

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69 *Staples v Freeman* [2021] NZHC 1308 at [76].

[112] The judgment also considers the impact of the live Campbell Live coverage of Mr Peters' speech. The judgment determines that Mr Freeman is responsible for the harm caused by Mr Peters' speech and the Campbell Live programme. In this way the judgment questions Mr Peters' speech and a programme that, potentially at least, may have a defence of qualified immunity if the programme was a fair and accurate report of the speech.

[113] The judgment's reliance on these matters to reach its conclusions as to liability and damages, without considering the extent to which the speech and the reporting of the speech may be protected by parliamentary privilege or be otherwise subject to immunity, must be revisited in light of the application of the Act.

[114] Counsel for the plaintiffs responsibly accepts, in light of the consequences of the failure to apply the Act, counsel for Mr Peters, the Attorney-General and the Amicus Curiae will need to be provided with the pleadings, submissions and evidence so they may conduct the necessary analysis before making further submissions to the Court on the precise extent of the revision of the judgment.

Conclusion

[115] The application for recall of the judgment is granted.

[116] The Act is the applicable law in relation to Mr Staples' claim against Mr Freeman.

[117] The precise extent to which the judgment will be revised requires further argument for the reasons given at [111] to [114].

[118] Counsel for Mr Staples is to provide counsel for Mr Peters, the Attorney-General, and the Amicus with a copy of the pleadings, evidence and submissions relied on for the formal proof hearing.

[119] The Registrar is to convene a telephone conference for the purpose of discussing timetabling directions for the filing of further submissions and any other issues arising from this judgment.

[120] The issue of costs remains reserved.

Doogue J

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