

IN THE COURT OF APPEAL OF NEW ZEALANDS/11  
CA 15/93

1962  
~~1868~~

BETWEEN    TELEVISION NEW ZEALAND  
                  LIMITED

Appellant

AND            HAMISH HENRY CORDY KEITH

Respondent

Coram:        Cooke P  
                  Richardson J  
                  McKay J

Hearing:      4 August 1993

Counsel:      R S Chambers QC for Appellant  
                  J G Miles QC and A H Waalkens for Respondent

Judgment:    29 October 1993

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JUDGMENT OF THE COURT DELIVERED BY McKAY J

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The appellant, Television New Zealand Ltd ("TVNZ") was the defendant in an action for defamation brought by the respondent, Mr Keith. The action was based on a segment of a programme broadcast on 11 April 1991 on Television 2. The programme was a satirical view of public issues, and the particular segment related to the purchase by the National Art Gallery of two Goldie paintings for a total price of \$900,000. Mr Keith was at that time Chairman of the Council of the National Art Gallery. He claimed that he was portrayed in the programme as a

character described as "Beamish Teeth". His complaint related to references to his having received a commission in respect of the purchase.

After a six day trial, the jury was asked to give its verdict in the form of answers to specific issues. They found that the words complained of would be understood by reasonable people to refer to Mr Keith. In their natural and ordinary meaning the words did not convey the meanings alleged by him, and were not defamatory. The jury found proved certain additional facts relied on by Mr Keith to found an innuendo. In the light of those facts, they found the words did bear the defamatory meanings of which Mr Keith complained. They rejected a defence of unintentional defamation. To the question "What sum by way of damages should be paid to the plaintiff?", the jury answered "All legal fees".

The jury delivered its verdict after 11.30 pm, and the Judge reserved the effect of the jury's answers until a later date. He also sought information as to the actual costs incurred by Mr Keith, and was provided with evidence of the actual costs of each party. Those of Mr Keith, including GST, Court fees and travelling expenses of witnesses and counsel, totalled \$108,271.20. After hearing argument, the Judge said he was satisfied that this expense was neither unreasonable nor inappropriate, and he entered judgment for this amount, plus costs in respect of the further hearing.

TVNZ had submitted that the jury's answer to the final question meant that they had decided that Mr Keith was entitled to nothing by way of damages. The jury had in error trespassed into the province of costs, which is the exclusive domain of the Judge, and upon which a jury is never entitled to express a view. The Judge rejected this submission, saying:

"Having presided at the trial, heard and seen the witnesses, listened to the addresses of counsel and considered the answers to all the

issues in light thereof, I have no doubt that the jury was indicating that the plaintiff should, in respect of the defamation which had been established, receive a substantial award of damages. For a jury to use the formula "all legal fees" is not consistent with a nominal award. I should not ignore the general public perception of the expense involved in engaging lawyers. It inevitably leads to the conclusion that the jury knew of the level of legal expenses and wanted "all" of them met. That is not consistent with a token amount but a large sum of money."

He went on to say that in his judgment the jury's view was justified on the evidence. There was no mention of commission in the original scripts for the programme, which was telecast in April long after the controversy regarding the acquisition of the Goldies had been a topical matter. The rumour that Mr Keith had received a commission or "kick back" from the deal had been referred to in a lengthy magazine article, and it appeared to the Judge to be too much of a coincidence that this issue, which had not been in the initial script, was introduced into it at precisely the time of this article. He said:

"I am satisfied that what the jury concluded was that this man was entitled to have his name cleared, to have his reputation vindicated, and that he should not be out of pocket as a result."

We agree with the Judge that the jury's verdict cannot be read as indicating that Mr Keith had failed to establish a claim to more than nominal damages. Such a finding would be inconsistent with the nature of the defamation which they found proved, and with their clearly expressed intention that he should receive what could only amount to a substantial sum. We therefore reject the contention for TVNZ that the verdict should be treated as a "nil award" on the basis that the jury did not find any damages as such.

At the same time, the jury was not entitled to award costs, nor to take the amount of the costs into account in assessing damages. Damages for defamation are intended to be compensation for the injury to reputation, and for the natural injury to feelings, and the grief and distress caused by the publication: see Gatley

on Libel and Slander 8 ed para 1453; *McCarey v Associated Newspapers* [1965] 2 QB 86 at 104-5 per Pearson LJ. Damages can also be regarded as a vindication of the plaintiff and of his reputation. The Judge in this case referred to a comment by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1967) 118 at 150, where he said:

"It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

Costs are a matter for the Court's discretion, as provided in rule 46 of the High Court Rules. The costs of an action cannot be awarded as part of the damages in the same action: *Cockburn v Edwards* (1881) 18 Ch.D 449 (CA). Counsel cannot properly ask the jury to allow for costs in making its award, and did not do so in this case. If the law were otherwise, then it would follow that the parties could lead evidence as to the proper amount of the costs. That has never been allowed. "The jury are not judges of the costs of the action": per James LJ in *Harnett v Vise* (1880) 5 Ex.D at 307 at 311. Where the jury expresses a view as to the way in which costs should be borne, the Judge "must exercise his discretion as to costs, not only unfettered by, but wholly independently of, any view expressed by the jury on that particular matter": per McCardie J in *Martin v Benson* [1927] 1 KB 771 at 774.

Our attention was drawn to a minute of White J dealing with an issue which arose in *Lewin v Maclean* (Wellington A4/72, unreported 10 August 1972). The jury awarded damages of \$100 for defamation, adding the words "plus costs sufficient to cover the plaintiff's legal fees incurred in bringing these proceedings". The Judge noted that the award was small in relation to the \$3,500 claimed, but



said it was not contemptuous, and together with their expressed view as to costs, indicated the jury's view that the plaintiff was fully justified in bringing the proceedings. He awarded slightly more than the scale party and party costs, although less than half the estimated solicitor and client costs. Cases such as *Martin v Benson* do not appear to have been drawn to his attention.

A similar question came before the Court of Appeal in England in *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116. A jury had awarded the plaintiff £12,000 damages for libel, but a new trial was ordered on the ground of misdirection. At the second trial, the plaintiff was awarded damages of ½p. The plaintiff appealed, his principal ground being misdirection or lack of adequate direction on how the jury should regard the question of costs. The second jury had asked a number of questions as to the incidence of costs. The Judge directed that costs were in his discretion and were not a matter with which the jury were required to wrestle. In answer to the further question "Are costs of both sides automatically awarded against the loser?", the Judge directed:

"No, not automatically. They are in my discretion, but I have to exercise my discretion judicially, and unless there is a very good reason to do otherwise, I would order that costs follow the event. You do not have a discretion in the matter. Costs are my funeral, not yours."

It was submitted that this answer amounted to a material misdirection. It was clear from the words of the foreman when the verdict was returned, "We award damages of the smallest coin in the world", that the jury had no wish to provide the plaintiff with anything other than the minimum amount of compensation by way of damages. The question was whether they had allowed the question of the incidence of costs to influence their decision. It appeared that they had, but this argument did not avail the plaintiff. It might suggest that if the jury had appreciated that such a nominal award would not necessarily carry costs, they

might have increased the amount of their award in order to protect the plaintiff's position on costs. This would have been an impermissible reason, and could not be used to justify ordering a new trial. The jury should have been directed that costs were not a matter for their consideration at all: see per Neill LJ at 122-123, Oliver LJ at 127-128 and Purchas LJ at 130.

Mr Miles QC, for Mr Keith, submitted that the rule in *Cockburn v Edwards* was presumably devised with the English system of awarding costs in mind. In New Zealand, as Richardson J pointed out in *Taylor v Beere* [1982] 1 NZLR 81 at 91, there is not the same heavy punitive element in our costs system, and our party and party scale falls far short of a complete indemnity to the successful party. Mr Miles submitted that if *Cockburn v Edwards* could not be distinguished, then it should not be followed in New Zealand. He pointed out that costs appear to have been awarded as damages in *In re Scottish Petroleum Co, Anderson's Case* (1881) 17 Ch.D 373 (see the footnote at 378), but as was pointed out by Jessel MR in *Cockburn v Edwards* at 454, the point does not seem to have been argued. Mr Miles referred also to *Bradlaugh v Newdegate* (1883) 11 QBD 1, as a case in which costs were awarded as damages, but they were the costs of other proceedings and not the costs in the particular action in which the damages were awarded.

The principle that costs are in the discretion of the Court, and are not part of the damages to be awarded by the jury, is not only enshrined in the High Court Rules but has been an accepted part of the law of this country as it has been of the law in England. No good reason has been advanced why the law should now take a different course, and allow the jury to take costs into account, and allow that issue to be canvassed before them both in evidence and in submission. The Report of the Committee on Defamation (December 1977) recommended no change in the method of assessing compensatory damages, including aggravated compensatory damages. What the Report did recommend, and what has been adopted in section

24 of the Defamation Act 1992, is that a plaintiff may now seek a declaration of liability in defamation, and where such a declaration is made, the plaintiff is to be awarded solicitor and client costs against the defendant unless the Court orders otherwise. By proceeding in this way, the plaintiff can now achieve the result which the jury sought to achieve in the present case, but it is achieved without the jury intruding into the area of costs, and while preserving the ultimate discretion of the Judge.

It follows that the Judge was in error in accepting the jury's purported award of "all legal fees" as a valid award of damages, and in translating it into the actual figure for the solicitor and client costs reasonably incurred. The judgment must, therefore, be set aside.

If the jury's purported award is set aside, then the issue as to damages has not been answered, and the verdict is defective within rule 494(g). Under that rule a new trial may be ordered where, in the opinion of the Court, there has been a miscarriage of justice that justifies a new trial. One of the circumstances where the Court may so hold is where any finding of the jury is so defective that the Judge cannot give judgment upon it. That is clearly the case here. Although the Judge recorded that both parties were in agreement that the Court should endeavour to deal with the matter without inflicting the financial hardship, anxiety, and inconvenience of a retrial, he noted that neither counsel had invited him to fix damages himself. Similarly, this Court was not invited to fix the damages in the event that the judgment was set aside, and it follows that there must be a new trial.

The issue of a new trial was necessarily before the Judge when he reserved the effect of the jury's answers for further consideration. He recorded that the possibility of a new trial was raised by counsel for Mr Keith immediately after the verdict on the basis that the jury had failed to answer an essential issue. If the

verdict were not upheld as a valid award of damages equivalent to the amount of the costs, or as a "nil" award of damages, then the only other course open to the Judge would be to order a new trial. A formal application was probably not necessary, but when the matter came before the Judge on 30 November, Mr Miles, on behalf of Mr Keith, made an oral application for a new trial in the event of his primary submission being rejected. Mr Chambers, for TVNZ, was apparently taken by surprise, and sought to have reserved the question whether if there was a new trial it should include other issues. In the event, the Judge did not have to consider the question of a new trial, but he recorded that he would have given Mr Chambers an opportunity to be heard further on that question if necessary. He recorded that the parties had agreed to make no issue as to the time limit for applying for a new trial, Mr Miles' oral application of 30 November being outside the 14 day limit in rule 495(1).

In this Court, Mr Chambers accepted that the Court has power under rule 494 to limit any new trial to the issue of damages, but he submitted it should not do so in this case. He said there may well have been misdirections, although this was the first time such a suggestion had been put forward in respect of the trial which concluded on 9 November last year. No specific misdirection was identified. We do not understand counsel's agreement to make no issue as to the time limit for applying for a new trial as extending to an application on grounds other than that of a defective verdict. The possibility of a new trial and the extent of a new trial, if one were to be ordered, were apparently argued before the Judge. They were clearly issues which could arise on the present appeal. Nevertheless, Mr Chambers sought leave to file a memorandum on the scope of a new trial if one were ordered, and leave was granted to submit a memorandum on whether any new trial should be limited to damages, but at TVNZ's risk as to costs. In the event, no memorandum has been filed.

The power to order a new trial on any question in a proceeding without interfering with a decision upon any other question is given by rule 494(5). As pointed out in McGechan on Procedure, this power finds its most common application in directions for a new trial on quantum only. Such orders are common where misdirection or improper evidence relates to quantum only, where the verdict is against the weight of evidence only in respect of quantum matters, or where the finding is that damages are excessive or too small. Orders for a new trial on the issue of liability only are rather more rare, as are orders relating only to the apportionment of liability between defendants. An example in the area of defamation is *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153. The publisher succeeded in its appeal only upon the ground that the damages awarded were in all the circumstances unreasonable and excessive. It was therefore entitled to have those damages reassessed by a new jury, but it asked the Court to go further and to set aside the jury's verdict on liability. Lord Donaldson of Lynton MR, at 179, described this as "prima facie quite absurd". In fairness to the publisher, however, he went on to explain the problem which confronted it. He said at 179:

"Under the law as expounded in *Speidel v Plato Films Ltd* [1961] AC 1090, if a defendant in a libel action is allowed to plead matters in justification of the whole or part of the alleged libel, all evidence relevant to that plea can be taken into account by the jury in assessing damages, notwithstanding that the plea of justification is rejected by them. On the other hand, pleas or evidence relating to particular acts of misconduct on the part of the plaintiff which are not capable of amounting to a plea of justification are wholly inadmissible and so cannot come to the knowledge of the jury and be taken into account in mitigation of any award of damages."

He went on to comment that as a result of this state of the law, pleaders of defences were inclined to take an optimistic view of what might be capable of supporting a plea of justification, since even if the plea failed in the only purpose which justified its inclusion, the evidence led in support of it might lead the jury to award a smaller sum by way of damages, an objective which could not be achieved

by directly introducing the evidence for this purpose. He said he did not like this situation, which savoured more of chess than justice. The publisher contended, in effect, that it was impossible to have a fair reassessment of damages unless it was in a position to put before the second jury the evidence available to the first jury in support of the pleas of justification which failed.

Lord Donaldson said that he could see the force of this submission from the point of view of the publisher, and even more from the point of view of the plaintiff, who might well take the view that the attempted justification, coupled with the failure of the defendant to call any evidence in support, might well have increased the amount of damages awarded. At the same time, he said it was quite unacceptable that the publisher should be allowed to reopen the first jury's verdicts on liability, and equally that it should be allowed to lead evidence or seek by cross-examination to establish matters which were inadmissible on an assessment of damages, unless rendered admissible as going to an issue of liability. He considered the solution was that there be a retrial only as to damages, but that either party be at liberty to inform the jury of the course taken at the first trial, that being directly relevant to the issue they would be considering in the context of the claim to aggravated damages. This course was approved by the other members of the Court.

In the present case, there has been no attack on any part of the verdict other than the purported award of damages. There can be no valid reason for depriving Mr Keith of the benefit of the findings he has obtained in his favour on the issue of liability. There was in this case no plea of justification such as to raise the issues which concerned the Court in *Sutcliffe's* case, but which were still insufficient to persuade it to reopen the issue of liability. No other matter has been raised which might cause difficulty to a new jury in assessing damages on the basis that they must accept that the words published bear the meaning alleged by way of innuendo,

and as such were defamatory. It would be a serious injustice to the plaintiff to require him to relitigate the issues as to liability, after he has obtained an unexceptionable verdict in his favour after the cost and trauma of a six day jury trial. We give weight also to the view of the trial Judge, who although not called upon to decide this question, and having said that he would not have denied Mr Chambers the opportunity to be heard on the issue of the scope of a new trial, said that "as currently advised I am of the view that there could not be any justification to interfere with the other findings of the jury. They were wholly consistent with the evidence and all have an adequate evidential base".

We allow the appeal, set aside the judgment and order a new trial limited to the issue of damages. We direct that the costs of the appeal be costs in the cause, and reserve leave to apply in case counsel are unable to agree as to the amount.



Solicitors

N J Vautier, Solicitor, Television New Zealand Ltd, Auckland, for Appellant  
Bell Gully Buddle Weir, Auckland, for Respondent

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IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 161/92

BETWEEN TELEVISION NEW ZEALAND

LIMITED, a duly incorporated  
company having its registered office  
at Auckland carrying on business  
throughout New Zealand as the  
operator of television services and  
having a principal place of business  
at Victoria Street, Auckland

Appellant

A N D

RICHARD WILLIAM PREBBLE  
of Auckland, Member of Parliament

Respondent

BETWEEN

RICHARD WILLIAM PREBBLE  
of Auckland, Member of Parliament

Appellant

A N D

TELEVISION NEW ZEALAND  
LIMITED, a duly incorporated  
company having its registered office  
at Auckland carrying on business  
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having a principal place of business  
at Victoria Street, Auckland

Respondent

Coram:

Cooke P.  
Richardson J.  
Casey J.  
Gault J.  
McKay J.

Hearing:

2, 3, 4 and 5 November 1992



Counsel: J.W. Tizard and Sandra M. Moran for Television New Zealand Limited  
A.R. Galbraith Q.C. and Deborah A.T. Hollings for  
R.W. Prebble  
The Attorney-General, Hon. P.C. East, and J.C. Pike as  
*Amici Curiae*

Judgment: 14 May 1993

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JUDGMENT OF COOKE P.

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In the action in which these appeals arise the plaintiff, who was (with an intermission) Minister for State-Owned Enterprises and with other portfolios in the fourth Labour Government, 1984 to 1990, sues Television New Zealand Limited for alleged defamation in a 'Frontline' programme on 29 April 1990. The statement of claim refers also to a follow-up programme of 6 May 1990 and to alleged authorisation by the defendant of a slightly amended programme in Australia. General damages of \$950,000 and exemplary damages of \$400,000 are sought.

To summarise the pleadings briefly, the plaintiff claims (third amended statement of claim, 4 June 1992) that the programme meant that he secretly conspired with certain highly placed business leaders and public officials to sell state assets on unduly favourable terms in return for donations to the Labour party. He also says that the programme meant that he had acted without any genuine belief that the sales were for the public good; and that it meant that he had acted in a manipulative and dishonest manner to promote the conspiracy and had arranged for incriminating documents to be destroyed. All the meanings which he alleges are variations on those themes.

In its statement of defence (12 June 1992) the defendant denies that the programme bore the meanings alleged by the plaintiff but pleads as to many of the

alleged meanings that, if the programme did have those meanings, it was true (the defence formerly known as justification); and further that it was fair comment on matters of public interest and also protected by qualified privilege on the ground of reciprocal duty and interest between the broadcaster and the viewing public. Particulars of the alleged facts primarily relied on by the defendant occupy some 100 pages. The defendant also gives notice of its intention to adduce at the trial in negation or mitigation of damages evidence of what it alleges to be the plaintiff's bad reputation as a politician, a range of colourful adjectives being given to describe that reputation.

Some of the particulars pleaded by the defendant refer or in some cases may refer to speeches in the House of Representatives by the plaintiff and other Ministers: or to proceedings in the House such as the alleged hasty passage of legislation (the State Sector Bill): or to memoranda, reports, announcements, correspondence or action coming within the umbrella of 'proceedings in Parliament'. In a judgment delivered on 24 June 1992 Smellie J. struck out, as being in breach of parliamentary privilege, the pleadings and particulars in the statement of defence which refer to statements made and things done in the House or before any Committee of the House. The order appears to cover some 18 particulars, but the Judge envisaged that some others might also have to be struck out; precision on this point did not emerge from the arguments in this Court. In a judgment delivered on 15 June 1992 the Judge ruled that the defendant had cast its net too wide as to the evidence of bad reputation admissible on damages. Some of the particulars of the plaintiff's allegedly bad reputation were struck out. In a judgment delivered on 29 July 1992 the Judge dismissed an application by the plaintiff that the action be tried before a Judge without a jury.

The defendant appeals from the rulings on parliamentary privilege and evidence of reputation. The plaintiff appeals from the refusal of trial by Judge alone rather than Judge and jury. In addition the plaintiff lodged an appeal against another judgment delivered on 29 July 1992, whereby the Judge dismissed an application to strike out the pleaded particulars of justification and fair comment on the ground that the pleadings were unsatisfactory in various respects. That appeal, however, was abandoned at the hearing in this Court, although Mr Galbraith for the plaintiff made it clear that the width of the particulars was relied on in support of the appeal against trial by jury.

### Parliamentary Privilege

On the question of parliamentary privilege the Judge had heard argument from the Attorney-General and Crown Counsel as *amici curiae* and we had the same advantage in this Court.

The kind of parliamentary privilege relevant to this case may be traced to three sources. One is that identified by Lord Reid in the judgment of the Privy Council in *Chenard v. Arissol* [1949] A.C. 127, 133-4: namely the recognition that absolute privilege in respect of statements made in a legislative assembly by members of that assembly is so essential for free discussion and the proper conduct of business that the setting up of any legislative assembly necessarily implies the creation of that immunity. The same considerations influenced the view recently acted on by this Court in the Sealord case, *Te Runanga O Wharekauri Rekohu Inc. v. Attorney-General* (C.A. 297/92, judgment 3 November 1992), that public policy requires that a representative chamber of Parliament should be free to determine what it will or will not allow to be put before it; and that Ministers of the Crown

must be free to determine, according to their view of the public interest, what they will invite the House to consider.

The second source is article 9 of the Bill of Rights 1689, declaring:

**Freedom of speech.** - That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

That article reflected the eighth grievance recited in the Declaration of Right earlier in the year - the prosecution in the King's Bench of suits only cognisable in Parliament, as in *Eliot's* case (1629) 3 St.Tr. 294. But it has not infrequently been given as the ground also of the immunity of members from civil proceedings for defamation based on their speeches in the House: see for example the judgment of Palles C.B. in *Dillon v. Balfour* (1887) 20 L.R.Ir. 600.

The third source lies in the conventions applying to the relationship between the Courts and Parliament. The legislative, executive and judicial arms of the state do not intrude into the spheres of one another except when that is essential to the proper performance of a constitutional role. There is a principle of mutual restraint.

In combination these three sources have led in the United Kingdom to well-known judicial statements to the effect that whatever is done within the walls of a House of Parliament must pass without question in the Courts: *Stockdale v. Hansard* (1839) 9 A. & E. 1, 193, 243; *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 271 *passim*. Subject to some refinements apparently not relevant in this case, the same approach has predominated in Australia: *Sankey v. Whitlam* (1978) 142 C.L.R. 1, 37; *Mundey v. Askin* [1982] 2 N.S.W.L.R. 369, 373; *Comalco Ltd*

*v. Australian Broadcasting Corporation* (1983) 78 F.L.R. 449; *Amann Aviation Pty Ltd v. Commonwealth of Australia* (1988) 19 F.C.R. 223. Those overseas authorities indicate that examination of the motives for parliamentary speeches or proceedings is not embarked upon by the Courts. In citing the overseas authorities I have omitted *R. v. Secretary of State for Trade, ex p. Anderson Strathclyde plc* [1983] 2 All E.R. 233, to which the argument of the *amici curiae* gave some prominence in the present case, because as far as relevant that particular English decision has been overruled by the House of Lords in *Pepper v. Hart* [1993] 1 All E.R. 42, 68.

The general English approach is well settled and the general Australian approach fairly well settled. There is insufficient reason for a different general approach in New Zealand in stating the current law. Nor is anything to be gained by seeking to distinguish between the three contributing origins of that law. The English Bill of Rights 1689 (or 1688) was intended to be declaratory. Perhaps the parliamentary privilege from 'questioning' of debates and proceedings has come to be established on an unnecessarily wide basis, a point to which I must return. But established on a wide basis I think it is.

The very general language of article 9 of the English Bill of Rights has given rise to problems. It has been pointed out that if 'questioned' is given a wide meaning, 'impeached' is unnecessary; but tautology for the sake of emphasis is common enough in general affirmations of rights. There is now no doubt that Hansard may be referred to, for sufficiently strong reason, as an aid to the interpretation of the intention expressed by Parliament in an Act: see in New Zealand for instance *Marac Life Assurance Ltd v. Commissioner of Inland Revenue* [1986] 1 N.Z.L.R. 694, 701, 708, 713, 716, 718, and in England *Pepper v. Hart*,

already cited. I adopt as correct the following passage in the written submissions presented to this Court by the Attorney-General:

... Article 9 of the Bill of Rights does not impose a blanket ban on the admission of evidence of debates or proceedings in Parliament. Such evidence is admissible provided it is used consistently with Article 9 when used -

1. to prove material facts, such as the fact that a statement was made in Parliament at a particular time, or that it refers to a particular person. [*Hyams v. Peterson* [1991] 3 N.Z.L.R. 648, 656; *New South Wales Branch of the Australian Medical Association v. Minister of Health* 26 N.S.W.L.R. 114.]
2. for the purpose of proving that a Government decision was announced in Parliament on a particular day; [*Roman Corporation v. Hudsons Bay Oil and Gas Company* [1993] S.C.R. 820.]
3. in order to establish that a member of Parliament was present in the House and voted on a particular day; [*Forbes v. Samuel* [1913] 3 K.B. 706.]
4. to establish that a report of parliamentary debates corresponds with the debate itself and is fair and accurate and therefore attracts qualified privilege in the law of defamation; [First Schedule to the Defamation Act 1954].

...

The courts have also resorted to reports of debates for the purposes of interpreting statutes. This use has been assumed not to be contrary to the Bill of Rights and nothing in this submission is intended to challenge that practice.

Nor does the admission of debates in legal proceedings depend upon the leave of the House being first obtained. The practice (such as it is) of obtaining leave from the House to introduce evidence of debates in court has nothing to do with the use to which such debates may be put.

There is at least one statutory exception to the privilege of freedom of speech contained in the Bill of Rights. This concerns any person giving false evidence on oath to the House of Representatives or a committee of the House with intent to mislead it. Such a person commits the offence of perjury (section 108 of the Crimes Act 1961). Article 9 therefore, does not in the public interest prevent a trial of perjury involving evidence given to the House or a committee.

Beyond that point the question becomes more difficult. It seems clear that Browne J. was right in holding in *Church of Scientology v. Johnson-Smith* [1972] 1 Q.B. 522 that Hansard extracts cannot be read to support an allegation of express malice, advanced to refute a defence of fair comment in an action against a member based on his statements outside Parliament; but, in the light of what was said by Lord Browne-Wilkinson with the concurrence of other members of the House of Lords in *Pepper v. Hart* at p.68, the *Scientology* case can be taken no further. In *Rost v. Edwards* [1990] 2 Q.B. 460, 475, Popplewell J. found himself constrained by authority to hold that the privilege is violated if the Court seeks to ascertain not only what happened in the House but why it happened, although he would have preferred to limit the privilege to cases of allegations of improper motives. His actual decision appears consistent with Lord Browne-Wilkinson's observations in *Pepper v. Hart* on the same page:

In my judgment, the plain meaning of art. 9, viewed against the historical background in which it was enacted, was to ensure that members of Parliament were not subjected to any penalty, civil or criminal, for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed. Relaxation of the rule will not involve the courts in criticising what is said in Parliament. The purpose of looking at Hansard will not be to construe the words used by the minister but to give effect to the words used so long as they are clear. Far from questioning the independence of Parliament and its debates, the courts would be giving effect to what is said and done there.

With regard to the *obiter dicta* in *Rost v. Edwards*, however, I respectfully doubt whether the prohibition on examination of motives should be held to apply only when impropriety is alleged. I agree that, as the law has evolved, any scrutiny of a member's motives for speaking or voting in a certain way has to be seen as contrary to the privilege, whether or not the motives are suggested to be improper; and I am disposed to think that it might well be too late to take a narrower approach at any judicial level. That is different from considering what was said as an aid to determining the purpose and meaning of an Act. But in the instant case propriety is sufficiently in issue to make a decision on the point unnecessary.

In *R. v. Murphy* (1986) 5 N.S.W.L.R. 18, Hunt J. held that a member of Parliament giving evidence when charged with a criminal offence could be asked whether he had made a prior inconsistent statement to a Committee of a House of the legislature. That decision was not followed by Carruthers J. in *R. v. Jackson* (1987) 8 N.S.W.L.R. 116 and was in effect abrogated by the Commonwealth of Australia Parliament in the Parliamentary Privileges Act 1987, s.16. I would join the ranks of those who have not been persuaded that *R. v. Murphy* is a sustainable decision.

The views that I have been expressing are directed to the present law and are much influenced by the wide interpretation that has traditionally been given to article 9 of the English Bill of Rights. It is not to be overlooked that the approach of the House of Lords in *Pepper v. Hart* and what has been held or said by Hunt J. in New South Wales and Popplewell J. in England point in the direction of narrowing the privilege somewhat.

The 1992 Report in Western Australia of the Royal Commission into Commercial Activities of Government and other Matters, paragraphs 5.8.4 to 5.8.8,



discusses the issue of public policy. The Commission find 'puzzling' the distinction between questioning what is said in Parliament in a Court and questioning the same conduct elsewhere - for instance in the media. While accepting that what is said in Parliament should not be actionable, they consider that members of Parliament or persons appearing before a parliamentary committee should be 'accountable'; and that, subject to the absolute privilege for defamation, proceedings in Parliament should be open to question in a Court or like place. 'Indeed, we are of the view that the present construction of that portion of Article 9 of the Bill of Rights is fundamentally inconsistent with the right of all citizens to subject their parliamentary representatives to scrutiny, and to be governed in an open and accountable manner'.

These currents of opinion are significant, but I do not think that they could justify a reinterpretation of article 9 which would of itself take what was said in the House by the plaintiff and other Ministers outside the scope of the privilege for the purposes of the defence in the present case. If the defendant were to be held free to have parliamentary debates and proceedings examined at a trial of this action, it would have to be on other grounds.

The argument presented to this Court by Mr Tizard for Television New Zealand naturally built on cases where in an action for defamation brought by a member of Parliament the Court, in adjudicating on a defence, has allowed to be examined what the plaintiff said in the House. Thus in *Adam v. Ward* [1917] A.C. 309 the House of Lords undoubtedly examined in a critical way the plaintiff's statements in the House of Commons, in determining whether a defence of qualified privilege, based on rebuttal of his attack in the House, could be raised to his action on an extra-parliamentary publication. The uncompromising nature of that examination is sufficiently illustrated by Lord Finlay L.C.'s description of the

attack made by the plaintiff in the House as made 'for an indirect purpose' and 'unfounded': Lord Dunedin's comment, following his examination, 'Do what you will, the stern chase after a lie that has got the start is apt to be a long one': and Lord Atkinson's description of the appellant's speech as 'this vile slander'. See [1917] A.C. at 312, 324 and 341. Similarly in the Court of Appeal in that case Buckley L.J. spoke of 'the duty of communicating to the public the antidote to the poison which Major Adam had administered' (31 T.L.R. 299, 304).

In *News Media Ownership v. Finlay* [1970] N.Z.L.R. 1089, our predecessors in this Court, North P., Turner and McCarthy JJ., considered the tenor and content of the plaintiff's statements in the House of Representatives in assessing the defendant newspaper's defence of provocation. The Court accepted that it was open to the defendant to invite the jury, when considering damages, to take an adverse view of the plaintiff's speech. It is hard to see that this would not be a 'questioning'. The essence of the judgments was that, comparing the plaintiff's speech with the defendant's article, the jury could take the view that the speech was provocative but that the article had gone too far in response.

It can be said that in neither *Adam v. Ward* nor *Finlay's* case was the parliamentary privilege point taken. But the same cannot be said of *Wright v. Lewis* (1990) 53 S.A.S.R. 416. There the South Australian Supreme Court *in banco* held that a newspaper and a writer of a letter to it could prove the plaintiff's statements in Parliament in support of their defences of justification of a counter-attack. The judgments of the three members of the South Australian Court contain valuable reviews of the authorities and considerations. I will not attempt selective quotations.

The arguments in this Court covered a range of materials much wider than those to which I have expressly referred. It has been necessary to consider them, but the foregoing will serve to bring out the essential factors to be weighed.

The conclusion which seems to me right and sufficient to dispose of the present case is that there can be no departure from or undermining of the principle that a member is absolutely protected from defamation proceedings for anything said by him in the House. In any event, for proceedings commenced after 1 February 1993 that is now in effect expressly enacted by s.13 of the Defamation Act 1992. Further, as already indicated, the view to which I incline is that in proceedings not initiated by the member the Court should not examine (at least in the absence of waiver) the motives which have led him or her or any other member to make any statement in the House. That would amount to forbidden 'questioning'. The position is somewhat different if the member initiates proceedings by bringing an action for defamation in which the defendant reasonably wishes to rely for or as part of his defence on statements in the House. In that event I think that the plaintiff, if he pursues his action when faced with that defence, must be held to waive his personal privilege. Otherwise, as King C.J. put it in *Wright's* case at 421, there would be a gross distortion of the law of defamation: the defendant could not establish or would be severely handicapped in establishing truth or fair comment or qualified privilege. To hold that a newspaper or a broadcaster or any other member of the public could not prove the truth or fairness of a statement about what a member of Parliament has said in Parliament, even when sued by that member, would be a gross restriction on freedom of speech. In my opinion it would be contrary to the New Zealand Bill of Rights, a point to which I shall return shortly.

But it must be remembered that the privilege is not that of the plaintiff only. Sometimes eminent authorities have said that the privilege belongs only to the House as a whole - on which view only the House could waive it. I respectfully disagree, as it seems clear that the individual members also have privileges. It would be odd and unacceptable in a democracy if the House could resolve against an individual member's wishes that he or she be deprived of his or her defence of absolute privilege. Further, s.242(1) of the Legislature Act 1908 provides that the House of Representatives and the Committees *and members* thereof shall enjoy the like privileges as on 1 January 1865 were enjoyed by the Commons House of Parliament of Great Britain and Ireland, and by the Committees *and members* thereof (with immaterial qualifications). Our legislation thus recognises individual as well as collective privileges.

The fact remains that the House collectively has a privilege as well as the individual members. If the House or any individual members concerned assert those privileges, the proper course for the Court will be to give effect thereto. There are cases, however, where the House elects not to assert its privilege or the Court has apparently assumed that it is content not to do so. That may explain *Adam v. Ward* and *News Media Ownership v. Finlay*. Another view is that the House of Lords and the Courts below in England and the Court of Appeal and the trial Judge in New Zealand all acted *per incuriam* in those two cases. But *Adam v. Ward* was argued by the Law Officers of the Crown, the Attorney-General and the Solicitor-General, and it is difficult to accept that the point was overlooked.

Be that as it may, I agree with the view implicit in the judgments of Popplewell J. in *Rost v. Edwards* ([1990] 2 Q.B. at 475) and Hungerford J. in *New South Wales Branch of the Australian Medical Association v. Minister of Health* (1992) 26 N.S.W.L.R. 114, 129, that it is competent for the House to waive its

privilege. See also Browne J.'s observations in the *Scientology* case [1972] 1 Q.B. at 531. The very general language of article 9 of the Bill of Rights was not directed to the question of waiver and need not be interpreted to exclude that possibility. There could well be occasions when the House wishes examination of its proceedings not to be stifled. *Adam v. Ward* certainly suggests as much. The occasions might be rare but cannot sensibly be defined in advance. As long as waivers are required from the House and the individual members concerned, no public interest is imperilled. To hold remorselessly that there can be no waiver would be needlessly to deprive the House and its members of possibly useful rights. Moreover it seems doubtful whether a House of the legislature, as that House happened to be constituted for the time being, could finally decide that no power of waiver exists. Just as one Parliament cannot bind its successors, so it may be that one House of Parliament cannot bind its successors.

As to other individual members, the particulars in this case refer to things said or done by the Right Hon. David Lange, the Right Hon. Sir Geoffrey Palmer, the Right Hon. Michael Moore, and the Hon. Sir Roger Douglas. Some of these may fall within the scope of 'proceedings in Parliament', an expression of unsettled ambit: see *In re Parliamentary Privilege Act, 1770* [1958] A.C. 331, 342, 353; *Rost v. Edwards, supra* at 477-8.

Rather than dealing with the problem by allowing for waiver, it may be maintained that counter-attack cases constitute a special category outside the scope of the privilege altogether. But that would be a more extreme solution; and, as in effect the Attorney-General and Mr Tizard were for different reasons agreed, it would not seem either logical or satisfactory.

In this case the House of Representatives has not waived its privilege. On the contrary the Attorney-General with the leave of the House has come to Court to claim it. That the House and its Privileges Committee may have been instigated by the plaintiff, by approach to the Speaker, to take this stand is beside the point. It is to be assumed that the House of Representatives has authorised the point to be taken for solid reasons. Indeed the very fact that it has done so tends to emphasise that the defence is manifestly questioning parliamentary speeches and proceedings. The privilege should therefore be held to prevent the defendant from relying on the particulars of parliamentary statements and proceedings put forward in the statement of defence.

The question becomes what effect this has on the future of the action. It is possible to envisage a case in which the inadmissible particulars are so minor in the context of the litigation as a whole that they may be struck out without staying the proceeding. Or a defendant might plead parliamentary matters unnecessarily, with an eye to achieving a stay of the action. The Court has to be alert to guard against such possibilities. But the present case is not in my view within either of those categories. Numerically (on any count) the inadmissible particulars are not a major part of the pleaded defences, yet what was said and done in the House of Representatives in the relevant years is very close to the core of this highly political case. One of the defendant's purposes forecast in the particulars is, as Mr Tizard put it during the argument, to show that the plaintiff was saying one thing in the House but doing another. The sincerity of some of the plaintiff's statements in the House is thus called in question. But a more far-reaching examination is called for by the defence. Certainly at this stage the Court is not entitled to dismiss the pleading as not made seriously or in good faith, or as prompted by purely tactical and flimsy reasons. The challenge can be seen as being to nothing less than the sincerity of a major part of a Government's economic policy and legislative

programme over a period of years. A defamation action by one ex-Cabinet Minister claiming damages from a broadcasting organisation is hardly a suitable vehicle for such an inquiry. To exclude scrutiny of what took place in Parliament could make the trial even less apt.

Obviously the Courts should not avoid their responsibility of adjudicating on issues between litigants merely because they touch on political matters. Still, there are some cases where the law and the constitutional conventions regulating the relationship of the legislative and judicial arms of the state are such that the Courts should refrain from potentially critical scrutiny of the legislative process or statements in the House or matters closely connected therewith, unless the House and the members concerned do not wish to invoke the privilege. If justice cannot otherwise be done, the action should then be stayed. Crown counsel accepted that there may be cases where a stay is appropriate. In my opinion this case is peculiarly in that class. It is impossible to be confident that justice can be done if the Court is precluded from any close examination of Parliamentary debates or proceedings. That is the dominant consideration in this case. The plaintiff's proceeding for damages should be stayed unless and until the House of Representatives and any individual members concerned waive privilege. The individual members are those present or former members named in any particulars referring to statements or proceedings in Parliament.

This answer does not entirely accord with the approach of the South Australian Supreme Court in *Wright v. Lewis*. There it was said that incapacity to maintain an action in the Courts in respect of defamatory statements which constitute contempt of Parliament would be a considerable deprivation of a member's civil rights: see 53 S.A.S.R. at 422. That is so, but it is a question of balance. A member enters Parliament with the great advantage of absolute privilege

for his statements there. It is not unreasonable that, without the waiver of the House and those of his colleagues who may be involved, he should not at the same time enjoy the right to sue persons outside Parliament for statements relating to his parliamentary remarks, if a fair trial for the defence involves examination of the motives for those remarks.

Petitioning the House for leave to refer to its proceedings in Court is an available practice in New Zealand and the United Kingdom: see P.A. Joseph, *Constitutional and Administrative Law in New Zealand* (1993) 374-5; Erskine May, *The Law, Privileges, Proceedings and Usage of Parliament*, 21st ed. (1989) 758-63. If the plaintiff wishes to pursue his defamation proceedings, one way of seeking a waiver of privilege by the House would be a petition by him.

On the views I have already expressed, he will also require waivers from the other individual members concerned. All in all, therefore, he will be faced by formidable obstacles, perhaps insuperable. The case is not a relatively simple one like *Adam v. Ward* and the others where only one member has been involved. But in a democracy a price has to be paid for freedom of speech both in and out of Parliament. I would, however, reserve to the plaintiff the right to apply to the High Court for leave to continue his action if all apparently necessary waivers are not forthcoming. The reason for that reservation is that a situation could arise in which it could be found that inability to question the words or actions of a very limited number of other members would not materially prejudice the defendant. The particulars were not examined in that light in the argument before this Court.



### **The New Zealand Bill of Rights**

The New Zealand Bill of Rights Act 1990 is of assistance on this whole matter. Section 14 affirms:

**14. Freedom of expression** - Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.

Both a member of Parliament and an outside commentator on his or her performance have rights under s.14. They have to be reconciled as practically as possible. In working out the common law in this field regard has to be had to s.5, which allows for such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Article 9 of the Bill of Rights 1689 (or 1688) is in force in New Zealand by virtue of the Imperial Laws Application Act 1988, s.3 and First Schedule. It is in my view an 'enactment' within the meaning of s.6 of the New Zealand Bill of Rights Act. Therefore, if it can be given a meaning consistent with the rights and freedoms contained in our Act, that meaning shall be preferred to any other meaning. Article 9 need not be interpreted in a way leaving a member of Parliament free to sue a person in circumstances which would severely limit that person's rights under s.14. Although separated by three centuries, the English Bill of Rights and the New Zealand Bill of Rights are capable of operating together to produce a fair result. This case is so highly charged with parliamentary political content that I cannot avoid the conclusion that the fairest result at this stage is a stay of proceedings, not overlooking that a stay could possibly prove permanent.

### Evidence of Reputation

If the House of Representatives and the other individual members whose waiver is needed do not waive privilege, the issues in the other two appeals will be academic. But to avoid any need to come to this Court on them again I would dispose of them as follows.

As to evidence of reputation, the defendant pleads:

**19. IF** the meanings are as alleged by the Plaintiff (which is denied) then the Plaintiff has suffered no damage by reason of the publication by the Defendant as alleged **AND THE DEFENDANT HEREBY GIVES NOTICE** that at the trial of this proceeding the Defendant will adduce evidence of the Plaintiff's bad reputation as a politician. That reputation includes that of being hated; a liar; dishonest; a thug; a back stabber; a street fighter; a bully; a mad dog; a breaker of promises; arrogant; pushy; offensive; belligerent; hysterical; threatening; uncontrollable; undemocratic; intimidatory.

The Judge struck out the references to evidence of alleged bad reputation as a politician that the plaintiff is *hated, a thug, a back stabber, a street fighter, a bully, a mad dog, arrogant, pushy, offensive, belligerent, hysterical, threatening, and intimidatory*. In doing so he acted in accordance with the principle that only reputation in the sector of the plaintiff's life relevant to the alleged defamation will be allowed. The more recent authorities to that effect include *Plato Films Ltd v. Speidel* [1961] A.C. 1090, *Jorgensen v. New Zealand Newspapers Ltd* [1974] 2 N.Z.L.R. 45, and *Pamplin v. Express Newspapers Ltd* (No. 2) [1988] 1 All E.R. 282. In New Zealand the Defamation Act 1992, which does not apply to proceedings (like the present) commenced before it came into force, provides in s.30:

**30. Misconduct of plaintiff in mitigation of damages -**

In any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate.

In allowing evidence of specific instances of misconduct, this is intended to be a change in the law; but the phrase 'the aspect to which the proceedings relate', also used in s.40 in a requirement of pleading, reflects the existing law.

Identifying the relevant area of conduct may be difficult, as Viscount Simonds recognised in *Plato Films Ltd v. Speidel* at 1124-5. In the same case Lord Denning put it at 1140, in a way probably deliberately allowing for a degree of judicial judgment on the particular facts, -

When evidence of good or bad character is given, it should be directed to that sector of a man's character which is relevant. Thus, if the libel imputes theft, the relevant sector is his character for honesty, not his character as a motorist. And so forth. It is for the judge to rule which is the relevant sector.

In this case Smellie J. identified the plaintiff's performance as Minister of State-Owned Enterprises as 'the sector of his life and career as a politician which has primary relevance to the libel complained of'. If meant as a limiting criterion, that would be too narrow. Many people do not carefully distinguish in their opinion of a prominent politician between performances in various portfolios. The political image is of the person rather than the office-holder.

Miss Moran submitted that the relevant sector here is the plaintiff's reputation as a politician, pointing out that all the epithets pleaded are expressly limited to that sector. But the plaintiff claims, and understandably so, that the programme attacked his probity as politician. There is a broad difference between,

on the one hand, allegations of disagreeable characteristics such as arrogance or belligerence and, on the other, allegations of want of integrity. If a politician was generally reputed to be a bully, a reasonable jury should not on that account reduce any damages awarded to him for being falsely called dishonest. Some of the alleged descriptions struck out by the Judge are capable of relating to the sting of the libel, namely *a thug, a back stabber, a street fighter*: these can all suggest something underhand. *Hysterical* can just be admitted in the context of a claim that the programme meant that the plaintiff was so worried that he arranged for papers to be shredded. I would therefore restore the words just italicised, leaving struck out as not within the relevant sector *hated, a bully, a mad dog, arrogant, pushy, offensive, belligerent, threatening, intimidatory*.

There is an unacceptable risk that, if allowed to give evidence, purportedly in mitigation of damages, that the plaintiff had a reputation for any of these latter qualities, the defendant might be able to divert the course of the trial from the true issues. And even as to the alleged qualities left in, the trial Judge will be entitled to exclude evidence which, as the trial develops, emerges as a distraction rather than a legitimate exercise of defence rights. On this whole matter also, it will be advantageous that, as shortly to be explained, any trial should be by Judge alone.

Let it be added that the wording of the defendant's pleading might be found gratuitously offensive. If the case does go to trial, that is a risk which the defendant will have to face should any assessment of damages be required.

### Mode of Trial

With respect, I am unable to agree with the decision in the High Court that trial by Judge alone ought to be refused. The Judge's description of this case as 'nothing markedly out of the ordinary' is unexpected. One can understand that, as he said, he would welcome the help of a jury on a problem on this kind. But that is not the test. On the pleadings as they stand - and my view is confined to the existing pleadings - the issues arising include whether some major state assets were sold at an undervalue. While a broad-brush approach can be taken to such an issue, the plaintiff is entitled if he wishes to an investigation in depth. Difficult questions in relation to business matters, involving an investigation which cannot conveniently be made with a jury, are likely to arise. In terms of s.19A(5)(b) of the Judicature Act 1908 there is strong ground for ordering a Judge-alone trial. The English *dicta* cited in the judgment under appeal were not directed to the New Zealand statute and do not persuade me that a trial with a jury would be likely to do justice in this altogether unusual case. The plaintiff's appeal from this ruling should be allowed.

In the result I would dispose of the appeals by varying the ruling as to parliamentary privilege by ordering on the defendant's appeal that the proceeding be stayed unless and until privilege is waived by the House of Representatives and any individual member or former member thereof whose words or actions in Parliament are questioned in the defence. The right should be reserved to the plaintiff, however, to apply to the High Court for leave to continue the action on the grounds specified on p.17 of the present judgment.

To bring the case to a head, any waiver of privilege should be within three months of the delivery of the present judgments in this Court; otherwise, subject to the right reserved, the stay should be permanent. The defendant's appeal

as to the permissible extent of evidence of reputation should be allowed in part. The plaintiff's appeal as to the mode of trial, if there is a trial, should be allowed and trial by a Judge alone ordered. All questions of costs should be reserved.

In accordance with the opinion of the majority of the Court, the appeals will be disposed of by orders as just stated.

*R.B. Cooke P.*

Solicitors:

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R.D. Ganda, Auckland, for R.W. Prebble

Crown Law Office, Wellington, for *Amici Curiae*

BETWEEN    TELEVISION NEW ZEALAND LIMITED

Appellant

A N D        RICHARD WILLIAM PREBBLE

Respondent

BETWEEN    RICHARD WILLIAM PREBBLE

Appellant

A N D        TELEVISION NEW ZEALAND LIMITED

Respondent

Coram:        Cooke P  
                  Richardson J  
                  Casey J  
                  Gault J  
                  McKay J

Hearing:      2, 3, 4 and 5 November 1992

Counsel:      J W Tizard and Sandra Moran for Television New Zealand Limited  
                  A R Galbraith QC and Deborah Hollings for R W Prebble  
                  The Attorney-General, Hon P C East MP and J C Pike as *Amici Curiae*

Judgment:    14 May 1993

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**JUDGMENT OF RICHARDSON J**

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Article 9 of the Bill of Rights Act 1989 declares:

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

This appeal is concerned with the use of speeches in the House of Representatives in defending a defamation claim brought against Television New Zealand Ltd by a member of Parliament. It turns on the constitutional role of Parliament and the relationship between the legislative and judicial branches of government. Although it raises questions of great constitutional significance there are two related reasons why it is unnecessary to undertake a comprehensive assessment of Article 9 and of those large constitutional questions in various Commonwealth countries.

The first is that at the heart of the enquiry is the identification and weighing of relevant public policies. Different strands in judicial thinking and in expressed attitudes of legislatures in other jurisdictions are attributable to differing perspectives reflective of the range of values and different experiences in those societies. There are no New Zealand cases in point where these questions of high public policy have been canvassed. In these circumstances there is every justification for New Zealand judges to seek to apply first principles in a straight forward way.

The second is that on the facts this is a highly unusual, if not unique, case. Unlike so many of the cases in other jurisdictions discussed in argument it is not concerned with a single speech in the House. Mr Prebble's claim is that the Frontline programme entitled "For the Public Good" broadcast by Television New Zealand alleged that he conspired with certain New Zealand business leaders and others to sell State assets at low prices in return for political donations. In turn Television New Zealand defends averring that the programme was not defamatory of Mr Prebble given his reputation which it puts in issue. It also contends that, if otherwise defamatory, what it published in the programme was true or constituted fair comment and was protected by qualified privilege because it was published in good faith on matters of public interest and concern.

Clearly the proceedings will be concerned not simply with Mr Prebble's conduct although that aspect is important in view of his seniority in Government and particular Ministerial responsibilities. They will inevitably involve extended consideration of the policies adopted by the Fourth Labour Government in relation to the sale of State assets and their implementation in the broad context of the economic policies of the Government during its two terms of office 1984-1990.



The 100 pages of particulars pleaded by Television New Zealand bring out the depth of the intended defence, contrasting the conduct and statements of Mr Prebble and others inside and outside the House in relation to the privatisation of State assets and detailing the processes actually adopted in securing the passage of relevant authorising legislation.

**Parliamentary privilege:**

Against that background the rights, powers and privileges of the House of Representatives in its corporate capacity become a primary consideration in this case. As Popplewell J emphasised in *Rost v. Edwards* [1990] 2 QB 460, 467, the courts must always be sensitive to the rights and privileges of Parliament and the constitutional importance of Parliament's retaining control over its own proceedings. The rule which has emerged is that it is for the courts to determine whether a particular privilege exists and for the House to be the judge of the occasion and of the manner of its exercise (*R v. Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162; affirmed (1955) 92 CLR 171, 172 (PC); and for Parliamentary recognition see The Report of the Privileges Committee (1986-87) AJHRI 15 cited in *Chen & Palmer*, Public Law in New Zealand 742, 745). Whether put in terms of the inadmissibility of evidence or of a refusal to allow the proceedings in Parliament to be the subject of any submission or inference (cf *Finnane v. Australian Consolidated Press Ltd* (1978) 2 NSWLR 435, 438 and *Comalco v. Australian Broadcasting Corporation* (1983) 50 ACTR 1, 5) the Court is complying with the law of the privileges of Parliament. In accordance with established practice the Attorney General and Mr Pike appeared in the High Court pursuant to leave granted to them by the House in that regard. They did so to assist the High Court in determining whether Television New Zealand could rely on statements made by the plaintiff and others in the House of Representatives.

**Parliamentary privilege: statutory foundations**

Parliamentary law is part of the Law of New Zealand. The statutory foundations for parliamentary privilege are s242 of the Legislature Act 1908 and Article 9 of the Bill of Rights Act 1689 (UK) which s3(1) of the Imperial Laws Application Act 1988 recognises as part of the Laws of New Zealand. Section 242(1) provides:

The House of Representatives and the Committees and members thereof shall hold, enjoy and exercise such and the like privileges,

immunities, and powers as on the 1st day of January 1865 were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the Committees and members thereof, so far as the same are not inconsistent with or repugnant to such of the provisions of the Constitution Acts as on the 26th day of September 1865 (being the date of the coming into operation of the Parliamentary Privileges Act 1865) were unrepealed, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, statute, or otherwise.

Subsection (2) goes on to deem such privileges, immunities and powers to be part of the general and public law of New Zealand. Before 1865 the privilege attaching to freedom of speech in the House was expressed directly and succinctly in s6 of the Privileges Act 1856 which provided:

All words spoken by any Member of any Legislative Body in his place therein or in any Committee thereof ... shall be taken and deemed to be words spoken ... under privilege.

Had that provision still been in force it would have reduced the debate over the true interpretation of the more generally expressed Article 9 of the Bill of Rights.

To complete the picture I should add that Order 1 of the Standing Orders of the House of Representatives relating to public business records that nothing in the Standing Orders shall diminish or restrict the rights, privileges, immunities and powers of the House, and that in terms of Order 16 the newly elected Speaker presents himself or herself to the Governor General and lays claim to the privileges of the House "especially to freedom of speech in debate ... and that the most favourable construction may be put on all its proceedings".

#### **Two categories of privilege:**

It is clear from s242 that the privileges of the House are not confined to those possessed or enjoyed by virtue of Article 9. They extend to those privileges, immunities or powers held, possessed or enjoyed by the British House of Commons in 1865 by custom, statute or otherwise. It is a feature both of Article 9 and of historical and contemporary statements of the privileges that they fall into two categories: those concerned with the speech and conduct of individual members and those concerned with the collective or corporate functions of Parliament. In that regard Order 423 of the Standing Orders providing for the appointment of the Privileges Committee speaks of "the privileges of the House or the members

thereof". That distinction is also reflected in the discussion in *Erskine May, Parliamentary Practice* (21st ed, 92, of "proceedings" in the context of Article 9. The author notes that its primary meaning, as a technical parliamentary term, is some formal action taken by the House in its collective capacity and naturally extending to the whole process, including debate by which it reaches a decision. He goes on to note that an individual Member takes part in a proceeding usually by speech, but also by various recognised kinds of formal action, such as voting, giving notice of a motion, etc. or presenting a petition or a report from a committee, most of such actions being time-saving substitutes for speaking. And the "proceedings" include everything said or done by members in the exercise of their functions as members as well as everything said or done in the House in the transaction of parliamentary business.

This case raises both aspects of parliamentary privilege, but for reasons which I shall come to it is the privilege of the House in its collective or corporate capacity which is determinative.

Viewed from the perspective of the individual member the object of freedom of speech in the House is that the member may speak "with impunity and without any fear of the consequences" (*Sankey v. Whitlam & Ors* (1978) 142 CLR 1, 35 per Gibbs CJ); "to protect [the member] from harassment in and out of the House in his [or her] legitimate activities in carrying on the designs of the House" (*Roman Corporation Ltd v. Hudson's Bay Oil & Gas Co* (1971) 23 DLR 3d 292, 299 per Aylesworth JA); and in institutional terms Erskine May notes (20th ed p77) that freedom of speech is a privilege essential to every free council or legislature. Its contemporary significance lies in its crucial importance to the effective functioning of Parliament. It is at the very heart of the parliamentary process.

While the objects are clear the scope of the privilege and in that regard the meaning of "impeached or questioned" in Article 9 are not clearly settled. The earlier view as expressed in *Blackstone's Commentaries* (1st ed vol 1 pp.158-159) and affirmed in the great cases of *Stockdale v. Hansard* (1839) 9 Ad & El 1; 112 ER 1112 and *Bradlaugh v. Gossett* (1884) 12 QB 271 was that anything arising concerning the House "ought to be examined, discussed and adjudged in that House ... and not elsewhere". That puts the emphasis on Parliament as a whole and brings home the crucial point that the privilege of Parliament is not the privilege of any individual member.

**Privilege: speech and conduct of individual members**

The other perspective is the impact on the individual member reflected in the dicta of Gibbs CJ and Aylesworth JA that a member must have a complete right of free speech in the House without any fear that his or her motives or intentions or reasoning will be questioned or held against him (or her) thereafter (*Church of Scientology of California v. Johnson-Smith* [1972] 1 All ER 378, 381; and *Mundey v. Askin* [1982] 2 NSWLR 369, 373). It is that latter emphasis which may have encouraged some courts to draw a distinction between the use of parliamentary materials for those purposes and their use as a record of events which are not in dispute and are not to be subject to criticism. And the provisions of the Defamation Act 1954 concerning the publication of reports by or under the authority of the House (ss18 to 20) and providing qualified privilege for reports of the proceedings of the House or any committee thereof (s17 and first schedule para 1) recognise that proceedings of the House may be properly reported outside. The Defamation Act 1992 which applies to proceedings commenced on or after 1 February 1993 is to the same effect: see s13 as to absolute privilege in relation to parliamentary proceedings and s16 and Part I of the first schedule as to qualified privilege. In the latter case, to determine whether a publication is a fair and accurate report of parliamentary proceedings it will be necessary for the Court to compare the text of the report with Hansard. In that regard Cockburn CJ speaking in the Court of Queens Bench in *Wason v. Walter* (1868) LR 4 QB 73, 85 said:

There is obviously a very material difference between the publication of a speech made in parliament for the express purpose of attacking the conduct or character of a person, and afterwards published with a like purpose or effect, and the faithful publication of parliamentary debates in their entirety, with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards any one.

Another line of cases has emphasised the limiting language of "impeached or questioned" in Article 9 itself. This was the approach of the House of Lords in *Pepper v. Hart* [1992] STC 898. Lord Browne-Wilkinson put the point shortly at p.921:

In my judgment, the plain meaning of art 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal for what they said and were able, contrary to the previous

assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed.

An Australian judgment to similar effect is that of Hunt J in *R v. Murphy* (1986) 5 NSWLR 18.

But there is another view as to the meaning originally intended to be conveyed by the words "impeached or questioned" and their reach under Article 9. It was expressed by Lord Campion, a former Clerk of the House of Commons, in this way (*Odgers, Australian Senate Practice* (5th ed 1976) 639):

According to the *New English Dictionary*, to impeach, although it now means 'to challenge, call in question, cast an imputation upon, or attack' or 'to discredit or disparage', originally meant 'to impede, hinder, prevent', and it retained this signification at the time the Bill of Rights was passed. It would seem to follow that the privilege of freedom of speech would be infringed, not only by direct proceedings against members for words spoken in Parliament, but by any acts which impede or hinder members in the exercise of, or prevent them from exercising, this privilege.

On one view that might even proscribe any reference to speeches in Parliament as more than an historical record of what was said by a particular member on a particular occasion: knowledge that their speeches could be analysed and commented on outside Parliament could inhibit and affect and so impede or hinder discussion in Parliament. There are recent legislative and judicial reactions in Australia pointing in that direction. In response to the decision of Hunt J in *Murphy* the Commonwealth Parliament promptly enacted s16 of the Parliamentary Privileges Act 1987 which in effect overruled the approach taken in *Murphy* (see *Amann Aviation Pty Ltd v. Commonwealth of Australia* (1988) 81 ALR 710, 715-717). Section 16(1) provides that:

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

Section 16(3) then reads:

In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements,

submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of -

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

The most recent Australian decision is *New South Wales Branch of the Australian Medical Association v. Minister for Health* (1992) 26 NSWLR 11. In that case after reviewing the authorities and referring to the Commonwealth statute, Hungerford J refused to admit in evidence a report of the Public Accounts Committee which was tendered for the purpose of establishing the fact and opinions contained in the report.

That narrow approach does not sit easily with the practical functioning of democratic institutions in New Zealand in the 1990s. In the course of discussion in *Pepper v. Hart* Lord Browne-Wilkinson noted that on the Attorney General's approach the use of Hansard for the purpose of construing a statute would involve an investigation of what the Minister meant by the words he used and would constitute "questioning" the freedom of speech or debate. His Lordship observed (p.921) that:

If the Attorney-General's submission is correct, any comment in the media or elsewhere on what is said in Parliament would constitute "questioning" since all Members of parliament must speak and act taking into account what political commentators and others will say. Plainly art 9 cannot have effect so as to stifle the freedom of all to comment on what is said in Parliament, even though such comment may influence Members in what they say.

In that regard s14 of the New Zealand Bill of Rights Act 1990 affirms the freedom of the media to impart information and opinions and s6 requires that any other enactment, and so including Article 9, should if possible be given a meaning consistent with the maintenance of freedom of expression.

An associated consideration is that Standing Order 54 of the House of Representatives requires that all proceedings of the House be broadcast during all hours of sitting and also states that the proceedings shall be available for television coverage (see also Radiocommunications Act 1989, s177). Live broadcasting and televising under the authority of Parliament have taken us far from the historical position in which the House of Commons prohibited publication of any report of its proceedings. The nature and extent of that publicity should be taken into account in weighing the relevant public policy considerations as they apply in today's society.

Next it is well settled in this country, as has now been recognised in England in *Pepper v. Hart*, that the courts may have recourse to parliamentary history and parliamentary debates to assist in the interpretation of legislation. That is not surprising given that the purpose of interpretation is to ascertain the intention of Parliament.

Finally the counter attack cases are put on the basis that parliamentary privilege would be turned into an instrument of oppression if it operated to prevent a person exposed to an action by a member for defamation from defending himself by proving the truth of the criticism of the statements or conduct of the member (*Wright and Advertiser Newspapers v. Lewis* (1990) 53 SASR 416, 426-427).

Following his review of the cases the Attorney General submitted that what was forbidden was the use of speeches in Parliament to call into question what was said in the House. In my respectful opinion that accords both with the mainstream of recent authority, including *Pepper v. Hart* and *Wright and Advertising Newspapers v. Lewis*, and with the considerations of policy and established practice which I have been discussing.

#### **Privilege: corporate capacity of House**

It is not necessary to explore further any judicial differences relating to the freedom of speech of individual members of Parliament. As noted earlier, the primary concern in this case is the application of the privileges of the House of Representatives in its corporate capacity. Various privileges belonging to the House in that capacity are recognised in the standard texts. Three are particularly relevant to this case. The first is that Article 9 of the Bill of Rights declares that proceedings in Parliament in the wide sense as discussed earlier cannot be impeached or questioned elsewhere than in Parliament. An example in the narrow sense of

proceedings is the statement of principle in *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* [1941] AC 308, 322:

It is not open to the court to go behind what has been enacted by the legislature and to inquire how the enactment came to be made, and whether it arose out of incorrect information, or, indeed, out of actual deception by someone on whom it placed reliance. The court must accept the enactment as the law unless and until the legislature itself alters such enactment on being persuaded of its error.

The second is that Parliament has the right to provide for or institute official enquiries relating to any subject within the legislative competence of Parliament.

The third, which is associated with the first, is that speeches or writings or other conduct reflecting on the proceedings of the House are a violation of the rights and privileges of the House. Such acts tend to obstruct the House in the performance of its functions by diminishing the respect due to it. It is clear from standard texts on parliamentary privilege that contemporary practice recognises that criticism, even if intemperate and wrong-headed, of parliamentary institutions or of the conduct of members should not be stifled unless and until it reaches the point of improper obstruction, or is likely to cause substantial interference with the performance of their functions (*Odgers "Australian Senate Practice"*, p643; see also *Maingot, Parliamentary Privilege in Canada* 214-215). But, as *Maingot* emphasises (p213), bribery of a member is probably the most serious accusation one could make; and to make an accusation that members of a Government have been in receipt of bribes manifestly amounts to a reflection on the House.

A relatively recent case which reflects these three considerations is *British Railways Board v. Pickin* [1974] AC 765. The House of Lords declined to examine proceedings in Parliament in order to determine whether the passing of an Act had been obtained by means of a fraud or an irregularity. Lord Reid accepted that no court of justice could enquire into the manner in which a bill was introduced into Parliament, what was done previously to its being introduced or what passed in Parliament during the various stages of its progress through both Houses of Parliament (p.787); Lord Morris concurred with Lord Reid's conclusions (p.792); Lord Wilberforce emphasised that for a Court to embark on an enquiry of that kind would involve it in a potential clash with Parliament and in a series of steps which could lead to no result (p.796); and Lord Cross said that the Court would not enquire into what passed in the course of the passage of the bill through Parliament



(p.802). Lord Simon put the matter squarely in terms of the Bill of Rights, holding that the issues "would not be fairly tried without infringement of the Bill of Rights and of the general parliamentary privilege which is part of the law of the land" (p.799). He continued (p.800):

A further practical consideration is that if there is evidence that Parliament may have been misled into an enactment, Parliament might well - indeed, would be likely to - wish to conduct its own enquiry. It would be unthinkable that two enquiries - one parliamentary and the other forensic - should proceed concurrently, conceivably arriving at different conclusions; and a parliamentary examination of parliamentary procedures and of the actions and understandings of officers of Parliament would seem to be clearly more satisfactory than one conducted in a court of law - quite apart from considerations of parliamentary privilege.

#### **The pleadings:**

In his third amended statement of claim Mr Prebble pleaded that the words of the Frontline programme and accompanying pictures and sound material combined to convey to the ordinary viewer of the programme in their natural and ordinary meaning in the context of the programme as a whole and were understood to mean:

- (a) That the plaintiff as a highly placed politician had secretly conspired with certain highly placed businessmen ("business leaders") and public officials, (including heads of SOE's and government departments; senior civil servants and ex-treasury officials) ("public officials") in New Zealand to promote and implement state asset sales with the object of providing the said business leaders with a once in a lifetime opportunity to dip into the "public treasure chest" and obtain assets on unduly favourable terms to them and that this was the dark side of New Zealand politics.
- (b) That these state-owned assets were so sold under this conspiracy pleaded in para 9(a) above to which the plaintiff was a party on such favourable terms that the said business leaders actually scrambled or queued up to obtain transfers of these assets to themselves.
- ...
- (e) That in order to promote this improper conspiracy the plaintiff proposed "to get rid of the chairman, Hugh Fletcher, and the Managing Director Norman Geary" and replace them "with Merchant Banker, David Richwhite, and Bob Matthew, a Brierley

representative" as he, the plaintiff intended and was successful in bringing about that the Brierley's consortium would purchase Air New Zealand. This was an example of the manipulative and dishonest manner in which the plaintiff went about effecting this improper conspiracy in relation to the selling of state-owned assets to big business.

...

- (j) The plaintiff entered into understandings with business leaders to promote policies that he would not otherwise have espoused so as to obtain donations from those business leaders for election campaigns.
- (k) As Minister for State Owned Enterprises and a member of Cabinet the plaintiff promoted and implemented the sale of state assets because of an understanding he had with business leaders to repay them for campaign donations.
- (l) He acted in the manner pleaded in (j) or (k) above without any genuine belief that such policies and actions were for the public good.

In response and in support of its plea of justification, Television New Zealand gave detailed particulars. In respect of para (a) the particulars extended over 55 pages and were summarised by Television New Zealand in this way:

In summary, the defendant alleges that the plaintiff (as part of a wider programme) proceeded to implement a policy of selling state-owned assets in circumstances from which it can be inferred that he was party to a conspiracy of the kind he described.

Those circumstances include the fact that such a policy was contrary to the manifestos on the basis of which the plaintiff campaigned in 1984 and 1987; public statements he made and assurances he (and other senior politicians) gave prior to and during the initial implementation of the policy; the opposition to such a policy by his own electorate, the New Zealand Labour Party ("NZLP") and the public; his conduct in suppressing opposition to such a policy; and his attempts to remove from office those he perceived to be opposed to his views; the appointments he promoted in furtherance of the policy; the fact that the policy reflected the views and resulted from the influence of such businessmen and public officials; his association with Roger Douglas and their personal friendship with highly placed businessmen and public officials; the use of consultants on the sale of SOE's where such consultants had a potential financial interest in the implementation of such policies; the size and circumstances of donations made to the 1987 Campaign

Committee of the NZLP; the cessation of sizeable donations to the NZLP from businessmen when they perceived the policy and the wider programme no longer being pursued by the Government of which the plaintiff was a member; the restoration of the plaintiff to Cabinet as Minister of State-Owned Enterprises in January 1990 and the consequent resurgence of the policy; and the announcement of the economic package on 20 March 1990 designed to signal the further implementation of the policy and of the wider programme, and to elicit donations from businessmen for the re-election of the Labour Government in 1990.

In relation to para (j) Television New Zealand averred that Mr Prebble promoted these particular policies in circumstances from which it can be inferred that he did so to secure donations for election campaigns. It went on to particularise those policies in this way:

Those commonly known as "the New Right" which included, inter alia, that the "market" should determine the price of all goods and services, that there should be no or minimal regulatory control of or intervention by the Government in the market or of private enterprise business, that the exchange rate of international currencies should be determined by market forces, that there should be no import barriers in international trade, that Government Departments should adopt business practices and model their administrative structures on the same basis as private enterprise business, that private enterprise businesses would operate and manage trading enterprises then undertaken by Government Departments more efficiently than Government Departments and at less cost to the taxpayer, that trading enterprises undertaken by the Government should be sold to the private sector, that salaries, wages and rates of remuneration should be determined by "the market" being reflected in contracts of employment between individual employers and individual employees and not through a collective bargaining process, and that citizens should be free to conduct their affairs on whatever basis they each should choose with minimal involvement by the State.

In relation to para (l) Television New Zealand averred that from the circumstances in which the plaintiff proceeded to implement the policies, the manner in which he acted, and the consequences of the implementation of the policies, it can be inferred that he had no genuine belief that such policies and actions were for the public good. It went on to particularise those circumstances in essentially the same terms as it had in the summary in relation to para (a) set out above and continued:

The manner in which he acted includes his conduct in suppressing opposition to such a policy; his attempts to remove from office those he perceived to be opposed to his views; and the appointments he promoted in furtherance of the policy;

The consequences of the implementations of the policies include the divisions caused within the NZLP and the plaintiff's own electorate, the unpopularity of the policies and the Plaintiff's own unpopularity in consequence, the sharp increase in unemployment, the greater disparity of incomes of New Zealand, the disadvantaging of provincial and rural areas and of sections of the community.

It is unnecessary for present purposes to refer to the further detail of those particulars or to the particulars in relation to other paragraphs. It is sufficient to note that they name certain business leaders and their appointments under the Fourth Labour Government, detail the parliamentary and other processes affecting Crown assets sales, detail alliances between business leaders, public officials, Mr Prebble and Mr Roger Douglas (for much of the time Minister of Finance), contrast what was done and said with New Zealand Labour Party and Labour Government policies, and list political donations made by specified business leaders and their companies and Crown assets acquired by those companies.

### **Conclusions:**

It is evident from the pleadings that the defamation proceedings are likely to turn into an inquisition on the assets sales policies of the Fourth Labour Government and the implementation of those policies. They are likely to extend more widely to the economic policies of the Government. Given the nature, breadth and detail of the allegations which go to the heart of policy making in government, they could more readily be traversed before a commission of inquiry or in a political forum than in adversarial proceedings in a court of law. As Frankfurter J said in *Baker v. Carr* (1962) 369 US 186, 287 in relation to another public policy concern:

The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of government are made and unmade.

It is also difficult, if not impossible, to see how the issues could be treated fairly without extensive reference to debates in the House and to the proceedings of

Parliament. And, in the words of North CJ in *Barnardiston v. Soame* (1674) 6 State Trials 1063 at 1110:

It cannot be seen whither we shall be drawn, if we meddle with matters of parliament in actions at law.

That parliamentary material is contentious and would inevitably be used directly and by contrast with other evidence to impugn the conduct of Mr Prebble, and in that process other members of the Fourth Labour Government. As the issues in the case now stand they come more within the sphere of the Legislature than of the courts. They bear directly on the privileges of the Legislature in its corporate capacity. It follows in my view that references to material debates and proceedings of Parliament as contemplated in the pleadings would infringe parliamentary privilege.

The Attorney General acknowledged that it might be unjust if Television New Zealand could not adduce evidence of what was said and done in Parliament in support of the plea of justification. He drew attention first to the High Court's inherent jurisdiction to refuse to allow a member of Parliament's action to proceed in such circumstances; and second to the powers of the Parliamentary Privileges Committee to provide an appropriate remedy. Clearly the operation of the parliamentary processes during the term of the Fourth Labour Government is central to Television New Zealand's defence. I am satisfied that the High Court could not fairly hear the case if it could not adequately consider a substantial plea of justification or if it could not properly quantify damages because of its inability to have regard to what was said and done in Parliament.

I would uphold the claim to parliamentary privilege and stay the plaintiff's proceedings. Whether Parliamentary privilege can be waived may be a matter for determination by the House rather than the courts. That would be consistent with the rule that it is for the courts to determine whether a particular privilege exists and for the House to be the judge of the occasion and of the manner of its exercise. So far as I am aware the New Zealand House of Representatives has not formally decided the question of waiver. But in 1980 the Committee of Privileges of the House of Representatives of the Commonwealth of Australia expressed the view that "as a matter of law there is no such thing as a waiver of Parliamentary Privilege" (PP.154 (1980) 6, cited in *Browning, House of Representatives Practice*, 2 ed, 1989, 693). In this country Mr D G McGee, clerk of the House of Representatives, has also taken the view that waiver is not possible ("The Application of Article 9 of the Bill of Rights 1688", [1990] NZLJ, 346, 348).

There was no suggestion in argument that the House would wish to waive privilege if it had power to do so. However, I concur in the proposal of Cooke P that to bring the case to a head any waiver should be within three months of the delivery of the present judgments; otherwise the stay should be permanent. It will be apparent from what I said earlier in the judgment that I consider that the Article 9 privilege in this case is that of the House and representing its members collectively. The ruling of the Speaker of the Commonwealth House of Representatives of 25 September 1952 explains the underlying principle relating to individual acts and speeches in this way:

Each member enjoys an individual privilege which guarantees him certain powers and immunities needful to perform his functions as one of that collective body which is this House. But the privilege becomes a collective privilege in relation to anything said or done in this House in the discharge of his duties and functions. One of the oldest privileges of Parliament and the one most obvious to us all is the privilege of free speech within the chamber. Once something has been said in this House it becomes the collective property of the House, although the responsibility for saying it rests on the member.

*(Odgers, Australian Senate Practice, 5 ed 1976, p.653).*

On the limited argument we heard I am not persuaded that as a matter of law, if the House waives the privilege, the consent of any individual member is also required but as a majority of those who have dealt with the point favour seeking individual waivers I do not dissent from the order proposed by Cooke P.

Finally, if it becomes material I agree with Cooke P's conclusions in relation to the mode of trial and the permissible extent of evidence of reputation.



Solicitors

Oakley Moran, Wellington, for Television New Zealand Limited  
R D Ganda, Auckland, for R W Prebble

BETWEEN TELEVISION NEW ZEALAND  
LIMITED

Appellant

A N D RICHARD WILLIAM PREBBLE

Respondent

Coram: Cooke P  
Richardson J  
Casey J  
Gault J  
McKay J

Hearing: 2, 3, 4 and 5 November 1992

Counsel: J W Tizard and Sandra Moran for Television New Zealand  
A R Galbraith QC and Deborah Hollings for R W Prebble  
Hon P C East MP and J C Pike as Amici Curiae

Judgment:: 14 May 1993

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**JUDGMENT OF CASEY J**

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Mr Prebble issued proceedings claiming that he had been defamed in the appellant's "Front Line" programme of 29 April 1990, alleging that in it he was accused of conspiring with leading businessmen and officials to sell State assets cheaply in exchange for financial support for the Labour Party. The appellant (TVNZ) filed a statement of defence denying the meanings alleged by him and raising the defence of fair comment in pleadings of a kind usually encountered in such actions. The matter was then set down for trial, both sides presumably

accepting it was in all respects ready to proceed. At the eleventh hour, just two weeks before the fixture, TVNZ sought and was granted leave to file an amended statement of defence, running to over 100 pages and pleading truth or justification for the first time, in terms expanding the issues from what promised to be a relatively straight-forward enquiry into Mr Prebble's conduct into a wide-ranging review of the policies and conduct of the fourth Labour Government in its dealings with State-owned assets. There was no appeal from the grant of leave to file that document.

It emerges from these amended pleadings that TVNZ intends to rely on events in the House of Representatives to support its plea of justification. This raises the first and most important question in the present appeal by TVNZ from the judgment of Smellie J ordering the striking out of parts of the statement of defence - that of Parliamentary privilege, in the way described by him in his judgment :

"The two issues of Parliamentary privilege which the case throws up relate primarily to the alleged secret conspiracy. First the defendant pleads and, if permitted, intends to call evidence to show that the Plaintiff and other Ministers of the Fourth Labour Government made statements in the House refuting any suggestion that the sale of state-owned assets was in contemplation when in fact the Plaintiff was already conspiring to that end. Secondly the Defendant similarly pleads and seeks to show that certain legislation was part of the implementation of the conspiracy and some of it was introduced and passed through the House without prior consultation and in a precipitous manner."

The present nature and extent of Parliamentary privilege have been explored in the judgments of Cooke P and Richardson J. I see no need to traverse the same ground because, for the reasons they give, I agree with their conclusions that the privileges of the House of Representatives and of the individual members



thereof prevent the raising in Court of the matters described in the above extract. Those matters cannot be regarded as merely peripheral to the defence of justification, or as a simple recital of historical fact. The statements in the House will be relied on by TVNZ to reinforce the attack made on Mr Prebble's character. To bring them before the Court for that purpose is contrary to Article 9 of the Bill of Rights 1689 and contravenes the absolute privilege for parliamentary statements, long recognised by the Courts - see e.g. *Chenard v Arissol* [1949] AC 127. Further, to raise what other members have said and to suggest the manipulation of legislative procedures for the same purpose must be equally objectionable.

The fact that TVNZ seeks to pray in aid these matters as part of the defence against Mr Prebble's attack is beside the point. Parliamentary privilege is not a rule of evidence capable of being moulded by judicial decision to serve the interests of justice : it is something fundamental to the existence of legislative supremacy. Article 9 declared a principle which the Courts have respected ever since. The paramount consideration is that the House may choose what it wishes to discuss, and that its members (within the confines of its rules) may say what they please, without fear of being impugned in any Court or Tribunal. As was said in *Bradlaugh v Gossett* [1884] 12 QB 271, "Anything arising concerning the House ought to be examined, discussed and adjudged in that House .....and not elsewhere."

As Cooke P observed in his judgment, s242(1) of the Legislation Act 1908 refers to the privileges of the House and the members thereof, indicating that the latter may enjoy the privileges in their own right as well. I agree with his conclusion that where a member initiates defamation proceedings and the defendant wishes to rely on his statements or conduct in the House, then that member could be regarded as having waived his privilege by instituting the proceedings. There seems to be nothing in Article 9 to preclude such a personal waiver, and logic .

suggests that he should have this ability, consistently with the general rule that privilege may be waived by the person for whose protection it exists.

But that is not the end of the matter. Any reflection on a particular member's conduct may also reflect on other members. In the present case, for instance, Mr Prebble is alleged to have spoken and acted as a Minister, and in considering his conduct it would be almost impossible to fix a boundary between matters affecting only his reputation and those affecting the reputations and motives of other members of the House. A member is an integral part of that corporate body, and its privilege must be co-extensive with that of each member, and only the House could waive that. Whether it is able to do so, in view of the peremptory language of Article 9, may properly be a matter for its consideration, but this question does not arise directly in this appeal, since the Attorney-General maintained a claim of privilege in respect of TVNZ's allegations in his submissions to us.

Accordingly I agree that TVNZ cannot rely on the parliamentary statements and proceedings pleaded in the statement of defence. As they are an integral part of its plea of justification, it would not be a just solution to strike out the offending passages and leave TVNZ to defend this major claim under such a disadvantage.

For the reasons given by Cooke P I too would favour a stay of proceedings for three months to enable the House to determine whether it can and should waive its privilege: if it does not, the stay should be permanent.

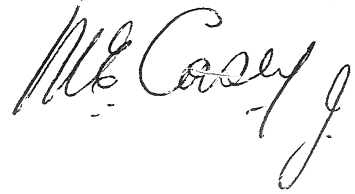
### Particulars of Reputation

In support of a plea in mitigation of damages, TVNZ gave notice of its intention to adduce evidence of the plaintiff's bad reputation as a politician, following this by a catalogue of epithets, some of them bordering on mere abuse. Mr Prebble moved to strike them out and Smellie J regarded most of them as inapplicable to his reputation as Minister of State-Owned Enterprises, that being the sphere of public life in respect of which the plaintiff pleaded he was defamed. I find it difficult to separate the reputation Mr Prebble may have had in that capacity and that which he has as a politician, to which many of the pleaded epithets apply. Accepting the reasons given by the President in his judgment, I agree that the words he listed as not being within that sector should be struck out, and I would allow this part of TVNZ's appeal to that extent.

### Mode of Trial

Having regard to the wide-ranging nature of the trial inevitable on the present pleadings, I have reached the conclusion that Mr Prebble's appeal against Smellie J's refusal to grant his application for a Judge-alone trial must succeed. An important segment of the fourth Labour Government's policies relating to the sale of State-owned assets and of its conduct in their disposal will be under close scrutiny if the trial proceeds. As the supporting affidavit demonstrates, it will require prolonged examination of documents. This consideration set out in s19A(5) of the Judicature Act 1908 as justifying a Judge-alone trial is not balanced by the need to pay regard to the vindication of the plaintiff's honour by a jury - normally a powerful factor in settling for that mode of trial in defamation cases. Here it is the plaintiff himself who seeks a Judge-alone hearing. With respect to the contrary views expressed by Lord Denning in *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, I do not see the defendant's wish to have its reputation

vindicated by a jury as carrying much weight in considering the mode of trial in this case. I would allow Mr Prebble's appeal on this point.

A handwritten signature in cursive script, appearing to read "Mr. Casey J.", written in dark ink.

**Solicitors:**

Oakley Moran, Wellington, for Television New Zealand Limited  
R W Ganda, Auckland, for R W Prebble

BETWEEN    TELEVISION NEW ZEALAND  
LIMITED

Appellant

AND            RICHARD WILLIAM PREBBLE

Respondent

BETWEEN    RICHARD WILLIAM PREBBLE

Appellant

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Coram:        Cooke P  
                  Richardson J  
                  Casey J  
                  Gault J  
                  McKay J

Hearing:      2,3,4 and 5 November 1992

Counsel:      J W Tizard and Sandra Moran for Television New Zealand  
                  A R Galbraith QC and Deborah Hollings for R W Prebble  
                  Hon P C East MP and J C Pike as Amici Curiae

Judgment:    14 May 1993

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**JUDGMENT OF GAULT J**

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On Sunday 29 April 1990 Television New Zealand broadcast on channel TV One in its programme series Frontline under the title "For the Public Good" a "major investigation" into relationships between politicians particularly some of

those in the then Labour Government and persons with business interests in New Zealand.

Mr Prebble, who was then and had been at all relevant times the Minister for State Owned Enterprises, Police, Pacific Island Affairs and Railways, sued in defamation. He alleged that the programme referred to him; that the words, pictures and sound material were published falsely and maliciously with intent to injure his reputation and that in their natural and ordinary meaning meant and were understood to mean what is set out in 12 subparagraphs in the Third Amended Statement of Claim.

TVNZ in its defence denied that the programme bore any of the alleged meanings but in respect of seven meanings (should they be established) pleaded justification and fair comment and in respect of six of the meanings that they were broadcast in circumstances giving rise to qualified privilege.

TVNZ also gave notice of intention to adduce evidence of the plaintiff's bad reputation as a politician.

There were two separate appeals. Mr Prebble appealed against dismissal of his application to strike out the particulars of justification and fair comment (although this was not pursued) and against the order for trial before a Judge and jury. TVNZ appealed against a ruling excluding evidence of bad reputation going beyond Mr Prebble's performance as Minister of State Owned Enterprises and against an order striking out certain particulars of justification and fair comment held to breach Parliamentary privilege.

The last of these raises important issues and will be dealt with. Because of the view I take on that I do not need to express views on the others.

The meanings (if established) which TVNZ intends to justify as true or will say were fair comment are to the effect that Mr Prebble as a highly placed politician had secretly conspired with certain business leaders and public officials in New Zealand to promote and implement state asset sales with the object of providing the business leaders with a once in a lifetime opportunity to dip into the "public treasure chest" and obtain assets on unduly favourable terms; that the assets were sold under this conspiracy; that the plaintiff acted without any genuine belief that the sales were in the public good and, as an example of the manipulative and dishonest manner in which he went about effecting this improper conspiracy, he proposed to replace certain business leaders to facilitate the sale of Air New Zealand to the Brierley consortium; that he entered into understandings with business leaders to promote policies he would not otherwise have espoused so as to obtain donations for election campaigns and that because of that understanding he promoted as a member of cabinet and implemented the sale of state assets.

The particulars given are extensive indeed but the issues are captured in the following passage from the judgment of Smellie J in the High Court:

The two issues of Parliamentary privilege which the case throws up relate primarily to the alleged secret conspiracy. First the Defendant pleads and, if permitted, intends to call evidence to show that the Plaintiff and other Ministers of the Fourth Labour Government made statements in the House refuting any suggestion that the sale of state-owned assets was in contemplation when in fact the Plaintiff was already conspiring to that end. Secondly the Defendant similarly pleads and seeks to show that certain legislation was part of the implementation of the conspiracy and some of it was introduced and passed through the House without prior consultation and in a precipitous manner.

It is unnecessary to attempt a summary of the particulars or to consider them separately because Mr Tizard for TVNZ argued the issues on an all or nothing

basis. I approach the matter then as raising whether it is inconsistent with the constitutional relationship between Parliament and the Courts for there to be conducted a trial requiring a wide ranging investigation of the truth of allegations that the formation and implementation of the asset sales policies of the Fourth Labour Government at least to the extent they were influenced by Mr Prebble were part of a conspiracy with business leaders designed to secure political donations. The implementation of the policies necessarily involved the procedures of Parliament in the passage of legislation.

As I understand the particulars they notify the intention to lead evidence of what was said in the House of Representatives by Mr Prebble and other members of the Government to establish the secrecy of the conspiracy by showing that the statements in the House amounted to assurances inconsistent with the policies that were to be implemented. They also signal the intention to give evidence of the manner in which the procedures of Parliament were employed to implement the conspiracy - as by enactment of statutory provisions without approval or proper consultation and within a time frame that precluded effective public participation. A typical clause in the particulars in this category is 8.9.5 relying upon:

The Parliamentary process surrounding the State Sector Bill including the amendments introduced by the Government before the Select Committee had completed hearing all submissions made on the Bill.

At the heart of this part of TVNZ's case is the contention that Mr Prebble participated in a secret conspiracy to use for improper purposes the procedures of Parliament. Part of that contention is that statements made in the House concealed the true position or indicated lack of genuine belief that the policies of the Government were for the public good. Perceived in this way the matter is such that comity suggests that the Courts should consider long before assuming jurisdiction



rather than regarding it as a matter quintessentially within the jurisdiction of Parliament.

That same conclusion follows as a matter of law. Article 9 of the Bill of Rights Act 1689 applies in New Zealand by virtue of s 3(1) of the Imperial Laws Application Act 1988 and s 242(1) of the Legislature Act 1908. It states:

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

This seems to me to be a clear case in which TNVZ seeks to question in Court the debates and proceedings in Parliament.

Mr Tizard argued that on a proper construction of art 9 appropriate to the position of Parliament in a modern democracy it does not preclude proof in Court of what is said by a Member in the House of Representatives for the purpose of enabling adjudication upon a dispute between two citizens. This he said does not involve challenging anything said or done in Parliament or attempting to impose any penalty on the member for what he has said and done there. He submitted also that the authorities permit reasonable response to litigation brought by a member even if this involves reference to what was said and done in Parliament by the member.

If consideration is confined to that aspect of the privilege relating to what is said and done by an individual Member in Parliament there is much to be said for the view as to the circumstances in which this can be proved in Court adopted by the full Court of the Supreme Court of South Australia in *Wright and Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416. The decision of the House of Lords

in *Pepper v Hart* [1993] 1 All ER 42, delivered since the date of the hearing in this Court, adopts a similar construction of art 9 (p 68 per Lord Browne-Wilkinson).

However to regard this case as raising simply the issue of whether proof of what a member said in the House for the purpose only of questioning what he said and did outside Parliament is to take too narrow a view. By alleging inconsistency between what was said in the House and what was said and done outside Parliament TVNZ necessarily questions whether Mr Prebble acted properly in Parliament in saying what he is alleged to have said. As Lord Browne-Wilkinson said in *Pepper v Hart* with reference to the issues in *Church of Scientology of California v Johnson-Smith* [1972] 1 All ER 378:

Those issues included an allegation that the defendant acted improperly in Parliament in saying what he did in Parliament. That plainly would amount to questioning a member's behaviour in Parliament and infringes art 9.

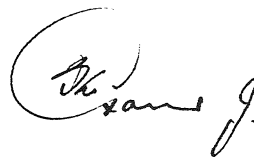
In any event I consider that the pleadings must be viewed even more widely in this case and, as I have already said, they effectively question in a very direct way the use of Parliamentary procedures by Mr Prebble and the Government of which he was a member. Investigation of that would take the Court right into the legislative process and the procedures of Parliament. That is where the Courts steadfastly have refused to go: *Hoani Te Heuheukino v Aotea District Maori Land Board* [1941] AC 308, *British Railways Board v Pickin* [1974] AC 765 and *Te Runanga O Wharekauri Rekohu Incorporated v The Attorney-General* (the Sealord case) CA297/92, judgment 3 November 1992.

Because the privilege here is that of Parliament not of the individual member I do not consider the scope of the privilege can be determined by the fact

that the Court proceedings have been commenced by a member who thereby invites counter-attack by reference to his statements in the House.

Accordingly I am satisfied that Smellie J's conclusion that the pleaded particulars are in breach of Parliamentary privilege was correct. I agree however with the other members of the Court that if TVNZ is precluded by that privilege from reasonably defending the proceeding by justifying the truth of what its programme is alleged to have conveyed then the proceeding should be stayed.

I should add, in case the problem of privilege is resolved, that if it had been necessary to do so I would have allowed TVNZ's appeal on the reputation point. I consider that it should be open to TVNZ to lead evidence of any alleged impropriety or underhand conduct of the plaintiff in his capacity as a politician. On this point I agree with the views expressed by McKay J in his judgment I have read in draft. I would also have allowed the appeal against the order for trial before a Judge and jury. I agree with the other members of the Court that the complexity of the case, as presently pleaded, dictates trial before a Judge alone.

A handwritten signature in black ink, appearing to read 'R D Ganda', enclosed within a large, loopy circular flourish.

Solicitors

Oakley Moran, Wellington, for Television New Zealand Limited  
R D Ganda, Auckland, for R W Prebble

BETWEEN    TELEVISION NEW ZEALAND  
LIMITED

Appellant

A N D        RICHARD WILLIAM PREBBLE

Respondent

BETWEEN    RICHARD WILLIAM PREBBLE

Appellant

AND         TELEVISION NEW ZEALAND  
LIMITED

Respondent

Coram:        Cooke P  
                  Richardson J  
                  Casey J  
                  Gault J  
                  McKay J

Hearing:      2, 3, 4 and 5 November 1993

Counsel:      J W Tizard and Sandra M Moran for Television New Zealand Ltd  
                  A R Galbraith QC and Deborah A T Hollings for R W Prebble  
                  The Attorney-General, Hon P C East, and J C Pike as *Amici Curiae*

Judgment:    14 May 1993

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JUDGMENT OF MCKAY J

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These appeals are from interlocutory rulings of Smellie J made in defamation proceedings. The proceedings were brought by Mr Prebble against Television New

Zealand Ltd ("TVNZ") in respect of a television broadcast in the programme "Front Line" on 29 April 1990. Mr Prebble was at the time a Minister of the Crown. He complained that the broadcast by its pictures and sound material conveyed, as its natural and ordinary meaning, that he had secretly conspired with business leaders and public officials to promote and implement sales of State assets so as to enable business leaders to obtain these assets on unduly favourable terms. The broadcast further conveyed that sales had taken place on these favourable terms, and that Mr Prebble's motive was to secure donations from the business leaders to the New Zealand Labour Party. In so acting, he was portrayed as having no genuine belief that his actions were for the public good, as having implemented the conspiracy in a manipulative and dishonest manner and as having arranged for the destruction of Government records which might incriminate him. He claimed general damages, including aggravated damages of \$950,000 and exemplary damages of \$400,000. Particulars were pleaded to support the claims to aggravated and exemplary damages.

What is alleged, therefore, is a very serious defamation which was broadcast on television in prime time to a very large New Zealand wide audience. TVNZ in its statement of defence denies that the broadcast conveyed the meaning alleged. If it did, then TVNZ pleads justification supported by 100 pages of particulars which range over a wide field of Government policies and decision making. Alternative defences pleaded are fair comment and qualified privilege. TVNZ also pleads that Mr Prebble has suffered no damage, and gives notice that it will adduce evidence of his bad reputation as a politician.

### **Parliamentary Privilege**

These pleadings raise two issues of Parliamentary privilege which were the subject of one of the interlocutory judgments from which the appeals have been brought. TVNZ has pleaded and proposes to call evidence to show that Mr Prebble

and other Ministers of the Government made statements in the House of Representatives refuting any suggestion that the sale of State owned assets was in contemplation, when in fact Mr Prebble was already conspiring to that end. Secondly, TVNZ has pleaded and seeks to show by evidence that legislation which was in implementation of the conspiracy was introduced and passed in a precipitous manner.

These are important issues. They involve on the one hand the principle that members of the House of Representatives must be able to speak freely in the House and to conduct its proceedings without questioning or interference by the Courts. On the other hand, there is the important principle that every person is entitled to access to the Courts, either to obtain redress for alleged wrongs or to answer a claim made against him, and for this purpose to adduce all relevant evidence.

Article 9 of the Bill of Rights 1688 states:

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

Article 9 deals with one particular aspect of the privileges of Parliament, but they extend over a wider area. The Courts do not concern themselves with the manner in which Parliament or its officers perform their functions. This was settled by the great cases of *Burdett v Abbott* (1817) 14 East 148 and *Stockdale v Hansard* (1839) 9 Ad & E 1, and reaffirmed in *Bradlaugh v Gossett* (1844) 12 QB 271. Parliament and the Courts are careful to avoid conflict between them in their respective functions. As was said by Lord Simon in *British Railways Board v Pickin* [1974] 1 NZLR 609 at 628:

"So for many years Parliament and the courts have each been astute to respect the sphere of action and the privileges of the other - Parliament, for example by its sub judice rule, the courts by taking

care to exclude evidence which might amount to infringement of parliamentary privilege."

The privilege does not exist because of its personal advantage to the members of the House, but because it is essential in the interests of the citizen. As the Attorney-General pointed out, the preamble to the Bill of Rights states that it is an Act declaring "the ancient rights and liberties" of the subject. In *Stockdale v Hansard* (1839) 9 Ad & E 1 Littledale J said at 243:

"The privileges of the House are my own privileges, the privileges of every citizen in the land."

Parliament has in the past claimed much more extensive privileges. In the latter part of the 17th century the House of Commons voted breaches of privilege for such things as serving a process on a Member of Parliament, arresting his servant, or seizing the cattle of his tenant: see *Stockdale v Hansard* at 13. It has now long been recognised that the privileges do not extend beyond what is required for the energetic discharge of the duties inherent in the role of the House. As was laid down in *Stockdale v Hansard*, and as was accepted by the Attorney-General to be now settled principle, it is for the Courts to determine as a question of law and fact whether a particular privilege exists, and for the House to control the manner and extent of its exercise.

The particular privilege of Parliament which is enshrined in Article 9 of the Bill of Rights was considered by the House of Lords in *Pepper v Hart* [1993] 1 All ER 42. It was described by Lord Browne-Wilkinson at 67-69 in these terms:

"Article 9 is a provision of the highest constitutional importance and should not be narrowly construed. It ensures the ability of democratically elected members of Parliament to discuss what they will (freedom of debate) and to say what they will (freedom of speech)... Plainly art 9 cannot have effect so as to stifle the freedom of all to comment on what is said in Parliament, even though such comment may influence members in what they say.

In my judgment, the plain meaning of art 9, viewed against the historical background in which it was enacted, was to ensure that members of Parliament were not subjected to any penalty, civil or criminal, for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed."

In that case the House of Lords held that it was permissible, where the words of a statute are ambiguous, to refer to a clear statement in Hansard by the responsible Minister in order to assist the Court in interpreting the meaning of those words. This did not involve in any way impugning or criticising the Minister's statement or his reasoning.

The Attorney-General referred us to the following passage from the judgment of King CJ in *Wright & Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416, a case heard by three Judges of the Supreme Court of South Australia sitting in Banco:

"The prohibition against the use in court of evidence as to a member's statements and conduct in Parliament is by no means absolute. The facts as to proceedings in the Parliament such as the identity of the presiding officer, a particular member's participation in a debate and the tabling of a document, may be proved in evidence: *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ at 37. It appears that it is permissible to prove "as a fact, that certain things had been said in the course of a debate" even in support of an action against a member in respect of allegedly defamatory statements made outside Parliament: *Mundey v Askin* [1982] 2 NSWLR 369 esp. at 373. In an action between parties neither of whom was a member, Blackburn CJ in the Supreme Court of the Australian Capital Territory, held that although the words spoken in Parliament could be proved, they could not be made the subject of any submission or inference: *Comalco Ltd v Australian Broadcasting Corporation* (1983) 78 FLR 449. In *R v Murphy* (1986) 5 NSWLR 18 Hunt J held that witnesses at a criminal trial could be cross-examined as to statements made by them in evidence before a Senate Select committee and that such statements could be proved as prior inconsistent statements. In *R v Jackson* (supra), however, Carruthers J expressed disagreement with the basis of the decision of Hunt J, namely



"that Art 9 should be strictly interpreted in the sense that the exercise of the freedom of speech given to members of parliament may not be challenged by way of court process having legal consequences for such persons, because they had exercised that freedom" (at 121).

Where do those principles and authorities leave a defendant to an action by a member for defamation, who wishes to defend himself from the charge by making a false imputation against the reputation of the member? There is no authority directly and explicitly in point, although some indication of the general attitude of the courts in this area may be gleaned from certain of the cases."

The Attorney-General submitted that this squarely put the issue~ which was raised by the present case, namely whether Article 9 of the Bill of Rights prevented the use of statements made in Parliament to defend an action in defamation. He accepted that it was beyond doubt that in certain circumstances reference may be made in a Court to statements made in Parliament. Essentially, he submitted, the broad distinction in the cases is between those that allow the objective fact of a statement or event to be proved, and those which forbid such a proved statement or event from being called into question. As illustrations of this he cited *Comalco Ltd v Australian Broadcasting Corporation* (1983) 78 FLR 449 per Blackburn CJ and *Amann Aviation Pty Ltd v Commonwealth of Australia* (1988) 19 FCR 223.

He submitted that Article 9 of the Bill of Rights 1688 is not an evidential point but a substantive rule of law. He said it applied in any Court and also in any other place where pursuant to formal procedure evidence is given or submissions are made to a body with a statutory power of decision. It also applied in any place where, pursuant to formal procedure, evidence or submissions are given to a body for the purposes of inquiring into the rights, duties, privileges or liabilities of any person. He submitted that the rule prohibited the use of anything said in Parliament, or of any proceeding in Parliament where the result of that use could be to:

- "(i) call into question the accuracy, truth or circumstances of what was said or otherwise to comment upon it or call into question the motives or intentions of the speaker; or
- (ii) undermine the authority of Parliament to regulate its proceedings and determine the scope of its privileges;
- (iii) in any way interfere with or bear on a member of Parliament's freedom of expression."

He stressed that the question was not whether the evidence would affect these values, but whether it could affect them. It was not an absolute prohibition, and evidence of debates or proceedings in Parliament would be admissible provided it was used consistently with Article 9 in the following circumstances.

- "1. to prove material facts, such as the fact that a statement was made in Parliament at a particular time, or that it refers to a particular person. [*Hyams v Peterson* [1991] 3 NZLR 648, 656; *New South Wales Branch of the Australian Medical Service v Minister of Health* 26 NSWLR 114.]
- 2. for the purpose of proving that a Government decision was announced in Parliament on a particular day: [*Roman Corporation v Hudsons Bay Oil and Gas Company* [1983] SCR 820.
- 3. in order to establish that a member of Parliament was present in the House and voted on a particular day; [*Forbes v Samuel* [1913] 3 KB 706.
- 4. to establish that a report of parliamentary debates corresponds with the debate itself and is fair and accurate and therefore attracts qualified privilege in the law of defamation; [First Schedule to the Defamation Act 1992]".

In *Wright & Advertiser Newspapers Ltd v Lewis* the full bench of the Supreme Court of South Australia held that a defendant in a defamation action could plead matters apparently covered by Article 9 in defence to an action brought by a Member of Parliament. King CJ said that a defendant by so defending himself could not be regarded in any real sense as impeaching or questioning the freedom of speech or of proceedings in Parliament, and nor could the Courts be fairly regarded

as doing so if they permitted the defendant to so defend himself. It would not be sought to visit any legal consequences on the Member, nor to examine his actions or motives, except so far as might be made necessary by the Member's own action. The object would be merely to repel the accusation made by the Member that a false imputation had been made against him.

The Attorney-General submitted that this case could be regarded on a narrow view as deciding merely that where a Member of Parliament sues in defamation in respect of defamatory words uttered in response to what the Member said in Parliament, the defendant can plead justification and use in reply words spoken by the Member in Parliament without breach of Article 9. If the case was relied on for the wider proposition that where a plaintiff Member of Parliament initiates defamation proceedings Article 9 cannot apply, then he submitted that could not be right.

I agree with the Attorney-General that it would be going too far to suggest that Article 9 or any other privilege of Parliament would cease to apply merely because the case was one in which a Member of Parliament was a plaintiff in an action for defamation. I also accept that the rule does not prevent any reference to what has been said or has happened in Parliament, but only to such use of that material as to call into question either what was said or the motives of the speaker. Any use which might tend to undermine public confidence in Parliament, or interfere with a Member's freedom of expression in the House, would infringe the rule.

The decision in *Wright v Lewis* was supported in part by reference to the decisions of the House of Lords in *Adam v Ward* [1918] AC 309, and of this Court in *News Media Ownership v Finlay* [1970] NZLR 1089. In *Adam v Ward*, Major Adam made a speech in the House of Commons which accused a Major Scobell of

having rendered reports on certain officers which contained wilful and deliberate misstatements of fact. Major Scobell brought the matter to the attention of the Army Council. The Secretary of the Council, Sir E Ward, wrote to Major Scobell and released the letter to the press. The letter stated that the matter in question had been thoroughly investigated at the time, and that Major Adam was himself one of the officers to whom the report had related. It said Major Adam had declined an approach to provide any information in substantiation of his charges. The Council was satisfied that the reports not only contained Major Scobell's unbiased and conscientious opinion, but that his conclusion was correct, and that Major Adams' charges were without foundation. Major Adam then sued Sir E Ward, but the House of Lords held that the occasion was privileged as being a proper reply to a violent attack. The question of Parliamentary privilege was not raised, but one cannot assume from this that the members of the House of Lords were not well aware of it. The issue was whether the publication of the Army Council's letter was privileged. What was material to this issue was the fact of Major Ward's attack in the House. Its accuracy or otherwise was irrelevant to the legal issue of privilege. The Army Council may have questioned the statement made in the House, but the issue for the Court was whether that statement had in fact been made, and if so whether the reply to it was covered by privilege under the law of defamation as going no further than a reply to the attack on Major Scobell.

*News Media Ownership v Finlay* was a similar case. Dr Finlay had in Parliament attacked the weekly newspaper "NZ Truth" for what he described as an unprincipled campaign against the penal policy of the then Government, which Dr Finlay said was motivated more by concern with profits than by the public good. The newspaper responded by alleging that Dr Finlay was himself more concerned with profits and as to the impact which sterner penalties for violence might have on his legal practice. Dr Finlay sued and the defendant pleaded the qualified privilege which in defamation proceedings protects a reply to an attack. It was accepted that

the occasion was privileged, but the Court held that the defendant had gone beyond the proper scope of its privilege of reply. No question of Parliamentary privilege was raised or argued in the case. There was no question as to what Dr Finlay had said in the House, and the Courts were not concerned with whether what he said was correct or not, nor with his motives for saying it. The mere fact that he had said what he had was sufficient to confer qualified privilege on the newspaper to publish a reply.

Against this background of principle, I turn to the present case. It will be sufficient to use one instance by way of example. Paragraph 9(a) of the Third Statement of Claim alleges that Mr Prebble conspired with business leaders and officials to promote and implement sales of State assets in order to provide the business leaders with an opportunity to dip into the "public treasure chest" and obtain assets on unduly favourable terms. Clause 8.2 of the Particulars of Justification in the Statement of Defence allege that the sale of State owned assets was contrary to assurances given by the plaintiff and other highly placed politicians of the Fourth Labour Government. This is followed by details of various statements made by Ministers both in the House and outside the House. The Judge struck out those particulars which refer to statements made and things done in the House of Representatives or before any Committee of the House.

The issue raised by this pleading goes further than mere reliance on the fact that the statements were made. The issue will be whether Mr Prebble was party to a conspiracy of the kind alleged, and whether his motives were as alleged. The statements in the House are relied upon not for the mere fact that they were made, but as evidence from which the conspiracy and the alleged motives might be inferred. The precise circumstances and meaning of the statements will be in issue, as will the question whether they are properly to be described as "assurances". This was made clear by Mr Tizard, counsel for TVNZ. He argued for no limitation to

be placed on the use that his client could make of the statements on the ground that section 9 had no application to proceedings for defamation commenced by a Member of Parliament. He submitted it was difficult to see how one could "fence off" a statement as to the use that could be made of it. He accepted that it was an "all or nothing" situation. In this I think he was correct. Even if it might be possible in some cases for the defendant to rely merely on proof that a particular statement had been made in the House, the nature of the issue would require the plaintiff to go further in order to show the true meaning and significance of the statement. The issue is not, as in the cases of qualified privilege for a reply to an attack, one which requires looking only at the bare fact of a statement having been made.

For these reasons, I think the Judge was correct in striking out the pleading and particulars in the Statement of Defence which refer to statements made and things done in the House of Representatives or before or by any Committee of the House.

### **Stay of Proceedings**

This raises a further question whether the plaintiff's claim should be allowed to proceed. It is common ground that TVNZ broadcast the programme complained of and that the programme included the words set out in the Statement of Claim. If those words conveyed the meaning alleged by the plaintiff, then they were grossly defamatory of him. He should have the ordinary right of any citizen to seek a remedy in the Courts. TVNZ, likewise, should have the right to allege in its defence that the words were true, and to adduce evidence to prove that. If it is unable to adduce such evidence because of Parliamentary privilege, then it might be said that a fair trial is impossible, and the action should not be allowed to proceed.

The pleadings clearly presage a wide ranging inquisition into the asset sales policy of the Fourth Labour Government and into the implementation of those policies. Parliamentary privilege does not extend to the actions of the Government as such. Such matters have not infrequently come before the Courts, see e.g. *Meates v Attorney-General* [1983] NZLR 308 and *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700. The privilege is limited to the proceedings of the House of Representatives. It must also be remembered that the privilege is not a personal one which Mr Prebble has power to waive. It is a privilege of the House, and to the extent that it is enshrined in Article 9 of the Bill of Rights, it is arguable that not even the House can waive it.

It does not seem from a mere perusal of the pleadings that the striking out of the particulars relating to statements made in the House or before or by members of its Committees or things done in Parliament is likely to be determinative of the defence of justification. The Judge identified 7 paragraphs in the particulars for which Parliamentary privilege was claimed for statements in the House and 11 paragraphs where privilege was claimed for things done in proceedings in Parliament. He identified a further 15 which might be affected, although it was unclear whether they referred to statements in the House or before a Committee of the House or to statements made in some other place. Some of these are in fact pleaded as having been made in an address to the Post Office Union Annual Conference. Counsel identified a further 16 paragraphs, but some of these merely refer to statutes which have been passed. These numbers must be compared with the total of 267 paragraphs of particulars of justification in respect of only the first of the meanings alleged by Mr Prebble.

In this case TVNZ denies that the broadcast programme conveyed the meaning of which Mr Prebble complains. That defence is unaffected by the present issue. What is clear, however, is that TVNZ, which is not inexperienced in the

field of defamation actions, has chosen to publish a programme highly defamatory of a Cabinet Minister, or at least it has elected to plead as a defence that the highly defamatory meanings which he attributes to the programme are in fact true. It is a commonplace that defendants in defamation actions may have published statements which they honestly believed were true, but they are nevertheless liable unless they can prove that what they said was true. No matter how good the publisher's grounds may be for believing the truth of what he states, he may find himself in difficulty if he is unable to give adequate particulars, or if he is unable to prove the relevant facts. In this case, certain facts which are arguably relevant cannot be proved because the use intended to be made of them would infringe Parliamentary privilege. An experienced publisher should be aware of the danger of making defamatory statements or seeking to justify them in circumstances where it cannot prove that its statements are true.

I would allow Mr Prebble to proceed with his action. It will of course be a matter for the trial Judge to ensure that no counsel or witness seeks to call in question anything said in the House or at a meeting of a Committee of the House, or otherwise seeks to infringe the privileges of Parliament.

Since writing the above, I have read in draft the judgments of the other members of the Court which favour the grant of a stay. If a stay is to be granted, then I would agree with the President's proposal that any stay should cease to apply if the House and the individual members concerned waive privilege within three months of the delivery of judgment. I also agree with his proposed reservation to the plaintiff of leave to apply to the High Court for leave to continue his action if the necessary waivers are not forthcoming. This would enable a fuller examination of any prejudice to the defendant resulting from the privilege, and if necessary a fuller examination of the question whether the waiver of individual members is required if the House itself has waived privilege.



### The Reputation Point

TVNZ also appeals against the Judge's ruling of 15 June 1992 on an issue raised by paragraph 19 of the Statement of Defence. That paragraph reads as follows:

"If the meanings are as alleged by the Plaintiff (which is denied) then the Plaintiff has suffered no damage by reason of the publication by the Defendant as alleged AND THE DEFENDANT HEREBY GIVES NOTICE that at the trial of this proceeding the Defendant will adduce evidence of the Plaintiff's bad reputation as a politician. That reputation includes that of being hated; a liar; dishonest; a thug; a back stabber; a street fighter; a bully; a mad dog; a breaker of promises; arrogant; pushy; offensive; belligerent; hysterical; threatening; uncontrollable; undemocratic; intimidatory."

Mr Prebble challenged the breadth of the evidence which TVNZ proposed to call in support of this pleading. His counsel relied on the principle that evidence of general bad reputation must be confined to the sector of the plaintiff's character which is relevant to the libel: Gatley on Libel and Slander 8 ed. para 1418. The Judge, after analysing the pleadings, said that it was clear that Mr Prebble's performance as Minister of State-Owned Enterprises was the sector of his life and career as a politician which had primary relevance to the libel complained of. He recorded that Mr Galbraith, for Mr Prebble, had accepted that any available evidence of bad reputation in relation to being a liar, dishonest, a breaker of promises and undemocratic could not be objected to as being outside the relevant sector. To that list the Judge added the word "uncontrollable", in the limited sense of taking unauthorised unilateral action in relation to the records which the Statement of Defence alleges were improperly destroyed. For the rest, he ruled that evidence of bad reputation that the plaintiff was "hated, a thug, a back stabber, a street fighter, a bully, a mad dog, arrogant, pushy, offensive, belligerent,

hysterical, threatening and intimidatory" should not be admitted at the trial. Such evidence, assuming it was available, would not be directed to the sector of the plaintiff's character or reputation which is relevant.

I agree with the Judge that each of the meanings complained of in the Statement of Claim is linked to Mr Prebble's position as Minister of State-Owned Enterprises, and not to his wider role as a Member of Parliament or as a politician. Miss Moran, who argued this part of the case for TVNZ, submitted that it was the sector of his life as a politician which was relevant, and that even if Mr Prebble had confined his pleadings to his reputation as a Minister, it would be artificial and unrealistic to regard his reputation as compartmentalised to that extent. She accepted that evidence of a general bad reputation as a husband or father, or as a motorist, would not be admissible because it would have no relevance to the libel of which he complains. She accepted that evidence must be limited to general bad reputation "as a politician", but this limitation is expressed in the pleading itself. The last sentence of paragraph 19, which contains the pejorative adjectives, is qualified by that limitation.

I agree that it would be unreal to compartmentalise reputation into overly refined segments. The leading case is *Speidel v Plato Films Ltd* [1960] 2 All ER 521, affirmed [1961] AC 1090. Devlin LJ, delivering the judgment of the Court of Appeal said at 526-7:

"We would prefer to state the principle as being that the evidence must be confined to matter which a reasonable jury could properly take into account as diminishing the damages which they would otherwise have awarded. The enforcement of anti-Jewish policy in Occupied France may, of course, have involved the commission of atrocities; but if so, that is covered under the general term of war crimes which we shall next consider. Apart from that, no jury ought to diminish the damages that they would award to a man falsely accused of murder and betrayal because they hear that he has a

reputation for anti-Jewish and anti-democratic activities, however repugnant such activities may be to them."

Devlin LJ went on to accept the submission that the pleader is not confined to alleging simply that the plaintiff has a bad reputation, but must be permitted, and in the Court's opinion can be compelled, to specify what sort of bad reputation is being alleged. They allowed an amendment but made it clear that this was based on their view that evidence of a reputation of the kind alleged was not plainly inadmissible. They did not hold that it was admissible, but left that for decision by the Judge at the trial to decide in the light of all the circumstances as he saw them when the question was put.

When the present matter was argued before the Judge, it does not appear to have been made clear to him that the meanings which he struck out were all qualified by the introductory reference to "reputation as a politician". In this Court it was made clear that this limitation was accepted to apply. So understood, I do not think the additional words could be struck out on the ground that they referred to a sector of Mr Prebble's reputation which was not relevant to the libel, in that they are not limited to his reputation as Minister of State-Owned Enterprises but extend to his wider reputation as a politician.

Since writing the above, I have had the opportunity to read in draft the judgment of Cooke P. I agree with him that the defamation complained of is the attack on Mr Prebble's probity as a politician, and not on other aspects of his reputation. I would, therefore, allow the appeal from the Judge's ruling of 15 June 1992 in part, leaving as struck the words which fall outside the relevant sector, namely *hated, a bully, a mad dog, arrogant, pushy, offensive, belligerent, threatening, intimidating*.

I would do so on the same basis as the Court of Appeal in the *Speidel* case, namely, that evidence of reputation as a politician of the general kind referred to in paragraph 19 is not clearly inadmissible, and it is therefore inappropriate to strike out the pleading. It will be for the Judge at trial to rule whether any particular question is or is not admissible within the relevant principles. Likewise, I am not to be taken as approving the style of the pleading. Many of the words appear to be pejorative rather than informative, but it may be premature to reach any firm view of that.

### **Striking Out Plea of Justification**

Mr Prebble applied to the Judge for an order striking out inter alia the defence of justification. In a judgment delivered on 29 July 1992 the Judge refused the application and Mr Prebble has appealed. The matter appears to have been argued in considerable detail before the Judge, and while upholding particular complaints and giving directions as to further particulars on certain actions, he dismissed the application.

In this Court, counsel's written submissions again sought to have struck out the whole of the defence of justification, but accepted that in that event TVNZ would probably be permitted to replead. The submission referred to individual paragraphs only by way of illustration. At the hearing, Mr Galbraith abandoned the appeal as such, but relied on his submissions in support of the appeal as to mode of trial. He claimed that the defence pleaded was so diffuse that it effectively shifted the focus from the meaning complained of by the plaintiff to an alternative meaning which would not be within the scope of the defence, that some of the particulars were obscure as to their relevance, and that others were pleaded with the intent of attacking the plaintiff's reputation without sufficient relevance to the issues properly before the Court.

None of the matters put forward would have persuaded me that the defence of justification was so clearly untenable that it should be struck out. It may be that the wording of the Statement of Defence can in places be criticised, but the argument before this Court did not focus on detail. It will be for the trial Judge to ensure that the evidence is confined to those matters which are relevant to a plea of justification of the meanings of which Mr Prebble complains, these being the only meanings to which the defence of justification is relevant.

### Mode of Trial

Also before the Court is an appeal by Mr Prebble against an interlocutory judgment given on 29 July 1992 in which the Judge declined to order that the action be tried without a jury. Perhaps unusually in defamation cases it was the plaintiff who applied for an order that the case be tried by a Judge alone, but this represented a change of stance on the part of the plaintiff following the filing by leave of the lengthy amended Statement of Defence some two weeks before trial. The application was made on both of the grounds mentioned in section 19A(5) of the Judicature Act 1908, namely, that the trial would involve mainly the consideration of difficult questions of law, and that the trial would require prolonged examination of documents such as could not conveniently be made with a jury. The Judge rejected the first of these grounds, and I agree with him. The essential issues in the case as pleaded are issues of fact, and it cannot be said that the trial of the proceedings or of any issue in the proceedings will involve mainly the consideration of difficult questions of law.

In respect of the second ground, there is no doubt that a multiplicity of documents have been relied on in the pleadings and will fall to be considered. The Judge held that under normal circumstances he would have been prepared, in view of the volume of documents and the complexity of the issues, to order a trial before a Judge alone. He referred, however, to two English decisions which he said

provided relevant guidance as to the exercise of his discretion. The first was *Williams v Beesley* [1973] 1 WLR 1295, in which Lord Diplock, delivering the leading judgment in the House of Lords, said at 1298-9:

"As respects issues of integrity and honour, these may be a weighty consideration in ordering trial by jury at the instance of the party whose integrity or honour is impugned; but it is not a sufficient ground for ordering trial by jury against his wishes at the instance of the other party"

The Judge said that, although the case was one concerning reputation, this was not a factor as it was Mr Prebble who wished to have trial by Judge alone. The second decision to which he referred was that of the Court of Appeal in *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, a defamation case in which the plaintiff sought trial by Judge alone, but the defendant wanted trial by jury. In that case Lord Denning MR, delivering the leading judgment said at 1017:

"Looking back on our history I hold that, if a newspaper criticised in its columns the great and the powerful on a matter of large public interest - and is then charged with libel - then its guilt or innocence should be tried with a jury, if the newspaper asks for it, even though it requires the prolonged examination of documents."

The Judge mentioned that there have in the past been jury defamation cases involving prominent Members of Parliament in New Zealand, but no case previously which has focussed on the performance of a senior Cabinet Minister and his Government over a period of substantially two terms in office. Clearly the case involves matters of great public interest.

I would accept that these are all proper matters to be weighed in the exercise of the Judge's discretion as to the mode of trial. This Court should always be reluctant to interfere in the area of the exercise of a discretion, but in this case I have come to the view that the Judge has clearly failed to give adequate

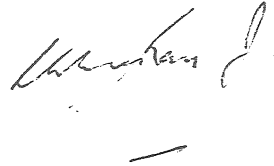
consideration to a number of matters which required to be weighed. We may well have had the benefit of fuller and more focussed argument. I refer to the complexity of the issues raised by the Statement of Defence, the enormous volume of documents that will be involved, the expert evidence on issues of economic theory, and the inevitable lengthening of a jury trial. This in turn is likely to mean a large increase in cost in a case brought by a litigant in person against a large corporation, and there is always a risk in such a complex matter that there may at the end be grounds for a new trial. These factors would not persuade me that the trial should be before a Judge alone if it was the plaintiff who sought trial by jury. I think the principle recognised in *Williams v Beesley* is an important one. There can be no doubt that the issues will be of very great public interest, but the issues appear to me to cover a much wider and more complex field than the closing of the one enterprise with which the Court was concerned in *Rothermere v Times Newspapers Ltd*. I note that even in that case the Court of Appeal was divided, Cairns LJ supporting the judgment of Ackner J in the High Court who had directed trial by Judge alone. The other New Zealand cases involving prominent Members of Parliament to which the Judge referred have in no way been comparable to the present case in complexity.

I would allow Mr Prebble's appeal and direct trial by Judge alone.

### **Conclusion**

In the result, I would dismiss TVNZ's appeal against the Judge's order striking out the pleading and particulars in the Statement of Defence which refer to statements made and things done in the House of Representatives or before or by any Committee of the House. I would not order that the plaintiff's action be stayed, but if a stay is to be granted, then I agree that it should be subject to the limitations and the reservation of leave proposed by the President. I would allow the appeal by TVNZ against the Judge's direction that portion of paragraph 19 of the Statement of

Defence be struck out, this being the pleading and notice of intention to call evidence of general bad reputation as a politician. I would dismiss Mr Prebble's appeal from the Judge's refusal of his application to strike out the defence of justification, but I would allow his appeal from the decision as to mode of trial, and would direct trial by Judge alone.



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