IN THE SUPREME COURT OF NEW ZEALAND SC69/2008
SC70/2008

BETWEEN **APN NEW ZEALAND LIMITED**
First Appellant

TELEVISION NEW ZEALAND LIMITED
Second Appellant

AND **SIMUNOVICH FISHERIES LIMITED**
First Respondent

AND **PETER JOHN SIMUNOVICH**
Second Respondent

AND **VAUGHAN HILTON WILKINSON**
Third Respondent

Hearing:	9 and 10 June 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	B D Gray QC with A L Ringwood and T C Goatley for the First Appellant A R Galbraith QC with W Akel and T J Walker for the Second Appellant J G Miles QC with A E L Ivory for the Respondents

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CIVIL APPEAL

MR GRAY QC:

May it please Your Honours, I appear for the appellant in SC 69/2008 APN New Zealand Limited and with me are Mr Ringwood and Ms Goatley.

ELIAS CJ:

Thank you Mr Gray.

MR GALBRAITH QC:

If Your Honours please I appear with William Akel and Tracey Walker for Television New Zealand.

ELIAS CJ:

Thank you Mr Galbraith.

MR MILES QC:

And I appear with Mr Ivory Your Honours for the respondents in both appeals.

ELIAS CJ:

Thank you Mr Miles. Yes Mr Gray?

MR GRAY QC:

Thank you Your Honour. If it please Your Honours this appeal is an interlocutory appeal that concerns the extent to which the second defendant APN may rely on judgments made by Courts, statements made in Parliament, and statements made on other occasions which attract privilege such as reports prepared for government departments and it's the extent to which those statements maybe relied on as particulars supporting defences of truth and honest opinion in a defamation proceeding. Most of the particulars at issue are pleaded in support of truth defences but some of them are also pleaded in support of an honest opinion defence.

The proceeding concerns allegedly defamatory statements published by the New Zealand Herald in a series of newspaper articles published between 4 May 2002 and 1 February 2003. The articles are contained in tabs 2 to 12 in the annexures to the second amended statement of claim which is

volume 3 of the bundle. APN is sued in respect of 35 excerpts from 16 publications which comprise 11,000 words. There are a very large number of publications. Of course each of them constitutes a separate cause of action but in respect of each of them the plaintiffs have alleged first that all the articles need to be read together and that the meaning of subsequent articles needs to be discerned having regard to the context of prior articles and second the plaintiffs have alleged that each article, and indeed the Assignment programme broadcast by Television New Zealand has the same five meanings. So there are five imputations pleaded in respect of each article individually and the whole of the 16 articles and also the Assignment programme.

For that reason when considering the particulars pleaded in support of defences of truth and honest opinion, it's necessary to have in mind all of the articles which are in tabs 2 to 12 of the second schedule to the second amended statement of claim and it's necessary to consider the state of publication in all the prior articles and it's important to do that because if Your Honours come to look at any of the articles contained in the second schedule to the second amended statement of claim, it is perfectly plain that on their face many of them cannot be defamatory or the plaintiffs. They can only be defamatory if they're read in conjunction with prior articles.

The plaintiffs or respondents in their written submissions have said two things with which we take issue. One is that the statements made by APN in its articles are broadly to the same effect as the statements made in the broadcast by Television New Zealand. We don't necessarily agree with that. It maybe said that they have similar effect but we say each of the articles and the broadcast stand on their own and speak for themselves. We say that they address the same issues but they are different in quality.

Your Honours will no doubt be aware of the scampi litigation which has occupied much of the time of the courts, principally down here in Wellington. Scampi was a new species of fish which was developed during the decade of the 1990s. It was found in the decade of the 1980s. In the early part of the

1990s there was no quota to manage it and the decade was taken up with establishing a basis upon which departments and Ministries of Fisheries would manage the allocation of quota for scampi. There was a lot of litigation because some fishers came to believe that the allocation of quota ultimately made by the Ministry was unfair and inappropriate and had preferred one or two fisheries, one of which is Simunovich but Simunovich not being the only one.

The litigation culminated with a decision of the Court of Appeal in 2002 in which the Court made quite trenchant criticisms of the Ministry, the way in which it had undertaken allocations of quota on several occasions and the way in which the result of the allocations had led to one or two fishing companies seeming to have been preferred or to have done much better than others.

McGRATH J:
Is that decision of the Court or the judgment you're referring to of the Court or was it one Judge of the Court?

MR GRAY QC:
It was one Judge of the Court Your Honour. Of course I'm referring to the judgment of Justice Thomas. The report is in the bundle.

McGRATH J:
Yes that's, I know the report.

MR GRAY QC:
As is the judgment of Justice Ellis in the High Court in which relevant comments were made, criticisms were less trenchant and of course were balanced by other comments made by the Judge in the course of his reasons that no impropriety could be found. Of course it was a review proceeding and it was a proceeding that concerned only the conduct of the Ministry and its officials and not other parties who were before the Court.

Following the release of the judgment in the Court of Appeal in 2002, there was a good deal of public comment. The unsuccessful parties to the litigation remained unhappy. They prepared some affidavits and made those affidavits available to members of Parliament among others and then led in time, early in 2002, to Mr Winston Peters making a number of statements in the House of Representatives that he had evidence that the Ministry had been involved in corruption, had condoned corruption, had aided and abetted corruption and had involved itself in corruption. Mr Peters said that the Ministry of Fisheries knew about and condoned mis-reporting of the species catch history, the evading of catch history records, the packaging of catch in cartons and other packaging which grossly understated weights in order to disguise volume, and mis-declaration of species in order to avoid quota restrictions. He alleged that the, or he said that the Ministry knowingly condoned the systematic altering of fishing returns and the packaging of one species of fish in cartons labeled as being another species of fish, thereby inflating catch history. Mr Peters said that the Ministry had been involved in collusion and cover ups and that he had documentary evidence which he would make available as evidence of these statements. And Mr Peters continued to make statements after the publication of the first Herald article in May 2002.

The first Herald articles was not the first publication in the press about the Court of Appeal judgment or about the statements made by Mr Peters. Other publications such as the Independent Business Weekly published stories both before and after the Herald commenced publication, dealing with the same material, relying on the same privileged material, being statements made in the House of Representatives and court judgments, but those publications have not resulted in defamation proceedings.

Ultimately there were two inquiries. One under the auspices of the State Services Commission and the other by a Parliamentary Select Committee. Both of the inquiries concerned conduct by public officials rather than conduct by private enterprises who were involved in the fishing industry. There were also two reports commissioned from a barrister Mr Andrews and they were reports provided in August and October of 2002.

So the starting position for the appellant APN, is there is a narrative to the events which gave rise to this defamation proceeding. It is a narrative that begins with fishing during the 1990s, with litigation and judgments of courts, with statements in the House of Representatives by a very senior politician, by the commissioning of reports by a barrister and by two inquiries and ultimately with reports of those inquiries which the plaintiffs say clear them, although whether or not that's a correct description of the effect of the final reports remains to be seen.

What APN is saying today, is that when it defends these claims of defamation by relying not only on qualified privilege, and of course ultimately this may prove to be more a qualified privilege case than a truth case or honest opinion case, but when it defends not only by relying on qualified privilege but also on truth and honest opinion, it is that narrative which a jury or a Judge, depending on who tries the case must see, it is that narrative which provides the context for the claims made by the plaintiff and the defences made by the defendants. This application by the plaintiffs to exclude from consideration by a jury in respect of truth and honest opinion defences, a large part of the narrative which gave rise to the stories and a large part of the context within which the words complained of were published and the imputations allegedly made have arisen, needs to be part of the information that's available to the jury when the jury or the Judge come to make the decision.

In the Court of Appeal, I suppose that proposition was expressed in this way, it doesn't help to withhold too much from the jury. It's important when the jury, dealing in this very vexed area of the law, comes to consider words, their meaning and their effect. That the jury understand what it is that has led to the publication, what it is that the authors of the publication have relied on and had in their mind and then the jury can deal with the allegations that the plaintiffs make.

TIPPING J:

What the authors had in mind Mr Gray, what bearing does that have on whether you can prove the truth of the sting, namely that these people were corrupt? It doesn't matter what they had in mind, does it, it's a question of whether you can establish that they were corrupt. I'm talking about truth, I'm not talking about comment or opinion.

MR GRAY QC:

Your Honour, to the extent that what they had in mind was secret and not contained within the publication and of course the observation is right, what they had in their mind is irrelevant. But to the extent that what they had in mind, forms part of the story that is published and part of the information contained in the articles which the plaintiffs say need all to be read to together, then we say they do form part of the narrative and part of the context and are relevant.

ELIAS CJ:

Sorry, I thought you were just accepting that they weren't relevant to truth of the sting?

MR GRAY QC:

They are relevant not as the subjective mental musings of the authors but the words where they appear are relevant and the particulars that are relied on in this case are words which have been published.

TIPPING J:

But the fact that a politician in the House asserts that Joe Bloggs is a thief, doesn't prove that Joe Bloggs is a thief, it doesn't even tend to prove that he's a thief, it's an assertion.

MR GRAY QC:

The fact that it's said, is a fact by itself.

TIPPING J:

Yes, it is a fact that it's said –

MR GRAY QC:

And it is a privileged fact.

TIPPING J:

Yes but how does it tend to prove that Joe Bloggs is a thief, it's just the opinion of the person stating it, isn't it?

MR GRAY QC:

We very quickly come to the nub of the privilege argument. The fact that a member says in the House Joe Bloggs is a thief, is a fact in itself and it is a privileged statement. It may not defamatory of Joe Bloggs to say, a member said in the House that Joe Bloggs is a thief.

ELIAS CJ:

Is that putting it accurately? It's privileged as said in the House and a fair and accurate report of it is privileged but is it right to say that the statement is privileged in a more general way?

MR GRAY QC:

That's the way Lady Justice Arden put it in *Curistan*, that it cannot be defamatory to say a member of Parliament said in the House that Joe Bloggs is a thief. If that statement is contained within a publication –

TIPPING J:

It's not per se defamatory but how does it become a fact which tends to prove that Joe Bloggs is a thief?

MR GRAY QC:

It becomes a fact which is part of context and which must be considered when considering the defamatory nature, allegedly defamatory nature, of other statements not privileged, found within the same publication.

WILSON J:

Mr Gray, how is the privileged status of a statement of any relevance in the context of the truth defence? I can understand its relevance on the authorities in the context of honest opinion but what's the relevance of privilege in the context of truth?

MR GRAY QC:

The starting point is that any one article has one meaning. It is a meaning derived from the context of all of the words in the article, not just some of them. If an article contains words which are privileged and which may therefore not be defamatory –

WILSON J:

They're still defamatory, they're still defamatory but they may be privileged.

MR GRAY QC:

Privileged may not give rise to a claim for defamation. Then they form part of the context within which the non privileged words must be construed. In those circumstances, they cannot be ignored, they cannot simply be put to one side.

WILSON J:

I understand that but I am still interested in the authorities to why the privileged status of a statement is in itself relevant when it comes to the truth defence?

MR GRAY QC:

We'll come to look at *Curistan*, if it pleases Your Honour and we'll work through the judgments, principally of Lady Justice Arden and of Justice Laws but the propositions that Their Lordships articulate in that case, is that the privilege is whole and must be protected. It undermines the privilege to deny a defendant the opportunity to rely on a fair and accurate report of what is said in Parliament, for the purposes of pleading the truth to other non-privileged statements made in the same article.

TIPPING J:

Let's say I publish something to say that so-and-so is a thief and I decide that it would be a good idea to call someone, who has the opinion that so-and-so is a thief. That person's opinion would not be admissible to prove that so-and-so was a thief, it's just their opinion of someone else. Like my brother Wilson, I don't understand why it becomes better because the opinion, if you like, is stated on a privileged occasion.

MR GRAY QC:

Certainly, by itself, the holding of an opinion would not tend to prove the truth of particularly a tier 1 meaning which is guilt of thievery –

TIPPING J:

Yes, we're talking about tier 1, if one wants to use that terminology.

MR GRAY QC:

With respect Your Honour, we're not, we are talking about tier 2.

WILSON J:

Also, tier 2, as a statement of fact.

TIPPING J:

Yes, as a statement of fact.

MR GRAY QC:

We're not talking about tier 1. The plaintiff has alleged one imputation which has a tier 1 meaning. The second defendant APN, has pleaded truth to that but the particulars in support of that defence are not at issue today. We are only dealing with tier 2 and tier 3 meanings.

TIPPING J:

So what we're talking about then is establishing the accuracy, or the fact that the publication facts are truly stated, is that what we're talking about?

MR GRAY QC:

Partly Your Honour but also partly, the more difficult question of whether the expression of opinion may tend to prove that there are serious grounds for belief that Joe Bloggs is a thief.

ELIAS CJ:

I have to flag that you will have to convince me that tier 2 doesn't run foul of the repetition rule.

MR GRAY QC:

I hope to do that in two ways Your Honour. The first is, we say there's always been an exception to the repetition rule for privileged statements. That the repetition rule is not absolute but that there is a longstanding exception that can be traced through the authorities, that say in respect of –

ELIAS CJ:

Or straight reporter?

MR GRAY QC:

Yes. The second is more complicated but it rests on the development of the understanding of tier 2 meanings and of course this is a part of the law of defamation which is in a state of transition, principally in the United Kingdom and because we get so few cases here, is not something which courts in New Zealand have come to consider in great depth but the first principal question of whether expression of an opinion or a hearsay statement can tend to prove that there are serious grounds for belief, has been left open. There are warnings that the application, cases saying that the repetition rule applies to tier 2 meaning shouldn't be read as statutes and that the focus of the allegations, the particulars and the evidence in respect of tier 2 meaning should be on conduct of the person who's the subject of the story. But the decisions in the cases do not go so far as to say that hearsay may not be

relevant and admissible as providing context or linking conduct and therefore should be excluded as particulars. What they do say is it's not enough by itself to seek to prove a tier 2, the truth of a tier 2 meaning, only by saying somebody else told them. And of course it's important to take a step just slightly further back and ask, why is it that these hearsay statements are excluded as particulars tending to show the truth of tier 1 and tier 2 meanings, and what the cases say is well one of the reasons for that is we don't want juries to be troubled by having to consider the reliability of what has been said, the reliability of the person who made the hearsay statement and we don't want to convert defamation proceedings into a consideration of whether the third party relied on is a good person to believe or not. But we say in respect of judgments of Courts and in respect of statements made in Parliament, the law has always recognised as a special case and has always recognised that those statements are authoritative and are special and that's why the law of privilege has developed.

ELIAS CJ:

Well privilege it seems to me is quite different. It is simply an immunity from liability for accurate reporting. You're going much further in what you're putting to us.

MR GRAY QC:

Yes I am. Yes. But I'm talking about one of the consequences –

ELIAS CJ:

And isn't the real reason that hearsay opinion, well it's opinion evidence, is not admitted is that it's not relevant if you are seeking to prove the truth of the underlying sting, corruption?

MR GRAY QC:

In respect of tier 2 –

ELIAS CJ:

Well you say that tier 2 is adopting the English Court of Appeal decisions that you simply need to prove that the – well that the opinions are relevant to whether there are reasonable grounds to believe but I have great difficulty in seeing that that is any different from an assertion that it is rumoured that such and such. You know, in other words that it is just a – how you formulate it doesn't seem to me to be so critical.

MR GRAY QC:

Well, leave to one side for a moment the argument I will make which is my principal argument which it is a recognised exception. But dealing with Your Honour's primary question which is, is it right that it should be so and why should it be so, part of the answer is that in respect of court proceedings, for example, a judgment in a court proceeding is of course an opinion but it is final and binding on the parties. It is reached after a process of evaluation and argument –

ELIAS CJ:

But you can report that decision but you are seeking to rely on that to prove the truth of the underlying sting and in that context it is an opinion and you need to demonstrate the facts which justify it.

WILSON J:

Quite apart from section 50 which really governs the question of judgments doesn't it?

ELIAS CJ:

Yes, yes.

MR GRAY QC:

We'll come to section 50 –

WILSON J:

Which you'll come to no doubt?

MR GRAY QC:

Yes.

ELIAS CJ:

Which is a specific, yes.

MR GRAY QC:

My submission will be that section 50 really deals with the law of res judicata and issue estoppel and there's if you like a little mini code simply saying that the provisions of the Evidence Act don't extend the law of res judicata and issue estoppel any further than the law otherwise does, that that's the true effect of section 50. But to answer Your Honour Justice Elias' question, remember that in respect of tier 2 meanings we're talking about serious grounds for belief or reasonable grounds for belief. Court judgments are authoritative and they may form part of an evidential basis for a belief and they may provide serious grounds for a belief. Members of the community –

ELIAS CJ:

Well I can see that that goes to honest opinion but I don't see that it goes to justification.

WILSON J:

I think it's very important that throughout this argument you keep in mind there are really three separate, albeit related, issues. Firstly, particulars in support of truth. Secondly, particulars in support of the factual basis of honest opinion and thirdly the opinion itself.

MR GRAY QC:

Yes. But of course as with the whole of this fixed area of the law, no part – no one of those issues exists in isolation from the others and the montage of defences from truth through honest opinion to privilege, do exist together and need to be considered in the context of each other.

TIPPING J:

When you speak of the truth of a tier 2 meaning you're not, as I understand you, talking about the truth of the underlying sting, you are talking about the fact that there are or it's an assessment that there are reasonable grounds to believe.

MR GRAY QC:
Yes.

TIPPING J:
Is that fair?

MR GRAY QC:
That's correct Your Honour.

TIPPING J:
I think that's where we're getting into a spot of bother. You used the word truth in a sense that perhaps was a little misleading for tier 2 cases because it's not truth in the justification sense, it's the establishment of the fact that there are reasonable grounds to believe which is an assessment, not a fact.

MR GRAY QC:
I'm grateful to Your Honour. I used the word truth because the defence is labelled in the Defamation Act as a truth defence.

TIPPING J:
I know but that's not very helpful.

MR GRAY QC:
Not in the current context –

TIPPING J:
No.

MR GRAY QC:

– because what is alleged is, is that the articles meant there were serious grounds on reasonable grounds for a belief and what the second defendant is seeking to be able to prove is that they were indeed serious grounds for belief and the statements of senior politicians and of courts do provide serious grounds for belief. They may not be enough by themselves. It maybe that because they are only hearsay that they may not by themselves be sufficient to provide serious grounds for belief but as part of context they may well.

ELIAS CJ:

Well you're going to come onto dealing with the second tier problem later. You started off by dealing with privilege.

MR GRAY QC:

Yes.

ELIAS CJ:

And I'm just wondering whether you have sufficiently answered the question of what does privilege – what does the status of privilege add?

MR GRAY QC:

If I can take just a little moment to address it. The topic of tier 2 meanings really arises from the decision of the House of Lords in *Lewis v Daily Telegraph* and from the judgments of Lords Reid and Devlin in that case. Their Lordships did not in that case spell out –

ELIAS CJ:

Sorry, does that mean you're not going to deal any further with what does privilege add? You are now going to go onto tier 2?

MR GRAY QC:

No if it pleases Your Honour I will. I'm beginning to do that. I'm trying to take us to the starting point which is *Lewis* and in *Lewis* what Their Lordships said is, well we need to be clear about what's said. It's one thing to say that

Joe Bloggs is a thief but it is quite another to say, well the police are investigating whether Joe Bloggs may be a thief and even further there might be an intermediate position where you say well we think Joe Bloggs may well be a thief because he might have done something which caused that. And so that was the genesis of, of the tiers and it was what caused further consideration to be given to the repetition rule and the relevance of the repetition rule in the context of truth defences to those meanings.

ELIAS CJ:

Are you going to take us to *Lewis* first?

MR GRAY QC:

I can do that Your Honour. That's found –

ELIAS CJ:

I don't recall *Lewis* really providing such a clear introduction for re-evaluation of the repetition rule but I haven't looked at it recently.

MR GRAY QC:

No, no, it's part of context, it's under tab 13 Your Honour. The passages which really are the springboard, are found in the judgment of Lord Reid at page 260 and it's the third paragraph. You'll see that His Lordship said, "Before leaving this part of the case, I must notice an argument to the effect that you can only justify a libel that the plaintiffs have so conducted their affairs as to give rise to suspicion of fraud, or as to give rise to inquiry whether there has been fraud, by proving that they've acted fraudulently." Then it is said that, "If that is so, there can be no difference between an allegation of suspicious conduct and an allegation of guilt. To my mind, there's a great difference between saying that a man has behaved in a suspicious manner and saying that he's guilty of an offence. I'm not convinced that you can only justify the former statement by proving guilt. I can well understand that if you say there's a rumour that X is guilty, you can only justify it by proving that he is guilty because repeating someone else's libellous statement is just as bad as making the statement directly but I do not think that it's necessary to reach a

decision on this matter of justification in order to decide that these paragraphs can mean suspicion but cannot be held to infer guilt." So, His Lordship –

ELIAS CJ:

It's pleaded against you here, presumably that the publication does imply guilt?

MR GRAY QC:

Yes, it is.

ELIAS CJ:

So, that's what you have to meet.

MR GRAY QC:

Not in this application Your Honour. There is one imputation. Perhaps it helps, perhaps if it pleases Your Honour, to actually look at the meanings that are alleged. They are found in volume 3, at page 171. There at paragraph 16, the first is, "That the plaintiffs in consort, or each of them, were guilty of longstanding corrupt actions with senior personnel at the Ministry." Second, "That they were corrupt and dishonest businessmen." That's the individual plaintiffs, not the company. Third, "In the alternative, there were serious grounds for believing that each or all of them were guilty of longstanding corrupt actions with senior personnel." Fourth, "There were serious grounds for believing that each of them were corrupt and dishonest." Fifth, "That they in consort, or each of them, committed or were responsible or were parties to serious criminal or fraudulent activities." One, two and five are tier 1 meanings. Allegations three and four are tier 2 meanings, if we can adopt the English nomenclature. The second defendant APN, has pleaded truth to meanings 2 to 5. It has provided particulars in respect of the tier 1 meanings and those particulars are not challenged in this proceeding. So, we are not dealing with particulars, or truth of tier 1 meanings, we are only dealing with particulars of truth of tier 2 meanings, usually in the United Kingdom called reasonable grounds, in this pleading called serious

grounds. Whether that semantic difference creates a difference of substance I'm not sure and that's probably a matter for another day.

TIPPING J:

You don't have to justify a comment, sorry, an opinion, do you? You simply have to demonstrate that there were facts from which a normal person could hold that opinion.

MR GRAY QC:

Your Honour has put his finger on what's going to be the essence of my argument when I come. We say the Court of Appeal is in error because it's decision has tended to support the proposition that it is necessary to justify the opinion and to create something of a hurdle for authors around accuracy.

WILSON J:

It's necessary to justify the opinion for the purposes of the truth defence, isn't it, not the honest opinion?

ELIAS CJ:

Yes.

TIPPING J:

Yes.

MR GRAY QC:

Yes, Your Honour and it is necessary for it to be clear that the opinion was genuinely held, whatever it may have been.

TIPPING J:

Yes, well that's fundamental because if it's not genuinely held, you don't have it.

MR GRAY QC:

Then we have malice.

TIPPING J:

Aren't these tier 2 meanings, subject to whether they are supported by publication of facts, more in the nature of comment than fact?

MR GRAY QC:

I'm sure my learned friends for the appellants will say no because the answer to that, in respect of tier 2 meanings, is not only found in the repetition rule but also what is known as the conduct rule.

TIPPING J:

I know, I know but just leaving all that aside, if I say that in my opinion Joe Bloggs is a thief, if I have nothing in my publication to support that, it will be held, won't it, to be a statement of fact? If however I say, in my opinion Joe Bloggs is a thief and a I base my opinion on (a), (b) and (c) and can justify (a), (b) and (c), then it's comment?

MR GRAY QC:

Yes.

TIPPING J:

The trouble with these tier 2 things, is that there is a tendency for them to – it's a bit like the rolled up plea, that they partake it in a sense of fact and in a sense of comment but ultimately one has to decide, or the jury has to decide, don't they, as to whether they are to be treated as fact or as comment?

MR GRAY QC:

Your Honour is quite correct. There is a primary, or prior, question. What is meaning and whether the statements made are a fact or opinion.

TIPPING J:

Pleaded this way, as an alternative, surely that's quite a long way on the road to asserting that they are comment?

MR GRAY QC:

I suspect what my learned friends will say is that the stories say, the articles say, that the plaintiffs have so conducted themselves that they've provided reasonable grounds for suspicion and that there is a link between the mere existence of reasonable grounds which provides the substratum for the expression of an opinion and a statement which is not sufficiently clearly expressed as being an opinion, that it becomes a statement of fact and needs to be regarded as a statement of fact.

TIPPING J:

If it's a statement of fact, it's no different from the tier 1 meaning, is it?

ELIAS CJ:

Well, unless you accept a tier 2 distinction.

MR GRAY QC:

Yes.

ELIAS CJ:

I've just been looking at *Lewis* and that was a case of a straight report of the fact that there was a police investigation. So, it's a mile away from the publisher saying there are reasonable grounds to believe that he's guilty of corrupt practice. You really need to go on to the following cases but I have real doubt as to whether that isn't simply another way of saying it is rumoured, or in other words, it's a repetition issue, if you are looking at the fact as opposed to the opinion, it's quite different if you're relying on the publication fact to support your honest opinion. You are meeting here, the higher point, that this is a tier 2 publication for which, you say, you can rely upon opinion to justify.

MR GRAY QC:

As part of the justification, yes I do.

ELIAS CJ:

As part of the justification, yes.

MR GRAY QC:

As Your Honour rightly points out, in *Lewis*, the report was that the police had commenced an investigation. The complaint was, by publishing that you're really telling readers that I'm guilty of –

ELIAS CJ:

Lord Reid says it's not capable of bearing that meaning and that the jury should have been so instructed.

MR GRAY QC:

Precisely, yes and there are distinctions between saying someone's suspected of something, there are reasonable grounds for the suspicion and that they're guilty. This really was the introduction of that consideration of shades of meaning because each of those statements can be defamatory if false. The other complication in *Lewis* is that what the person alleging that David Fane said is when you can only prove the rumour by proving the ultimate fact and if it's in relation to that argument that Lord Reid is saying, well no that's not the case –

ELIAS CJ:

But there was no adoption there.

MR GRAY QC:

No there wasn't.

ELIAS CJ:

Of the suspicion. There's just a straight report as to a fact which Lord Reid says is not capable of the defamatory meaning.

MR GRAY QC:

Right.

ELIAS CJ:

That's not what's alleged here?

WILSON J:

Sorry just getting away from the three tier classification but just coming back to this question as to whether the alleged tier 2 meanings are fact or opinion. It seems to me, if I may say so, quite appropriate, at this pre-trial stage, you are pleading in the alternative as you're entitled to, that the tier 2 meanings if they are fact, you're pleading truth, and in the alternative if they're comment, you're pleading honest opinion?

MR GRAY QC:

Honest, yes. And in compliance with section 38 of the Defamation Act we've separated those defences and particularised them separately. I'm one of those lawyers who think that most things worth saying in the law have been said by Lord Reid and so it's not necessary to go any further but Lord Devlin does also say similar things in page 285 from the second paragraph. "In the libel that the House has to consider there is, however, no mention of suspicion at all. What is said is simply that the plaintiff's affairs are being enquired into, that's defamatory as is admitted because a man's reputation may in fact be injured by such a statement even though it's quite consistent with innocence." And then His Lordship discusses why it can be defamatory to say that and goes on about 10 lines from the bottom, "But a statement that an enquiry is on foot may go further and may positively convey the impression that there are grounds for the enquiry. That is that there is something to suspect. Just as a bare statement of suspicion may convey the impression that there are grounds for belief in guilt, so a bare statement of the fact of an enquiry may convey the impression that there are grounds for suspicion." Don't say that it does but there can be that distinction.

The next case in what we say is the correct chain of analysis is *Stern v Piper* and that's found under the next tab in the bundle, tab 14. This involved a debt action. At page 128 in the reasons for decision of Lord Justice Hirst the discussion of the law of justification commences at the letter G, "The plaintiff relies on the well established rule of the law of justification that it is no defence to an action for defamation for the defendant to prove he was merely repeating what he had been told." It refers to a text under a heading "Rumour or Hearsay" and labels that proposition of law the repetition rule. He then goes on to record argument about the repetition rule, refers over at 129E to the decision of the Judicial Committee of the Privy Council in *Truth (NZ) Limited v Holloway* and cites from reasons for decision given by Lord Denning at the letter G, "If you accept that the words were spoken by Judd it's not a defence at all. A statement might be defamatory that is put forward by way of report only. It doesn't help the defendant that the way that it is put is that Judge said see Phil and Phil would fix it. The case is properly to be dealt with as if the defendant had himself said see Phil and Phil will fix it." At page 130 Lord Justice Hirst notes that *Gatley* accepts that this is a good statement of the law.

He then deals with two cases called *Cadam* and *Waters* and they are cases, well *Waters* in particular is a case that I will take Your Honours to as authority for the proposition that there's an exception in relation to privileged statements and he then discusses those in the context of truth in *Holloway v Lewis*. At 132 at H he notes that "counsel did not for present purposes seek to challenge the decision in *Cadam* and *Waters* but submits their ambit is strictly limited to reports of the issue of a writ or the institution of other legal proceedings which he says constitute public acts or events or reports of judicial pronouncements". He then proceeds to discuss those two decisions.

He notes at 134G that *Waters* presents more difficulty since there's a hearsay problem but Lord Justice Hirst's analysis of *Waters* is, "That case can only be explained, as Mr Price suggested, on the basis that the statements reported were judicial pronouncements made in open court and therefore fell into a special category. But I, for my part, regard *Waters* as on the outer fringe of

this class of case and consider it should not be followed, save on similar facts."

He then considers the relationship between justification and absolute or qualified privilege. He accepts counsel's submission that the defence of justification may be maintainable where a defence of privilege would fail and that's demonstrated by both *Cadam* and *Waters* and says the latter is very unlikely that a defence of qualified privilege would have been maintainable since a fair and accurate report would have required mention of the fact that *Waters* had appealed against conviction and succeeded.

But he goes on to say, "I think it's significant that privilege only protects reports of proceedings taking place in open court and that it's foundation is that those proceedings should have taken place in public so that the public in general should have access to fair and accurate reports of them." He notes that it's a matter of public policy. It doesn't just extend to court documents which are being brought into the public arena. He refers to a passage from *Gatley* relying on a statement of Justice Holmes in the American case of *Cowley v Pulsifer* that it would be taking privilege too far for it to include documents merely filed in court.

Lord Justice Simon Brown begins his judgment at the foot of the page. He accepts the repetition rule and adopts Lord Justice Hirst's term for it. He comes to discuss privilege at the foot of page 136. He notes that absolute privilege as attaches to all documents, pleadings, affidavits and the like brought into being for legal proceedings when used for that purpose. Fair and accurate reports of proceedings in open court which are contemporaneous and by newspapers and that qualified privilege attaches to such reports of proceedings in open court that are not contemporaneous or not nearly published by newspapers and are not malicious.

What he does helpfully recognise over the page at 137 between C and D is that the very existence of the law of privilege to cover the fair and accurate reporting of proceedings surely postulates that otherwise such reports would

fall foul of the repetition rule. As was said by the New South Wales Court of Appeal in *Wake v John Fairfax and Sons Limited* it seems to us that in a case where there's no qualified privilege to report, or repeat the defamatory statements of others, the whole cohesion of the law of defamation would be destroyed if it were permissible merely to plead and prove that the defamatory statement was made by another. That this fact was stated in the matter complained of and that the defamatory imputation was not adopted or affirmed. The law as to qualified privilege, as to qualified protection of the reports of certain designated matters would be largely, if not wholly, redundant.

He then discusses *Cadam* which says, "This line of authority although as I recognise was not analysed in the judgments as exceptions to the repetition rule should in my judgment be so regarded. The exceptions are justified. *Waters*, with difficulty, is reports of public acts or events including public judicial findings. *Cadam*, in particular, appears to fall into the same category of case as some others."

TIPPING J:

Acts or events doesn't sound like opinions of judicial offices but including public judicial findings, you would say I presume, covers that?

MR GRAY QC:

Is an act, yes.

TIPPING J:

By acts or events, I think His Lordship was really referring to issuing writs or that sort of thing, objective facts rather than conclusions reached but I suspect the judicial findings would be apt to include conclusions reached?

MR GRAY QC:

In my submissions they must, including the reasons for decisions. The difficulty that the Lord Justice would have had with *Waters*, is that in *Waters* there was quite a strong summing up to the jury. Ultimately, there was an

appeal and the appeal succeeded on grounds of misdirection but the publication was only of part the summing up and didn't go on to say that there had been an appeal and the appeal had succeeded. The complication in that case which gives various Judges cause pause, is that there may well have been an argument that a fair and accurate report ought to have gone on to say and what's more, there was an appeal and the appeal was successful. Complicated when we come to *Waters* by there in fact being three decisions of three different Courts, all of them making comments critical about the plaintiff and financial affairs of the plaintiff. So there was, if you like, a conjunction of three different findings. We're back to Lord Justice Simon Brown on page 137, at the letter G. He says, "In my judgment, these cases strike an acceptable balance between the public interest and freedom of speech, the right to disseminate and receive information and the public interest in protecting people's reputations. If any different balance is to be struck, it should not be by expanding these exceptions to the repetition rule but rather, as Lord Justice Hirst observes, by legislation. One can well understanding however, why the law of qualified privilege does not extend to the pre-trial reporting of allegations contained in court documents. It's one thing to report proceedings contemporaneously or even retrospectively, then both sides' stories are being, or will have been, told in open court. Quite another to be privileged to do so when perhaps, as here, only one side's allegations are being repeated and at a time likely to be months or even years before the full picture will emerge in open court." *Stern v Piper* –

TIPPING J:

Would you just forgive me Mr Gray, if I just asked you to drop down to letter C on that last page in Lord Justice Simon Brown's judgment. He says, just under letter C, "Had Mr Gorman's affirmation alleged, not that the appellant is guilty but only that he is suspected, I would imagine that would be a fortiori reasonable grounds for belief, although that may not necessarily follow", Then *Lewis*' case would be in point, the defendant's on repeating such lesser allegation would then have had to prove merely grounds for suspicion and not actual guilt. Now that really is your point, isn't it?

MR GRAY QC:

Yes, it is. I'm grateful to Your Honour for the passage. That is my point, that in respect of tier 2 meanings, a judgment may not by itself provide reasonable grounds but maybe a particular that can be relied on.

TIPPING J:

The particular simply gives notice of what it is that's being relied on. Proof of the particular in the sense of fact, of course, is quite a different matter.

MR GRAY QC:

Yes, it is and whether or not a judge or jury ultimately found it to be sufficient is another matter again.

ELIAS CJ:

I wonder whether this is quite accurate in terms of *Lewis*' case however. I mean, the passive is used here, he is suspected. Of course, in *Lewis*' case it was that the police or serious fraud or someone, were investigating. I wonder whether it is possible to slide so readily into an adoption by the publisher with the implication that the publisher asserts that there are reasonable grounds for suspicion. It's not quite clear what Lord Justice Simon Brown is saying here because he uses the passive.

MR GRAY QC:

Yes and Your Honour puts her finger on one of the difficulties with these tiers and that is that there is in fact a spectrum of meaning, or a continuum of meaning, with very fine shades. I mean, is what is said, someone has made a complaint to the police, police have decided to investigate, the police are conducting an ongoing investigation, police are gathering enough evidence, that there might be something in it, there's sufficient evidence available to the public, that the public can come to think that there is serious grounds for thinking there might be an offence. Any number of different things can be said and it is a little bit arbitrary to separate them into three, although it's difficult to think of a more helpful separation into categories.

TIPPING J:

You've put your finger on it, the point that's really worried me in reading for this case. As Lord Reid said, there's a difference between you are guilty and you are suspected of being guilty, obviously, but is there not also a difference between strong grounds to believe and some reason to suspect? I'm just putting the outer edges, if you like, just to make the point more vivid. What the ultimate sting is, is a jury matter, isn't it? So, you've really got to get yourself organised in pleadings to cope with any meaning the words are capable of bearing and thus if they're capable of bearing a lower meaning, if you like, then you should be entitled to plead to that lower meaning. Well, I'm not wanting to get into the double meaning issues and so on but that's what is so difficult here, that you don't know quite what the sting is ultimately going to be held to be.

MR GRAY QC:

Your Honour is correct and when, as in this case because there are a large number of publications and broadcasts, in order to try and make the proceeding manageable the plaintiffs have said look, we think five meanings emerge. Those meanings necessarily are expressed quite broadly because they do need to be relevant to a range of different publications. That means however, that the defendant comes along not knowing precisely what a plaintiff will say in relation to particular publications, each of which is a separate tort and will need to be tried separately. We say that the defendant has to be able to point to privileged statements in support of tier 2 and 3 meanings because at trial it may well be that the way in which the jury is asked to infer that the alleged imputations arise from the story, is merely that there are serious grounds for belief, or it may go much further than that and say look, we say that there are strong grounds for belief and if you don't find it's strong grounds then we accept that we lose, although it's hard to see that.

ELIAS CJ:

I still have trouble understanding why the fact of privilege affects it. Even accepting the principal argument you're putting to us, if it's relevant to show

that respectable people have this opinion, that's fine but why does the fact that it's privileged add anything at all?

WILSON J:

Certainly, on a general basis as opposed to a possible exception for a judicial statement.

ELIAS CJ:

Yes, section 50.

MR GRAY QC:

Lord Justice Laws in his judgment in *Curistan* puts it typically pithily, repetition rule is a rule of policy. Like so much in this field, it's not objectively right, it's a choice that's been made for a bunch of policy reasons, including that the undesirability of having to litigate the reliability of the third party's speaker. Privilege is a rule of policy, when to the two collide privilege prevails, it's more important –

WILSON J:

That was the point of *Curistan*, wasn't it, that privilege prevails over the repetition rule?

MR GRAY QC:

Yes.

WILSON J:

That's a rather different issue, isn't it?

ELIAS CJ:

Yes.

MR GRAY QC:

As I understood it, Your Honour Justice Elias' question is why? Why should it be that merely because something is privileged, it should nevertheless –

TIPPING J:

If the original is privileged, then its adoption likewise should be privileged, one might say but if the original –

WILSON J:

Which is certainly the case with honest opinion. I'm not aware of any authority to the context of truth of that –

MR GRAY QC:

Adoption is a different point and that's the *Buchanan v Jennings* point.

TIPPING J:

Well don't get me onto that Mr Gray.

MR GRAY QC:

And that's a path we don't want to –

ELIAS CJ:

Parliament's going to correct it.

MR GRAY QC:

Well I wonder if I might take Your Honours through the cases until we get to *Curistan* and then address it.

ELIAS CJ:

Yes.

MR GRAY QC:

But essentially the answer that's given by the Judges in *Curistan* is that privilege is eroded if it is not available to be considered when considering the truth of non-privilege statements in an article and that privilege should not be eroded.

ELIAS CJ:

I'm sorry to hold you up but just at this page 138 my, I'm stuck on the rather prior point that I have no difficulty with the *Lewis* position that if you report that the police are investigating that is a fact which you can say, which you can justify, which you can say is truthful. But I still have difficulty understanding why saying that there are reasonable grounds to have suspicion, which is the publisher saying there are, affirmatively there are reasonable grounds to suspect, is not a different way of saying it is rumoured or X says and therefore funs foul of the repetition rule so when you go through the cases, bear in mind that I have a doubt about that.

MR GRAY QC:

What I then planned to say to Your Honours was that there has in the United Kingdom been a number of cases developing in understanding of these tier 2 meanings and developing rules of practicing procedure around them in much the same way as we are doing here today. Those cases are in the bundle, they are *Shah*, *Bennett* and *Musa King*. There was at one point a helpful list of factors which might well be taken into account in dealing with tier 2 meanings and they are found in *Shah* and *Shah* is at tab 22 in volume 2 of the bundle. And in this Lord Justice Hirst again partly deals with his understanding of the difficulty Your Honour Justice Elias is dealing with at page 259 where he talks about the conduct requirement. At letter F he begins with *Lewis* and the passage is from –

ELIAS CJ:

Sorry what page?

MR GRAY QC:

259 Your Honour. Begins with *Lewis* and the passage is from the judgment of Lords Reid and Devlin that we've looked at. It goes onto a case called *Evans v Granada Television Limited* over the page at 260 at the letter D and refers to *Jackson v Fairfax* and other Australian judgments at the letter H citing from *Sergei v Australian Broadcasting Commission*, I'm sorry again he repeated the passage from *John Fairfax* which we've already seen. Starting

between the two "I agree that it's so although such a line of reasoning to my mind clearly supports the proposition that a statement of such suspicion without more is at least capable of suggesting that suspicion is warranted. I now accept that it does not necessarily convey that suggestion but it is obviously capable of conveying a suggestion that the plaintiff has so conducted himself as to have warranted that suspicion".

And then Lord Justice Hirst draws his consideration of this topic together over the page at 261. "Mr Brown submitted that these authorities supported the contention. Mr Rampton invited us to disregard them. That leaves us, leaves still the important statements of Lord Reid and Lord Devlin on which Mr Rampton is self-relied in support of his general proposition that a defence of reasonable suspicion is valid. Both these passages seem clearly to suggest that the reason why a plea of reasonable suspicion is sustainable is because its sting is that the plaintiff has, by his own conduct, brought suspicion on himself and Justice Hunt's view is fully in line with this approach. For these reasons I consider Mr Brown's submission is correct and that it's an essential requisite of a defence of justification of reasonable suspicion that it should focus on some conduct of the plaintiff's part giving rise to reasonable suspicion. I choose the words "focus" advisedly in order to avoid any implication that such a defence must be exclusively confined to allegations of conduct. Clearly it will be necessary. Part of a – particularly in a complicated like the present, for the defendant to portray in some detail the relevant background and also to set out material which connects together the main facts relied on".

So to the extent that this judgment touches the questions asked by Your Honour Justice Elias, the way in which Lord Justice Hirst distinguishes the tier 3 from tier 2 is that tier 2 is a category of meaning in which conduct by the person defamed or alleging that they have been defamed itself has given rise to suspicion and Lord Justice Hirst says that is what creates a different category in this case and that's why mere rumour cannot be enough. But Lord Justice Hirst goes on to say mere rumour cannot be enough by itself and the truth defence should focus on something done by the plaintiff.

TIPPING J:

In this sense the conduct rule overcomes the repetition rule if you can bring it within the conduct rule?

MR GRAY QC:

I wonder Your Honour if it's that they work together?

TIPPING J:

Well you can't repeat but you can point to conduct of the plaintiff giving grounds to suspect?

MR GRAY QC:

Yes. It's not enough to repeat.

ELIAS CJ:

But why is it repetition? It's a straight statement by the publisher.

TIPPING J:

But if it's a statement based on someone else's statement, then you're in effect repeating that other person's statement. That's the problem.

ELIAS CJ:

But you can't justify on that.

MR GRAY QC:

Remember what – we're here because the plaintiffs say you may not, in seeking to prove that there were reasonable grounds for belief, tell the jury that there were judgments of the Court and there were statements made in Parliament because they're not relevant. They can't possibly help to provide evidence of reasonable grounds for belief. We say they may not by themselves but they can, as Lord Justice Hirst says, provide context or connect together the main facts relied on. We say they're not able to be excluded.

TIPPING J:

There's a policy issue here, isn't there, as to whether it should be possible to treat the opinion or assertion of another person as amounting to grounds, however you categorise those grounds?

MR GRAY QC:

Precisely Your Honour. That's the issue.

TIPPING J:

That's the ultimate issue of policy, isn't it?

MR GRAY QC:

Yes. Yes. And it can be addressed in two ways. One is there's a policy issue that's embodied in the repetition rule which is that it's just unhelpful to let people complicate defamation proceedings by saying what I said is true because I read it in a newspaper or a read it in a book or someone told me and part of the reason for that is we don't want to convert the trial into a consideration of how good the book was or the reliability of the person who told you. But first we say there's an exception for privileged statements and second we say –

TIPPING J:

Sorry can I interrupt you there Mr Gray? Other than *Curistan*, and I think you'll be taking us to that, can you point to any authority for the proposition that there's a general exception for privileged statements in the context of a truth defence?

MR GRAY QC:

Yes *Waters* and I say if Your Honours come to consider the discussion of all of these cases that we're looking at now, you will see that in each case the Judge says, apart from privileged statements, you can't repeat what someone else has said.

TIPPING J:

But is the reason for this exclusion for privileged statements that the occasion gives some credence to the reliability of the assertion, that must be it, mustn't it?

MR GRAY QC:

Yes there is a policy which says we've decided that these statements are sufficiently important –

TIPPING J:

Or reliable –

MR GRAY QC:

Yes.

TIPPING J:

– or likely to be reliable that we can make an exception for, because of their provenance. It's not because of their privilege. Privilege is just simply used to identify the type of circumstance which has enough provenance to justify it being brought in. Is that perhaps one way of looking at it?

MR GRAY QC:

Privilege is –

TIPPING J:

It's not privilege per se it's just the privilege is the identifier of a sufficiently reliable occasion?

MR GRAY QC:

Yes.

ELIAS CJ:

I had always understood certainly the approach in Australia and I think also the approach of Privy Council in *Buchanan v Jennings* is that privilege

attaches to occasions not to statements whereas you are really asserting that the statement itself carries privilege?

MR GRAY QC:

Your Honour, with respect I think not. It was shorthand. It's a statement made on an occasion and to a fair and accurate report of a statement made on an occasion.

ELIAS CJ:

Yes.

MR GRAY QC:

But Your Honour's right. The genesis of it is the occasion itself and must always be. In respect of court proceedings of course –

ELIAS CJ:

But you're going further than that and adopting what Justice Tipping was putting to you in saying that the quality of the statement is there's some sort of quality approval that comes with privilege and I just doubt whether that's right.

MR GRAY QC:

In my submission the analysis is that the reason privilege has been accorded is because the occasion is regarded as an appropriate one for privilege and the reason the occasion is regarded as appropriate is in some cases because of the solemnity and the formality of the processes which have led to the making of the statement.

TIPPING J:

Wouldn't it be better to forget the idea of privilege per se and simply say the occasion has to be – or the circumstances or the nature of the statement has to be inherently reliable or something like that? Because I agree with the Chief Justice, I was, I'm not necessarily of the view that privilege warrants accuracy.

MR GRAY QC:

No it doesn't but our community has already made a decision about the status –

TIPPING J:

But it's one thing to report it, it's quite another thing to use it as the foundation for your own assertion –

ELIAS CJ:

Of truth.

TIPPING J:

Well of –

WILSON J:

But can't you argue Mr Gray that by analogy with the honest opinion defence, whereas I understand the English authorities it's well established, that the defendant can rely on the statements made on the privileged occasion without independently establishing them, you're really seeking to extend that rule across to truth as well?

MR GRAY QC:

Yes I say the law does extend it to truth.

WILSON J:

Yes.

McGRATH J:

Mr Gray can I just ask you to consider how this would operate in practice in the case of court statements where in a judgment a conclusion that a defendant wished to rely on would nearly always be the particular context which would be somewhat different to the context of the issues at the trial. Wouldn't this often set up a separate sub-issue of having an examination of the whole of the context of the case in which the statement was made,

perhaps an assessment in an appellate court of what one judge thought as against another, that would be in itself wholly diverted and the thought of practice that the repetition rule was designed to avoid. What I'm really saying is that the mere fact that the statement is made but just looked at literally appears to offer some help. In light of the further examination that necessarily would be conducted might not provide any help at all.

MR GRAY QC:

Ah, not a new enquiry Your Honour. The privilege is only available for fair and accurate reports and the enquiry that Your Honour is describing is whether or not the report is fair and accurate.

WILSON J:

Are you only seeking to apply this approach in the context of reporting privilege?

MR GRAY QC:

Yes.

WILSON J:

Rather than privilege generally?

MR GRAY QC:

Yes. I have no further submissions on that topic. If we come back to *Shah* we were on page 261 and Lord Justice Hirst was about to discuss the repetition rule and he did so first by reference to *Stern v Piper* between the letters E and G and as you can see at the letter H "counsel in that case made the same complaint the plaintiffs do in this case. Mr Brown submitted that the repetition rule is a rule of law which not only governs the assessment of the meaning of a publication complained of but also limits both the permissible scope of the plea of justification of such a meaning and the admissibility of evidence in support of such a plea. Mr Rampton on the other hand submitted the rule is simply and solely a rule of meaning and not one regulating either the scope of a plea of justification or the evidence permissible to support it".

His Lordship then goes on to discuss that evidential point made by Mr Rampton and concludes it over the page at 263 at D. He says, "I've come to the conclusion that the repetition rule applies in the manner described by Mr Brown for the reasons he gave. Contrary to Mr Rampton's argument I am satisfied that it's a rule of law which governs not only meaning but also the pleading and proof of a defence of justification. *Stern v Piper* is a very good illustration since the ultimate decision was that the defence of justification should be struck out. Moreover I consider that the repetition rule reflects a fundamental canon of legal policy in the law of defamation dating back nearly 170 years, that words must be interpreted, and the implications they contain justified, by reference to the underlying allegations of fact and not merely by reliance upon some second-hand report or assertion of them."

I don't gain assistance from wrongful arrest cases and the argument in that case was well because police officers need reasonable grounds to suspect commission of an offence before they're permitted to arrest and does that provide a helpful analogy in considering what might make up reasonable grounds and Their Lordships –

ELIAS CJ:

It's not very easy to follow this reasoning. Maybe it's just that I haven't read through it but what does it mean that having rejected Mr Rampton's argument in saying that *Stern v Piper* is a good illustration since the ultimate decision was that the defence of justification should be struck out. How does that assist in his being satisfied that it's a rule of law which governs not only meaning but also the proof of the defence of justification?

MR GRAY QC:

As I understand the report Your Honour Mr Brown had said it's a rule of law going not only to what words means but also what may permissibly be introduced in evidence to justify it.

ELIAS CJ:

Yes.

MR GRAY QC:

On the other hand Mr Rampton counsel for the publisher said no, it's related only to meaning –

ELIAS CJ:

Yes.

MR GRAY QC:

– and it doesn't affect what evidence I'm able to introduce to support my plea of justification.

ELIAS CJ:

Yes but I don't understand the reasoning that –

MR GRAY QC:

No.

TIPPING J:

The defence of justification was struck out because what they were trying to do was to justify it by simply saying that it had been made.

MR GRAY QC:

Only on grounds that someone else had said.

ELIAS CJ:

Ah, yes. I see.

TIPPING J:

Not by supporting the underlying –

ELIAS CJ:

Yes, yes.

MR GRAY QC:

Somewhat unhelpfully what His Honour Lord Justice Hirst did not do is explain in detail Mr Brown's argument. He adopted it without having earlier explained it. His description of it is in the last five lines of page 261.

ELIAS CJ:

Thank you.

TIPPING J:

I think, can I just take you back, while it's in my mind Mr Gray. On 261 letter H, just about letter H, is it not a little cryptic to talk about Lord Reid and Lord Devlin differentiating rumour from suspicion. What they differentiated was rumour from grounds for suspicion and you had to identify the grounds. I know what His Lordship was meaning but rumour and suspicion in the abstract suffer from the same vice, don't they?

MR GRAY QC:

Yes. Suspicion maybe shorthand for suspicion based on some external –

TIPPING J:

Exactly, exactly. It is shorthand and it would be dangerous to read it otherwise.

MR GRAY QC:

Yes I mean in the sense that suspect only means –

TIPPING J:

But it's grounds. The key point in Lord Reid's discussion was the existence of grounds rather than the suspicion per se, wasn't it?

MR GRAY QC:

Yes. And certainly that's the relevant context for tier 2 as it has been developed and has emerged. We were at 263 at D and E Lord Justice Hirst said that he didn't get help from the analogy with wrongful arrest cases. He

does go on to say that he struggles with *Aspro Travel* which is another privileged case, reported privileged because there's a report of a court case and at G he concludes his discussion by saying, "One most salutary advantage of holding fast to the repetition rule is that it avoids lengthy investigation of the reliability of the makers of hearsay statements which might otherwise be admissible."

Lord Justice May agrees with Lord Justice Hirst and adds some comments. Quite helpfully in this case he concludes on page 270 between A and B, "In my view a proper balance between freedom of speech and protection of reputation is achieved by rejecting Mr Rampton's submission. Those who publish without malice defamatory statements to the effect that there are reasonable grounds to suspect a plaintiff of discreditable conduct, are protected if the occasion is privileged. If the occasion is not privileged they may justify the publication by proving objectively that there are such reasonable grounds. Allegedly credible hearsay evidence may not contribute to such proof. Defendants will have to call their informants or provide other direct evidence. If this an individual case – if this is an individual case it's difficult that only emphasises that reputation should not be put at risk by publication on occasions which are not privileged or unsubstantiated hearsay. In the end the argument turns not so much on the repetition rule as on the admissibility, probative value and relevance of hearsay evidence."

But what Lord Justice May is saying is to the extent that a publication contains material published on a privileged occasion because it's a fair and accurate report either of the court proceeding or a proceedings of Parliament, then it maybe relied on and because of the single meaning rule in relation to articles as a whole having one meaning, when construing an article it's necessary to include in the construction the material in respect of which there is a privilege and the material in respect of which there is not. And it is to deny the privilege to require the defendant seeking to justify to remove from consideration the privileged material.

WILSON J:

I have difficulty in seeing how the privilege is denied. I mean the privilege is an alternative defence isn't it?

MR GRAY QC:

It's there for that part of the statement but that part of the statement is not considered in isolation from the article as a whole. The article is considered as a whole. It is construed to produce a meaning as a whole. The whole includes all of the parts including the privileged parts. It's to deny privilege to say to a plaintiff you must now justify only the non-privileged parts. A defendant must be entitled to justify having regard to all of the components including the privileged parts and one of the things that the judges come on to say in *Curistan* is well if you do otherwise, if you simply delete, excise the privilege parts, you're effectively making the defendant prove the privilege parts and that's a higher burden than the law requires in respect of publications made on a privileged occasion.

TIPPING J:

What is the purpose of the privilege? It is, is it not, to report fair and accurately. It is not to use the statement as a basis for one's own personal assertion?

MR GRAY QC:

In my submission that is artificial. The reason privilege exists which is to enable the reporting so that people can know of what has been said and what may flow from it.

TIPPING J:

But isn't – the privilege is given simply to give a fair and accurate report. It is not given to use the statement as a building block for one's own conclusion.

MR GRAY QC:

Well –

TIPPING J:

That's where I tend to agree with my brother Wilson. I'm not so sure that it does damnify the privilege at all. I would have thought in some ways it could be said to support the privilege and confine it to its proper purpose.

MR GRAY QC:

In my submission if like *Buchanan v Jennings* privileged material is used by being adopted, that creates a separate issue. If it's extrapolated then ultimately the speaker will be responsible for the extrapolation because that's the bit that they've added and you will see in *Curistan* that it's a case that involved a man about –

TIPPING J:

But you see the problem with *Buchanan v Jennings* if I may be just permitted just for a moment.

ELIAS CJ:

We can take the morning adjournment at this stage and if Justice Tipping wishes to pursue –

TIPPING J:

No, no.

MR GRAY QC:

As Your Honours please.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.43 AM

MR GRAY QC:

As Your Honour pleases, before the break I said in answer to a question by His Honour Justice Wilson that our position is that there was all the way through the authorities in respect of report cases a setting aside of privileged statements. We were just looking at *Shah*. Where it can be found in *Shah* is

in the judgment of Lord Justice Hirst at 263 where His Lordship said that he had not gained assistance from wrongful arrest cases because he thought the context was wholly different but went on to say nearly at E but that was very different from the special circumstances where a defence of qualified privilege is likely to be available. Similarly in the next case which is *Bennett* and which is in a different factual context, it's in relation to an investigation of police officers, is a discussion of *Shah* beginning at paragraph 23 then it is under tab 21 in the bundle in volume 2 and the discussion of *Shah* begins at paragraph 23. But it concludes –

ELIAS CJ:

Sorry what tab is it?

MR GRAY QC:

I'm sorry Your Honour, tab 21. And in that case the decision of the Court given by Lord Justice Robert Walker concludes the consideration of *Shah* on page 873 and at paragraph 31 said well Lord Justice may refer to *Stern v Piper* and *Aspro v Owners Abroad Group* and also expressed some reservations about the latter. He summarised at 625 the second part of the issue as being whether for a defendant who wishes to justify a meaning of reasonable grounds for suspicion. It is permissible to rely on what he's been told by somebody else. He concluded by saying that it was not, saying at the end of his judgment, "Those who publish without malice defamatory statements to the effect that there are reasonable grounds to suspect a plaintiff of discreditable conduct, are protected if the occasion is privileged. If the occasion is not privileged they may justify the publication by proving objectively that there are such reasonable grounds. Allegedly credible hearsay evidence may not contribute to such proof. Defendants will have to call their informants or provide other direct evidence. If this is in individual cases difficult, that only emphasises that reputation should not be put at risk by publication on occasions which are not privileged of unsubstantiated hearsay. In the end the argument turns not so much on the repetition rule as on the admissibility, probative value and relevance of the hearsay evidence."

WILSON J:

I must say that seems to be against you. It's saying that the protection is provided by the privileged occasion but on the issue that we're discussing, isn't that against you?

MR GRAY QC:

In my submission, no, because what is sought to be excluded, particulars which are published on a privileged occasion and what this passage says, and we'll come on in *Curistan* to deal with the point in which a single article contains some privileged material and some non-privileged material and the question then becomes, well what do we make of the privileged material in such an article.

WILSON J:

In terms of meaning?

MR GRAY QC:

Yes. Ah, no, in terms of particulars of a defence of truth. In my submission this material, this passage is for us because it recognises that the availability of privilege, because there is a privileged occasion, is an exception to the repetition rule and that it is permissible to publish on a privileged occasion what others have said and what *Curistan* goes on to do is to apply that to articles which are combinations of privileged and unprivileged material and say well what is the significance of the privileged material. The answer is it may be relied on as a particular supporting the truth of the non-privileged material because otherwise it's to deny the privilege.

The matter was developed a little in *Al-Fagih* which is in the bundle under tab 28. This is not an Al-Qaeda or terrorist financing case and most of the United Kingdom cases with Arab names are those. This is actually statements made in the course of a political dispute. In the High Court there was a ruling that the article was not protected by qualified privilege and part of this was because of lack of care and inadequate care in verifying statements made so that's the development of the *Reynolds* defence known as reportage**.**

The Court of Appeal considered the European Convention and considered Strasbourg decisions concerning the relevance of a political dimension and English and Welsh decisions concerning reportage. In that context the Court considered the reasons for the repetition rule and the discussion begins at page 231 on paragraph 35. There Lord Justice Simon Brown said, "At first blush one might wonder why a correctly attributed and unadopted allegation is defamatory at all. To state that an allegation has been made after all, is after all true, such a report is however plainly defamatory under what is known as the repetition rule. A report of a defamatory remark by A about B is not justified by proving merely that A said it. Rather the substance of the charge must be proved. A jury cannot be invited to treat to the allegation as reported as bearing any lesser defamatory meaning than the original allegation. See *Stern v Piper* and *Shah*. As indeed *Stern v Piper* points out, the whole law of statutory privilege pre-supposes such a rule. Why else would it be necessary to afford qualified protection to reports of proceedings and the like. What however Mr Caldicutt stresses is that the repetition rule concerns only the scope of the defence of justification in report cases. It does not limit the scope of qualified privilege at common law. Least of all does it require that an unadopted allegation is to be treated in the same way as an allegation asserted to be true." And then he goes on to deal with *Reynolds* and the requirements for privilege.

TIPPING J:

Well there's a very useful italicised sentence there from Lord Nicholls which it need not adopt allegations as statements of fact.

MR GRAY QC:

Yes.

TIPPING J:

That really is close to the kernel isn't it? Have you adopted the mis-statements of fact as your own and the more you support them by independent facts, the less you will have adopted them as your own statements of fact.

MR GRAY QC:

Precisely Your Honour. And the less will – the availability of privilege be lost. And then in relation to the human rights dimension –

WILSON J:

There's no question of losing privilege though is there? That's not the issue?

MR GRAY QC:

Well what *Curistan* comes on to say is if in proving, in particularising and proving the truth of non-privileged statements, it's not permissible to rely on the privileged statements, then part of the privilege is lost. The benefit of it is lost.

TIPPING J:

Lord Justice Hirst could equally have called it the republication rule?

MR GRAY QC:

Yes.

TIPPING J:

Couldn't he? It's really a species of republication. What you have to determine is whether it's been adopted, if you like, as your own statement and whether you've endeavoured to support it by other facts which you identify. Not just on a per se basis.

MR GRAY QC:

Yes, whether for example the report is in the House, Mr Winston Peters said X and we think Mr Peters was right. We agree with Mr Peters, we say he was plainly right.

TIPPING J:

Because.

MR GRAY QC:

Well you might or might not say because if because –

TIPPING J:

Well no if you don't say because –

MR GRAY QC:

Then you're in trouble.

TIPPING J:

Then, exactly.

MR GRAY QC:

But if you haven't said we agree with Mr Peters and you simply say Mr Peters said –

TIPPING J:

Then you've not adopted it.

MR GRAY QC:

Yes. Look I'm sure I don't need to make submissions to this Court on the value of free speech or the interplay between free speech and reputation but there are passages in paragraph 40 which explain the way in which the English and Welsh Court of Appeal in this case dealt with the scope of qualified privilege. In the case of *McCarten* it's qualified privilege arising from a public meeting and those are the policy reasons which support the availability of privilege.

Now as I say *Al-Fagih* is actually a case about whether or not a *Reynolds* privilege or reportage defence was available rather than a truth defence and so we come to *Curistan* which is under tab 1. Now in *Curistan* the plaintiff was a businessman in Northern Ireland. The Sunday Times published a story describing him as an Irish Republican Army developer. The story said that the plaintiff had been accused under parliamentary privilege of IRA money

laundering and financial malpractice. In the High Court the Judge ruled that the story had a tier 1 meaning, actual guilt. One of the issues determined on appeal that in fact the story carried a tier 2 meaning, meaning reasonable grounds for suspicion.

TIPPING J:
As well as or?

MR GRAY QC:
No instead of.

TIPPING J:
Instead of?

MR GRAY QC:
Yes. The story contained some elements which were treated as being a fair and accurate report of what had been said in Parliament and other elements which were the result of investigation by the newspaper and expression of its own views. The newspaper did not adopt what had been said in Parliament, it merely published a story which contained a fair and accurate account of what had been said in Parliament and then its own separate investigations and what it thought. The first judgment is that of Lady Justice Arden and it begins at page 596 and at paragraph 1 at the end of the first paragraph Her Ladyship says, "The essential issues concern the availability of qualified privilege for statements made in Parliament. Two, the actionable meaning of the article which comprised in part those statements and in part other factual material representing the newspapers own investigative findings. The first issue is largely fact specific but the second issue involves a novel challenge to the so called repetition rule which generally applies to reported speech in defamation proceedings."

WILSON J:
Mr Gray, although justification is pleaded, it wasn't an issue as such on these pre-trial applications was it?

MR GRAY QC:

No. No, meaning was.

WILSON J:

Meaning and qualified privilege?

MR GRAY QC:

Yes and what were permissible particulars for the plea of truth which would be tried later. So to what – it's an issue that's very close to the one in this case. To what extent is it permissible for the defendants in seeking to prove the truth of a tier 2 meaning, to rely on what was said in Parliament.

And the second paragraph Her Ladyship introduces the repetition rule for the purpose of –

WILSON J:

I'm sorry, just going back to what Lord Justice Arden said in the first paragraph in identifying the essential issues, there's one and two –

MR GRAY QC:

Yes.

WILSON J:

They're rather different from the issues here aren't they?

MR GRAY QC:

In my submission no. In my submission the application which has been made by the plaintiffs is to strike out as particulars of truth – of a truth defence to a tier 2 implication, statements which are privileged and it does so on grounds that the statements which are privileged are repetitious. They're merely a repetition of what has been said by others. We say because what has been said by others affords a privileged occasion, they may be included and they

may be relied on as particulars of the truth defence for the other parts of the statements made in the articles.

Her Ladyship goes on to the repetition rule. "For the purpose of the law of libel a hearsay statement is the same as a direct statement." She goes on to say, "The purpose of the rule is to protect the individual's right to reputation. Repeating someone else's libelous statement is just the same as making it directly."

Refers to *Stern v Piper* and says, "In *Stern v Piper* the Court applied the rule to a situation where the defendant contended that it simply made a statement that an allegation had been made thus the policy of the law appears potentially to apply in all circumstances and irrespective of whether the meaning of a statement is that the publisher is only reporting that a statement has been made without adopting or endorsing it but an important inroad was made in *Al-Fagih* where this Court declined to apply the repetition rule where statements that allegations had been made were made on a privileged occasion. The first issue in this case is whether any part of the article is entitled to reporting privilege but the second and important issue is whether the Judge was correct to adopt the submission that he had to find a single meaning for the whole article including any privileged parts and in so doing to apply the repetition rule to the allegations which he found were entitled to privilege. Privilege and meaning are two key elements of the law of defamation. They ultimately concern the freedom of expression and of the media as well as the right of individual to protection for reputation. Moreover in these proceedings that freedom and right and invoked in the context of a statement made in Parliament the right to freedom of expression assumes a special importance in the context of statements in Parliament because they concern political matters."

Her Ladyship then deals with the background and the judgment of Justice Gray at first instance. She, at page 606, identifies again the issues summarises the parties case at 607 at paragraph 21 she summarises her conclusions. First that the Judge was correct on the privilege issue and that is

that there was privilege in respect of the report of what had been said in Parliament because the report was fair and accurate. Second, on the single meaning or repetition issue the Judge was wrong. He was wrong because he treated privileged passages as other than the context in which the statements in which non-privileged passages were made. And then finally he should have found that they were level 2 meanings rather than level 1.

TIPPING J:

Was it axiomatic, for this purpose anyway, that it had to be one or the other but there was no pleading that it was both?

MR GRAY QC:

Well of course the single meaning rule is that an article may only have one meaning.

TIPPING J:

Well ultimately yes but there's nothing to stop pleading is there?

MR GRAY QC:

I think part of this interlocutory application was is it a tier 1 or is it a tier 2 and the reason for that is there are consequences for the practice and procedure leading up to trial.

TIPPING J:

Yes, quite. Thank you.

MR GRAY QC:

And if Your Honour asks were they pleaded in the alternative so that there might be different rules, I take it from the report that they weren't pleaded in the alternative.

TIPPING J:

No it must be so, yes, mustn't it.

MR GRAY QC:

Now Her Ladyship then dealt with a number of discrete propositions. First at the top of page 608 dealing with the fairness and accuracy of reports in order for there to be privilege. Second, at paragraph 26 that in order for fairness and accuracy to be maintained there mustn't be such intermingling that it's lost. The third proposition is on page 611 and that is that the maker of a report will be liable in defamation for allegations entitled to reporting privileges if they are adopted. Page 612, that the Judge correctly applied the principles and correctly concluded that there was a claim to qualified privilege. And those are the, so far as we're concerned for the submissions that I wish to make, the preliminary propositions.

The key proposition is found on 615 and it is under paragraph 51, "In the case of an article consisting in part only of passages entitled to reporting privilege, the meaning of the non-privilege passages is to be ascertained on the basis first, that the privileged passages merely provide the context in which the statements in the non-privileged passages were made and two, the repetition rule has no application to the privileged passages."

What the Judge did, having rejected the submission made on the pre-preliminary issues was to consider the meaning of the non-privileged passages on the basis of the whole of the article and he did this through a combination of the single meaning rule and the repetition rule. The real complaint is about the repetition rule. If that is not applicable to the privileged rules, those words can only be relevant as context. Mr Parkes submits in a skeleton argument the repetition rule is well established common law principle in England and Wales. It profoundly affects the meaning to be put on words and the way in which they can be justified and she then cites the passage from *Shah* that we have seen.

She then goes on over the page at 616 at the foot of paragraph 23, ah, 53. "*Stern v Piper* is binding authority for the proposition that in a case where no privilege arises the effect of the rule is the reported statement has to be treated as one made by the defendant." She then discusses the repetition

rule and then at paragraph 56 cites from the judgment of Lord Justice Simon Brown in a case called *Mark*. At paragraph 34 Lord Justice Simon Brown had said, "That to my mind is the crucial point to bear in mind. The repetition rule concerns the meaning of words and of course justification is the other side of the same coin. It recognises the reality as I've sought to explain it. It does not have the effect of making defamatory a publication which otherwise would not be but when of course it comes to qualified privilege the precise terms and circumstances in which the defamation comes to be repeated become all important." And he then discusses in *Mark*, *Reynolds* and *Al-Fagih* and against that's in the context of the reportage or *Reynolds* qualified privilege defence.

Her Ladyship goes on at 57, "In those paragraphs Simon Brown refers to *Al-Fagih.* In that case this Court held that the repetition rule does not apply to a case where the newspaper is entitled to qualified privilege at common law for neutral reportage. That is for a responsible reporting on matters of public interest under the principle in *Reynolds* in circumstances in which it does not adopt the allegation which it reports neutrally." She then goes on at 58 to say, "In my judgment it is impossible to distinguish what Lord Justice Simon Brown says in *Mark* about qualified privilege under the principle in *Reynolds* and reporting privilege. He was, however, referring only to the application of the repetition rule to the passage protected by qualified privilege and not to non-privileged passages in a hybrid article. Mr Parkes submits the Sunday Times repeats a submission that was rejected by this Court in *Stern v Piper*. In that case it was unsuccessfully argued that where a journalist was discussing as opposed to adopting an allegation by another, he ought not to be required to prove the truth of the underlying allegation. I don't accept that submission. *Stern v Piper* was decided before *Al-Fagih* and *Mark* and accordingly before the Court held the repetition rule does not apply to reports entitled to qualified privilege. To apply the repetition rule would also in my judgment be inconsistent with section 15 of the Defamation Act of 1996." And that's the provision providing a privilege for statements in Parliament.

"As I have already noted Lord Justice Simon Brown observed in *Stern v Piper* and again in *Al-Fagih* that the law of statutory privilege presupposes the existence of the repetition rule. Put another way, the clear intention of section 15 is at minimum to dis-apply the repetition rule as it would otherwise apply to the fair and accurate report. What Mr Curistan contends is that the single meaning rule applies to the article as a whole, that the meaning of the non-privileged words is to be found by taking the cumulative effect of the privileged words and the non-privileged words together and applying the repetition rule. There's no antidote in the article to the bane of Mr Robinson's allegations. The existence of a defence of privilege would be relevant only to the assessment of damages and not meaning. As I see it this is merely an indirect way of applying the repetition rule to the privileged words. The non-privileged words have on this analysis to be interpreted from a standpoint of a hypothetically reasonable reader, on the footing that the defendant is himself making the allegations which in the report are attributed to somebody else. In my judgment this infringes the privilege given to the fair and accurate report since it imposes a sanction on its author for what is said in that report. Moreover, it's bound to have a chilling effect on the addition of factual material to a report as is commonly expected from the responsible press today and may have the same effect on the addition of comment even though the defence of fair comment is not affected.

Moreover, if the repetition rule were to apply to the ascertainment of meaning of the non-privileged statements appearing in the same article, so as to impose a higher hurdle for the maker of those statements to have to overcome if he wishes to justify the truth of those statements, the value of the privilege would be undermined and indeed would be revealed as incomplete. That would, in my judgment, be contrary to the purpose of section 15. In all the circumstances, I conclude that the submission that the repetition rule should not apply to the accusations made in the report is contrary to section 15. It is therefore no answer that the defendant maybe able to rely on some other defence such as *Reynolds*.

My conclusion on this point is also in answer to the submissions of Mr Parkes, that to disapply the repetition rule would elevate political speech into a special category by requiring an adjustment of the rules of meaning which apply to a report of a statement in Parliament when this would be contrary to *Reynolds*. As I see it, the disapplication is a consequence of the statutory protection given to the reporting privilege. Furthermore, a conclusion that where an article contains both passages entitled to reporting privilege and passages not so entitled, the repetition rule applies to the privilege parts is also internally contradictory. It involves saying that the report is privileged but at the same time can enhance the seriousness of allegations made in other parts of the article containing both the privileged words and the non-privileged words. Moreover, my conclusions on this point receive support from *Al-Fagih* and *Manjana*, referred to above.

WILSON J:

Doesn't all of that go to the application of the statutory privilege to a hybrid article?

MR GRAY QC:

Yes.

WILSON J:

Isn't that rather different from the issue we're concerned with today?

MR GRAY QC:

In my submission Your Honour, no because what it says is there's one article and one meaning. The privileged words are part of the article. Meaning must be determined by reference to the words which are privileged and those which are not and in proving the truth of the non-privileged words, the publisher is entitled to rely upon the privilege parts and to do otherwise is to undermine the privilege.

ELIAS CJ:

But he's relying on it to substantiate the non-report portion of the article. That's not the same as simply claiming the privilege and not undermining the privilege for reporting. It's using privilege to justify his independent assertion.

MR GRAY QC:

Yes, in my submission that's what flows from this case.

TIPPING J:

I have major difficulties Mr Gray and I think you should put them because you may well be able to dispel them. The main paragraph on page 618, the second half of it, at paragraph 59 it is, where Her Ladyship says, it's the as I see it, this is merely an indirect way et cetera and then down to, "On the footing that the defendant is himself making the allegations which is in the report are attributed to someone else. In my judgment this infringes the privilege." The privilege is not given to allow you to make your own independent allegations on the basis of the privileged communication. It is given solely to report the privilege communication. I may have misunderstood Her Ladyship but as you were reading it through, I was struggling with it and I still have trouble with it. It seems to me that there's a begging of the question here. The question is, is the occasion of the report privileged? It is if it's fair and accurate and no more. It isn't if it's fair and accurate plus a building block.

MR GRAY QC:

First Your Honour, to deal with the paragraph. What Her Ladyship does earlier in the paragraph, in about the eighth line, is say, "What Mr Curistan contends is the single meaning rule." So, she's dealing with arguments advanced by the plaintiff.

TIPPING J:

Yes.

MR GRAY QC:

"What Mr Curistan contends is that the single meaning rule applies to the article as a whole and that the meaning of the non-privileged words is to be found by taking the cumulative effect of the privileged and the non-privileged together and applying the repetition rule." Then she goes on to say, "As I see it, that's merely an indirect way of applying the repetition rule to the privileged words." If I can interpolate, "As I see it, what Mr Curistan is saying, is the non-privileged words are to be interpreted on the footing that the defendant is himself making the allegations which in the report are attributed to somebody else."

BLANCHARD J:

But we're not concerned about the meaning.

MR GRAY QC:

No, I'm –

BLANCHARD J:

I'm having similar difficulty in understanding this argument.

MR GRAY QC:

Similar? Can I deal with His Honour Justice Tipping's point –

TIPPING J:

Could I try and simplify my difficulty? Let's forget what Her Ladyship was talking about here. Let's say I report that John Smith said in Parliament X and Y?

MR GRAY QC:

Yes.

TIPPING J:

X and Y is defamatory of the plaintiff. If I do no more, I have qualified privilege, or I have privilege. If I add and I agree with what so-and-so said in

Parliament and I then say my grounds are so-and-so, the issue is can I add to my grounds by invoking what X said in Parliament. That's where I start getting into difficulty.

BLANCHARD J:

It amounts to a form of adoption.

TIPPING J:

Mhm.

BLANCHARD J:

It seems to me a very strange policy.

MR GRAY QC:

What the story did is not adopted. In Parliament it was said that this man was a member of the IRA and was engaged in money laundering. We ourselves have found out that while running his company, he received these unexplained revenues, ran them through some companies and paid them to some other people. That's not adoption of what's said in Parliament –

TIPPING J:

I know but in the present case, isn't it said against you that you have in effect adopted?

MR GRAY QC:

No, no, it's said that we may not refer to what was said in Parliament as a particular of the truth of reasonable grounds to suspect. If Your Honours will bear with me while I develop the point I was making –

TIPPING J:

This is the enlightenment I'm looking for.

MR GRAY QC:

It is short of adoption. It simply leaves what is said in Parliament and says, in Parliament it was said this man was a member of the IRA and while there, engaged in money laundering. Our own investigations subsequently, have demonstrated that he used his own company to take in unexplained money and to pay it to somebody else. We say that there are serious grounds for believing that this man has engaged in money laundering. That's not an adoption of what is said in Parliament but in order to justify the truth of the serious grounds for belief, the author is able to rely both on their own investigations which they prove but also on what was said in Parliament.

BLANCHARD J:

Saying that what was said in Parliament provides serious grounds?

MR GRAY QC:

Yes, is a particular –

BLANCHARD J:

Which effectively, is a form of adoption of what is said in Parliament.

MR GRAY QC:

Not in the publication but for the purpose of proving the truth of the imputation that arises from the non-privileged part, from the article taken as a whole.

TIPPING J:

Your purpose is to do more than merely report. Your purpose is to rely on what was said in Parliament, to help you establish that there were indeed serious grounds to whatever?

MR GRAY QC:

Yes and that's what *Curistan* says is permissible –

TIPPING J:

I'm neutral as to *Curistan*. I'm trying to tease out exactly what it is we're – but you can't get away from the fact, can you, that you're wanting to use it for more than mere reporting?

MR GRAY QC:

Yes, it's not merely the reporting of what is said in Parliament. We want to use it for the purpose of establishing the truth of the imputations in the statement of claim that I've referred you to afterwards. If I can come back to His Honour Justice Blanchard's question. This is a case about meaning but in the natural scheme of things, once you've established meaning you then turn to pleadings and proof in respect of that meaning and the consequences flow through the subsequent stages of the inquiry that will be undertaken later on.

TIPPING J:

In effect surely, if you are saying this supports our allegation of reasonable grounds, you are using it, if you like, adopting it or whatever word one chooses, for a purpose of your own as opposed to simply informing the public?

MR GRAY QC:

With respect Sir we're not saying, we're not adopting in a sense of saying Mr Peters was right. We're saying –

TIPPING J:

Well you must be by inference?

MR GRAY QC:

We're saying because it was said by a senior politician in Parliament and is not capable of giving rise to an action for defamation, because of the availability of a privileged defence, it was something we were entitled to rely on for the truth of a tier 2 meaning. It provides evidence of serious –

TIPPING J:

To justify a tier 2 meaning?

MR GRAY QC:

Yes.

TIPPING J:

And I'm using that word advisedly.

MR GRAY QC:

I understand. Yes.

TIPPING J:

Because I think truth in the context of reasonable grounds is very elusive.

MR GRAY QC:

Yes. Truth really is better applied to tier 1 isn't it?

TIPPING J:

It is, it is and despite the heading of that section.

MR GRAY QC:

Yes well when the section was undergoing its 20 odd year gestation period these tiers 1, 2 and 3 –

TIPPING J:

Of course.

ELIAS CJ:

But privilege has nothing to do with value, it's about immunity from suit, so why should it be converted into some ground for the view being independently expressed by the publisher?

MR GRAY QC:

I think Your Honour there are two reasons. The first is why has the privilege been confirmed.

ELIAS CJ:

Well it's not because what's said in Parliament can be treated as truthful or accurate.

MR GRAY QC:

Not but it is, with respect, because what is said in Parliament ought to be able to be known to the public, reported and commented on –

ELIAS CJ:

But then a qualified privilege claim will run but this is, but what we're looking at here is a claim of truth, a defence of truth.

MR GRAY QC:

Yes and we're not saying necessarily that the statement necessarily proves the tier 2 meaning, provides there are serious grounds. We are saying it's something which can provide a particular and provide part of the evidential framework for a justification of the existence of serious grounds to believe.

McGRATH J:

You're really saying, are you, that the addition of factual material must also be protected or rather that's what Lady Justice Arden is saying. That the addition of factual material obtained by the publisher's own researchers, is also protected as well as a fair and accurate report of what was said in Parliament?

MR GRAY QC:

In my respectful submission Sir, no. The additional factual material written by the publisher and the publisher is responsible for them. But in justifying the additional factual material, the publisher is entitled to rely upon the privileged material. Now whether it's enough by itself –

McGRATH J:

It's a form of partial protection that derives from the privilege.

MR GRAY QC:

It's an evidential point really. It's just are we entitled to rely upon these privileged statements as part of the evidence available to justify the statements we've made ourselves. Is it part of the substrata.

TIPPING J:

You want it to be part of the context, that rather elusive –

MR GRAY QC:

Context is everything of course.

TIPPING J:

Well it's very easy to say that but it's a bit like letting the jury know the full story which used to be the vogue in similar fact cases a little while ago and that was absolute nonsense because that was no test at all.

MR GRAY QC:

Indeed.

TIPPING J:

I just have a little bit of shyness about this rather undisciplined appeal to context.

MR GRAY QC:

Yes. That of course is taken from the passage in the decision of Lord Justice Hirst in *Shah* that we looked at before.

TIPPING J:

I appreciate that.

MR GRAY QC:

And essentially all Lord Justice Hirst was saying is in respect of tier 2 imputations, serious ground for belief, the enquiry must focus on conduct by the plaintiff but I don't go so far as to say only evidence of conduct is relevant. Other evidence –

TIPPING J:

But the fact that a MP has said it in Parliament, as that MPs assessment, it is – the fact that that's privileged, doesn't seem to me to be anything to the point. It doesn't give it any warranty of greater authenticity.

MR GRAY QC:

Um, well, one our community has decided that there are particular values attaching to what is said in Parliament which support free reporting and free comment. Second, it so happens that in relation, particularly to courts but also to Parliament, there are procedures available to people about whom things are said, that enable them to correct records if what is said is disputed. In the litigation that we are dealing with Simunovich was a party. They were present, they called witnesses, they cross-examined, they made submissions. In relation to Parliament if something is said which is – I'm sorry. I said cross-examination, it was a review proceeding and it probably proceeded on affidavits. In Parliament of course it's possible to go to the speaker and say things have been said –

TIPPING J:

Yes but the damage has been done.

WILSON J:

I must say Mr Gray I, as I've disclosed, was counsel for the Ministry at that inquiry. I certainly don't recall Simunovich being a party or question.

MR GRAY QC:

No, I said the litigation Sir, the –

WILSON J:

There was no –

MR GRAY QC:

I'm sorry I don't understand.

WILSON J:

I'm sorry, what were you referring to? Simunovich had its opportunities where?

MR GRAY QC:

I referred to the litigation Your Honour.

WILSON J:

Oh the litigation.

MR GRAY QC:

That led to the judgments of Justice Ellis and of –

WILSON J:

Yes, not to the inquiries.

MR GRAY QC:

Not to the inquiries, I didn't make the submission in relation to the inquiries.

TIPPING J:

What would happen in a case of a dissenting judgment?

MR GRAY QC:

Well again the Defamation Act deals –

TIPPING J:

Of which – well I'll say no more.

MR GRAY QC:

The Defamation Act deals with that. Privilege exists for a fair and accurate report.

TIPPING J:

Yes provided – but can you use a dissenting judgment as a building block for your own hobby horse?

MR GRAY QC:

Oddly enough that's not unlike the issue that arose in respect of *Waters*. In *Waters* there had been a direction to the jury. There was a conviction. The conviction ultimately was set aside on grounds of misdirection but nevertheless the article referred only to the direction and also to two other judgments of County Courts which had made similar findings in respect of the financial good faith of the person alleged to be defamed. That is why *Waters* is said in the cases to be a difficult one but nevertheless it was held –

TIPPING J:

It seems to me to be a rather backhanded way of justifying your own opinion to say that someone else's holds it. Surely the essence of opinion is that you've got to portray objective facts upon which your opinion is based.

MR GRAY QC:

We come back to the point that Your Honour made about the distinctions between tier 1 and tier 2 meanings. If what is said is there are serious grounds to think that something might have gone wrong here, is the fact that a conjunction of strong statements by Courts, strong statements in Parliament said to have been based on the availability of documentary evidence and in respect of later applications barristerial enquiries undertaken by government departments, may in combination be sufficient to provide serious grounds for thinking that something's gone wrong. Now as a matter of evidence at trial it might not be enough but it –

TIPPING J:

Yes, obviously it's a difficult point because there is force both ways. As I think Lord Justice Laws said in that passage that I imagine we're coming to quite soon.

MR GRAY QC:

Oh yes. In fact let's do that now. I mean Lord Justice Laws is able to express himself succinctly and very clearly and he does in this case. His judgment commences on page 622. At the bottom of the page he says he's had the advantage of reading Lady Justice Arden's judgment and adopts it and agrees that the appeal should be dismissed. At paragraph 80 he sets out the repetition rule and its purpose. At 81 he says "the rule involves an exception to the law's general approach to the meaning of words in defamation cases which is that an impugned publication is to be judged according to the natural and ordinary meaning of the words used, since it may be plain that the publisher is doing no more than repeating what someone else has said. In that case, the natural and ordinary meaning of the words used is not X is the case but A said X is the case. For the policy reasons given in the cases, the publisher is in the same position as if he had indeed stated X is the case. Qualified privilege is also a rule of policy. It is a buttress of free expression. As regards reports of parliamentary speech, the need to ensure that what is said in Parliament maybe freely disseminated, maybe taken as obvious. There is a plain affinity with the absolute privilege that attaches to what is said by members of the legislature within Parliament itself. The privilege is now given by statute in the shape of section 15 and part 1 of schedule 1 of the Defamation Act 1996, by which qualified privilege is accorded to a fair and accurate report of proceedings in the public of a legislature anywhere in the world. The single meaning rule is, I think, not so much a rule of policy as a function of the need to understand and interpret expressions in the context in which they appear and this is a matter of common sense and fairness."

At paragraph 14, Lady Justice Arden cited Duncan and Neill on Defamation. At paragraph 84, "A publication may and the article in this case does, contain both a fair and accurate report of statements made in Parliament and also

comments of the publisher's own and the two – as is also here the case – may be readily distinguishable. In those circumstances, the repetition rule, which favours the protection of reputation, and qualified privilege, which favours free expression, may be in opposition; and the single meaning rule cannot bridge the gap between them. The Court's approach to a defamation claim relating to the whole publication must in my judgment be as follows: (i), the report of what was said in Parliament is subject to qualified privilege. This necessarily involves a disapplication of, or exception to, the repetition rule as regards that part of the publication. If the rule were applied, the privilege would be nullified. The privilege allows the publisher to rely on the fact that he is reporting what another has said, that other is a legislator speaking in Parliament. The very purpose of the privilege is to facilitate what s/he has said. It can only be done if the repetition rule is set aside. (ii), the meaning of the publisher's own comments is to be ascertained separately from the meaning of the report of parliamentary speech. This necessarily involves a disapplication of, or an exception to, the single meaning rule. So much follows from proposition (i): once it is accepted that those parts of the publication consisting in the report of parliamentary speech, being covered by parliamentary privilege, must be understood without reference to the repetition rule, the publisher's own comments must necessarily be interpreted according to their own terms and no special rule applies. Accordingly the relation between the report and the comments is that the first sets the context for the second, no more. Thus, the hybrid case involves exceptions both to the repetition rule and the single meaning rule, but does so on a principled basis for the reasons that I have outlined."

TIPPING J:

If, as His Lordship says, that the two aspects are readily distinguishable, I just have slight difficulty with the second step. That you've got to treat what is clearly and distinguishably the publisher's own work, nothing to do with what the MP has said in Parliament, on the same basis as the first stage, what is said in Parliament. I haven't put that very well Mr Gray but you see what I'm getting at? If they're distinguishable, why does the rule or the approach in the first necessarily have to be applied to the second?

MR GRAY QC:

I'm sorry, I have misunderstood Your Honour, I haven't followed the question.

TIPPING J:

I haven't got my thinking sufficiently clarified to be fair to you, so perhaps we better move on but I just flag, in case anyone else wants to pick it up –

WILSON J:

Could I try? Isn't the statement that, "The publisher's own comments must necessarily be interpreted according to their own terms and no special rule applies," against your argument?

TIPPING J:

Yes, that's exact, sorry, that's exactly what I was troubled about.

MR GRAY QC:

Because Lord Justice Laws is saying you set aside the privileged material and consider just what the publisher has said? Is that why Your Honour –

TIPPING J:

Yes, it's distinguishable, it has to be viewed separately.

MR GRAY QC:

As to meaning.

TIPPING J:

As to meaning?

MR GRAY QC:

As to meaning.

WILSON J:

I thought you said that everything else flowed from here?

TIPPING J:

Yes and everything else apparently flows from that, thank you.

ELIAS CJ:

Para 88 seems to be totally against you too?

MR GRAY QC:

If it pleases Your Honour, may I address the question that had just been asked which is first. When it comes to however, particularising and proving the meaning of what it is that the publisher has said, in my submission, what Lord Justice Laws is saying is, you may repeat what somebody else has said. There is a disapplication of the repetition rule.

TIPPING J:

But is he saying –

MR GRAY QC:

The repetition rule is disapplied –

TIPPING J:

Is he saying that in order to justify your own bit you can rely on what –

ELIAS CJ:

No, he's not.

TIPPING J:

No.

BLANCHARD J:

I don't really think this gives much support to your argument at all.

ELIAS CJ:

It's simply saying that to the extent that the article is a fair and accurate report, it remains subject to qualified privilege, to the extent that it goes beyond that, the general law applies.

McGRATH J:

It's disapplied to extent the statute says so and no more.

ELIAS CJ:

Yes.

MR GRAY QC:

In my submission, that's not what His Lordship is saying. He says it disapplies and it remains part of the article. At paragraph 84, "The Court's approach to a defamation claim relating to the whole publication." In my submission, what he's saying – it is true and I'm bound to accept that what His Lordship is saying is that in respect of meaning, the publisher's responsible for the publisher's own work but the article remains the whole article. When considering truth, either the qualified privilege material is excluded completely and as Lady Justice Arden points out, the effect of that is to require the publisher to prove the truth of what somebody else has said because that thing that the somebody else has said is the part of the whole publication. Or alternatively, it should be that the privileged material should be available and reliable for the purposes of demonstrating the truth, or justifying what it is that the publisher has itself said.

ELIAS CJ:

Well, where does it say that?

MR GRAY QC:

In my submission, that's consistent with paragraph 84.

BLANCHARD J:

Which bit of paragraph 84?

MR GRAY QC:

Of Lord Justice Laws, where he talks about the approach to defamation of a claim relating to the whole publication.

TIPPING J:

Remember that this case was solely about meaning and qualified privilege. It wasn't to do with what material you could invoke in order to justify your own contribution, if you like. I don't think they were really addressing this point, were they?

MR GRAY QC:

Forgive me Your Honour, I'm simply looking at what Lord Phillips said in case – no, again, the Lord Chief Justice was discussing adoption. My submission is that it must necessarily be the case, that if the repetition rule is disapplied then it is permissible to defend a statement by reason of the fact that somebody else said it. That is a disapplication of the repetition rule.

ELIAS CJ:

That seems to be totally contrary to what Lord Justice Laws is saying in para 88. He's simply saying that you just, that the analysis of the case is simply that it's only the fair and accurate reporting that has, to which the privilege attaches.

TIPPING J:

I think 90 puts it as clearly and as simply as His Lordship could. He's talking about qualified privilege. Where it's distinct the one is privileged the other is not.

MR GRAY QC:

Yes I understand that. The question then is what's the significance for the other.

ELIAS CJ:

Well this case is not dealing with that.

TIPPING J:

It doesn't help it.

MR GRAY QC:

In my submission it is a consequence of it.

TIPPING J:

Well I don't follow the logic of that. I know there are difficulties where it's rolled up to use that awkward phrase but where it is distinguishable, readily distinguishable and separate, as His Lordship said this case was all about, I don't understand why you don't just go down the two streams of thought. Why you have to, as it were, borrow from the other where they're both demonstrably different.

MR GRAY QC:

Well let's come back with respect Your Honour to first principles and ask ourselves where we have a hybrid article, we have an article that contains fair and accurate reports of proceedings in Parliament and of what is said by courts and a story which is based both on those and also on separate research. Privileged material may not support a defamation proceeding. It may be defamatory but it is defensible. It is something which the community has assessed ought to be reliable or alternatively in respect of which the community believes there is sufficient value in expression that nothing should be done to inhibit discussion, reporting of it and discussion about it. It is in a special category of case. I suppose I'm just saying it again and again to say, we say that for those policy reasons which underlie the availability of privilege in the first case, and because it would erode the availability of privilege if it can't be reported and relied upon fully, then necessarily it is something which is available to support at least a tier 2 implication which is a serious grounds one. That the community has to be able to take seriously what court's say and what is said by senior Parliamentarians in the House. And that it is an erosion

of free speech and of appropriate reporting of those institutions for there to be a limitation on the extent to which a report of those proceedings can be used.

BLANCHARD J:

You seem to be arguing that you're entitled to rely upon the material because it's privileged. Isn't it more that there is an immunity in relation to the privileged material as the Chief Justice has pointed out. That doesn't necessarily extend to an ability to rely upon it.

MR GRAY QC:

For the truth –

BLANCHARD J:

Because to rely upon it, you're adopting it.

MR GRAY QC:

Well it comes back to the distinction between the proof, merely that somebody said something and proof of the content of what they said. We're not seeking to rely on it necessarily for the truth but for the purpose that somebody who's speaking on a privileged occasion has said it.

WILSON J:

It may well help you when it comes to opinion or comment but I have difficulty in seeing how it helps you in the context of the truth defence of the substrata to honest opinion?

MR GRAY QC:

Well in respect of honest opinion in my submission the law is reasonably clear so it's the justification, if I can use that word, to avoid running into problems between tiers 1 and 2.

WILSON J:

Yes.

MR GRAY QC:

Bear in mind that when we looked at *Shah* we saw that even in that case what Lord Justice Hirst was saying is the proof must focus on conduct but he didn't exclude everything else and we say that there are circumstances in which he was prepared to contemplate hearsay material being used and these are those circumstances, because of the special rules around reporting of proceedings of Parliament and of courts. I wish I could be cleverer than that –

WILSON J:

That's all right. You put the argument very clearly.

MR GRAY QC:

Yes it's whether I've supported it as well as Your Honours might like. I did want to deal with section 50 of the Evidence Act because the –

ELIAS CJ:

Where are we going with your argument now? Sorry, we've interrupted, what do you want to cover?

MR GRAY QC:

It brings to a conclusion my discussion of the cases. I wanted to deal with section 50 of the Evidence Act and then look briefly at honest opinion and section 38 of the Defamation Act and that would be my submissions.

ELIAS CJ:

Yes, thank you.

MR GRAY QC:

It might not quite be completed by lunchtime.

ELIAS CJ:

No that's fine.

MR GRAY QC:

I earlier foreshadowed what our argument in relation to section 50 of the Evidence Act is. We say that section 50 of the Evidence Act is no more than a limitation of the law relating to res judicata and issue estoppel to the current state of the common law and it doesn't – and it provides that the Evidence Act doesn't do anything to interfere with those provisions. The text of section 50 Your Honours is found under tab 6 of the bundle. And we say the key to understanding subsection 1 is to look at subsection 2 because it's subsection 2 that tells you what it is that the framers of the legislation wish to protect and that was the law relating to enforcement of judgments to res judicata and to issue estoppel. If subsection 1 means that evidence of a judgment is not admissible, then that would mean for example that a fair and accurate report of a judgment might be defamatory and the immunity lost because it wouldn't be possible to introduce evidence of the judgment.

WILSON J:

Mr Gray, for what purpose are you seeking to rely on court judgment or judgments in support of your defence of truth?

MR GRAY QC:

We say that the statements made in the judgments, particularly but not only in the Court of Appeal, provide some support for the existence of serious grounds to believe.

WILSON J:

So more than the fact of the finding you want to rely on the content of the finding do you?

MR GRAY QC:

No. We say it is the fact of the finding. The fact that a court was prepared to make strong comments that something had gone wrong, we say is something that would lead any member of the community to think that there were serious grounds for believing that something may well have gone wrong.

ELIAS CJ:

Mr Gray your argument can't possibly be right in terms of the inability to refer to the judgment in – because what it is, is it can't be introduced to prove the existence of a fact that was in issue in the proceedings. That's what it can't be introduced for so it doesn't affect the privilege and it doesn't affect reference to the judgment in connection with an indication of the privilege.

MR GRAY QC:

I accept that Your Honour. I accept that that must be right on reflection. I then turn to honest opinion and a vexed question of the meaning of section 38 of the Defamation Act. The Court of Appeal held that particulars relied on by the second defendant for its honest opinion defence were not available. They found that section 38 of the Defamation Act applied not only to the rolled up plea but defences each of truth and honest opinion had found that a defendant who wishes to plead honest opinion must be guided by section 38 and that it must therefore plead the facts and circumstances that it relies on in support of allegations that statements are true. Now we accept that a defendant must provide particulars of a truth defence. We accept that the purposes for which a publisher does that is to inform the plaintiffs so it can adequately prepare for trial and vouch for the sincerity of its contention and those phrases are derived from *Ah Koy* and also are found in the submissions of the respondents.

We also accept that it's necessary for a plea of honest opinion to succeed that there are sufficient facts available so that a reader can judge for themselves whether they agree with the opinion or not. But we say those obligations arise at common law not by the operation of section 38 of the Defamation Act. We say that section 38 of the Defamation Act is directed only at the rolled up plea. We point to its adoption as rule 136C of the Rules of Civil Proceeding. Similar adoption –

WILSON J:

Just on that, it's interesting, isn't it, that in Rule 136C the heading was particulars where fair comment pleaded, now we've got the change to the truth.

TIPPING J:

I think they've got themselves muddled here.

MR GRAY QC:

Yes.

TIPPING J:

I think this is directed to a honest opinion defence.

MR GRAY QC:

Yes.

TIPPING J:

And the heading of truth is, it should be protected in defence of honest opinion.

MR GRAY QC:

And that's because the law clearly was that the rolled up plea was a honest opinion plea –

WILSON J:

Exactly.

MR GRAY QC:

– and not a truth plea. It never was a truth plea.

TIPPING J:

No. The factual element of the honest opinion previously you didn't have to particularise. That was the vice that this section was directed at, wasn't it?

MR GRAY QC:

Yes.

WILSON J:

The rolled up plea.

TIPPING J:

The rolled up plea, sorry, the rolled up plea at common law you didn't have to particularise –

MR GRAY QC:

And that's why –

TIPPING J:

And that's what this is here for.

MR GRAY QC:

Yes and it's why the identical provision in the United Kingdom was adopted and it's why *Lord v Sunday Telegraph*, a decision of Lord Denning, was clear that the rule is addressed only to honest opinion.

ELIAS CJ:

Does the McKay Report shed any light on this?

MR GRAY QC:

No but what does is the Laws of New Zealand which in its defamation section was, had Sir Ian McKay as a supervising editor. At 17 if it pleases Your Honours –

TIPPING J:

I think he was more than the supervising editor. I think he was actually the author Mr Gray.

MR GRAY QC:

Well I wouldn't want to use hearsay material to support my submission.

TIPPING J:

No but I have I think what claimed to be fairly direct knowledge that he was the author.

MR GRAY QC:

Page 133 at paragraph 172. Now what he doesn't go on to do in this is say section 38 doesn't apply to truth.

TIPPING J:

Well he says it's a plea of honest opinion, not of truth, that's just about enough to demonstrate that the heading is misplaced.

MR GRAY QC:

Yes. Of course when he was writing this it wouldn't have been permissible to refer to the heading to construe the provision but now it is. The reason I raise it and the reason it's a problem is not because of the requirement to particularise the facts that are relied on for the opinion but because section 38(b) might be regarded as a requirement that the opinion be justified and there's some support for that from the decision of the Court of Appeal in *Haines* because in *Haines*, which is found in the materials at tab 11, the Court held that section 38 requires a defendant to plead facts and circumstances supporting the truth of opinions. We say that the defence of honest opinion is not at all concerned with the truth.

TIPPING J:

Well in (b) those statements must be the statement for which the defendant alleges are statements of fact.

MR GRAY QC:

That is the correct position.

TIPPING J:

I don't think, with the greatest of respect, there can be too much doubt about that.

MR GRAY QC:

We say that that is the position and we say that one of the potential embarrassments is it is an encouragement –

TIPPING J:

Has anyone – has someone suggested that you've actually got to justify in the sense of getting people to agree with your comment. Well that can't be right, surely?

BLANCHARD J:

Where is that in *Haines*?

MR GRAY QC:

It's under tab 11 Your Honour. It begins at paragraph 90.

TIPPING J:

Is the first sentence in 90 entirely correct?

MR GRAY QC:

My understanding Sir is that if it's unclear –

TIPPING J:

It goes to the jury.

MR GRAY QC:

– then it goes to the jury. Perhaps that's why in the first instance it's not meant as a –

TIPPING J:

The reference to in the first instance with great respect doesn't make much sense either because if the Judges decided that's it, there's no second instance.

MR GRAY QC:

Yes. And then they go on at 91 to say the jury needs to look at the publication as a whole and not just the statements which might be categorised as opinion. It's not correct –

TIPPING J:

Oh I'm sorry I think I was a bit hasty. I'd overlooked the are capable of being.

MR GRAY QC:

Yes.

TIPPING J:

I think I was a bit hasty. What is this in 90 that you say that supports the view that you've got to justify the actual opinion?

MR GRAY QC:

It goes on to 91 Your Honour where it talks about the jury considering the meaning of the words and there is a passage which says, forgive me the passage is not just jumping out at me but there is a passage which says that the section 38 requires a defendant to plead facts and circumstances it relies on for the truth of the opinions.

TIPPING J:

Well that would be –

MR GRAY QC:

Perhaps I can find that passage for you.

TIPPING J:

– a fairly startling proposition.

MR GRAY QC:

Yes well it's just to avoid that possibility because it does make pleading difficult and of course it's not appropriate.

ELIAS CJ:

Sorry did you identify where that's from?

MR GRAY QC:

No I wonder, Your Honour, if I can do that over the luncheon adjournment?

ELIAS CJ:

Yes. Is that 104? Perhaps you could find it.

MR GRAY QC:

No, forgive me. I found it yesterday but it's not jumping out at me today. I wonder if I can come back to Your Honours after lunch?

ELIAS CJ:

Yes, indeed. Thank you. We'll take the adjournment now.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.17 PM

MR GRAY QC:

May it please Your Honours. Three short points to conclude. First, in relation to *Haines*, a phrase that caused us to make the submission we did is indeed from paragraph 90 and from the second sentence. Now what the Court of Appeal said there was the fundamental question which arises for the jury is to determine whether the imputations they have found to exist were conveyed as publications, as expressions of opinion or statement of fact and it's the conjunction of imputations and expressions of opinion. We say that whether or not words used are expressions of opinion, doesn't bear any relation to

whether the words bear the imputations alleged by the plaintiff and there's an unhappy conjunction of different concepts used for different purposes to mention in the same breath the opinions and the imputations and it may well be that the way in which the Court of Appeal has dealt with the issues that arose in *Haines* which was by saying well look, in a trial the starting point is to determine meaning and to identify whether or not the imputations alleged by a plaintiff are in fact the imputations that the article bears. And when making the decisions that we do about truth defences, we need to start with that and think about the trial process has led the Court to express itself in this way but by the time we get to honest opinion the meaning of the opinion is not important. What is important is whether it is genuinely held and whether it's accompanied by sufficient facts to enable the reader to decide whether they agree with the opinion or not. And we say that if that is borne in mind and if the historical analysis of section 38 that we've asserted for in our written submissions is correct, then section 38 only really exists in the rolled up plea and operates to require someone pleading honest opinion to particularise the facts relied on for the expression of the opinion and we accept of course that that's an obligation that exists. But we say section 38 operates to go no further.

The first final conclusory comment is to refer to the New Zealand Bill of Rights Act. Of course we are in a field of human rights, first as to reputation and second as to freedom of expression and of course there is that issue that arises from the preamble to the Bill of Rights where there's an affirmation and protection of the rights contained in the Bill and then only an affirmation of other rights contained in the international covenant and the question arises whether the commitment is different in respect of those contained in the Bill, and those contained in the international covenant, and of course reputation is not in the Bill but is in the covenant. We say that the Bill of Rights dimension doesn't really add anything to this particular case or indeed to this field because we say courts have for decades, perhaps centuries, been trying to balance competing rights in this field, reputation on the one hand and free speech on the other, and in a sense this is a precursor to rights dialogues that occur in other dimensions. You will have see, as we've gone through several

of the decisions of the United Kingdom Court of Appeal, or the England and Wales Court of Appeal, that counsel over there have argued that the enactment of the United Kingdom Human Rights Legislation may in some way have affected the way in which the law of defamation should develop and in each case what the courts have said is no it doesn't, the enactment of the human rights legislation doesn't add anything. It's what we've been doing anyway and we are achieving interference with freedom of expression in a way that's justified in a fair and democratic society by the balance that we're already achieving. So in a sense we can't ignore the Bill of Rights Act or the dimension that arises by reason of that but we, on our side anyway, don't argue that any particular interpretation of provisions or analysis of cases should follow from it.

Finally we do say, however, that in appeals like this which deal with the practice and procedure of defamation, consideration must be given to the technical consequences and practical consequences for the parties of decisions that are made. We didn't put them in but in the bundle are cases like *Pizza Pizza* and *Lucas-Box* which deal with truth defences and imputations and what is clear from the Court's consideration in those cases of whether or not to permit a defendant to plead alternative imputations to those alleged by a plaintiff, is a very careful analysis of and understanding of the technical and practical consequences of the decisions that were being made. And the decision such as the one before Your Honours in this appeal do sit within a process by which a jury is going to be asked to consider some words that were published, the impact of those words on the plaintiffs, and whether or not there are defences to any defamatory effect those words may have had by reason of the words either being true or an expression of an opinion honestly held or published on a privileged occasion. We say that Your Honours should take account of the balance that exists in terms of pleadings within New Zealand. I happen to be one of those who hope that one day we'll get a chance to argue in this Court whether the choice made for New Zealand in *Haines* is the best choice for this country or whether a different choice is an appropriate one. It is interesting that in almost all the England and Wales Court of Appeal decisions that we've looked at today, it is

the *Lucas-Box* meanings alleged by the defendant that are in issue, which may perhaps be explicable by the defendant's meanings being the ones that are more real before the jury as a result of the way in which practice and procedure has evolved in the United Kingdom. So we do say when you make this decision, please do so having regard to the whole of the progress of this case to trial, what it is a jury will have to decide and what will be most helpful to them to decide it. Unless Your Honours have any other questions, those are my submissions.

ELIAS CJ:

Thank you Mr Gray. Yes Mr Galbraith?

MR GALBRAITH QC:

There is one difference between the pleading my learned friend Mr Gray's party, the second defendant and the first defendant TVNZ which is of some significance, and that is you'll see from the schedule which was set out in paragraph 16 Court of Appeal judgment, is that TVNZ have pleaded justification or truth to two of the imputation pleadings of the plaintiffs, both serious grounds imputation pleadings, pleadings 3 and 4, but have also pleaded section 8(3)(b) in relation to the plaintiffs, I say to the meanings, to the plaintiff's allegations as a whole and you'll see that set out in paragraph 16 there. That I will be suggesting to Your Honours is relevant when Your Honours come to consider whether or not the repetition rule which has been applied in the UK can sensibly have any significance to these pleadings and particularly the 8(3)(b) pleading. I'll come back to that obviously.

I had, for a fleeting and hopeful moment, thought that possibly the Court of Appeal decision which said that we could plead section 8(3)(b) as the High Court decision had said, had also, in effect, implicitly accepted the particulars which we'd pleaded to 8(3)(b) but I think to be fair when one reads it the directions as to particulars and what can be pleaded seems to encompass what they describe as the truth pleadings and they've in this paragraph, in this schedule in 16 you'll see they put section 8(3)(b) under truth which it is in a general sense.

So the particulars which are at issue before Your Honours so far as our appeal is concerned have to be considered under 8(3)(a) and 8(3)(b). So for that reason we have both a tier 2 meaning issue to discuss and a 8(3)(b) issue to discuss. You will also have seen from the Court of Appeal judgment, I think paragraph 336, that by the time Television New Zealand came to run its programme, there had already been a great deal of publicity, well publicity is not perhaps quite the right – publication of, of course, the judgments. There had been also articles as in the Herald which started some considerable time earlier in the year and as my learned friend Mr Gray indicated to you in addition to what's described in the judgment of the Court of Appeal, there had also been articles in the Independent, there'd been the statement of the Right Honourable Winston Peters in Parliament and there had been some inquiries or a report by Peter Andrews, although that wasn't, I think I'm right in saying, wasn't public. I think that's right at the time that the programme was published but there was a good deal of material already out there in the public arena and so of course it's hardly surprising that the programme was built around all this material which was already out in the public arena and that's what we plead in paragraph – or that's what's referred to in our submissions at paragraphs 14 (a), (b) and (c) and I just wondered if it might be helpful because Your Honours heard my learned friend Mr Gray say well we want this material in as a matter of context and there was the discussion between Your Honours and my friend as to context. But it just may give Your Honours an appreciation if I could just take you in volume 4, which is the purply, I think it's purple, volume behind tab 3, and you'll see our pleading or TVNZ's particulars in relation to the Court judgments and so there are –

ELIAS CJ:

What are you taking us too?

MR GALBRAITH QC:

I'm sorry Ma'am, the purple volume, volume 4.

ELIAS CJ:

Behind tab 3?

MR GALBRAITH QC:

Schedule 3, judgments of the High Court and the Court of Appeal in the scampi litigation and so there's reference to a judgment in the High Court of Justice Randerson's and it, as you'll see, describes what it was. It was an application for judicial review, 1.2 Simunovich joins the party, records the differences in limits, held manifest disparity, did not comply with the requirements and thereby unlawful, set aside the allocation decisions. The second one *Vautier Shelf* that's the judgment of Justice Ellis. Again it sets out to describe what the judgment or what the case was about, the fact that Simunovich was involved and 2.3 sets out statements that Justice Ellis made and then the Court of Appeal judgment under 3, *Official Assignee v Chief Executive of the Ministry of Fisheries* again describes what the judgment was about in appeal and then what the presiding Judge – the comments which the Judge made, and you'll see the comments are directed to the Ministry because of a judicial review (a) "The Ministry have seemingly moved from one regime to another in a manner which has caused considerable confusion; policies have been announced but have been revoked or then changed without due consultation or notice; other policies…" et cetera et cetera et cetera so this is very much what my learned friend described as context. It's the scene as in these judgments it was described that the programme then went on to talk about specifics.

WILSON J:

Had there been any suggestion of corruption in any of those judgments?

MR GALBRAITH QC:

No there was not. In fact I think expressly, if I say expressly that word wasn't used Your Honour but I think there was certainly expressly said there was no indication of impropriety or anything like that. So that's why I say these judgments are context and they're – but they are judgments, they exist, they were the result of hearings that Simunovich participated in and if one had to go off if one wasn't allowed to refer to the judgments and prove now all these

facts, then there would be another great long inquiry going on in the context of the defamation hearing. So –

TIPPING J:

These are judgments, of course, in respect of which the plaintiffs of the defamation action but not the defendants in the defamation action were parties, is that –

MR GALBRAITH QC:

Yes, that's right Sir. That's right. And the judgments might be right, wrong, half-right, half-wrong but the aspect for which TVNZ seeks to refer to in its particulars is the fact that they were given, they said what they said and they were part of the background upon which the programme was built.

TIPPING J:

If they are context, whatever that word might precisely mean Mr Galbraith, can they also – either they're particulars of an allegation are fact or they're not, the fact that they're context doesn't make them into particulars does it? Per se?

MR GALBRAITH QC:

Per se, no I agree with that. Per se it doesn't and I have to then explain myself because that's where one comes back to either section 8(3)(a) pleading or to the 8(3)(b) pleading. If I could perhaps start by saying that if I can agree with His Honour Justice Tipping that in terms of what we're wanting to talk about, justification is a better expression than truth because quite clearly with a section 8 – a serious grounds pleading to that, our position is that we're wanting to produce evidence that there were serious grounds. We're not seeking to accept an onus, we have to prove that it's true that Simunovich's were corrupt or engaged in illegal practices or whatever. Just that we had justification for making the programme which we made relying on the information which we relied on.

Now if I could just perhaps take slightly head on what Your Honour the Chief Justice said earlier on to my learned friend which was that Her Honour wasn't satisfied that there was a difference in meaning between a meaning of serious grounds to believe and –

ELIAS CJ:

I didn't say meaning.

MR GALBRAITH QC:

I'm sorry.

ELIAS CJ:

No I said I struggled to see that it isn't repetition.

MR GALBRAITH QC:

Right, okay. If I could just perhaps go to the meaning aspect for a moment and if Your Honours wouldn't mind going to *Curistan* which just because it actually has some of the other extracts conveniently set out. Because our submission is that – the question at the end of the day is what meaning you're trying to justify. And the repetition rule is, in our submission, a rule of policy which imputes a meaning to words which those words may not in fact convey and if one goes to *Curistan* at page 616, *Curistan*'s under tab 1 sorry. If one goes to *Curistan* at page 616, you see there at paragraph 54 it said, "A feature of the repetition rule is that it applies irrespective of the defendant's position in relation to it. As Lord Justice Simon Brown said in *Stern v Piper*, the repetition rule dictates the meaning to be given to the words used." And then they go on to say, "In *Mark* Lord Justice Simon Brown (with whom Lord Justices Mummery and Dyson agreed) went on to say that the assumed meaning accorded with reality." Now that's what they went on to say. "Thus he said, that i.e. that the repetition rule dictates the meaning to be given to the words used is by no means to say that the meaning dictated is an artificial one. Rather, the rule accords with reality. If A says to B that C says D is a scoundrel, B will think just as ill of D as if he had heard the statement directly from C." Now I agree with that but that's tier 1 meaning and in tier 1 meaning

because somebody says that A said something, that isn't artificial to apply the repetition rule to it.

But if Your Honours wouldn't mind going over to page 620.

ELIAS CJ:

Do you want to say what C says is grounds for belief that B is a scoundrel?

MR GALBRAITH QC:

If – I don't like this –

ELIAS CJ:

Well this sort of reductio ad absurdum sort of argument you've embarked upon and I just really am trying to follow it through. I am struggling to understand the difference between saying rumour has it that you are a scoundrel. B says that you are a scoundrel and – and there are grounds to believe on what the basis of what B says that you are a scoundrel.

MR GALBRAITH QC:

In the terms which Your Honour is putting it which is building on reductio ad absurdum. That seems improbable but it turns on whatever the facts are that justifies that. If you're simply saying well because B says you're a scoundrel that's grounds for believing that you're a scoundrel or sorry, that somebody else is a scoundrel, that immediately sounds like it's not much of a step on from where they were in *Mark*. But what I want to go on to say – could I just get to it before we sort of leap to it in a sense, if you don't mind because if you just go across to 620 for a moment. You'll see there, three lines down from the top, it says it will be recalled that the repetition rule involves an imputed meaning. It does not turn on whether the hypothetical reader would have interpreted the report as an endorsement by the maker of the report of the allegations made in it. So the point that is being made there, and it's made in other places also, is that what you have with the repetition rule is an imputed meaning whether or not that is the actual meaning of the words. Now that's why I ducked, with great respect, Your Honour's proposition because if you

take that sort of example then it's hard to see it may have another meaning but that may not be what in fact has been said and the essential submission for TVNZ is that you have to look at the words which were used.

TIPPING J:

The repetition rule originated doesn't it, didn't it, it must have, in a tier meaning environment – a tier 1 rather –

MR GALBRAITH QC:

A tier 1, yes.

TIPPING J:

– environment. The crucial question is whether it logically can be extended to a tier 2 environment.

MR GALBRAITH QC:

Yes. That's exactly the question and the short point which I'll say a little bit more about but the short point is that there can be a wide variety of tier 2 meanings. Tier 2 meaning isn't necessarily just A saying well I heard from B that C's a scoundrel and that's that. There maybe, as I say, a wide variety of meanings and you see it in *Lewis* when you look at Lord Devlin's comment in *Lewis* that – the paragraph above which my learned friend referred you to and perhaps it's just worth looking at *Lewis*. Perhaps where this tier business started from. At page 285 in *Lewis* the first paragraph –

ELIAS CJ:

Sorry what tab?

MR GALBRAITH QC:

Tab 13 Your Honour, page 285. First paragraph, "It is not therefore correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the

meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there was also a fire but it can be done. One always gets back to the fundamental question, what is the meaning that the words convey to the ordinary man, you cannot make a rule about that. They can convey a meaning of suspicion short of guilt but loose talk about suspicion can very easily convey the impression that it is a suspicion well founded." Then he goes on to these three categories and talks about having to jump two fences on the other page 286 et cetera.

Now they're talking about a particular situation there but the fundamental point which Lord Devlin is saying, you've got to look at the words and see what they mean and it's – and they can mean a variety of things because there's a variety of ways of expressing whatever one wants to –

ELIAS CJ:

On your argument a newspaper would always be into second – a newspaper would always avoid the repetition rule if they couched their statement as there are good reasons to believe.

MR GALBRAITH QC:

If they couched their statement in that form they would be into – well it would depend what it was. As Lord Devlin said there, you can say something and that maybe a suspicion that gives rise to an imputation of guilt or it maybe, as I think he said on the previous page, if you say well I'm reporting this but I don't actually believe it, then that won't convey any imputation at all so it depends what exactly has been said. It doesn't follow because you say we've got, we believe on these grounds something is something, that either it's – well it – you have to justify in our submission in terms of the meaning which the words convey.

TIPPING J:

And the jury has to decide whether they think that this imputes guilt or just grounds to believe.

MR GALBRAITH QC:

Yes.

WILSON J:

Because under our law at present don't you have to justify in terms of the meaning the plaintiff seeks to attribute to these words?

MR GALBRAITH QC:

There's two things. Yes, in section 8(3)(a), that's right, imputation, you've got to justify. But the first thing is that the plaintiff pleads here serious grounds to believe something, something, something. When we get to trial, there's a point that His Honour Justice Tipping made before, there will be a lot of movement between now and the end of trial when my learned friend gets up to finally address the jury. Quite what the serious grounds are that they're going to say we have relied on or we've stated in our article, time will tell. They're not particularised at all, it's just a meaning at the moment.

TIPPING J:

But if they're pleading in the alternative, guilt as one and reasonable grounds to believe in guilt, you must surely be entitled to take the view that if they are driven back to the alternative, the words do not mean guilt because they failed to establish –

MR GALBRAITH QC:

Guilt, that's right.

TIPPING J:

– that asserted meaning.

MR GALBRAITH QC:

Yes.

TIPPING J:

So when you're pleading to the alternative presumably as a matter of logic you must be able to have made the assumption that is inherent on when you get to the alternative. I don't see how they can say in the one breath it means guilt but if it doesn't mean guilt it means reasonable grounds but when you get to the second one, well it actually means guilt.

MR GALBRAITH QC:

Well that's – I have sympathy for what Your Honour is saying but the point I'm making is that –

TIPPING J:

But this is not against you.

MR GALBRAITH QC:

No, no, no. I appreciate, that's why I have great sympathy for what Your Honour is saying.

ELIAS CJ:

It's another reductio ad absurdum.

MR GALBRAITH QC:

Well the difficulty about striking out at this stage is that we don't actually know what's going to happen, what shape the trial's going to take. What the evidence is going to be and what the Court is doing in striking out at this stage is excluding evidence, which was in the programme, in relation to these particular meanings and with 8(3)(b) it's even worse, if I can put it that way, or because 8(3)(b), which is a pleading which we're entitled to make, is a pleading that taking the publication, nothing to do with imputations, the publication taken as a whole is in substance true. And the publication includes all of these matters which we've particularised – well, sorry. It certainly includes the schedule 3, the Andrews reports weren't in the programme, but it includes the bulk of the matters which we've particularised and they make up the publication.

TIPPING J:

In this section the word imputations must mean imputations of fact mustn't it?

MR GALBRAITH QC:

Yes. In 8(3)(a)?

TIPPING J:

In 8(3)(a).

MR GALBRAITH QC:

Yes.

TIPPING J:

The word imputations doesn't appear in 8(3)(b).

MR GALBRAITH QC:

No, 8(3)(b) has got nothing to do with imputations at all.

TIPPING J:

No.

MR GALBRAITH QC:

8(3)(b) is that we can put the publication before the Court and say, taken as a whole, that's in substance true and if that subsumes whatever the meaning is that the plaintiff's pleading well the plaintiff loses. But it seems extraordinarily difficult, at least to me as a, I doubt my learned friend will point out, a novice in the defamation area to see how one can then exclude the particulars which are particulars of matters which are stated in the publication as a whole. Which gets back to the rather simple proposition which I was going to make. That at the end of the day of course, as one of Your Honours has just said to me, it will be the meanings that the jury decide upon which count. And in my respectful submission it seems to me to be a very strong argument that rather than the Court applying this repetition rule to impute a meaning to the words,

which the words may not in fact carry, so there maybe – the repetition rule says that you've got to prove the underlying sting, it said, where the words may in fact simply be saying well here's a lot of very significant information which is out there, court judgments, Parliamentary statements, and on the basis of that well there's something which is of considerable concern. Now the jury should be able to look at whatever it is that's in the programme and say well, we think what that means is whatever, not what the repetition rule forces the meaning to be and then we think you either met that – jumped that bar or you didn't jump that bar because the information you were relying upon is either credible or not credible, reliable or not reliable and our very respectful submission is that that is essentially a jury question.

What do these words mean and can you justify them and juries – to me at least it was interesting reading the cases because what seems to have happened, at least to a novice in this area, is that the repetition rule according to the Judges arose 170 odd years ago in respect of tier 1 meanings and it seems to run right through. After *Lewis* it's been extended into tier 2 meanings in England. Some of the reasons which the judgments give for extending it are perceived difficulties which the jury will have with dealing with this sort of issue and my respectful submission is that when one's dealing with the flow of information that exists in the world these days, and then one thinks back 170 years, my respectful submission is that the, I suppose the person at Capital Omnibus has now become the person in the Astoria Café but they are well capable of sifting through internet material, television material, radio material, newspaper material and sifting out for themselves the wheat from the chaff. It's done every day by people. 170 years ago that didn't happen that way but it's just what happens day by day these days.

TIPPING J:

There's an inherent lack of attraction at least for me, to require the jury to find the meaning, unless there is a clear, as there is in tier 1, where it's just simply the assertion is adopted and repeated. As a matter of policy you don't allow them to say well it's true that it was said. It seems a little awkward to require a

jury to be forced to take a view as to meaning outside that very confined context.

MR GALBRAITH QC:

Well it's interesting though Sir to note that in the UK as I understand it, from what I've had to read recently, with the *Reynolds* defence, that juries, as I understand it, end up having to come to conclusions on all of the *Reynolds* factual, and I think there's about 10, at least 10, and then the judge makes a decision as to whether *Reynolds* privilege applies or not based on the jury's conclusions on all those factual elements. So juries are expected –

TIPPING J:

Again this point is not against you.

MR GALBRAITH QC:

No.

TIPPING J:

It just seems to me that unless there is an equally compelling policy reason to require a jury to find a meaning outside the tier 1 context, one would be hesitant in clipping the jury's wings so to speak.

MR GALBRAITH QC:

Yes, yes, exactly. Because, as I've been saying, there's a wide variation on what might be meant outside the tier 1 because the tier 1 meaning is apsis straight line, either you can prove the guilt or you can't prove the guilt.

TIPPING J:

Well the difference between tier 1 is the assertion. This tier 2 is grounds for the assertion, isn't it?

MR GALBRAITH QC:

Yes.

TIPPING J:

In the simplest possible sense.

MR GALBRAITH QC:

Yes.

TIPPING J:

The tier, all tier 2 is introduce the idea of grounds for between the speaker and the allegation if you like.

MR GALBRAITH QC:

And the difference in what the – and there will be some publications where the grounds will be such that they do involve the conduct of the plaintiff in which case you're going to have to prove that. There will be others, in my respectful submission, where they won't specifically involve the conduct of the plaintiff, although I suspect in terms of reliability there will need to be some sort of link, just logic says that, there must be. On the other hand there'll be, there'll be grounds which in some of these cases were relied upon that I think a judge quite appropriately would say aren't capable of being grounds to either serious grounds or reasonable grounds to raise a concern. If you take the one of the unattributed articles in Indian journalists or that sort of thing, I can't imagine any Judge would have any difficulty in saying well that doesn't go to the jury because it's just unsourced, it's the same as what Her Honour put to me, it's unsourced rumour effectively as far as the Court is concerned. But in our –

ELIAS CJ:

What is the difference however? What I'm struggling for is the difference between X told me that you were a scoundrel and there are good reasons to suspect you are a scoundrel because call them tier 1 or call them tier 2, they seem to me to amount to the same category and it's that prior aspect that – it's this categorisation that I have difficulty with and it is the thing I think that was troubling Lord Justice Sedley in that other case too. That the effect is as bad. So leave aside whether there's an imputation. What's the difference between those two types of statement?

MR GALBRAITH QC:

Well in my respectful submission Your Honour, it's wrong to treat it as, that that example is the category. As I said before the category –

ELIAS CJ:

Sorry which example?

MR GALBRAITH QC:

Sorry the example of the reasonable grounds to believe is simply a category. It's – there's a wide variety of statements that could be made, I've used the term, within that category, put it that way. There's only one sort of statement that can be made within a tier 1 category because that's what the Court's decided –

ELIAS CJ:

But do you say that X told me you were a scoundrel is tier 1? You're accepting that?

MR GALBRAITH QC:

Yes, yes.

ELIAS CJ:

Yes.

MR GALBRAITH QC:

Yes. And if, I was saying, tier 1 there's only one, the court's have said there's only one meaning and you've got to justify that meaning. That's what's been decided as a matter of policy. What I'm saying under tier 2 is that there can be a wide variety of statements made which a jury should be able to decide what the statement means or implies and then whether you can justify that. and that, with great respect, seems to me to be logical because at the end of the day the plaintiff is meant to recover, if the plaintiff does succeed in recovering, for whatever the average person, Astoria Café, Capital Omnibus,

whatever it might be, takes out of the programme as being disadvantageous or critical of the plaintiff. It depends, trite what I'm saying, but the meaning that the average person takes from the programme is what you're meant to get damages for, if it's defamatory. Now what happens in tier 1 is that the court's have said that the meaning out of the statement "somebody's told me you're a crook" is that you're saying they are a crook and therefore you get, you've got to justify that.

ELIAS CJ:

So what meaning do you take out of, "there are good reasons to suspect." Do you just say it's for the jury to decide what that meaning is?

MR GALBRAITH QC:

Well no, that means that there are good reasons if that's what was said then it depends what the reasons are, doesn't it? They're either good or they're bad.

ELIAS CJ:

I find it impossible to follow this.

MR GALBRAITH QC:

Well I'm sorry.

ELIAS CJ:

Maybe others do but I'm not a categorical person myself and –

MR GALBRAITH QC:

Well I'm trying not to be either.

ELIAS CJ:

I don't understand the distinctions because a newspaper would always be advised never to say X told me that you were a scoundrel but always to say there are good reasons, namely what X told me that you are a scoundrel.

MR GALBRAITH QC:

Well that's not going to save the newspaper in a fit. If that's all they do the newspaper's going to go down and there can't be any – I mean I have no quarrel with that at all. But if there's been 15 judgments of the High Court saying that building company X builds leaky buildings and that's what, there's an article about leaky buildings and there's reference to 15 judgments of the Court which say that, it would be surprising – I mean a jury might well say the newspaper was justified.

ELIAS CJ:

Well is this going back to the argument based on privilege or the standing of the –

MR GALBRAITH QC:

No, no.

ELIAS CJ:

Well then why isn't X a person of high standing or a member speaking in Parliament told me that X is a crook, good enough?

MR GALBRAITH QC:

Well we would say it is good enough but I'm just taking the simple example, staying with my schedule 3 at the moment, but if a jury – for example if, how do I put it. A lot of things are said in worlds that I tend to inhabit, sporting worlds and that sort of thing which are very robust. If an iconic All Black, I'll leave names out, if an iconic All Black says something which is then cited I think a jury might decide, it may not, they might decide that there's justification for somebody repeating that, they may not. It depends on the –

BLANCHARD J:

It depends on what he's talking about.

ELIAS CJ:

Well it might not.

MR GALBRAITH QC:

Well he might not know what he's talking about.

BLANCHARD J:

I don't know where this is going.

MR GALBRAITH QC:

All right, well let's go back to the court example which is, I think, the easier example to deal with. So far as the programme is concerned, the programme relied upon and referred to those court decisions and it relied upon them as you've seen in schedule 3. Now they're part, as I said before, of the context and with the other matters which are pleaded we would say that the justified, if a meaning of serious ground is where we end up, they built up a picture which justified us having serious grounds or for saying that there were serious grounds to believe that whatever was of concern.

WILSON J:

Well you accepted that they hadn't suggested impropriety?

MR GALBRAITH QC:

No. Well those, as I say they're only part of the picture but if you can't, if you can't –

TIPPING J:

But are they capable of giving serious grounds to believe impropriety if they don't make any mention of impropriety?

MR GALBRAITH QC:

Not on their own. Not on their own.

TIPPING J:

Yes but they can add, it's a bit like if it's a nought does it add anything to three on the other –

MR GALBRAITH QC:

Well, yes, with respect, they can because what they do say is that the Ministry was running a system which wasn't, well wasn't foolproof let's put it that way. Now that would be a step in any argument that you're going to put forward about whether somebody –

ELIAS CJ:

Was corrupt.

MR GALBRAITH QC:

Yes, maybe. But it's part of the, it's part of the serious grounds for believing that there were matters of concern.

TIPPING J:

If they tend to prove, in whatever way, the subject matter of the serious grounds for belief, then they are capable of supporting that –

MR GALBRAITH QC:

If they're a step along the way Your Honour.

TIPPING J:

Yes.

MR GALBRAITH QC:

If they're a step along the way.

TIPPING J:

If they have any relevance to the existence of the ultimate allegation they must be capable of supporting the assertion that there are reasonable grounds to believe it.

MR GALBRAITH QC:

Yes.

TIPPING J:

That's really what you're saying with respect.

MR GALBRAITH QC:

That's all I'm saying. That's all I'm saying. That's, as I say, how the programme was built. It was built on what was there in the public domain already.

TIPPING J:

Is it a bit like a sort of circumstantial situation that –

MR GALBRAITH QC:

Well it was because –

TIPPING J:

– on their own they don't prove much but when you add them to other things they might create an ultimate picture?

MR GALBRAITH QC:

Well that was the basis upon which they were allowed in the High Court under section 38 as being circumstances and that's what we argued for, for there, and they weren't allowed in the Court of Appeal on the basis of repetition rule that we had to in fact prove the underlying sting in that you couldn't succeed on serious grounds by proving serious grounds.

TIPPING J:

There seems to me to have grown out something of a mystique about this repetition rule. It is really no more or less, is it, than saying you can't get away with republishing a libel?

MR GALBRAITH QC:

Yes. That's its origin.

TIPPING J:

That's really the, almost the beginning and the end of it.

MR GALBRAITH QC:

Yes.

TIPPING J:

But if you add something or subtract something in this case subtract something because you're making a lower level of assertion, then the rule doesn't necessarily apply.

MR GALBRAITH QC:

Yes. All we're saying is that you can't, well one shouldn't with respect, automatically apply the repetition rule outside it's origin which is tier 1 and that it's not a decision that should be made prior to trial by a strike out, on a strike out, when the – provided the fair interpretation of the plaintiff's imputation, if we just 8(3)(a) for a moment, can encompass the particulars or the pleading which the defendant is making to it and the plaintiff's pleading is serious grounds to believe, and so the defendant should be able to plead whatever serious grounds it alleges, and unless they're incapable of being serious grounds, which if you apply the repetition rule they are because everything just gets wiped out, unless you apply the repetition rule to simply wipe out those particulars, they should be allowed to stand. Again subject to what I said before about unsourced rumours and Indian journalists or whatever else it might have been. But if they are matters of – that have the character that the ordinary viewer of the programme might regard as serious grounds, such as court decisions or what somebody has said in Parliament, because of the status which we accord to those matters then they're matters that the jury should decide on, whether they're relevant or not relevant. We – and then if one looks at 8(3)(b) as I said before it's, at least in my respectful submission, a wee bit difficult to see how the Court can exclude as particulars those matters which are actually in the programme itself when 8(3)(b) says view the – take the programme as a whole and decide whether it's in substance true because that cannot, in my respectful submission, be taking the programme

as a whole once you've chopped a number of the matters which were the basis for the programme out of it.

It's interesting, it may have come before Your Honours, it may not have, *Gatley* in the supplement before the latest addition had a comment on the *Musa King* case which I can't quite now remember whether my learned friend took you to or not but in that case, sorry in the supplement, it's not in the new addition, it was said to be wholly unjust and unreal that matters which were contained in the broadcast should not be able to be relied upon because otherwise the jury is left with only – not with the justification, the true justification for the broadcast because some of it has been stripped out. Now as I said before I don't have any problem about why it applies in tier 1 but tier 2, in our submission, should not have the repetition rule applied as a blanket exclusion and in fact an imposition or a dictation of the meaning which the words may not in fact carry because that's a policy decision which, unless the court thinks that there was justification for that policy in the sort of concerns which Justice Sedley of course referred to in *Jameel* where he was looking at the possibility of the third tier of meaning which is a call for an enquiry.

Now there is the issue of section 38 which I just perhaps should refer Your Honours too. my learned friend Mr Gray has made submissions that I think struck some chord with members of the Court in relation to section 38. Can I just draw your attention though to section 40 where the rolled up plea was abolished so it's –

TIPPING J:

I don't think the rolled up plea was abolished Mr Galbraith.

MR GALBRAITH QC:

Well it was, it was –

TIPPING J:

Because the rolled up plea is a plea of honest opinion.

MR GALBRAITH QC:

Well it's said you had to plead – you know it's when you were rolling up truth and honest opinion, it said you had to plead separately at section 40 I think.

TIPPING J:

Well yes but the rolled up plea is a plea of honest opinion. It's not a plea of truth. You have to justify the underlying facts on which your opinion is based but it's – I don't think section 40 inhibits the matter at all. You pleaded them separately but you can plead honest opinion by means of the rolled up plea.

MR GALBRAITH QC:

I think, well my understanding, Your Honour is much more likely to be correct than I am, I understood that there had been a practice which had grown up of rolling the truth and the honest opinion together and section 40 was to stop that but –

TIPPING J:

But 28 acknowledges that you may make up rolled up plea.

MR GALBRAITH QC:

Yes.

TIPPING J:

It simply tells you how you've got to do it.

MR GALBRAITH QC:

Yes.

TIPPING J:

So it can't be said that the plea, as such, is no longer available.

BLANCHARD J:

It just can't be rolled.

TIPPING J:

Yes. It's got to be unrolled.

MR GALBRAITH QC:

Well that's right, that's all I was trying to say.

TIPPING J:

Yes, it's got to be unrolled.

MR GALBRAITH QC:

Sorry, I'm sure that's accurate, that's what I was trying to say.

TIPPING J:

Oh right, well it didn't sound quite like that Mr Galbraith.

MR GALBRAITH QC:

No it didn't. That was my fault, I apologise. So there's – we submit and it was accepted in the High Court that there was life in section 38 for a pleading of truth. It was accepted in the Court of Appeal also and so there is that issue alive whether section 38 does apply to truth and, as the heading of it of course says, or whether it's simply an honest opinion, applies simply to honest opinion –

TIPPING J:

But the history of it, surely, demonstrates that it's concerned not with truth in the technical sense but with, with the honest opinion defence and you have to sever, you have to state what's fact and what's opinion and you have to give the particulars supporting the facts.

MR GALBRAITH QC:

Well certainly so far as –

TIPPING J:

And that's what it was that I think my brother Wilson said under the old rules in the –

WILSON J:

136.

TIPPING J:

136C or whatever it was.

MR GALBRAITH QC:

I accept the history in Mr Gray's address to you on the history. Unfortunately the Act doesn't seem to be very well expressed, if I just put it that way, and on the face of it that both Courts below have accepted that section 38 applies to the truth or justification defence and in the High Court it was accepted, therefore, that we could plead these matters which I've said to Your Honours is context as circumstances. In the Court of Appeal that wasn't accepted on the basis, of course, of the repetition rule applied and so we were excluded on that basis.

TIPPING J:

But here we're dealing with truth of fact. Here, what is referred to here surely are primary facts, not conclusionary facts, such as there are grounds to believe but the facts from which the opinion –

MR GALBRAITH QC:

In respect of opinion yes Your Honour's right.

TIPPING J:

Yes.

MR GALBRAITH QC:

Your Honour's right. All I'm saying is that the Court's below accept that this applied in the truth area –

TIPPING J:

Well I don't think it does.

MR GALBRAITH QC:

Well –

TIPPING J:

Subject to hearing anymore.

MR GALBRAITH QC:

I got that very clear impression to Your Honour's response to Mr Gray but I'm just explaining to Your Honours that it was accepted below that 38 had a life in truth as well as a life in honest opinion and if it does then we call in aid as we did in the High Court this reference to circumstances, but as I say in the Court of Appeal –

TIPPING J:

It wasn't needed for truth because there was a clear common law rule –

MR GALBRAITH QC:

There is a common law rule, yes.

TIPPING J:

– that you had to particularise.

MR GALBRAITH QC:

Yes.

TIPPING J:

The reason for this was that you could get away with not particularising if you made the rolled up plea and that was a cunning dodge and it was sensibly decided to stop it.

MR GALBRAITH QC:

I understand and accept that Your Honours. Unfortunately, as I said before, the Act isn't –

TIPPING J:

It's not crystal.

MR GALBRAITH QC:

It's not crystal, it's not, no. Perhaps just leave it at that. We made the point below and make it again, and I think Lord Justice May makes the same point in I think it was *Shah*, that the approach which we suggest which is that this – notice be left to the jury to decide is – and the jury should determine the reliability of both the meaning and reliability of whatever the grounds are which are relied upon, does have some consistency with the emphasis in the new Evidence Act which emphasises reliability and probative value. That was accepted in the High Court, not accepted in the Court of Appeal, but the reason again why it wasn't accepted in the Court of Appeal was because of the Court of Appeal's acceptance of the repetition rule applying and I've already addressed Your Honours on that. That becomes a policy decision for the Court as to whether it should but if it does it forces, as I said before, it forces the defendant into justifying a meaning which the words may not in fact mean and that seems a bit – and if it's a meaning which the words don't in fact mean, then it's a little difficult to see why if the defendant can't justify that meaning, the plaintiff should otherwise recover on that basis.

We've made the point also in our submissions, and I just briefly refer to it, that part of the justification or a justification which the Court in our respectful submission should consider in whether to apply the repetition rule or not in New Zealand is the different, the difference which exists between the UK and New Zealand. One we've got *Haines* in New Zealand at the moment which says that the defendant can't plead alternative meanings and of course we have the absence of *Reynolds* privilege in New Zealand so we're still with *Lange v Atkinson* where as there is a –

TIPPING J:

It's not that the plaintiff can't plead alternative meanings, it's that the defendant can't justify a lesser meaning.

MR GALBRAITH QC:

Sorry I meant to say the defendant can't plead alternative meanings, I'm sorry, I'm sorry. Which is *Haines* which as my learned friend Mr Gray indicated may one day come before this Court for reconsideration but that's the position at the moment and so we would say that the Court should be reluctant to further constrain the defendant in being able to put before the Court, or put before the jury, all the matters which the programme in fact relied on –

WILSON J:

Just on that point Mr Galbraith. Do you accept that going back to your section 8(3)(b) argument it wouldn't assist in respect of the report of Mr Andrew or if there are any other matters that weren't referred to in the programme?

MR GALBRAITH QC:

It seems to me it's got to be something that's in the programme because it's the programme taken as a whole, yes Your Honour. So what I was just repeating there was that the, so far as TVNZ is concerned or any media publisher is concerned, while it's true of course that the principal defence will be words don't mean what the plaintiff alleges, there'll also be a defence based on qualified privilege. It's still important to a publisher to be able to justify, to the extent that they feel able to, one or all of the meanings which the plaintiff asserts because they want to be able to say to the jury we did believe in this programme when we put it to air or published the newspaper, whatever it might be, and to do that they are literally tied with one hand behind their back. At first some meaning is going to be imputed to the words which they don't in fact bear and then they're going to be prevented from justifying meanings which the words may in fact bear but I've said that to Your Honours already.

In that respect if Your Honours are prepared to engage the idea that the repetition rule doesn't automatically apply to impute that limited meaning or to a tier 2, tier 2 words whatever they might be, then in our submission it would be appropriate to allow for particulars of matters which otherwise would fall

under the qualified privilege head not because of an argument about qualified privilege per se but because they are matters which our law has singled out as being of special status to be protected in themselves but the reason they're protected in themselves is because they are seen to have that special status or character and while they might be correct or incorrect, right or wrong, they are of course protected under qualified privilege whether they're true or false, right or wrong, they in our submission should be capable of being put before a jury as serious grounds because of their character or nature and the trouble Your Honour is with a reference to a case which isn't in the casebook but it's a judgment in which statements in Parliament that were reported were first recognised as having qualified privilege and that was on an analogy with Court with reports of Court judgments, it's a case of *Wason v Walter* [1868] and I may have the report not quite correct, it's 4 QB 73, it might be Law Reports 4 QB 73, 1868, but it's just an interesting judgment to read because of the emphasis which the Court places on the importance of first court decisions and their reporting and then by analogy on Parliamentary speeches and their reporting and so in – because of that character we say these fall within, if the Court is still minded to apply some modification of the repetition rule, these are of a character that should be capable of being relied upon –

TIPPING J:

Is that because the privilege takes them out of the repetition law, and therefore, it's logical, if you like, to deem them of this character to be not objectionable on account of the repetition rule?

MR GALBRAITH QC:

I think if the Court's going to apply the repetition rule, then I think I have to say that. If the Court doesn't apply the repetition rule, then all I have to say is, well, these are of a character that are sufficiently reliable that they should be resorted to.

TIPPING J:

I'm not sure about statements in Parliament, Mr Galbraith, without wanting to tread into a difficult area, here.

MR GALBRAITH QC:

I said I'm not saying that they're true, or.

TIPPING J:

Well, you said that they're sufficiently reliable to found a reasonable ground to believe.

MR GALBRAITH QC:

They're, they're of sufficient weight, perhaps I should say, to found that, because there is an assumption, I guess that's as strongly as I can put it, that Members of Parliament, who are elected et cetera, should not abuse their privileges. And so what they say in Parliament should be the subject of, but they should have a basis for saying it, let's put it that way.

TIPPING J:

But your first point is, that even if we apply the repetition rule, these are genuine exceptions to it.

MR GALBRAITH QC:

I have to say that, if you do apply the repetition rule, yes, I have to say that. I would prefer Your Honours not to play the repetition rule –

TIPPING J:

Of course.

MR GALBRAITH QC:

Simply to, and my learned friend Mr Gray took you to the two decisions which there are, which are *Waters* and *Cadam*, UK decisions on that. But these are open questions for this Court, it seems to me.

TIPPING J:

Isn’t the problem with the exception being that privilege is then being used for a purpose for which it hasn’t been given, the building-block point, the point that you can hardly use it, you can use it for fair reporting, but you can’t use it for another purpose, which is to build your castle.

MR GALBRAITH QC:

Well, you can use it for fair reporting, you can use it for honest opinion.

TIPPING J:

Yes.

MR GALBRAITH QC:

And, I mean, it’s a step on from there, Your Honour, I’ll obviously accept that. But it gets a bit circular, because it comes back to what one makes of the meaning of reasonable grounds, or serious grounds, that it, I think it all starts and finishes there, really, in terms of what can appropriately be introduced, and on the Chief Justice’s view, well, you couldn't argue for something else. With honest opinion, the first point which I make there is that, is really just a point I made a moment ago to Your Honour Justice Tipping that so far as privilege material is concerned, that is a basis for an honest opinion, and the Court below was wrong not to recognise that.

TIPPING J:

Provided the report is fair and accurate.

MR GALBRAITH QC:

It’s got to be fair and accurate, and then you can make comment on it.

ELIAS CJ:

It doesn’t have to be privilege to provide a foundation.

MR GALBRAITH QC:

Privilege, no, but privilege is a recognised.

WILSON J:

You don't need to prove the facts, if they're made on a privileged occasion, or to provide a factual basis for honest opinion.

MR GALBRAITH QC:

And the privilege, whatever is said in the privileged occasions may be right or wrong. It doesn't have to be correct. It's just that it's been said in a privileged occasion. And *Galloway*, which was the decision referred to in the Court below, and I think my learned friends refer to a couple of paragraphs of *Galloway*, makes that clear, but at different paragraph references. Tab 17, paragraphs 174 through 176. What this was, this was the MP who was alleged to have got too close to the Iraqis, and there were some letters which were used as a basis of an article, and there was an argument about *Reynold*'s privilege applying. And Your Honours will see that, 174, there's been a plea of fair comment. And across on the next page, "It is clear that the defendants were able to comment on their own articles irrespective of their truth or otherwise, because the articles themselves were protected by privilege. Alternatively, even if the articles were not privileged, they would be entitled to comment on the contents, at least the Iraqi documents themselves, whether or not they were true". It then goes on, "There is a line of authority which does indeed support the proposition that one may comment upon reports which are, themselves, the subject of privilege". It refers to *Cook v Alexander*, *Brent Walker Group*. "It emerges that the defendant in such circumstances does not need to prove that the underlying facts were true, but must prove, one, that the statements in question were made on a privileged occasion, and two, that the report of those statements was fair and accurate. These rules were not geared to the former privilege defence replied upon in this case", which is *Reynolds*, "and the learned members of *Gatley* point out certain difficulties of application in that context. In principle, however, the same rule must apply". In any event, what was an issue in that case isn't of importance. But it's important for that statement of principle, and I don't think we've given you *Cook v Alexander*, or *Brent Walker*, through I have them here. There may not be a quarrel about the proposition.

TIPPING J:

I don't think there's any quarrel, you don't have to re-prove the facts. I don't know that Mr Miles challenges that. If you're relying on a privilege, the facts underlying the opinion, they can be taken as sufficiently established, can't they, if you're relying on a privileged, fair and accurate report.

MR GALBRAITH QC:

As long as it's fair and accurate, then yes. Then I needn't bother Your Honours with that. Well, then, staying with honest opinion, in our submission, and I think it was discussed with my learned friend, it is possible for us to plead as facts that support the opinion or the comment which is made. The facts that the Court has said the various things we've got in schedule 3, for example, as being simply facts of what has happened, what has been said upon which, we've expressed comment. Now, those are privileged, so I guess that's not a good example, because it gets in under that exception. I'm trying to think if we've got any others.

TIPPING J:

If you were relying on a statement made by a third party, on a non-privileged occasion.

MR GALBRAITH QC:

That's why I'm trying to think whether we've got any, that we're worrying about for honest opinion. I think everything gets under that privileged head, but can I just check on that. Sorry, there is one, and it's referred to in our submission. If I could take Your Honours to paragraph 74 of the submission. I think everything else comes under the privilege head. There were some affidavits which were relied upon, and there was an issue raised by the plaintiffs, challenging a statement made in one of the affidavits, on the basis that the fourth defendant had sought to persuade one of the deponents to make an inaccurate statement. And there is, as we say in 75, "The fact that an audio recording of Mr Hikuwai", that was the deponent, "speaking to Mr Penwarden", who was the fourth defendant, "existed, which corroborated Mr Penwarden's

version of the telephone discussion, is, in our submission a fact relevant to the existence of reasonable grounds to suspect. It goes to the failure to rebut, in any compelling way, the allegations, and the possibility that response had misrepresented evidence of Mr Hikuwai". So, in our submission, those circumstances could elevate reasonable grounds for an inquiry, to grounds to suspect or shift a subjectively held suspicion to one which is reasonable, and so we say that's a material factor, and that is a fact or circumstance which a jury should be entitled to consider, both in relation to truth and honest opinion.

ELIAS CJ:

In respect of truth, because this comes in the portion of your submissions dealing with honest opinion?

MR GALBRAITH QC:

No, well it comes in under particulars, which covers both Your Honour.

TIPPING J:

I know it may not be central, Mr Galbraith, but what would be the position if, on a non-privileged occasion, someone said something which the person now expressing the honest opinion wishes to rely on for it having been said, not for its truth as supporting the honesty, if you like, or the genuineness of their opinion, that they genuinely held it. That surely would have to be allowed, I would have thought, because you're simply relying on the fact –

MR GALBRAITH QC:

For your honesty.

TIPPING J:

For my honesty.

MR GALBRAITH QC:

And in my respectful submission, that would be right because that's the reason it's being relied on, not for the truth of it, but for the fact that –

TIPPING J:

You're not justifying the opinion, thereby, you are simply, you are vouching for your honesty by saying "This is what led me to say it."

MR GALBRAITH QC:

Yes, Your Honour.

TIPPING J:

"Or express my opinion." Whether you believe is another matter, but it would have to be in play, I would have thought.

MR GALBRAITH QC:

Well you have to believe it. Yes, you'd have to believe it to be honest about it, or you'd have to believe it's credible.

TIPPING J:

It has to be your genuine opinion, but if you're challenged that it wasn't your genuine opinion surely –

MR GALBRAITH QC:

You can point to that and say, "I believed on good grounds that that was credible and –

TIPPING J:

"Others mightn't have, but I believed Mr X."

MR GALBRAITH QC:

Yes. Yes, Your Honour.

TIPPING J:

I don't think that arises specifically in this case, does it, there's no question yet of the genuineness of the opinion, to the extent that it is opinion.

MR GALBRAITH QC:

No, not yet Your Honour. Those are the submissions Sir.

ELIAS CJ:

Thank you. Yes, Mr Miles.

MR MILES:

Your Honours, it always becomes a little difficult at this stage to know exactly what issues still need further consideration. What I propose to do is perhaps start from the first issue which, and incidentally, I took these from the list that you set out in your judgment of the issues that you wish to have argued, and I just adopted that list when dealing with the particular issues. The first of them, which I – well I summarise each in my propositions, at paragraph 4 of my written submissions, but then at pages 5 and 6, I deal with the first issue which was whether section 38 sets out the particulars that are required as a stand alone proposition and I get the sense that at least some of Your Honours now accept that section 38 of course has relevance but relevance for honest opinion, rather than truth. The two points I'd like to make though, Your Honour, and I've set out the, really the two grounds of pages 6 and 7 of my written submissions. The first is that when this point was considered, at least inferentially in *Ah-Koy*, the paragraph 15 of the judgment which was delivered by His Honour Justice Tipping and setting out in a very effective way, if I may say so, the rationale for particulars, but while Your Honour didn't specifically refer to section 38 the phraseology used at paragraph 15 is taken directly from it, so –

TIPPING J:

It must have been unconscious Mr Miles.

MR MILES:

Well I don't think so at all, Your Honour. I think you probably accepted, as my recollection is, and the parties did, is that section 38 says what the introduction says it is, the particulars required as to truth, and it makes

complete sense, that those particulars should apply for truth as well as honest opinion, because the first thing it says is isolate fact from opinion, and that's what you have to do when running a truth –

TIPPING J:

It comes to the same thing in the end, doesn't it, whether the requirement to particularise is derived from section 38 or derived from the common law? You have to particularise allegations of fact.

MR MILES:

And then the facts and matters on which you rely to support the allegations of fact and the reason I think that it was accepted in that case, and by the way, that was a truth defence we were talking about, it wasn't an honest opinion truth, and Your Honour talked about isolating the facts and then facts and circumstance with direct phraseology. The reason, I think, is that it was recognised that that set of particulars at section 38 applies equally applicably to both honest opinion and truth.

TIPPING J:

But if the Court had thought, Mr Miles, that it derived from section 38 rather than the common law, it might have said so.

MR MILES:

It might have Sir.

TIPPING J:

I may be bold enough to say it would have said so.

MR MILES:

Well I accept that, and in that case, I think that's tantamount in saying that the requirements under honest opinion and truth in terms of particulars are identical because if we accept that section 38 applies just for honest opinion, then that clearly requires those two delineations. So the subject on that basis, though, really becomes academic.

TIPPING J:

I agree.

MR MILES:

But the second issue I was at least going to take Your Honours to is that you can trace the reason, I think, why section 38 was left in the Act from the analysis of Sir Ian McKay in his report and I've set that out at paragraph 17 onwards, if you got to the report itself, and we've got that in my bundle of authorities, tab 3, if you go to Sir Ian's analysis of the rolled up plea, which you find at paragraphs 161 through to 164, and you'll see that he says, as you might expect at 163, "The rolled up plea isn't expressly excluded by the code, but it's no longer effective." Again, and I think this has been already discussed by Your Honours, the rule in the code of course adopted that phraseology, so there's no question that that was the requirement, but the rolled up plea itself was no longer being used for the reasons discussed there, and Sir Ian, at 164, said "The rule doesn't prevent the rolled up plea from being pleaded, we consider that it's continued use is likely to cause confusion, would be preferable to impose an express requirement where both defences are raised, they must be pleaded separately. We therefore recommend it should be an act that the defendant tends to rely on the defence of truth and comment, the same shall be separately pleaded." So, and that of course was incorporated into the new Act.

TIPPING J:

That's section 40?

MR MILES:

Yes Sir, yes. Now, just to put this into context, when Sir Ian discussed the defence of truth, you will see at – which he does at paragraph 132, in particular the pleading of truth, and he said –

ELIAS CJ:

132?

MR MILES QC:

132, Your Honour, yes. A defendant intending to rely on truth must plead it in his defence and must give particulars of the facts he relies on in support of a truth of the statement. We don't recommend any change in that respect and he cites as authority *Pascoe v Bertram* an early New Zealand authority in 1914 and I refer to that case as well which records that that's been the common law for as long as New Zealand has been allowing the tort.

So what I think, then what Sir Ian, having recognised that particulars should be required of course for both defences, he then recorded this in his draft bill which you find at the end of the report. If you go to that and in particular to page 161, section 31, which talks about particulars in defence of truth, "In an action for defamation where the defendant alleges that so far the matter in respect of which the action is brought consists of statements of fact. It's true in substance of fact insofar as it's an opinion then they have to give the particulars." In other words this ultimately became section 38. But it was very unlikely that His Honour was considering that this was just the rolled up plea because he'd already recommended that the rolled up plea while strictly speaking could be pleaded, was nevertheless no longer relevant. So it seems reasonably clear to me that what His Honour was saying, that that is the section that ought to set out the particulars for truth and what he was probably including was truth in the sense of the requirement for truth of the underlying facts and honest opinion as well because he then under 32 talks about particulars in defence of comment but that is restricted solely to the issue of whether the opinion is honest or not. So the only section in his draft bill that relates to particulars for both defences, is found under 31 and in the sense of picking one's way through from the recommendations in the report to the draft bill and then ultimately the Act itself, you can see some coherence.

BLANCHARD J:

What happened to the draft section 32?

MR MILES QC:

That's in part section 40 I think of the –

BLANCHARD J:

No isn't it section 33 of the draft?

MR MILES QC:

I'm sorry the final? No it's, it's 39 I think Your Honour.

TIPPING J:

This is where you were challenged the genuineness of the opinion.

MR MILES QC:

Yes, yes exactly.

TIPPING J:

You had to give particulars but is that –

BLANCHARD J:

Oh I see.

TIPPING J:

Is that found in the current Act?

MR MILES QC:

Well the closest one gets to it is 39 where the plaintiff is challenging the journalist that it has to give notice.

BLANCHARD J:

They really just changed the heading to reflect the fact that it's requiring a notice.

TIPPING J:

But that's a rather different issue, isn't it? Challenging genuineness?

MR MILES QC:

Well no, the body of the draft 32 Your Honour is that.

TIPPING J:

Yes quite. But it's rather different. I understand the force of what you're saying Mr Miles, it's a bit of a mystery, but fortunately it's academic really –

MR MILES QC:

Yes.

TIPPING J:

– as you rightly said at the beginning because you have to do the same at common law so it doesn't really matter.

MR GALBRAITH QC:

No.

TIPPING J:

Whether this one strictly applies to truth on its own.

MR MILES QC:

It's just it might be helpful Your Honour, if Your Honours were with me, simply to clear up a concern that has often been expressed in the High Court anyway when I, and I'm sure my friends Mr April and others who are always arguing these issues, have been dealing with the question of particulars and invariably when section 38 is discussed Judges tend to say but that's only about the rolled up plea. That's of limited relevance to fair comment or truth and the reason why I went to a little trouble to try and track through the, really the, what led up to that section and I'm now, for the reasons I've discussed with Your Honours, consider that it has greater coherence.

TIPPING J:

I can understand the force of that.

WILSON J:

Just in terms of the coherence do you note Mr Miles at page 149, clause 10(1) of the Draft Bill recommended that the defence previously known as justification should be known as the defence of truth so on the argument you're putting forward would defence of truth have a different meaning in 10(1) rather than in 31?

MR MILES QC:

Well I think, for what it's worth Your Honour, I think that description particulars in defence of truth, was a misnomer.

WILSON J:

I think that's likely.

TIPPING J:

I agree.

MR MILES QC:

I think what it was meant to say was in defence of truth and honest opinion.

WILSON J:

Yes.

MR MILES QC:

And the fact that Sir Ian specifically recorded that there should be particulars for honest opinion but yet didn't apparently include a paragraph in here dealing with that, lends some support I think. But as you say it's academic but it would help pleaders to know that and that that's the requirement for both defences.

Now that leads me then to the perhaps more crucial issue and to the question of what facts and are the facts that have been required historically for the last couple a hundred years or so in England and for a century or two in

New Zealand for the defence of truth, what are those facts, namely primary facts supporting the defence and that has been the, say the requirement from time immemorial. And secondly, can there been any conceptual difference between the quality of the facts needed for guilt and allegations of good grounds for suspicion and I say logically both are extremely serious allegations. In both cases the facts that are necessary to establish the truth or whatever the meaning is being alleged, must have the same quality, namely primary facts not hearsay, rumour, opinion et cetera. And thirdly, is there any conceptual difference between the facts required to support a truth defence and the facts required to support the underlying bedrock of an opinion defence and I think I can certainly say with some confidence that I have never come across any authority, either in the UK, here or in the Commonwealth, that indicates that the quality of facts needed to support an opinion defence should be different from the quality of the facts required for a truth defence.

The classic phrase always used in opinion defence is that you have to show that the opinion is based on, what's the phrase, facts truly stated. And facts truly stated cannot be the outpourings of someone in Parliament or the opinions expressed either as a conclusion of a judgment or dotted throughout a judgment in a sort of by the way fashion or in terms of reports that have been prepared by barristers, that may or not may not depend on the extent of their inquiries, and finally, the fact that deponents have said something in affidavits that, in itself, which is being relied on by one or other of the defendants, as particulars of truth and honest opinion. The fact that A said, in an affidavit, that he'd been told to misreport catch figures is not evidence. What they have to do is to prove that on certain, at a particular time, at a particular day, X was told to do something illegal, and that's a legitimate particular. The fact that he's sworn an affidavit saying that he was said it is irrelevant. And those particular categories, I think, sum up the essence of the "facts", which the defendants are relying on to support both their defences of truth and honest opinion.

WILSON J:

But couldn't the statement in the affidavit support the honesty of the opinion, putting aside truth for the moment?

MR MILES QC:

Well, what they have to do, Your Honour, of course the opinion has to be honest. But that's a separate issue from the basis on which the opinion springs from. You can have an absolutely honest belief in something, but if the factual basis is nonsense, so is the opinion. And that's why it's always been required to have a factual basis that can properly be proved. Otherwise, there's literally no benefit for reading or listening to the opinion. As you know, one of the primary differences between truth and honest opinion is that the facts on which the defendant is relying in honest opinion must be in the article itself, or so notorious that the whole world, as it were, knows that fact. And it's the rationality behind that, the rationale behind that, is it enables the viewer or the reader to be able to make up his or her own mind on the legitimacy of the opinion. And, of course, if there are no facts given at all, then the Courts tend to say, that isn't an opinion, that's treated as a statement of fact.

TIPPING J:

Well, it can be tricky, can't it? Because the more facts you have, the more likely it is to be an opinion based on fact, and the less, but I agree, if you simply assert an opinion, which is just a concealed way, if you like, of asserting a fact.

MR MILES QC:

And *Mitchell v Sprott*, which Justice Blanchard gave the primary judgment, was an example of just a very simple statement in an article, and the argument there was whether it was a fact, or whether it was an opinion, and the extent to which, on a summary judgment, you could actually make those sorts of decisions. But in that judgment, there was an analysis of this sort of issue. So it can get quite tricky. But that's not an issue that we have today.

TIPPING J:

How does one cope with the fact that you don't know until the jury has found the meaning whether it's going to be viewed as fact or opinion?

MR MILES QC:

I'm not sure it really matters at the end. The judge has to rule that the issue that is complained about is capable of being a fact or an opinion. If it's capable, then it's over to the jury. And a judge has to give it a primary ruling, I suppose, whether the meaning attributed to it could reasonably be such a meaning. But once you get over that rather limited filter, then the jury decides whether it is, indeed, an opinion or a fact. If is an opinion, they then look at the facts on which the opinion is based. If it's fact, and truth is being run, they look at the facts on which it's being based, and almost certainly they'll be the same, because that's just what tends to follow. It's not, I don't think, in practice, I don't recall it in practice, having problems about that sort of issue.

TIPPING J:

I suppose if you equate the rules with truth and underlying facts for opinion, it's not going to make any difference. And that could be an advantage.

MR MILES QC:

Of course it could, Sir. And why shouldn't it? Because let's just, for a moment, take tier 1 and tier 2. And for myself, I've always been a little uncomfortable about these strait jackets of tier 1 or tier 2 or tier 3. And dotted throughout many of the English judgments over the last ten years are similar rumblings, that one can get a bit carried away by this. But basically, they say it is a sort of convenient way of talking about three common imputations that come out of investigative journalism, I suppose. Guilty, good grounds for believing, or at least, there should be an inquiry. But what comes through on a number of them, and, indeed, a number of the New Zealand judgments like *Hyam* and *Peterson* and *Crush*, are comments by Lord Cooke, for instance, and other judgments, that time and again, the difference between guilt and good grounds for believing it is a very fine one. And for the readers or the viewers of these sorts of shows, the overall impression can be a pretty fine one. In any case, or in either case, the allegations are particularly serious.

And what *Gatley*, for instance, has emphasised is that the more serious the charges are, the more important the specificity of the facts or particulars which the author is basing those allegations. And hence it doesn't matter whether it's opinion or fact, because you're dealing in both cases with extremely serious allegations that might have a profound impact on the plaintiff's reputation. And why should there be any difference between the quality of the facts on truth, and the quality of the facts on truth for honest opinion? And I don't recall, this is the second time already I've said it in ten minutes and I apologise, Your Honours, but I don't recall any statement in any Court indicating that the facts underlying honest opinion should be able to be more loosely applied, or in some, that are not the same primary facts as are relied on in truth.

WILSON J:

Even if made on a privileged occasion?

MR MILES QC:

Well, they're not, I don't recall a fact that statements having been made on a privileged occasion have ever been used as particulars for truth or honest opinion, Sir.

TIPPING J:

Until now.

MR MILES QC:

And they were dealt with in the appropriate way.

ELIAS CJ:

And of course, qualified privilege remains available.

MR MILES QC:

Of course. And, Ma'am, there are reams of particulars relied on for qualified privilege. And they're in a different category. Whether they're relevant or not is another matter. But that's, as my friends keep saying, for another day. I'll

just leave Your Honours on this note. I think there are something like 30 or 40 pages of particulars, I think, for APN and I don't want to be held precisely to those figures, but they are colossal. And many, many pages of TVNZ particulars as well. And one of the other themes running through so many of the English cases, and I would invite Your Honour to look at this, and perhaps comment, is the importance of trying to isolate particulars that are genuinely relevant to the issues, and to avoid the prolixity and the scattergun approach, which I say typifies the particulars that are being relied on in this case.

COURT ADJOURNS: 4.00 PM

COURT RESUMES ON WEDNESDAY 10 JUNE 2009 AT 10.08 AM

ELIAS CJ:

Yes, Mr Miles.

MR MILES QC:

Your Honours, I closed last night referring to the concerns that have been expressed on a number of occasions in some of the English authorities on the prolixity and time wasting aspect of so many particulars. And you get a very specific criticism on that point cited at *Gatley*, if Your Honours wouldn't mind turning in my bundle to tab 7, it's paragraph 29.10. And that's an important paragraph, because it's the paragraph that specifically deals with pleading particulars for justification, and you'll see about five lines down, "Thus where a general charge of misconduct is made, and the defendant seeks to enter plea of justification, he must plead a specific incidence of misconduct with which he seeks to justify the charge with sufficient particularity as to enable the claimant to know precisely what are the facts to be tried". And that's just another way, of course, of putting what His Honour Justice Tipping said in *Ah Koy*. One of the three purposes of particulars, of the three purposes, one, specifically, is to know precisely what the charges are, and secondly, to assess the credibility of the charges. *Gatley* goes on to say over the page, about four lines down, "The defendant should, however, ensure that in particularising his plea of justification, he confines himself strictly to issues necessary for a fair determination of the dispute between the parties, and doesn't act oppressively. Where a serious allegation of dishonesty is made against the claimant, there is a particular obligation on the defendant to plead full details of that allegation, setting out what it was alleged to have been known by whom".

Then they get on to the repetition rule, and they say "In the case of a defence of justification of reasonable suspicion, it usually is a requisite of such a defence that it should focus on some conduct of the claimant, giving rise to reasonable suspicion. Also necessary for the defendant to plead the primary facts in matters which, objectively judged, are said to have given rise to

reasonable grounds of suspicion. It is regarded impermissible to plead as a primary fact the proposition some person or person announced, suspected, or believed the claimant to be guilty. It may be open for a defendant to adduce hearsay evidence to establish a primary fact, but that in no way undermines the rule of statement, still less the beliefs of any individual cannot themselves serve as primary facts". And as part of the authority for the proposition that particulars should be kept to, I suppose, to what are essential. You see the footnote 50 on the previous page, where they quote *McPhilemy v Times Newspapers* in 1999 and a comment by Lord Justice May. If you go back Your Honour to page 1009, and if you go to footnote 50, and about four lines up from the bottom of that citation, you'll see His Lordship saying, "It may in particular no longer by tolerable, in libel actions, to have excessively long particulars of justification, which often give rise to expensive and time-consuming adversarial pre-trial contest. Rather, perhaps the particulars should succinctly set out the scope of the intended justification, leaving the detail to be given in witness statements". Now, that is not to be said that when making serious allegations of criminality particulars are to be generalised. What that is saying is that however serious the charges are, the particulars have to be relevant and pertinent.

TIPPING J:

Is this similar, Mr Miles, to the ordinary pleading rule that you plead facts, not evidence?

MR MILES QC:

Quite, Sir, exactly.

TIPPING J:

It's really the same point, but carried into the particulars area.

MR MILES QC:

Exactly, Sir. And the comment about expensive and time-consuming applications prior to trial could never have been more accurate when describing this litigation where the proceedings, the statements of defence by

the defendants have already been struck out once by Justice Allan. They then re-pleaded and, of course, His Honour struck out one or two, but allowed a number of others, and they in turn were struck out by the Court of Appeal. And that's, of course, what is being determined now. But the primary issue and significance, I think, is the summary of that paragraph, which is a summary really based on all of the recent English litigation on this topic, where the authors of *Gatley* conclude that, in the case of tier 2 allegations, reasonable grounds for suspicion, then these rules requiring primary facts to be pleaded are just as relevant as tier 1. And, of course, the reason is, as Her Honour the Chief Justice, I think discussed with my friends on the other side, is that the allegations of serious grounds for believing are, in the real world, as serious or often treated as being as serious as if they were statements of actual guilt.

TIPPING J:

Well, further to that, they have an almost equal capacity to damage the plaintiff's reputation, which is the essence of defamation.

MR MILES QC:

Exactly, Your Honour, exactly. And that is why you will find, without exception, those authorities which I've referred to in my submissions and a number of which are referred to in the defendant's submissions, but without exception, there's been no recognition in the English Court of Appeal that there should be any lessening of that requirement for tier 2. Indeed, there is some real concern, and I think, again, Her Honour the Chief Justice touched on that, the judgment of Lord Justice Sedley in *Jameel*, where, I think, with some real accuracy, pointed out that even at tier 3, they have the capacity to damage reputations. To say that Miles' conduct is being investigated by the Law Society would, I would regard as being extremely damaging, and to say that there's some semantic difference between an inquiry but reasonable grounds into believing becomes a fine distinction, because the average reader of that would say, the Law Society wouldn't investigate unless there were grounds for believing there'd been misconduct. So as Lord Justice Sedley pointed out, if you remove the requirement of primary facts even at the tier 3

level, which has been played with, the concept has been played with by the Courts, in fact, no particulars have actually been allowed.

TIPPING J:

There's a difference, though, isn't there, between an assertion that your conduct is being investigated by the Law Society, and an assertion that there are reasonable grounds to have the investigation?

MR MILES QC:

There's no doubt that there's a distinction, there's a semantic distinction. And as lawyers, we understand that. But somebody reading in that cursory way, as one does, the Morning Report and The Herald, or worse still, the fleeting comment on TV1's news, that distinction becomes fine. Because the overall impression is that there is a real issue over the proberty or whatever.

TIPPING J:

Is not the difference between tier 2 and tier 3 that in tier 2 you have to justify the reasonable grounds, if you like?

MR MILES QC:

Yes.

TIPPING J:

In tier 3, the reasonable grounds to believe of guilt, in tier 2 you have to justify somewhat lesser?

MR MILES QC:

Yes, you do, Sir. No doubt about that. But you still ought to, you still have to justify whatever needs.

TIPPING J:

Objective facts.

MR MILES QC:

Exactly, Sir.

TIPPING J:

It's the objective fact point which *Gatley* makes.

MR MILES QC:

Is so important.

TIPPING J:

Is important across the board.

MR MILES QC:

And that means, as Lord Justice Sedley pointed out, that one would expect that need primary facts as the same way as the other tiers of meaning, albeit less compelling ones. And the reason for adopting that approach, as His Lordship pointed out, is that it wouldn't be difficult for newspapers if they were allowed to report, to run that sort of allegation. It is, sources say, that there is a need for an inquiry by the Law Society. That would be allowed, if the sorts of particulars relied on by the defendants here. I know that we're not talking about third tier, third meanings, but if that were allowed, then that sort of particular would be allowed. But my point being that the allegation of a need for an inquiry can be deeply damaging to reputations in the same way as the more significant meanings. So while we don't have to, that's not an issue that has to be determined today, Your Honours might.

ELIAS CJ:

One of the particulars, of course, might well be there is a need for an inquiry. One of the particulars might be there's widespread public anxiety about this topic.

MR MILES QC:

Yes, Ma'am.

ELIAS CJ:

So, and that fact might well be able to proved by pointing to reports.

MR MILES QC:

And that was touched on in *Bennett*, actually, which was the case of wide-scale corruption by the police, and there were a number of complaints, and it was suggested that that could be relied on for a third tier meaning.

ELIAS CJ:

But I do really find, it is important to look at meaning, at distinct meaning, and that these are distinct meanings. But the application of the repetition rule, which is simply that you can't shield behind the fact that someone else has said it, must apply, it seems to me, across the board, subject to permissible proof through hearsay evidence where that's appropriate.

MR MILES QC:

We'd agree entirely with that Your Honour. That is consistent with the views that have been said again and again in England, specifically on tiers 1 and 2 but significantly in a recent case and I'm going to give you that case a little later but a recent judgment of Justice Eady, where he pointed out that in fact there haven't been particulars based on hearsay, opinion, et cetera, even in tier 3, so while the concept has been discussed, in a desultory sort of way, there's been little reliance on it in fact –

ELIAS CJ:

Well, of course it wouldn't be hearsay if you were saying there is widespread public anxiety and you point to reports, yes.

MR MILES QC:

Quite, quite.

WILSON J:

Mr Miles, are the passages in paragraph 29.10 of *Gatley* to which you drew out attention, equally applicable to particulars of the factual basis for fair comment or honest opinion?

MR MILES QC:

There's no suggestion otherwise Your Honour and I will take it as similar comment where *Gatley*'s talking about fair comment. I think for exactly the same reasons, to say that in my opinion Miles ought to be examined by the law society, there's no conceptual reason, particularly for the aggrieved plaintiff, why the defendant shouldn't have to rely on actual facts. Merely saying I believe doesn't, for the average punter reading it or listening to it, add much to the allegation. What is crucial is, that there's being a republication by The Herald or TVNZ of someone's opinion, reinforcing the fact that these allegations are out there and that Miles' conduct is under investigation. There's no case, that I'm aware of which has indicated that the facts truly stated in the support of honest opinion should be of any less quality than those for justification.

TIPPING J:

And the circumstances truly stated –

MR MILES QC:

And the circumstances –

TIPPING J:

– cannot include, as I understand it, the opinion of someone else. That's not a circumstance for present purposes.

MR MILES QC:

Not once has there been any suggestion that that allows getting in under the back door as it were, something less reliable than primary facts.

WILSON J:

Again, I appreciate you'll be coming to honest opinion but can I ask you at this point, can a defendant provide particulars in support of its professed honesty of opinion as opposed to the factual basis for honest opinion, by for example, asserting that it knew that others held the same opinion?

MR MILES QC:

If the honesty of the opinion was put in issue, then I suppose I could understand conceptually, something along those lines. I haven't given it any thought to be honest because it's not an issue as yet here.

ELIAS CJ:

Do you have to plead particulars of honesty?

MR MILES QC:

No, not normally.

ELIAS CJ:

No.

WILSON J:

I wonder whether it is permissible as opposed to required.

ELIAS CJ:

Yes, yes.

MR MILES QC:

Yes, so there wouldn't be a pleading as to why my opinion is honest. The plaintiff puts an issue, the honesty and presumably gives specific reasons why but when you're giving evidence, I would have thought on that issue you would be entitled to rely on whatever facts the Court considers relevant.

TIPPING J:

Section 39 which talks of the notice you have to give if you assert lack of honesty, it implies or is based I think on the premise, that the defendant rebutting that or asserting honesty, you don't have to give any notice. You might choose to but you probably wouldn't because for tactical reasons you'd just leave it until the evidence you called at the trial.

MR MILES QC:

That's how it tends to pan out.

TIPPING J:

You don't want to give advance warning unless you have to.

MR MILES QC:

No, quite.

TIPPING J:

As a matter of tactic.

WILSON J:

I think that that's a practical answer to my question.

MR MILES QC:

Can I turn to the repetition and conduct rules. Now, you heard a lot of my friends on the repetition rule. You heard very little on the conduct rule. They're both inter-related and inter-connected but as a very broad proposition, the repetition rule is obviously significant on meaning and it also has some significance on dictating of course what facts you're entitled to rely on but the conduct rule is equally relevant and particularly relevant on the issue of particulars because the essence of that – there's no magic about these rules. Merely because they've been described as a particular rule doesn't give them any uniqueness. Essentially, they're pleading rules which in one form or another fit comfortably I suppose with most of our concepts of what evidence is relevant. The conduct rule simply says that if a defendant is relying on truth

or honest opinion then almost invariably it is putting the plaintiff's conduct in issue because it's saying, the conduct which the plaintiff is upset about, the conduct invariably which is critical of the plaintiff, is true. So it puts squarely the issue of the plaintiff's conduct as part of the litigation and secondly on opinion, the underlying facts of course all concentrate on the conduct of the plaintiff and that applies whatever level the meanings we're talking about.

Hence, the helpful series of principles which the Court of Appeal adopted in *Musa King*. I've actually set them out in full at pages 11 and 12 of my submissions but if we turn to *Musa King*, you will I think get some assistance, certainly the Court of Appeal thought so, they followed them. You'll find it at tab 23 of my friend's volume, it's volume 2. You'll see at the bottom of page 437, it's paragraph 22. It's a summary of principles taken from the leading cases as at 2004. It includes *Lewis*, it includes *Shah, Bennett* and *Chase*, "In the first principle, there's the rule of general application defamation, dubbed the repetition rule, whereby a defendant has repeated an allegation of a defamatory nature about the claimant, can only succeed in justifying it by proving the truth of the underlying allegations, not merely the fact that the allegation had been made." I know Your Honours that is cited as being described as the repetition rule by Hirst LJ in *Shah*. Of course, this is a rule that has been around for 170 odd years, it was a rule discussed in *Truth (NZ) Limited v Holloway*, so it's been around forever.

"Secondly, more specifically where the nature of the plea is one of reasonable grounds to suspect, it is necessary to plead and ultimately prove the primary facts and matters giving rise to reasonable grounds of suspicion objectively judged. Three, it is impermissible to plead as a primary fact the proposition that some person or persons, eg law enforcement authorities, announced, suspected or believed the plaintiff to claim to be guilty. Four, a defendant may rely under the Evidence Act, may use hearsay evidence to establish a primary fact but this in no way undermines the rule that the statement is still less beliefs so any individual cannot themselves serve as primary facts." That of course, is the complete answer to our Evidence Act. Of couse you can prove or set out to proof the primary facts, using whatever principles the

Evidence Act now allows but it doesn't alter the primary requirement to establish the facts in the first place.

Five, "Generally it is necessary to plead allegations of fact tending to show that it was some conduct on the claimant's part that gave rise to the grounds of suspicion, the so-called conduct rule." That was the point being made at *Gatley*, where the more serious the allegations are, the more important it is to plead and require the particulars to be as specific as possible. *Chase* said that this isn't an absolute rule, for example, strong circumstantial evidence can itself contribute to reasonable grounds for suspicion. Now, keep in mind, Your Honours, that in *Chase*, which wasn't really given a great deal of emphasis by counsel for APN, although in the written submissions, *Chase* is referred to as being a key case. But what their Honours went on to say, after saying there may be circumstances where strong circumstantial evidence itself can contribute to reasonable grounds for suspicion, they say but certainly not in this case, and that case involved allegations against a nurse that she had, essentially, killed a lot of babies, you know, it was one of those nightmare cases where, and of course involved the most serious of allegations. And as *Chase* said, absolutely not in circumstances where it is the conduct of the plaintiff that is being emphasised. And the more serious the conduct involved, the more necessary it is that they have to be primary facts. And for what it is worth, that suggestion floated there hasn't in fact been taken up.

TIPPING J:

What is meant by circumstantial evidence if it's not directed to primary fact?

MR MILES QC:

It's, to be honest Your Honour, it's not entirely clear from the judgement.

ELIAS CJ:

It looks a little muddled, doesn't it, because that's a question of evidence, rather than pleading. The pleading would have to be that she killed the babies.

MR MILES QC:

Exactly, and then the particulars are on the 3rd of February a baby was found dead under her care.

ELIAS CJ:

Yes, yes.

MR MILES QC:

And it's a throwaway line in the judgment.

ELIAS CJ:

There are a lot of those in these cases, it seemed to me, reading them last night.

MR MILES QC:

And it hasn't been picked up. What you'll find is post-*Chase*, continuing re-affirmations of the requirement of primary facts for tiers 1 and 2.

TIPPING J:

It would be very difficult to administer, if it was strong evidence of a secondary kind. I mean, what is strong evidence? I mean, it's just almost meaningless.

MR MILES QC:

And particularly, given the rationale of the particular is now *Ah Koy*. Now only are you to know precisely what the charges are, but you also want to know, to have some idea, of the credibility of the charges. Merely reporting something doesn't help in either case. And then 7 isn't so relevant, and 8, they're the remaining requirements, perfectly uncontroversial.

McGRATH J:

Can I just go back to 2, Mr Miles? The words "objectively judged" are emphasised. Is that really just to make it absolutely plain that the subjective views as to whether a reasonable suspicion arises are irrelevant, and if that's all you're showing, you'll be struck out?

MR MILES QC:

Exactly, Sir. The phrase, I think, is specifically taken from *Shah*.

TIPPING J:

And it's picked up, of course, by *Gatley*.

MR MILES QC:

And picked up by *Gatley*. And as I said, Your Honour, the Court of Appeal adopted the relevant parts of those principles, and found it helpful. And again, there's been no suggestion subsequently that those principles are inappropriately stated. Now, Your Honours, at paragraph 33 of my written submissions, I say that those principles which we've just been discussing were actually taken from those series of leading authorities. And I've added one or two to them as well. My friends have taken you, sufficiently, I think, to *Stern v Piper* and *Shah*, which really, I suppose, well, I suppose *Lewis* is the seminal case, which triggered perhaps a slightly unfortunate three-tier distinction. But *Stern v Piper* and *Shah* were the two cases which picked up the pleading implications that flowed from the different levels and meanings. And you'll see I've given you certain references in *Shah*. Would you add at page 270 to that? This is paragraph 33. So if you wouldn't mind page 270 to that. If I could just take you to *Bennett*, and that's at Volume 2 of the defendant's bundle. *Bennett* 21. And that was the one about police corruption. And at paragraph 14, there's again a reference to what Their Lordships describe as the importance of clearing the decks, citing Lord Justice O'Connor in *Polly Peck*, that public policy in the interests of the parties require the trial to be kept strictly to the issues necessary for fair determination.

And then at paragraphs 27 onwards, you get the importance of the conduct rule, on reasonable suspicion, I mean, it's just the point I've been discussing with Your Honours. At 29, they point out that the repetition rule is not just a rule of meaning, but limits the permissible scope of the plea, and the inadmissibility of evidence, and again, we've discussed that. At paragraph 36,

Your Honours, they actually discuss the significance between tiers 1 and tiers 2, and tiers 3, actually. And you'll see on page 875, about eight lines from the bottom, or after referring to the three categories that Lord Devlin discussed in *Lewis*, and they say we do see a significant difference between subparagraphs 2 and 4. Now, Your Honours, subparagraphs 2 is a tier 3 meaning. You'll pick that up if you read the facts of the case, just calling for the inquiry into the conduct of the police. But 4 was good grounds for suspicion that there's been corruption, and Their Lordships say, "At the latter course, the plaintiff's conduct into question in a way that the former doesn't", and hence they say a less stringent test is appropriate for tier 3. However, for the reasons I've discussed with Your Honours and while you don't necessarily have to.

ELIAS CJ:

A less stringent test?

MR MILES QC:

A less stringent requirement for proving the truth of that meaning, because it's a less serious meaning than reasonable.

ELIAS CJ:

Well, isn't it just a different meaning? So it's different proof?

MR MILES QC:

That's how I see it.

TIPPING J:

Well, that must be the better way of looking at it, surely.

MR MILES QC:

Well, I cannot, I've struggled with the conceptual rationale for saying that a call for an inquiry allows a different quality of fact to support it than reasonable grounds, for the obvious reasons that both would reflect badly, or have the capacity or potential, to reflect badly on the reputation.

TIPPING J:

You are justifying using that word in the colloquial sense, different meanings.

MR MILES QC:

Exactly Your Honour.

TIPPING J:

All you have to do is to justify that meaning. You can't be asked to do it – how you do it surely is a side issue.

MR MILES QC:

You don't need so many facts.

TIPPING J:

Yes.

ELIAS CJ:

They're different primary facts perhaps but there always have to be primary facts.

MR MILES QC:

Yep, exactly. Otherwise, as Lord Justice Sedley said in *Jameel*, it would be open slather on the media provided they carefully kept the story to, we are call for an inquiry because the conduct of X has been so outrageous, et cetera, there's no stopping the – so long as I suppose there's some ultimate element of fairness.

TIPPING J:

You're going to get into some subtleties here in any event. We don't want more subtleties than we can help.

MR MILES QC:

Exactly. Well, as I've said, strictly it's not an issue that I have to convince Your Honours of because we're not into tier 3 meanings but logically, I think that that must be the better view. In *Hamilton v Clifford*, those proceedings brought by those controversial English MPs against the equally controversial PR expert. Of course, for once it turned out that the Hamiltons actually had been set up. Again, I just invite Your Honours to have a look at the case and specifically those references. I could actually take you, yes, there are two paragraphs I'd like to emphasise there. I think that's in, yes, *Hamilton* is in my bundle Your Honours at tab 10. I would invite Your Honours really to read in particular all of those paragraphs I have referred to in my citation but could I take you to 39, where once again, the Court pointed out that, "It won't do to regurgitate allegations from newspaper articles and add the assertion that the allegations are credible. No need for the discussion to become confused by references to hearsay evidence and the changes brought about by the Civil Evidence Act, see the observations of Lord Justice Brooke in *Chase*. The essence of May LJ, remarks in *Shah* was that the setting out of subjective views and judgments is irrelevant on grounds to suspect that would be judged objectively."

It's just once again, making the point which the appellants did emphasise in their written submissions that they were entitled under the Evidence Act to rely on hearsay for particulars, while at the same time pointing out that they were not actually relying on the Court of Appeal judgments for the truth of what the judgments said, merely the fact that there were judgments. How that can help on justifying a plea of truth is hard to understand. The whole point is just conceptually flawed because the fact that it might now be easier to prove the primary facts is irrelevant to the initial requirement of relying on primary facts for your particulars.

Could I also emphasise 45 because this is a point which hasn't been mentioned but is significant. This is the burden of proof issue. As Your Honours all know, the burden of proof on justification and on honest opinion lies on the defendant. By allowing hearsay, opinions, et cetera, in as

particulars it effectively transfers the burden of proof to the plaintiff to then say they are not so. I have facts or whatever to disprove those but in a subtle but very specific way, the obligation shifts. That was the point made here, as it has been made in earlier cases. His Lordship says he relies also, "Upon the fact the police have been unable to disprove our allegations despite careful investigation. That is a curious way to approach the burden of proof and I'm reminded in this context that in *Chase*, Brooke LJ made the very point that a defendant should not be permitted to plea particulars of justification in such a way as to have the effect of transferring the burden to the claimant of making a positive case to disprove them." Now, I don't recall my friends making that point but that's of course one of the fundamental reasons why the facts should be primary and not hearsay. *Jameel* which is in my bundle as well, at tab 11.

ELIAS CJ:

Were there two *Jameel* cases?

MR MILES QC:

Yes. This one did go to the House of Lords.

ELIAS CJ:

Oh yes, yes. Oh this one went to the House of Lords.

TIPPING J:

Wasn't there one involving The New York Times?

BLANCHARD J:

No, Wall Street Journal.

TIPPING J:

Wall Street Journal, sorry.

BLANCHARD J:

That one went to the House of Lords. That was the one where there had been very limited publication, I think, in England.

MR MILES QC:

That's right and they sued in England. I mean, obviously because of the more attractive libel laws in England which, I mean, England advertises, promotes itself, as being a libel capital, it's an obvious source of work but that's why those proceedings were issued there and of course they failed. In this judgment Your Honours, could I take you to –

ELIAS CJ:

So, this judgment didn't go on appeal?

MR MILES QC:

No, I don't think this did, no.

ELIAS CJ:

No. That's all right, thank you.

MR MILES QC:

Again, this is a judgment of course discussing yet again –

ELIAS CJ:

This is where counsel weren't in a position to argue the point the Court was avid to hear. It happens all the time.

MR MILES QC:

Well, it does, I was intrigued at that but they were very put out.

ELIAS CJ:

Yes.

MR MILES QC:

That's why at paragraph 28, presumably Lord Justice Sedley, "In these circumstances I venture only the following comments" because the points obviously were not extensively argued. He said, "The proposition that the

repetition rule applies across the board derives from *Stern v Piper*. That decision certainly contains no qualification in relation to level 3 meanings but the decision pre-dates *Bennett* which is the effective source of third level of meaning. So, the issue of the conduct and repetition of rules whether they apply to tier 3 is, so far as we know, unaddressed." That's where at 29 and 30, His Lordship pointed out the problems with lowering the level of proof. He said, three lines down on 29, "But if a level 3 libel is to have any legal existence distinct from the first two levels, it has to be because it asserts something less in either guilt or conduct found in reasonable suspicion. If so, it ought to be possible in principle to justify about pleading and proving no more than a third is alleged." So, that's he says, "in principle". Then, at 30, he said, "But the consequences of so holding are disquieting. It means that so long as a slur on an individual's repetition is cast at level 3 terms, it can be justified by reliance and the bear fact of assertions made by others without any need to make them good. The Court which decided *Bennett* wasn't asked to address this problem. Faced with it the course of preparing to hear this appeal it seemed to be first of all there was no prior reason why the repetition rule should apply to this third and novel class of libel. Secondly that there were defensible, theoretical reasons why it should not but thirdly, strong practical reasons why it should, among them that disapplying the rule will place a premium upon formulating slurs at level 3 allegations and defending them unembarrassed by the otherwise general restraint on repeating the allegations of others".

ELIAS CJ:

But again isn't that concern really answered if you keep in mind the distinction between pleadings and evidence and the repetition rule is simply that you cannot answer the plaintiff's pleading by – sorry.

MR MILES QC:

Yes. No there is a distinction I think Ma'am. It's if all that TVNZ needed to prove is that Peters made a statement in the House and that is a particular that enables him to justify the truth of the programme, then it's very straightforward for them. They just prove the statements were made or they

prove that affidavits were sworn. They don't have to prove, of course, the underlying facts on which the views of Peters or the views whatever were –

ELIAS CJ:

But they always have to prove, on your argument, the underlying facts in application of the repetition rule but the facts maybe substantiated by reference to what was said in the House or what has been reported in the press if one of the particulars is that there's widespread public concern for example.

MR MILES QC:

Yes. I think, yes Your Honour is right. I think all I was doing was pointing out that what Lord Justice Sedley is saying, that at tier 3 level merely where the enquiry is being called for, conceptually it might be possible to justify the sting, whatever the sting, however serious the sting might be from calling for an inquiry, you can justify it by saying the President of the Law Society said there should be an inquiry. You don't have to prove the facts behind that view. But His Lordship is clearly thoroughly sceptical about that.

McGRATH J:

Why does he say there's no prior reason?

MR MILES QC:

I can only assume it's because it hadn't been considered.

ELIAS CJ:

By authority.

MR MILES QC:

Thank you.

TIPPING J:

But if the rule were, Mr Miles, that first you derive the actual meaning and focus very sharply on that and then you have to justify if you like that meaning, but you can never rely, other than perhaps in very exceptional circumstances, on the opinion of someone else to support that meaning.

MR MILES QC:

Well –

TIPPING J:

Unless the meaning is such that the opinions of others are relevant to that meaning.

MR MILES QC:

And I agree with Your Honour entirely. I'm just pointing out that His Lordship did float the possibility.

TIPPING J:

Yes but they seem to back away from it because if you went that way it would be an obvious way around the repetition rule. I mean it would just be so simple that everyone would be saying, grounds for inquiry as you said yourself.

MR MILES QC:

As His Honour put it, it would place a premium upon formulating slurs at level 3.

TIPPING J:

Yes, exactly. And from the reputational point of view, although it maybe a bit less, it's still pretty serious.

MR MILES QC:

Oh well as I gave you the example of you. It seemed particularly significant even saying it for the cause there – a sort of free for all of irritation.

BLANCHARD J:

Let's hope this is not mis-reported.

TIPPING J:

Well I of course have reason to understand this subject quite acutely at the moment Mr Miles.

MR MILES QC:

Quite. And again I mean those views were, those judgments were agreed to by the other two Lord Justices. So that's, and perhaps if I, this might be an appropriate – well let me just refer Your Honours to that most recent case, a judgment once again of Justice Healy in March 2006 involving a well known jockey who was involved, so it was said, in pulling horses and because his – because of a betting ring. His Honour Justice Wilson may know the name of the jockey, certainly Mr Galbraith does - Kieran Fallon - but what is significant is that at paragraphs 18, 19 and 20 once again we just have the standard reiteration of the principles and I just invite Your Honours to read those in due course but what interests me is that the bottom of – well if you take paragraph 18 and look at the last couple of lines on that page, you'll see talking about reasonable grounds for suspicion that you needed to actually refer to facts for that. He said that's true of level 2 meanings. The Judge at first instance Gray J, he was again a very experienced defamation lawyer in *Jameel*. There are good reasons why it should also apply to level 3 meanings and he just notes that aspect of his judgment wasn't challenged on appeal. It's true that it was recognised by Brookhill J in *Musa King* that sometimes strong circumstantial evidence could be pleaded, even if it arose apparently through no fault of the claimant. So far however that remains theoretical and has not been exemplified in any particular case. Courts therefore need to be wary of pleaded particulars which appear to be designed to circumvent the primary conduct rule. Then discusses the onus of proof at 19, a point that I've already discussed with Your Honours, and then once again reiterating primary facts tier 2 objectively judged for the reasons that we have already discussed.

So there's not much doubt that the conduct and repetition rule are not only clearly as relevant today as they always have been, but contrary to the theme, one of the key themes in the written arguments by both appellants is that the law in this area has been extended. There are references to extended meanings of repetition and conduct rule. References I think to, in TVNZ's submissions to repetition rule that is slopped over or some reference – some indication that there's been a shift in the zeitgeist on these issues.

ELIAS CJ:

And a messy shift at that.

MR MILES QC:

And a messy shift. But the analysis that I've taken Your Honours through indicate it seems to me nothing more than just the occasional concept being floated for future consideration. So much so that a couple of years ago in *Fowlin* we had the most experienced defamation Judge in England just reiterating all of these principles as if they, they unchanged really since, since *Lewis*.

TIPPING J:

Is this whole grounds subject really, was it's genesis, the speeches in *Lewis*, and people have sort of latched onto that in a way that may not have been envisaged by the authors of those speeches.

MR MILES QC:

Well I don't think for a moment they were Your Honour because as I point out in the, actually in my next paragraph, the repetition rule has been around since 1829.

TIPPING J:

Quite.

MR MILES QC:

The requirement for facts in New Zealand goes back to *Pascoe* in 1914 and almost certainly before that, that just happened to be the first reported case, and the awareness of the distinction between proof and suspicion has been around forever. The fact that Judges haven't formally talked about that difference doesn't mean that it hasn't been a distinction that has been around forever. And that, of course, was specifically discussed in *Holloway*. Lord Denning, in the Privy Council, specifically pointed out this fact, that there is a distinction between guilty and suspicion, albeit suspicion can be very serious. The third tier, grounds for an inquiry, that, I think, was floated for the first time in Lewis, and then largely ignored. The reason I think there's no reference to these tiers until *Stern v Piper* in about 1997, is that nobody had really picked up the significance of the difference between tiers 2 and tiers 3. And you might say that the obvious reason for that is that the distinction is largely semantic.

ELIAS CJ:

Well, the distinction just follows meaning.

MR MILES QC:

Exactly, Your Honour.

ELIAS CJ:

But the underlying policy that you have to establish primary facts is constant.

MR MILES QC:

Particularly when it's the conduct of the plaintiff which is crucial.

ELIAS CJ:

When won't it be, though?

MR MILES QC:

Well, I've struggled with that. I suppose, I've really wondered how there can be a call for an inquiry into some set of circumstances which sufficiently

identifies somebody as being a party to those circumstances which isn't inherently defamatory. I suppose you could say that somebody says I'm calling for an inquiry into the way the Law Society Disciplinary Committee runs its affairs because no lawyer has been convicted for the last ten years. Now, I suppose, conceptually, you could say that the chair of that committee, known to be the chair, could say my reputation for impartiality has been impugned. And so, what the real issue is, is really whether the whole conduct of the Law Society Disciplinary Committee is an issue. But you still have to come back, at some stage, to conduct, because that's what's being criticised. So I rather suspect that the reason why Justice Sedley made that comment a couple of years ago, and why it's difficult to find examples of tier 3 particulars. Requiring anything less than primary facts is the recognition that even in calls for an inquiry, it almost invariably must involve conduct in one form or another.

ELIAS CJ:

If it's to be defamatory, I mean, there might be a wholly neutral.

TIPPING J:

But if it was capable of bearing that defamatory meaning, i.e. that the chairman must not lack impartiality, then the facts to justify that assertion would have to be concrete facts, not that some disaffected person has expressed that opinion.

MR MILES QC:

Exactly, Your Honour, the 28 cases, where the charges were dismissed.

TIPPING J:

And from which you would have to be able to rationally infer, or a jury would, that there was a lack of impartiality.

MR MILES QC:

Exactly, Sir, exactly. And that's Lord Justice Sedley and it's my position. I can see no logical basis for the distinction.

TIPPING J:

We can't have the law subject to further argument. It would be most unsatisfactory to have the law turning on such fine distinctions as to whether it was at the bottom end of tier 2 or the top end of tier 3, or the precise nature of the allegation, because the ingenuity of the human mind will soon find a way around that.

MR MILES QC:

And every now and again in these judgments, one of the Judges says, by the way, tiers 1, 2 and 3 is just a useful formula. Ultimately, defendants have to plead to meanings. And in a way, I think the reason why the tier 3 debate has gone off the rails is because it's seen as a concept, that actually as a meaning that has to be dealt with. Whereas, in fact, it's just another meaning, a graded, another meaning in the gradation of extremely serious down to less serious. Now, at paragraph 45 of my submissions, Your Honours, I just refer you to the relevant paragraphs in the Court of Appeal judgment, which actually dealt specifically with the particulars. And you'll find that at paragraphs 102 through to 107. I mean, I don't need to take Your Honours to it now, but it's hopefully just a helpful summary of the effect of the Court.

ELIAS CJ:

I'm a little lost as to what – the respondents are simply seeking to have the Court of Appeal decision upheld?

MR MILES QC:

Yes, Ma'am. The agreement with the parties, the defendants have not re-pleaded pending the decision from this Court. I just see at the top of my submissions, Your Honours, is where I've cited from *Bennett* again, but just that further point, you'll see one most salutary advantage to holding fast the reputation rule is that it avoids lengthy investigation into the reliability of the markers of hearsay statements. Again, we've discussed that off and on over the last day and a half. But it's another cogent reason for keeping the primary facts at whatever level we're talking about.

TIPPING J:

Have the Australians added anything recent to this subject matter, Mr Miles?

MR MILES QC:

No, Your Honour. And I also, in my submissions, refer to *Galooly*, you see that at paragraph 46. And unfortunately, the relevant page wasn't included in my bundle of authorities. But I have copied that and I will hand that up to Your Honours. Unfortunately, when I was looking for the volume in the High Court library here to give you the front page, the volume has been lost, apparently, for some time. But *Galooly* makes it clear that it's perfectly standard, as well.

TIPPING J:

Is that loose-leaf?

MR MILES QC:

No, Sir.

TIPPING J:

It's very out of date, then.

MR MILES QC:

It is. And as far as I know, there's no second edition at this stage.

TIPPING J:

Then there's no more recent case?

MR MILES QC:

Yes, there is. And I refer to that at paragraph 50 of my submissions. It's a 2008 case. *S, DJ v Channel 7*, and we have that hopefully.

TIPPING J:

So that was just simply an application of the effect the law as you contend it should be?

MR MILES QC:

It is. But let me take Your Honours to it. It's tab 13 of my bundle. It was the full Court in South Australia. And if Your Honours have got that judgment, if you go to page 3, you'll see a number of the particulars that are being relied on. And if Your Honours go to the last three particulars on that page, 7.2.1.2.3.

TIPPING J:

That says it all.

MR MILES QC:

Doesn't it, I agree. There was evidence that the plaintiff had been involved in a sexual relationship and the next one, there was evidence that the plaintiff spoke to Corinna Marr and there was evidence that the plaintiff left his workplace, and that is exactly the sort of particular which the defendants are relying on when they say affidavits have been sworn that say, and the issue was were those –

TIPPING J:

How anyone in their right mind could think that that was a particular, with all due respect, is a bit hard to understand. It just defeats the whole purpose of having particulars if you can get away with that.

MR MILES QC:

That is precisely what the defendants in this case have done.

TIPPING J:

I don't think it's quite as extreme as this Mr Miles.

MR MILES QC:

Well it is Your Honour because they've said – it's more extreme as a matter of fact. What they've said is, X has Mr Patterson, one of the key fishermen who

figured prominently in the story. Mr Patterson has sworn an affidavit that has said –

TIPPING J:

Yes but that's getting more specific –

MR MILES QC:

It's no more than there is –

TIPPING J:

– than there was evidence. Anyway, we won't debate that Mr Miles.

MR MILES QC:

No, no but it's conceptually just as damaging. Anyway, I take Your Honour's point but that got struck out and you'll see at paragraphs 18 onwards a discussion of the principles, there's a very familiar ring about them. "Perry J with whom Duggan and David JJ agreed, cited *Shah*, *Chase* and *Jackson v John Fairfax*. Those cases were also relied on by the respondent in this appeal in support of the proposition that in cases such as the present where a plaintiff pleads an imputation of suspicion on reasonable grounds of complicity … a defence of justification must plead the conduct of the plaintiff said to justify the reasonable suspicion." And Justice Perry set it out accurately from that citation that it's the only, second line up from the bottom of that citation that, "The suspicion can only properly be proved by objective evidence of conduct on the part of the plaintiff rather than by evidence of what others might have said or observed." And Their Honours in the Court of Appeal respectfully agreed. Were it otherwise would breach the repetition rule, and they repeat that over the page. Then on the application of those principles, they strike out the offending particulars and you'll see at the last paragraph, 25, he doesn't plead the promotion meant that any particular person entertaining the suspicion in fact did so on reasonable grounds. He pleads the imputation promotion was objectively, there were reasonable grounds to suspect, a plea of justification requires pleadings of the facts that justify the reasonableness of those grounds. So entirely conventional

exercise of the relevant principles, and you'll see the footnote at the bottom of page 6, those familiar cases, *Stern v Piper*, *Shah*, and *Hamilton v Clifford* cited, plus another Australian decision.

McGRATH J:

Justice Perry's decision was in the same, was it first instance in the same case or a different case?

MR MILES QC:

I assume it's different, Your Honour, because I see that they say Perry J with whom Duggan and David JJ agreed.

McGRATH J:

Duggan J is presiding in this case, isn't he?

MR MILES QC:

Yes, if you go to paragraph 6, as part of the introduction, there was a plea of justification filed by Channel 7. That plea was struck out by a decision of the full Court on 4th of April, and that, I think, is the decision which is being referred to as the –

BLANCHARD J:

Yes it is, it's got its own definition which crops up again at the beginning of paragraph 17.

MR MILES QC:

Yes, thank you Sir. This must have been, they must have re-pleaded it.

McGRATH J:

Yes.

TIPPING J:

With no greater success by the sounds of things. Well, anyway.

MR MILES QC:

So what I say Your Honours at paragraphs 51 onwards is that there's been this consistent theme running through the submissions of the appellants, that there has been an extension, relaxation of the repetition rule over the last, say, 15 years, but there is no basis for that, and nor has there been any basis for it anywhere else in the Commonwealth, and I then get on to *Curistan* because I point out that the most recent endorsement of these principles can be found in

Curistan and what I say in my submissions is really, I think the point that came out so clearly from the discussion with Your Honours yesterday, *Curistan* is entirely conventional exposition of the relevant law and qualified privilege and the repetition rule.

It confirmed what Judges time and again, and in particular Lord Justice Simon Brown, who commented, I think, in at least three cases, I think *Stern v Piper* and a couple of later ones, that qualified privilege itself depends on the concept of the repetition rules being in existence, because reporting what they said in Parliament of course, would be fatal, it would be struck down were it not for the qualified privilege that attaches to those circumstances, and because Parliament, quite appropriately asserted, there are certain circumstances where the repetition rule will not be invoked because of the importance of the occasion, then of course, the qualified privilege applies, but the judgments of Their Lordships in the Court of Appeal didn't for one moment indicate support for the proposition advanced by the appellants that, in some way, the fact of the statements covered by qualified privilege could be used as particulars in supporting the plea of truth or honest opinion that could be taken from the remaining parts of the statement. In other words, what the case was all about was both of these principles are crucial. One is a bastion for free speech, the other is a bastion for the protection of reputation.

What you can't do, and what was suggested by the plaintiffs in that case, is that the meaning of the statements in the non-privileged parts of the statement could be influenced by the statements in that part of the publication covered by qualified privilege. So that, if you get a statement in the house,

"Simunovich is a crook", you can't rely on that statement as being influencing the meaning of the publication, because the paper or station is entitled to publish that. You have to look at the non-privileged parts of the publication to get the meaning. Now, while I think Their Lordships recognised that that issue in its specific form hadn't arisen, or if it had arisen, it had only arisen rarely, it is nevertheless entirely logical. But it doesn't remotely assist the appellants because Lord Justice Laws and I think Your Honours pointed this out, made it clear that in the non-privileged part, the traditional rules applied. In other words, far from being the king hit, which was the impression one got from the written submissions, it was against the key submissions advanced by the appellants.

McGRATH J:

And did you say that Lady Justice Arden is equally on board with that? I mean, you rely mainly on Lord Justice Laws, but Lady Justice Arden did seem to have a broader perspective.

MR MILES QC:

It's attractive to go to Lord Justice Laws because the propositions have been encapsulated so attractively and so crisply, and I found it more helpful I suppose to go there but there was no suggestion in any of the judgments that Lord Justice Laws was indicating something different to Lady Justice Adern. Indeed I think he went out of his way to say he agreed.

McGRATH J:

That actually wasn't my impression, to say that he agreed with her reasoning but in any event it's Lord Justice Laws you're relying primarily on when you say there's nothing to contradict any of the judgments.

MR MILES QC:

And you won't find a single indication in the other judgments that the fact that a statement has been made in a privileged occasion can be relied on as a particular for the other two defences and of course the rationale being again as Your Honours pointed out yesterday, is they are fundamentally different

offences. They're conceptually about completely different issues. It is utterly irrelevant in terms of qualified privilege whether statements are true or not. The only way you can attack qualified privilege statements of course is on the basis of honesty or ulterior motives and you know the usual grounds. So I know of no authority, and I can't imagine how there could be an authority, that would indicate that you could use the statements that are covered by qualified privilege for the purpose of bolstering one of the other defences.

TIPPING J:

Well then you're stepping outside the purpose of the privilege.

MR MILES QC:

Exactly Sir. But it's misunderstanding the basic concept behind the privilege which is that the truthfulness of it is irrelevant. How can it help a truth defence or a honest opinion defence because the underlying facts have always got to be the primary facts.

BLANCHARD J:

You I would have thought would have got some assistance in that argument, at least in relation to honest opinion that must equally be so in truth, from the case of *Brent Walker Group v Time Out*.

MR MILES QC:

Indeed Your Honour. And I think just on that topic it is also I think – let me just go to, to *Curistan* which is volume 1 because I want to discuss with Your Honours again the very helpful comments by Lord Justice Laws on the embellishment adoption concepts. Tab 1, Your Honours, volume 1. Now we've discussed the first two or three pages of His Honour's judgments where talking about the relevant principles and the relationship between the principles. But can I come to embellishment in adoption at paragraphs 87 to 91? He says, "Finally I had these short comments about embellishment and adoption. It's plain that there will be no qualified privilege in an account of Parliamentary speech if the publisher has so embellished the material that it cannot be said to be a fair and accurate report. " He then cites Lord Denning

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

ELIAS CJ:

I've never heard of that expression before. It's a very homely simile.

MR MILES QC:

Yes but it's in fact a brilliant description of the Assignment programme because what the Assignment programme does is start – the very first paragraph is a reference to possible corruption. Then we have Peters claiming serious, extravagant corruption and keep in mind Your Honours that at this stage you're looking just at the written word, the clip is a very different animal. Then, and on that same page, the presenter says, Mr Peters of course is basing this on a number of affidavits from fishermen and we have copies of those affidavits. Then the next half dozen pages or so are an interview and discussion with Penwarden and I think one of the other competitors and that's largely unexceptional. It's just the discussion on the unfairness, perceived unfairness of the way the Ministry has treated other fishermen. Complaints that they just never were able to get a look in and all understandable. Then they get into the serious stuff with the introduction to Patterson who's described as probably the, I think, key fisherman and there are several pages of direct interview with Patterson who is one of the skippers for Simunovich and Patterson makes a whole series of extraordinarily damaging allegations. Not of grounds for suspicion, fact. "I was told by the Simunovich to misreport catch quotas". "We unloaded in the dead of night to avoid inspections". "We knew the inspectors were coming on board and we deliberately made it impossible for them". A whole series of statements of illegal, criminal conduct and implications involving corrupt activities with the Ministry because the relationship indicated clear connections. Then, somewhat surprisingly, they –

ELIAS CJ:

Mr Miles we're really dealing with this at a point of, on a level of principle. It's very engrossing having this background but do you think it really assists us?

MR MILES QC:

It –

ELIAS CJ:

I mean we can readily accept that there is, that the report goes further than is covered by qualified privilege, that's not really in dispute. Isn't that all that needs to be said?

MR MILES QC:

I'm, yes. I, perhaps I was repeating the obvious –

ELIAS CJ:

Warming to it.

MR MILES QC:

Well I was warming to it I suppose.

TIPPING J:

You're embellishing even the whole joint I suspect.

MR MILES QC:

Nowhere near. Not even in the same level.

BLANCHARD J:

You're putting the gravy on it.

MR MILES QC:

Well you could say it was a practice run. But could I just complete this. The relevance, Your Honour, is maybe slight but it was linked with the

adoption and embellishment proposition because as I understand my friends, and my learned friend Mr Galbraith who does touch on these issues and then slips past them but nevertheless touches on them, and one of his arguments is that qualified privilege material might be relied on as a particular for honest opinion. My point is that such a proposition has been accepted in theory on a very narrow basis in the case that His Honour Justice Blanchard has just referred to, but the essence of it is comment on the qualified – on the material covered by qualified privilege and what this Assignment programme is all about is a shared knowledge that TVNZ had with Peters. They had the same affidavits that Mr Peters had. They weren't using the comments by Mr Peters in the House as the basis for the programme. The basis for the programme was exactly the same basis as Mr Peters had, it was the affidavits. They were using the speech in the House as the introduction to their programme to embellish the whole proposition and to turn it into the sort of programme that might assist the ratings. It is a fundamentally different proposition to that advanced by that principle that my friend mentioned.

Finally, just on that point, and forgive me Madam Chief Justice, but the very end of that programme is, and I do invite you to just glance at it, they actually cross-examine Mr Peters because Mr Peters then resiled from what he said and actually claimed in the interview that it wasn't about the Simunovichs at all, it was about a different fisherman. "Who," says the interviewer, "Oh I'm not conceding that for a moment." And so the discussion goes on. What it is, is a classic case of embellishment or adoption of the underlying sting, because they had all the relevant documents and that was what the thrust of it was.

ELIAS CJ:

With that we'll go off and have the morning adjournment. Thank you Mr Miles.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.53 AM

MR MILES QC:

Can I turn to the judicial decisions exception that my friends rely on. Let me know Your Honours the extent you wish me to discuss this but I start at paragraph 62 of my written submissions by pointing out the factual anomalies or difficulties that arise with this proposition. I point out that both appellants rely on the judgments of Justice Ellis as well as the judgments in the Court of Appeal. Of course Your Honour Justice McGrath was one of the Judges in the Court of Appeal. However, they make it clear from the particulars that they rely on, that they're not relying on the actual results, the actual decisions, and of course the decisions were very technical. Essentially that certain of the regulations were void but you'll find no mention of that in the particulars. What they're interested in are the sort of by-the-by comments that Judges often make during the course of the judgments. And in particular in this case they rely on two or three comments by Justice Thomas in the Court of Appeal. Now this is complicated because they rely on the views expressed by Justice Thomas that Ministry officials were open to criticism and that Simunovich was a significant beneficiary of the various decisions by the Ministry over the years and presumably using my friend's phrase "building blocks" he would say that these are legitimate building blocks in putting forward an argument that ultimately the Ministry was corrupt and that the Simunovichs were guilty of longstanding corruption and criminal activities.

But quite apart from the conceptual problem which is fundamental, that there's no legitimate basis for relying on opinions of anyone, whether they be of the authority of Judges or the opinions of someone in the Sunday News, there is a real problem here. Firstly, they point out they're not relying on the truth of whatever was said because they're simply relying on the judgments as having been delivered and they've said how that can help on a truth or honest opinion defence is difficult to understand. Secondly, it's not the actual decisions that are being relied on but rather the comments dotted throughout the judgment. But thirdly, both Justice Ellis and Justice Thomas went out of their way in paragraphs that are not being relied on to say that the Ministry were conscientious and careful et cetera and acted bona fide and that, albeit it open

to considerable criticism for the way they operated the regulations or purported to operate them, and secondly both Judges went out of their way to say there is no impropriety on the part of the Simunovichs. You get this so clearly and the anomaly is so – is emphasised in a particular paragraph in Justice Thomas' decision where they quote the first couple of sentences and then leave out the next sentence. Let me take you to that. You'll find it at –

ELIAS CJ:

What's the proposition that you're putting to us here? That one needs to be very careful, in any event, about invoking opinions.

MR MILES QC:

They should be struck out because they're an opinion.

ELIAS CJ:

Well that's all that needs to be said really, isn't it?

TIPPING J:

Isn't the point further that this situation, judicial decisions, is in like case to Parliamentary statements and you cannot use them beyond the purpose of the privilege?

MR MILES QC:

Exactly Sir.

TIPPING J:

And if it's fair and accurate, you may comment on it, but you may not use them to enhance, if you like, much less misrepresent the thrust of the decision.

MR MILES QC:

Exactly Sir. But I have the added advantage here of not only saying that conceptually they should not be used as particulars, but I'm just pointing out that there are actual anomalies –

ELIAS CJ:

But you don't need to go to that if you succeed on the –

MR MILES QC:

No of course I don't.

McGRATH J:

And you haven't applied to strike out on the basis that they're particulars that are not capable of not supporting the allegations that are made?

MR MILES QC:

Well I think it's inherent, Your Honour, but Your Honour strictly speaking that is right. But – well could I just say in that case Your Honour that I've given the references in my written submissions to the point that twice in Justice Thomas' decision he clears the Simunovichs from impropriety and the Ministry officials from impropriety and so does Justice Ellis. And my last point which is probably I suppose even less conceptual than they one I've just mentioned, but my take on the judgments, and it's my take entirely, is that Justice McGrath and Justice Keith gave a very carefully structured judgment distancing, that's my word, but distancing themselves from the views expressed by Justice Thomas. so – and very explicitly setting out the basis of their decision. So again how could it possibly help a jury or a Judge to plead, to have these particulars as part of these defences?

TIPPING J:

It's really, at bottom, an issue of relevance, isn't it?

MR MILES QC:

Well, conceptually it's a bigger issue than that, Your Honour.

TIPPING J:

I agree, but ultimately, on whatever conceptual underpinning you say these.

MR MILES QC:

On relevance. And I would have moved to strike it out, regardless of whether conceptually it was permissible or not, simply on the basis of relevance. Because how one view and one paragraph help, I mean, we're talking about corruption, criminal conduct, here. And the judges themselves go out of their way to say there isn't any. It's difficult to see how you can conceivably, how that could help. But it shows the danger of being able to cherry-pick a sentence in a judgment here, and a sentence in a judgment here, ignoring the more significant paragraph somewhere else, and say, I'm entitled to rely on them.

TIPPING J:

That's why accurate is joined with fair.

MR MILES QC:

Well, in terms of particulars, Your Honour.

TIPPING J:

Qualified privilege, yes.

MR MILES QC:

Yes, quite. And that's, of course, the reason why in *Waters*, where there was that arguably and somewhat intemperate remark by the Chief Justice Lord Goddard, where the report published the comment by His Lordship, but not the fact that the conviction was overturned, hence noting that would never be able to be used on a qualified privilege argument, because it was simply an unfair report. But *Waters*, Your Honours, should not be regarded. It was clearly regarded in *Stern v Piper* as an anomaly. Lord Justice Hirst specifically disagreed with it, while being polite enough to say it should be distinguished other than on its own facts. But there's no need for Your Honours.

TIPPING J:

You mean only if another Lord Chief Justice –

MR MILES QC:

Of a similar ilk. Quite. But why should the views of however eminent a lawyer be regarded as being the basis for a truth defence? Ultimately, it was just a view expressed on the evidence. It might have been right, it might have been legitimate, it might have been illegitimate. It depends entirely on the evidence. Going back to the fishing cases, how can they be relevant to a fishing case here based on different issues and different facts? And of course, just while I remember, the fishing cases relied on the *Vautier* cases, they were reviewed, there was no cross-examination, it was just a discussion on the evidence. However, I'm moving on, Your Honour. But *Waters* and *Cadam* both explained in *Stern v Piper*, and they shouldn't be regarded as authorities for allowing a view that's been expressed in one judicial hearing to be used in another. TVNZ, Your Honours, in their written submissions, spent some time suggesting that *Haines* should be reviewed, and that it was wrong. My friend for TVNZ didn't touch on that, I'm assuming that that wouldn't be permitted. After all, *Haines* was applied in one of the first.

ELIAS CJ:

Well, it's not before us, Mr Miles.

MR MILES QC:

It's not before you, exactly, Your Honour. And, in fact, *Haines* was relied on by Justice Allan in one of the earlier decisions, striking out lesser meanings. And TVNZ didn't appeal. So it's just not open to them to argue it at this stage. But don't for one moment accept that I consider that *Haines* to be wrongly decided, and the arguments put forward by TVNZ are arguments, but they are just as valid arguments against it. And I didn't engage in my written submissions, because I didn't consider there was any right to be even running it. By the way, there are a number of states in Australia that have not followed *Polly Peck*, and have preferred the more principled approach of Justice Brennan in *Chakravarti*, if that's how it's pronounced, which is what was adopted by *Haines*. Now, let me move on to honest opinion.

WILSON J:

Just before you do so, Mr Miles, are you proposing to address Mr Galbraith's argument based on section 8(3)(b)?

MR MILES QC:

Oh, yes. This is a new argument, Your Honour. You'll find no mention of that as I recall it in the written submissions.

WILSON J:

There's one brief mention, I think, in that paragraph.

MR MILES QC:

Well, I certainly don't recall it being discussed in the Court of Appeal. It's not in the Court of Appeal judgment. And the reason it wasn't in the Court of Appeal judgment is I don't recall any discussion on the significance of that section and why particulars should be any less onerous under the second leg than they are in the first leg. Had my friend suggested to Your Honours that that section is a somewhat opaque section, I would have been in entire agreement. The explanation of it can be found in *Haines*, and the way through to that explanation comes from Sir Ian's report. And you'll see the genesis of what Sir Ian was wanting to do, and in his draft bill, he runs an elegant and carefully-structured truth defence, incorporating what he set out to do, and for reasons that are inexplicable, were completely re-designed and turned into 8(3)(b). But what Sir Ian was saying is that like the case where the general sued on lesser crimes, but ignored the huge war crimes that he'd clearly been guilty of, and the Courts reluctantly said, well, there's no justification for the lesser crimes, they were wrongly stated, so you're entitled to damages. And there's always been a sense that that was wrong, because why shouldn't you be able to refer to the other charges and prove them.

WILSON J:

A bit like *Templeton v Jones*?

MR MILES QC:

A bit like *Templeton v Jones*, exactly. And 8(3)(b) was designed to deal with that. And what Sir Ian said was, if there has been a charge which the plaintiff is innocent, but it's minor, and the other charges in the programme are much more serious, and which are not being justified, then you look at the overall story, and if the damage to the reputation from the lesser charge is swamped by the damage to the reputation by the other charges, then you should have a defence. So yes, you look at the whole of the story, which is what 8(3)(b) says. But it comes into play only when there are charges there that have not been sued on. Otherwise, you of course are bound to answer the imputations relied on by the plaintiff, which is 8(3)(a). Now, there are conceptual problems that are very real in 8(3)(a) and 8 (3)(b). It's unique, and the problem is the way it's been drafted. But that's the.

TIPPING J:

It would be much better, wouldn't it, theoretically, to say that the truth of the higher charges doesn't justify the lesser charge, but it so shows that the person had a reputation that was so inherently flawed anyway that the lesser charge can't make it any worse.

MR MILES QC:

Exactly, Your Honour, and that's what Sir Ian actually says.

TIPPING J:

Yes, that's what I rather recalled, the intended thrust.

MR MILES QC:

Yes, it's a reputational issue.

TIPPING J:

Yes, it's a damages issue more than, well, it's a question of how much more, if at all, your reputation is damaged?

MR MILES QC:

I suppose it's technically because if you had no reputation, you still nevertheless had to give the traditional farthing.

TIPPING J:

Yes.

MR MILES QC:

What he's saying, you actually don't have to worry about the farthing now.

TIPPING J:

Yes, it's to buy off the nominal damages issue.

MR MILES QC:

Exactly, exactly. And to do that, if the overall thrust of the story, for instance, if you go to *Templeton v Jones*, if the overall thrust was that you are a bigot, then arguably that might be applicable. But there's no reason why whatever particulars would be relevant to that defence ought not to be the same quality as the particulars on 8(3)(a).

WILSON J:

8(3)(b) does talk of all or any of the matter contained in the publication, though, doesn't it?

MR MILES QC:

But that's why you're entitled to, yes, yes. And that's one of the drafting difficulties because what the thrust of it is the, well – well I suppose it's trying to indicate that the charges might be, that the serious charges might be only part of what the total publication is or possibly if you look at the whole of it, it might still have that overwhelming impact but that's the – the meaning I think is reasonably clear even though it talks about all or any, that's what is intended by that. But particulars –

WILSON J:

A bit like section 38, it's not easy.

MR MILES QC:

Well to be honest it is difficult to get to the meaning of 8(3)(b) without the assistance of the genesis, the intended genesis of it in Sir Ian's report. So in short it's still a truth defence. Particulars must still be given because a plaintiff is entitled to know what it is that is being said is so damaging to his reputation that he's not entitled to damages.

TIPPING J:

But if you want to justify a worse meaning, which the plaintiff hasn't sued on, then it would be illogical to say that in those circumstances you didn't have to particularise –

MR MILES QC:

Exactly.

TIPPING J:

– your higher meaning. I mean it's just counter-intuitive.

MR MILES QC:

Exactly. And certainly it has never been suggested in any Court, until today, that that leg would be entitled to a different analysis in terms of appropriate particulars.

Now at the last two or three pages of my submissions I just deal with the, again the genesis of sections 11 and 38 of the Defamation Act and I did, I went into some discussion with Your Honours on that yesterday afternoon. I think it was agreed, at least on an initial basis, that section 38 was intended to cover particulars for both defences and that one picks that up really from Sir Ian's report and the way that developed. And certainly *Haines*, and

paragraph 101 is the significant paragraph, certainly states that section 38 is the appropriate section when dealing with particulars. And there's a helpful discussion again by Justice Blanchard in *Mitchell v Sprott* just on the requirements of the defence and the, I think there is a specific reference, I think it's at paragraph 22 where His Honour talks about the requirement of facts properly, truly stated, properly proved.

TIPPING J:

We're not concerned at the moment in this case to distinguish, with any particularity, between fact and opinion, are we?

MR MILES QC:

No we aren't Sir.

TIPPING J:

I can see real difficulties downstream on this but for the moment …

MR MILES QC:

Don't get me onto that.

TIPPING J:

No.

MR MILES QC:

Mr Aitken and I have a longstanding disagreement on a concept of what amounts –

TIPPING J:

Yes but we're not into that.

MR MILES QC:

No.

TIPPING J:

Except insofar as that distinction in the abstract might be relevant to the coherence, if you like, of the law of defamation. We're not concerned to state anything about this case in relation to what's fact and what's opinion.

MR MILES QC:

No. The only debate tends to be whether you can define the meaning as an opinion or whether, as I believe, it simply has to be picked up from the words used because you can't redefine the actual words and turn them into an opinion unless those words indicate that it's an opinion. Ultimately one has to come back to the words to say are these indeed opinions or are they –

TIPPING J:

That depends on the words themselves and the context in which they are published.

MR MILES QC:

Always context.

TIPPING J:

All right thank you, that's helpful.

WILSON J:

Mr Miles I just checked and the reference in the TVNZ submissions to 8(3)(b) is to be found in paragraph 33E.

MR MILES QC:

Yes, well –

WILSON J:

In the context of *Haines*.

MR MILES QC:

Yes, yes. Well I think since I'm here to uphold the Court's decision I think I'm entitled and ought to say that I recall no discussion on this issue in the Court below and I think the reference in the written submissions is commendably slight. Can I just take you to those references that I refer to again at paragraphs 80 and 81 which just record what's been the standard law on this issue as far as I'm aware forever and I give you *Hamilton v Clifford* and *Galloway* and *Gatley*. *Hamilton v Clifford* is –

TIPPING J:

Do you need to go through this Mr Miles? It's pretty standard stuff isn't it?

MR MILES QC:

Absolutely and the only reason I even have to go near it is because of the heretical arguments advanced by the appellants that in some way they're entitled to rely on facts that are not truly stated but –

TIPPING J:

Well they're entitled to rely on something that's not a fact.

MR MILES QC:

Would be another way of putting it.

TIPPING J:

From your point of view. I'm not saying that is my view at the moment.

MR MILES QC:

And you have – but the references to the contrary proposition which is what has always been the law, you can find in the, in *Haines* in New Zealand and in England in *Hamilton*, and *Galloway* and *Gatley* and you've got the authorities, I've given you the relevant paragraphs and my paragraphs 80 and 81.

TIPPING J:

Well you don't really need to go much beyond in New Zealand, do you, section 11?

MR MILES QC:

Oh quite.

TIPPING J:

Which makes – I mean I'm not downplaying the fact that the rest of the law is insignificant but it's just a ratification of standard stuff.

MR MILES QC:

It's a pretty useful starter.

TIPPING J:

Yes.

MR MILES QC:

And of course 38. And that's what I've said. I've concluded at 87 Your Honour none of these principles are new or controversial. And at 88, which is my last paragraph, and I don't, I think, need to take you to it but I point out that – well. Let me go to 87 which is TVNZ. I say that a very significant number of their particulars are struck out. Much of schedule 1 and schedules 3, 4, 5, 6, 7 and 8 all go and similarly at 88 the particulars relied on by APN, schedule B you've got pages 813 to 833 all go but I just note –

TIPPING J:

If it comes to it Mr Miles, we having, as it were, determined the principles that apply, would it be a matter perhaps in the first instance for the parties and then if agreement couldn't be reached to go back to the trial Judge or the intended – as to what the effect is, assuming we were with you in –

BLANCHARD J:

Are you dissatisfied with what the Court of Appeal did?

MR MILES QC:

I'm not.

TIPPING J:

You're not, okay, right.

MR MILES QC:

I'd be very reluctant to go back to a trial.

TIPPING J:

No, no. I take my brother's point.

MR MILES QC:

I think unless there's anything further Your Honour –

TIPPING J:

But if we were with the appellants in any respect then we might have to go down the route that I was indicating mightn't we?

MR MILES QC:

Yes although –

TIPPING J:

I think I got myself the wrong way round Mr Miles, I'm sorry.

MR MILES QC:

I must say, and I guess appellant lawyers usually do at this stage, but I must say that if you were prepared to disagree in any way with the Court of Appeal, I think I'd much rather Your Honours actually reinstate it or – if there are any that need to be reinstated, I would much prefer Your Honours to make that

decision rather than having to go back yet again. We have a hearing for October I think next year.

TIPPING J:

Next year? We should manage to meet that.

MR MILES QC:

I wasn't for a moment – but the reason why of course these interlocutory matters are proved so important is that they do dictate, of course, the evidence and much of the structure –

TIPPING J:

Well that's why we gave leave.

MR MILES QC:

Of course and we understood that and it's why I took the decision right at the start, to clear the decks as far as was possible. Well unless there's anything else Your Honours, that's all I was going to say.

ELIAS CJ:

Thank you Mr Miles. Yes Mr Galbraith.

MR GALBRAITH QC:

If Your Honours please can I start on a topic which I think is not heretical although at times during my learned friend's submissions it seemed to bear towards that and that's this question of honest opinion and the ability to rely upon privileged material. I was meant to hand up a small volume of cases which I forgot to do in opening but my learned friend was given it last night so it includes *Brent Walker* which His Honour Justice Blanchard referred to.

I had thought this was non-controversial when I was making my submissions before but it seemed to become somewhat controversial. The law in our submission is quite clear and under tab 2 we've got the extract from the 11th edition of *Gatley*. Paragraph 12.21 which says the rule that a defence of

fair comment will fail unless the facts commented on are truly stated, which obviously we accept, does not apply where comment is made on matters stated on a privileged occasion, for example in a Parliamentary paper or report or judicial proceedings. And under tab 3 which is the defamation section of the laws of New Zealand which as Your Honours noted yesterday is written by Sir Ian McKay and you find the same statement in paragraph 137, slightly longer, and *Brent Walker* where it wasn't allowed on the particular facts –

ELIAS CJ:

Sorry can you just slow it a little bit. Do you want us to read the *Gatley* extract?

MR GALBRAITH QC:

Yes I'm sorry, perhaps if you just wouldn't mind.

ELIAS CJ:

Yes.

MR GALBRAITH QC:

Yes and to that extent it's actually shorter in paragraph 137 in Laws of New Zealand but the reference to *Reynolds* has got nothing to do with our particular case. We don't have *Reynolds* defence at the moment. But there is that problem which I think Mr Justice Eady who that with the *Reynolds* defence or qualified privilege claim you're in a sense hauling us up by your own bootstraps and then justifying the use of the words which you've justified under the *Reynolds* defence. But we're not in that situation, where in a situation where we've got judicial statements, reports of statements in Parliament subject to the fact that they've got to be fair and accurate then those are exceptions to the otherwise – the principle that otherwise applies –

ELIAS CJ:

But isn't that though the issue, if they are fair and accurate –

MR GALBRAITH QC:

Absolutely.

ELIAS CJ:

– and don't go beyond that but once they do you're out of that.

MR GALBRAITH QC:

Absolutely Your Honour, accepted entirely and *Brent Walker*, I won't take Your Honours to it but just to indicate you'll find the discussion there on pages, the last paragraph, page 44, crossing to page 45, Lord Justice Bingham's discussion there.

WILSON J:

But isn't Lord Justice Bingham making clear there that he is referring to a comment on a statement made under qualified privilege?

MR GALBRAITH QC:

Yes.

WILSON J:

Or a fair and accurate report of such a statement?

MR GALBRAITH QC:

Yes indeed because it allows for the comment to be made on that and of course makes the obvious point that whatever's said in the privileged occasion might be true and might be false, but that's not the issue. And I took Your Honours to *Galloway*, paragraph 175, I think it was 174 through 176 and it wasn't referred to by the Court of Appeal. It just seems to be something that slipped under the radar in the Court of Appeal judgment which got expressed as an absolute, not recognising that there is a qualification and that is the qualification.

Can I just take up a complete side issue on this? There was a discussion with my learned friend about the need to give notice about honesty. A slightly

interesting issue has arisen recently in relation to, I forget the number of the new rule, which says if you don't plead to something, which is effectively an affirmative allegation for the other side, then you're deemed to have admitted it and there's been an issue about whether that, whether you've got to plead to particulars or not and there's a recent judgment of Justice Miller saying you don't have to respond to particulars in that respect. But if in a statement of defence for example the defendant raises something with respect to the affirmative, the plaintiff then has to file a pleading, pleading to that, if it's pleaded as a fact not a particular. Now that issue may end up before Your Honours at some stage, I'm not sure, but I just mention that.

Can I now go to the heretical part and just perhaps start by going to the *Fallon* case which as my learned friend quite correctly said I found interesting, both because I've met Mr Fallon and I've also seen the film of the race which is much referred to in the judgment. But it's not for that reason that I want to take Your Honours to it, it's really, particularly for paragraph 1 of the judgment of Mr Justice Eady, where what he says is that, in a neat little summary, is that the case requires consideration of the disciplines imposed in the context of pleading a *Lucas-Box* meaning which is pitched at level 2 or level 3 on the scale identified in *Chase v Lisa King*. And then he says, and this echoes what Her Honour the Chief Justice said to me yesterday and with which I entirely agree, it may be a somewhat artificial scale in the sense that defamatory words are capable of bearing an infinite variety of meanings and implications in corresponding the arrange of levels of gravity which do not necessarily lend themselves to classification in one or other of these three categories.

And then he goes on to refer to the *Jameel v Wall Street Journal*, *Armstrong v Times*, and also of course back to what Lord Devlin said in the paragraph which I referred Your Honours to yesterday in *Lewis* where Lord Devlin said, "It's not the thing for a rule because the meanings can be so variable you can't lay down a rule." So I submit that that supports what I was saying yesterday, that meaning is and the way it may be expressed is effectively infinitely variable. That the issue that is before the Court now is one which depends first on meaning and the difficulty, as I indicated yesterday, or my respectful

submission, the issue which the Court has to grapple with, is whether a policy which has been applied for 170 years, as my learned friend says to tier 1 meanings, should be applied to every other possible meaning, reasonable grounds, calling for enquiry, in a way that, as the UK Judges acknowledge, dictates the meaning. It isn't the actual –

ELIAS CJ:

I really have some query about that. Whether that's a useful statement. It seems right and on one level it is right but it's one of those throwaway lines that may have perpetuated some confusion because really the repetition rule is about justification or truth. It's what you may put out to prove the truth and really you take your meaning and apply it to that.

MR GALBRAITH QC:

Well Your Honour you don't with respect under the repetition rule when you start applying it to anything other than tier 1. In tier 1, As and Bs and that all make sense. But in tier 2s or 3s, if one's going to use those categories, and I don't myself much like them either, and I think Your Honour was saying yesterday, it depends what the actual meaning is. If the newspaper is making it very clear that it is only saying, as Your Honour put to my learned friend, that there's a wide public concern out there based on whatever it's based on and for that reason –

ELIAS CJ:

Then that's a primary fact –

MR GALBRAITH QC:

It's a primary fact –

ELIAS CJ:

In respect of that meaning.

MR GALBRAITH QC:

If – yes, but you look at the meaning, that's right.

ELIAS CJ:

Yes.

MR GALBRAITH QC:

That's really all I'm saying. But if you say that the meaning is dictated by the repetition rule and it is that if you say that there is, for example, a public concern or there are reasonable grounds –

ELIAS CJ:

Well I think it's really rather that the scope of the repetition rule is dictated by the meaning.

MR GALBRAITH QC:

Well –

ELIAS CJ:

You cannot –

MR GALBRAITH QC:

Well it certainly is in tier 1, there's no argument about that.

ELIAS CJ:

Well you always have to go to primary fact.

TIPPING J:

Isn't the point, it might be better labelled, actually, the republication law because if you republish you have to justify the original libel. The repetition rule is really no more subtle than that is it?

MR GALBRAITH QC:

I don't think – I agree with Your Honour. That is what the repetition rule is but –

TIPPING J:

You are republishing the original articles so you must justify the original libel not the fact that you're republishing it.

MR GALBRAITH QC:

Well that's what the repetition rule, that's the effect of the repetition rule. It says that if you report that then as Your Honour says you're republishing it. But if you make clear that all you're saying is that stepping away from the generic wide public concern and you report that 16 members of Parliament who know, investigated the poultry industry have made these speeches coming to certain conclusions and have announced them in Parliament and –

ELIAS CJ:

But not repeated them outside Parliament.

MR GALBRAITH QC:

No, no, I was going to take some outside for the moment. And the Chief Executive to the poultry industry had also said whatever, and the Chief Executive and Ministry of Agriculture and Fisheries had said whatever and therefore there should be an enquiry, with the greatest of respect, that does seem something that a publisher should be entitled to point to if that is the meaning of the article of publication which they are now being sued upon.

ELIAS CJ:

They will be able to advance qualified privilege.

MR GALBRAITH QC:

Oh yes, I accept that entirely Your Honour but –

ELIAS CJ:

We're just talking about truth here.

MR GALBRAITH QC:

Yes I know but the point I was trying to make, I believe it was yesterday, was that from a publisher's point of view, and certainly going before a jury, you want to be able to say we thought we were doing a proper job here, we were doing an honest job, we believed what these people who are apparently reliable, apparently well performed were saying was something that did justify calling for an enquiry. We're not going to hide behind qualified –

BLANCHARD J:

Well that sounds like a plea for a *Reynolds* defence but we're not being asked for that.

MR GALBRAITH QC:

Well you can't do it on – the moment in this –

TIPPING J:

Well isn't that the more natural or logical place for it to fit in as opposed to wrenching the truth and honest opinion rules?

MR GALBRAITH QC:

Well it would be nice if it was there Your Honour but it's not there at the moment.

TIPPING J:

Well no.

BLANCHARD J:

But that doesn't mean that we should distort the law.

MR GALBRAITH QC:

Well can I say, that per se doesn't mean that, no, I obviously have to accept that, but can I just talk a little bit more about this. What you've also got in our submission, which does distort the law in New Zealand as compared to where the repetition rule has been extended to these other meanings, is you've got *Haines* also so that you –

BLANCHARD J:

But again that's not before us.

MR GALBRAITH QC:

No, no, I accept –

BLANCHARD J:

We are in a narrow compass here with *Reynolds* on one side and *Haines* on the other and we're not invited to do anything about them. I'm not for a moment expressing a view on whether we should or not.

MR GALBRAITH QC:

No, no, I understand that Sir. Look I accept that but when you came to the, say *Fallon's* case for example, it's a case where the defendant was trying to plead the reasonable ground meaning. It was – and when you read it they didn't have a feather to fly with in terms of trying to set that up. What we've got in New Zealand is, and what we've got in this case, is it's the plaintiff who's decided to plead as an alternative serious grounds to believe and so the defendant is caught by the plaintiff's meaning, whatever that turns out ultimately to be at trial. As I said yesterday there's plenty of room in those words for the plaintiff to slither around as to what it says the defendant has said that constitutes serious grounds and very difficult for us to pin the plaintiff which is another reason, as I was saying yesterday, that section 8(3)(b) should be given the meaning which the words actually convey.

ELIAS CJ:

But you did, presumably, I haven't really looked at the pleadings properly but presumably you do say that it's not capable of that meaning.

MR GALBRAITH QC:

Oh yes, yes we did.

ELIAS CJ:

So again you can't load everything into the particular issue of truth that we're looking at here. There are other ways you can meet those concerns.

MR GALBRAITH QC:

Except that Your Honour, and obviously we take the meanings head on and say the programme doesn't mean any of the things which the plaintiffs are alleging. I mean of course we've got qualified privilege also and fair comment also but on these two grounds we would like to run a truth justification defence. Just perhaps lingering on this for one more moment. In *Bennett* it is, which is where they discuss third tier of course, inquiry meanings, just to give Your Honours a reference, I won't take Your Honours to it, but at page 875 you'll see in the bottom paragraph they're saying there, or the Judge is saying there, that the reason that the repetition rule may not apply there is that the defendant is not asserting the truth of whatever it is that is in issue. The defendant is saying well are these issues and they should be enquired into. This was the corruption in the police force issue. And that's the difference of meaning, where I see it a wee bit differently, perhaps very much differently from the Court, that you start with the meaning and you don't try and dictate the meaning by a policy or a Judge made policy decision. It's whatever the meaning is that the defendant is entitled to meet and if the meaning is as, has the opaqueness which the plaintiffs two allegations of serious grounds have, then the defendant is entitled to meet it in whatever way fairly falls within the scope of that meaning and in particular by reference to the basis of its articles so it can defend the justification for the article and that, as I said to you yesterday, is what *Gatley* in that supplement said at 27.10. Otherwise it looks like the defendant isn't trying to justify what it actually did.

Just perhaps staying on heretical for one more moment if Your Honours will indulge me. The rule that you can only plead primary facts does have a, obviously and impact on the scope of what investigative journalism might end up publishing and I got myself into a very inept analogy about the All Blacks yesterday until His Honour Justice Blanchard rightly shut me down. But just to take another situation which is perhaps a wee bit more topical. Its Chief

Financial Officer of a large listed company retires and in his interview after retirement says well I have one great regret in my life. That in the last two or three years we lost the plot and we became dysfunctional. We hired people who weren't competent. They mispriced securities in the subprime area. I'm awfully sorry, a lot of people have lost money but we screwed up, excuse the vernacular. He might go on to say that among the people we hired without naming them that there were people who really didn't know what subprime, the securitisation was about and didn't have the value et cetera. Now –

BLANCHARD J:

It doesn't sound defamatory to me.

MR GALBRAITH QC:

That's because Your Honour thinks – but what can construct, you know, a case situation out of it. There's somebody that, one of the employees for example for two years had been writing derivative columns in the newspaper or something and that employee feels that he's been, his reputation has been damaged so he sues. In the meantime the – and the newspaper, or the programme, they've made a programme that they've subprimed and he's lost money out of it, want to defend themselves on the basis that they were justified in saying well this gives rise to reasonable grounds for being concerned about the way that company conducted its business and the people employed in it. Now, on the repetition rule, they'd have to go back and actually went on in the company, and that's a devilish difficult thing to do.

ELIAS CJ:

Well, it sounds as if they've got a witness who will substantiate it.

MR GALBRAITH QC:

The witness may have gone to Uzbekistan, been run over by a bus, or anything, by then.

ELIAS CJ:

Well, then you turn up at Court at you say, we want to have the transcript admitted, because it meets the qualifications in the Evidence Act. But if it doesn't, but in terms of particulars, you're having to claim that the underlying allegation is correct, or you're going to get into qualified privilege.

MR GALBRAITH QC:

Well, that's the consequence of applying the repetition rule, I agree with Your Honour entirely. The question is whether that's the right balance or not the right balance. I agree also that if one doesn't apply the repetition rule, then you do change the balance between the claimant and the defendant.

TIPPING J:

Has qualified, just as a matter of interest, had it not been pleaded that there is qualified privilege here on a *Reynolds* type basis, or is that an argument for another day?

MR GALBRAITH QC:

It's an argument for another day, Your Honour.

TIPPING J:

But it is a live issue in this case?

MR GALBRAITH QC:

It's not live at the moment. Well, or may or may not be live at the moment.

TIPPING J:

It may be gathering some.

MR GALBRAITH QC:

It'll become live, I think, is my guess.

TIPPING J:

Because that's really what you're saying, is it's responsible journalism, to go around, I mean, I'm not expressing a view.

ELIAS CJ:

Well, you might even go further than *Reynolds*. You might go *New York Times v Sullivan*, you might just go further than the Court of Appeal.

MR GALBRAITH QC:

Well, I'm sorry, I'm diverging, but I'm interested, as Your Honours know, I'm not an expert in this area, so I ran a couple of articles off, and saw that there was one which did the survey about the difference in the US against the UK and Australia as to the effect that the different laws there had on what is published. And certainly this article indicated, from a survey of senior lawyers, that a lot more is published in the US than is published in the UK and Australia, and the reason is the difference in the libel laws. So that's a balance and an issue for this Court.

BLANCHARD J:

But that's been so for a very long time.

MR GALBRAITH QC:

Yes, it has, Sir, it has. But it illustrates the reason that *Jameel v Wall Street Journal* ended up in the UK, as my learned friend rightly said. Well, that's possibly enough, well, just one last thing on heresy. Section 8(3)(b) again. That was argued in the Court of Appeal, whether we could rely on 8(3)(b) or not. There's been a judgment, the Court of Appeal judgment covers that. There's no appeal against that. The Court of Appeal judgment doesn't limit us in the way that my learned friend wanted to.

ELIAS CJ:

What does the Court of Appeal judgment say on 8(3)(b)?

MR GALBRAITH QC:

It starts, Your Honour, at paragraph 45, which is 34 of the case on appeal. My learned friend ran an argument that you couldn't plead both 8(3)(a) and 8(3)(b), and a number of other sub-arguments. The Court of Appeal says in

48, this is talking about *Haines*, because in *Haines*, it was said that while you can't plead an alternative meaning, that's the defendant can't plead an alternative meaning, the defendant can still rely upon 8(3)(b). And you'll see that in the extract in paragraph 47 of the Court of Appeal's judgment, the extract from *Haines*. And paragraph 48 of the Court of Appeal's judgment, the Court plainly envisages both defences might be put to the jury. Refers then to Justice Allan and his judgment number 7, says that *Haines* wasn't a pick and choose case, because the plaintiff was relying upon the whole of the article. It says in 49 that Simunovich's case here, while it relies on the whole of the article, and in fact does, at least to some extent as a pick and choose case, it says in 50, Simunovich's argument also encounters more fundamental difficulties. 8(3)(b) provides where proceedings are based on all or any of the matter contained in the publication. The defence succeeds if the defendant proves the publication was a whole and in substance true, not confined to pick and choose cases. You'll see in 51 Mr Miles tried the same argument that he's tried before Your Honours that you've got to place a gloss on the language. The Court in *Haines* has decided that isn't correct, that it serves two different purposes. And that's, perhaps, if I can interject here, that's why I would say that it's impermissible to define 8(3)(b) in terms of what Sir Ian McKay was talking about some 17 years before Parliament passed the actual section it passed. They're not the same sections, and I mean, I've run into problems where there's been a change in a proposed section between the time it goes to the select committee and the time it ends up in a supplementary order paper, and everybody then, judges then tell me, well, too bad. You can't use what's in the select committee, because Parliament's words have to be taken as what they are, and interpreted objectively, or Parliament's passed 8(3)(b), and in my submission, it means what it says.

TIPPING J:

Isn't 8(3)(b) directed at higher meanings? It's not directed at lesser meanings. It's not a statutory rejection, if you like.

MR GALBRAITH QC:

It's not directed to meanings at all. It's directed to the publication as a whole.

TIPPING J:

Well, it must be directed to meaning, surely.

MR GALBRAITH QC:

Well, what it says Your Honour is, "Where the proceedings are based on order, any of the matter contained in publication then proves that the publication taken as a whole is in substance true", I mean, it's directed to meaning in the sense that it's the meaning of the publication, obviously. But it's not directed to imputations, if that's what Your Honour meant by meanings.

ELIAS CJ:

Isn't it about?

TIPPING J:

It's elusively expressed, because it's clearly a different point from A. But on casual reading, it looks like it's saying A in rather more elaborate language. If you read it.

MR GALBRAITH QC:

I think it's a bigger picture, Your Honour, than A, is what I would say, and so it may have a number of effects. I mean, it goes to.

ELIAS CJ:

Well, isn't it about whether the plaintiff is selecting a portion, and the defendant says that the whole context overwhelms the fact that it can't justify particular portion, and it is to same effect?

MR GALBRAITH QC:

Well, yes, though the plaintiff may be selecting the all also, Your Honour, because where the proceedings are based on all of the matter contained in the publication, so it's not limited to.

TIPPING J:

But if the plaintiff is basing himself on any, in other words, a part, the defendant can justify the whole. And thereby, justify the part, even though, literally, the part may not be justified.

MR GALBRAITH QC:

Yes, but it's also whether proceedings are based on all of the matter contained in the publication, defendant proves the publication taken as a whole is in substance true.

TIPPING J:

Well, it's very unhappily expressed.

MR GALBRAITH QC:

It'll be interesting to see how it plays out in the case, Your Honour. But there is no appeal against our entitlement to rely on 8(3)(b).

WILSON J:

Yes, but again, I imagine that's uncontroversial, or it is now, because there's been no cross-appeal that you may plead 8(3)(b). But that leaves open the question of the correct interpretation, and that location of that paragraph.

MR GALBRAITH QC:

Oh, yes, I accept that, I accept that there is a Court of Appeal judgment saying what it says, so subject to getting up in front of the Court of Appeal again, we've got that in our favour.

TIPPING J:

But are you saying that it's not on the table here, as to what 8(3)(b) means?

MR GALBRAITH QC:

Yes, it's not a subject of the appeal.

ELIAS CJ:

But the Court of Appeal decision is about whether it's open to the defendant to set up lessening things. It doesn't seem to be dealing with the bigger meaning, overwhelming the lesser meaning that the plaintiff is relying on.

MR GALBRAITH QC:

Well, I think to be fair to my learned friend, he ran every possible argument, as you would expect that he could run in a Court of Appeal.

TIPPING J:

What if, Mr Galbraith, the publication, this is a rather fanciful example, alleges that the plaintiff is a murderer and a shoplifter? And they sue on the shoplifter? Isn't that what this is all about?

MR GALBRAITH QC:

Well, it certainly encompasses that, Sir.

TIPPING J:

Well, you're saying it encompasses it. But does it not begin and end?

MR GALBRAITH QC:

No, I wouldn't accept that, Sir, on the wording.

TIPPING J:

Well, if it's not that, it's even more elusive as to what it is intended to cover.

MR GALBRAITH QC:

Well, as I say, it'll be interesting, Your Honours.

TIPPING J:

Well, I think we better say something about this. Otherwise the thing's just left.

MR GALBRAITH QC:

Well, it hasn't been argued Your Honour. It's not one of the grounds on appeal.

ELIAS CJ:

I think we cannot get into it but Mr Galbraith I suppose what the comments from the Bench indicate is that your view that there's nothing more to be said until you get back to the Court of Appeal may not be right because the way they've expressed themselves is quite limited.

MR GALBRAITH QC:

We're limited by what they've said. I accept that entirely.

TIPPING J:

Well the point's been argued in front of us. I mean are you saying it's technically not open to us to say something about it?

WILSON J:

It hasn't been argued in the context of particulars, what this appeal is all about, and insofar as 12(3)(b) may impact on the question of what particulars you can properly plead, isn't that before us?

MR GALBRAITH QC:

In terms of what particular we can plead, yes, and I made those submissions yesterday.

TIPPING J:

It's very hard to disentangle it in the sense of particulars and in the more general sense because it depends what it really means as to what particulars.

MR GALBRAITH QC:

Well I, it – I don't believe it has been argued before Your Honours in terms of the way it was argued in the Court of Appeal and I made my submissions –

TIPPING J:

Well this sounds to me like a recipe for wanting to prolong the agony Mr Galbraith.

MR GALBRAITH QC:

Well the agony's gone on a long time now.

TIPPING J:

Yes but there's no reason why it should go on even longer.

BLANCHARD J:

The judgment in the Court of Appeal in the relevant portions that we're looking at now, really doesn't address the question that's before us.

MR GALBRAITH QC:

No the particulars are different. That was what I said to Your Honours yesterday. I, to some –

BLANCHARD J:

Say you can plead a section 8(3)(b) defence doesn't tell you very much.

MR GALBRAITH QC:

It, well –

BLANCHARD J:

We're concerned with how you plead it.

MR GALBRAITH QC:

Yes. Well how you particularise it.

TIPPING J:

I don't –

BLANCHARD J:

I don't see that you can say that it's not on the table in that sense.

MR GALBRAITH QC:

How you particularise it, that's what –

TIPPING J:

Must depend on what its true meaning and purpose is.

MR GALBRAITH QC:

Well that – well all, in my respectful submission –

TIPPING J:

Otherwise one would draw the inference that your clients are simply trying to stave off the, by continued interlocutory warfare.

MR GALBRAITH QC:

We haven't brought any of these applications.

BLANCHARD J:

That is perhaps a little unfair.

MR GALBRAITH QC:

I think that's a bit, yes.

TIPPING J:

Well yes and no.

MR GALBRAITH QC:

Normally the plaintiff wants to get to court and –

TIPPING J:

Yes and no but to say that – something that appears to me to be relevant to the particulars issue can't be addressed because it's not strictly on the table.

MR GALBRAITH QC:

Well the –

TIPPING J:

And you're making that point, Mr Miles isn't making that point.

BLANCHARD J:

In order to explain what we think about particulars we're going to have to say what we think the section is all about, subsection is all about.

WILSON J:

It can only help you on the particulars I would have thought.

BLANCHARD J:

Otherwise we say something about particulars in a kind of strange vacuum.

MR GALBRAITH QC:

Well so far as particulars –

BLANCHARD J:

I mean it's bad enough that we have to decide this without –

ELIAS CJ:

Pleadings.

BLANCHARD J:

Without deciding *Haines* and with *Reynolds* hovering in the background let along introducing a further artificiality. I know defamation lawyers love artificialities but this is going a bit far.

MR GALBRAITH QC:

I hope you're not identifying me in that –

BLANCHARD J:

No, no, you're quasi.

MR GALBRAITH QC:

I'm very quasi and very uneasy about it Sir.

BLANCHARD J:

I hope that the transcript is able to record the spirit in which I'm making these remarks.

MR GALBRAITH QC:

What I suggest –

ELIAS CJ:

It is, however, absolutely privileged.

MR GALBRAITH QC:

Yes, fortunately.

BLANCHARD J:

I wasn't worried about that.

MR GALBRAITH QC:

What I suggest though about particulars in relation to 8(3)(b) is because it allows us to rely upon all of the entire publication then we surely are able to particularise the publication.

WILSON J:

Well I said it seems to me it can only help you if we have a look at it, if we really go that way, but if we go the other way you're no worse off. On particulars.

MR GALBRAITH QC:

Well yes that's right because that means varying the order in the Court of Appeal and perhaps I just leave it at that because that was my submission yesterday and that seems to square with the words of 8(3)(b) that we're entitled to rely upon the whole of the publication. How in due course that, as I say, that plays out time will tell.

Now just very briefly, this may not be an issue so perhaps I can simply ask you a question if that's possible. I think section 50, my learned friend Mr Gray satisfied the Court on that yesterday, am I wrong on that?

ELIAS CJ:

Section?

MR GALBRAITH QC:

50 of the Evidence Act.

ELIAS CJ:

Oh I don't think you need to.

MR GALBRAITH QC:

Okay that's fine. Thank you very much Your Honours.

ELIAS CJ:

Thank you Mr Galbraith.

COURT ADJOURNS: 12:55 PM

COURT RESUMES: 2.03 PM

MR GRAY QC:

Sir Ian McKay report, as he became, that my learned friend took you too, the report is under tab 3 of the respondent's bundle and my learned friend Mr Miles took you to page 41 of the report where it can be seen as a heading, "The Rolled Up Plea", and at paragraph 61 the report says instead of pleading

comment simplicitor there's a rolled up plea, it's 162, this type of plea has the appearance of raising a defence for truth as well as a defence of comment. In fact it's effective only to raise a defence of comment and that's a matter that I traversed with Your Honours in submission. Then at 163, "Although not expressly excluded by the code of civil procedure, the rolled up plea is no longer effective by virtue of an amendment to the Supreme Court Rules." And that was the amendment that I showed to Your Honours during my submissions. "The defendant in his statement of defence is now required to give particulars stating which of the words complained of he alleges are statements of fact and particulars of the facts and matters on which he relies in support of the allegations that the words are true."

That was the passage that my learned friend Mr Miles took you to but there is another passage dealing with the pleading of truth and particularisation of the pleading of truth and that's found at page 35 at paragraph 132.

BLANCHARD J:
Somebody else took us to that.

MR GRAY QC:
Did my learned friend take you to that one as well then –

ELIAS CJ:
Well I've certainly marked it.

MR GRAY QC:
Then I'm probably the only one who didn't and I apologise to my learned friend. But what we say is that what this passage shows is that the report specifically considers truth, notes that the obligation to particularise truth is a common law one and recommends that there be no change so does not suggest that the legislation when ultimately enacted should make any particular requirement for particularisation of truth defences.

ELIAS CJ:

Well it doesn't say that, does it? I mean it's a bit ambiguous, because you're not recommending a change to the effect, doesn't mean to say they're not proposing to include it in the bill. Is that what you mean? Leaving it to the common law?

MR GRAY QC:

Yes, we have, in our submission said, that there is an obligation to particularise but it's one that arises at common law.

ELIAS CJ:

Yes, yes I understand.

MR GRAY QC:

It doesn't arise under section –

BLANCHARD J:

What's the point of the distinction that you're making?

MR GRAY QC:

Well section 38 has a two stage process and a process that may or not apply to particularisation of truth defences. What section 38 does first is require particulars specifying statements that are alleged to be statements of fact and then the facts and circumstances relied on. It becomes awkward if it says that in relation to truth you need to first identify that the facts are indeed the facts and it's ample really for the common law obligation to particularise defences of truth really to do what only is required by section 38(b).

TIPPING J:

As a matter of the structure of the Act, if the section that we're talking about, the rolled up plea section, did not have the word "truth" in its heading, no one would have thought that it had anything to do with justification in the strict old fashioned sense. It's just that rather strange reference to truth in the heading and of course there is a habit, and it's marked in the passage referred to earlier, that people do talk about truth in the fair comment context. The truth of

the underlying allegations so it's all a bit of a mess but happily in the end it's not going to make much difference is it?

MR GRAY QC:

No great practical distinction. There is an obligation to particularise but it's similar to the obligation in 38(b) and jumps over the step in 38(a).

TIPPING J:

It could hardly, the distinction such as it is, could hardly drive the ambit of particulars.

MR GRAY QC:

Quite. The second point on which I wish to address Your Honours is the question of tier 2 imputations or meanings and the consideration of the submissions made by my learned friend this morning a combination of an outline of United Kingdom and Wales authority and in the beginning of the plaintiff's position in relation to the TVNZ publication as well. Can I ask Your Honours to look at the case on appeal at volume 3 and page 416? This is the first page within an extra two to the second amended statement of claim and it is the first article published by the New Zealand Herald on this story. The article is highlighted. The yellow highlighted parts are the extracts relied upon by the plaintiffs as being defamatory. I offer this as an illustration. This probably will turn out to be the strongest article published by the New Zealand Herald and the one which gives the best case to the plaintiff. It's important when considering the discussion that there has been about the appropriateness of the tiers and the boundaries between the tiers and when considering the need to consider actual publications and actual words.

If I can ask you then, while we're on this part of the –

ELIAS CJ:

What is the submission you are making in relation to this? You're inviting us to read it?

MR GRAY:

Yes I am inviting you to read it, I'm going to make submissions in support of those made by my learned friend Mr Galbraith in reply before lunch, that we do need to consider the context of the law of New Zealand and the way in which it differs from the law in the United Kingdom, we need to consider the task that confronts a defendant in a defamation case in seeking to support a publication. My starting proposition is that the important thing to do is to look at the article itself, and the pleading in respect of it, because that provides the context for considering the particular questions.

In the context of honest opinion, an illustration can be found at page 423, just the first four paragraphs. In the case of the Herald, this is illustrative because all of the opinions sued on are third party opinions, they are not opinions expressed by the Herald itself, but by third parties and so of course, all that is necessary for the Herald to show is not that this was genuinely its opinion, but it had no reason to think that this was not the opinion of Sir Geoffrey Palmer, and that arises of course by the operation of section 11 of the Defamation Act.

Now, in respect of those and the other articles, the plaintiffs allege five imputations and if Your Honours don't have a copy of them conveniently to hand, one is found at page 171 of the volume that you have in front of you. So that what it is the plaintiff is saying in this case, The Herald has said on page 416 and Sir Geoffrey Palmer has said on page 423, was that the three plaintiffs in concert or each of them were guilty of long-standing corrupt actions would seem personnel at the Ministry of Agriculture and Fisheries. There is no truth defence to that imputation. That imputation is defended by a denial of meaning and by a plea of qualified privilege which at moment is on the basis that *Lange v Atkinson* remains the law in New Zealand.

In a footnote to our written submissions, we noted that one of the difficulties in this area in New Zealand is that there are so few cases, but cases like *Lange v Atkinson* become frozen in time, while other jurisdictions march on and we do tend to develop this area of the law in big leaps. So there will be, as Your Honours have rightly observed in exchanges with my learned friends

this morning, a future issue, possibly in this case about whether *Lange v Atkinson* is the law so far as it has developed in New Zealand or whether, since then, our understanding has refined in social and political conditions have meant that the publications in this case could be regarded as being made on an occasion of privilege or alternatively, whether we should move to a *Reynolds* type regime of responsible journalism.

In relation to imputation 2, that is a tier 1 imputation, truth is pleaded together with a denial of meaning. There are extensive particulars of truth provided and they are not challenged. So they are not at issue. In respect of 3 and 4, they fall within what's called tier 2. They are the imputations that are before the Court, and the particulars to the truth defence in respect of them.

Now Your Honours were quite right in the exchange with my learned friend Mr Galbraith that the first defence to an allegation that the words that I've shown you and others bear those imputations is a defensive meaning. Only if the plaintiff succeeds on meaning, do we then get to the defences. But it is very unattractive to a defendant wishing to defend a story and to say that when, as the Herald did at 416, it's told the public of an event, of documents having been prepared which say serious things, which have been provided to people, which may give rise to further investigations. It's very unattractive to defend that simply by saying to a jury, we don't agree with what the plaintiff says it means, and we say even if we're wrong on that and the plaintiff is right, then we should be entitled to a defence, because we're going to argue to the Judge later on that it attracts qualified privilege. We say that it is a much fairer contest between plaintiffs and defendants if a publisher can say, if it wishes to, "Yes this is what we said and we stand by it." And recognising that, the United Kingdom choice has been for *Polly Peck* and *Lucas-Box*, and it's very instructive that all of the cases from the UK Court of Appeal that we've looked at in the last two days are *Lucas-Box* meaning cases. They don't concern plaintiffs' meanings, they all concern defendants' meanings. The context in the United Kingdom is that if the defendant is able to come to a jury with its story and say, "Not only do we not accept what the plaintiff says the story

means, but we're prepared to tell you what we think it means and to support it."

Now, New Zealand has turned its back on that. I entirely accepted that *Haines* is not before this Court, I don't make the submission I just did to encourage this Court to inferentially change *Haines*, but I do ask the Court to recognise that *Haines* provides for New Zealand a different context from the context that exists in the United Kingdom. And when this Court comes to make its decision about the correct way in which a practice and procedure in this area ought to be developed, and works towards obtaining what is an appropriate contest between plaintiffs and defendants about the defamatory effect of a story and the circumstances in which a defendant can protect its story and defend its story, consideration does have to be given to the fact that in New Zealand, at the moment, a defendant may not come to a jury and say, "We've got an alternative meaning that we think you should consider, and we're prepared to stand behind it, because we're prepared to stand behind our story."

ELIAS CJ:

Well how do we take that into account in this case?

MR GRAY:

We do it, in our submission, by doing what the second defendant has asked the Court to do and recognised that for Court judgments and for statements in Parliament, there are exceptions, there are special rules.

WILSON J:

Wouldn't it have been a preferable procedure, if you wanted to run this argument, for you to have pleaded your lesser meetings, the plaintiff would apply to strike them out and we could be dealing with that at the same time now.

MR GRAY QC:

It may well have been Sir. I have to accept that. It is not the plaintiffs who wanted to make serial applications in this case and to have them appealed. The plaintiffs have been willing to try and get this case – I'm sorry. The defendants have been willing to get this case ready for trial and to get it through to trial. But you're quite correct.

WILSON J:

Rather than, you know, try or to any extent revisit *Crush* and *Haines* by the back door doesn't seem a very attractive proposition as the Chief Justice –

TIPPING J:

We could have had qualified privilege on the table if you'd chosen to make a more adventurous plea than perhaps the law is thought at the moment to allow.

MR GRAY QC:

Well so far as decided cases are concerned so far as the law is.

TIPPING J:

Yes.

BLANCHARD J:

The difficulty with this approach is that if at a later date this Court did overturn *Haines*, and again I'm not indicating any view on that –

MR GRAY QC:

I understand that.

BLANCHARD J:

And in the meantime had done what you're suggesting, it might then have to reverse out of the decision that we're making today. I don't know. It's a –

TIPPING J:

And we're in effect anticipating.

MR GRAY QC:

I do say that –

TIPPING J:

But coming back to the more specifics, you're just talking about whether there should be an exception for Courts and Parliament?

MR GRAY QC:

Yes but that also is a thing that distinguishes this case from all of the cases that we've been considering.

TIPPING J:

Yes but how far does that exception run? You can make honest comment on a report of Parliament fairly and accurately made, but can you use the material of Parliament, as what I think it was I who called the building block, for making it – extending?

MR GRAY QC:

My answer to that Your Honour is the trite now proposition that context is everything. Let's have a look at the particular article, let's have a look at the particular meaning. What is it that has in fact been said? If, as is the case with 416 and as I say it's likely this will turn out to be the strongest thing that the second defendant has said, there's a reference to allegations being made, there's a reference to accusations. There are no statements that something has occurred and it is perfectly clear from this story that this is very preliminary only. This is a first story saying there's a topic on the table and some people are saying some things to support it. Whether we're at the cusp of tiers 1 and 2 and whether, if there is an artificial distinction between the various tiers, we're on one side or not of the other, may not be the point. But we say in the context of this story and of this publication it may well be that in

time the fact of Court judgments, the fact of Parliament debating the topic of management of a public asset like Fisheries and Quota Management, and the gathering of revenue from the employment of those public assets, is something that provides grounds for a concern. Of course it goes without saying when you look at these words it's very hard to find how the imputations that are contained in the statement of claim can be said to emerge from them –

TIPPING J:

Well in that case you'll win on meaning.

MR GRAY QC:

May well.

TIPPING J:

We are working on the premise that the words are capable of bearing a tier 2 meaning. There's no request to strike that meaning out as incapable. So we have to presume, don't we, that the words bear that meaning for the purpose of the pleading rule?

MR GRAY QC:

I'm making a practical point Your Honour. That this is a decision the Court has to make about the practice and procedure in this field and it does need to be aware of the consequences for both plaintiffs and defendants.

ELIAS CJ:

But the consequence for the defendant, and I might be quite astray in this because I haven't really considered *Haines*, but the consequence for the defendant is you simply say that the meaning that the plaintiff has pleaded is not correct and in doing that presumably you are going to indicate what you think the meaning is. It just means that you're not in jeopardy in respect of that meaning and therefore you don't have to seek to justify it. Isn't that it?

MR GRAY QC:

My understanding of the law is that it's permissible to say the words don't mean A, they mean B.

ELIAS CJ:

Yes.

MR GRAY QC:

But it's not permissible then to say, and what's more we say B is true and we stand beside –

ELIAS CJ:

Well why do you have to because you're not in jeopardy on that?

MR GRAY QC:

In my submission in front of a jury that's an unattractive place to be .

TIPPING J:

Well that of course is the rationale for the rule, the *Crush* rule, that you're not in jeopardy.

ELIAS CJ:

You'll just be proliferating the issues before the court unnecessarily.

BLANCHARD J:

Wouldn't the Judge have to tell the jury that the lesser meaning was not alleged to be defamatory? If they thought it was the lesser meaning it was not defamatory?

TIPPING J:

It isn't an alternative –

MR GRAY QC:

No I've never encountered that –

TIPPING J:

– meaning invoked by the plaintiff therefore if you think it bears that lesser meaning, plaintiff's meanings fails and that's the end of the case.

WILSON J:

This is the first issue, the jury answers that you're right, end of story.

TIPPING J:

End of story. Plaintiff's meaning fails.

ELIAS CJ:

And if you're really confident, apply to strike it out as not capable of bearing a meaning that you –

MR GRAY QC:

Well again that might be something for the future in this case.

ELIAS CJ:

I'm just really wondering about the problems that you're suggesting exist. They don't seem to be problems for you?

MR GRAY QC:

We say that we should be entitled to go to a jury and to stand behind our story and it is artificial for us to be precluded from doing that.

ELIAS CJ:

But that's not what the case is about. The case is about the defamatory meaning the plaintiff alleges and whether it's proved.

MR GRAY QC:

Where the problem becomes acute is you've heard my learned friend Mr Miles say that serious grounds is a very serious and high imputation close to guilt. The quid pro quo for *Haines* is that a plaintiff is held firmly to the imputations. In the United Kingdom where *Lucas-Box* is available, there's room for more latitude for a plaintiff in relation to imputations –

ELIAS CJ:

Yes that's why I say I don't understand why you are worried about this.

MR GRAY QC:

Well if it is the case that the plaintiff's position is that the tier 2 imputations, 3 and 4, are high imputations and the plaintiff genuinely is held to that at trial, if that's a matter that fortifies this Court in the approach that it takes to the decisions that it gives, then I wouldn't be unhappy with that.

TIPPING J:

Is there any suggestion afoot that that isn't the case?

MR GRAY QC:

Well we've talked a great deal Your Honour about skilful defence advocates crafting stories with clients and crafting statements of defence, manipulating tiers, but skill is not limited to defence advocates. Skill can be found on all sides of the table and these imputations –

ELIAS CJ:

But at the moment we don't have wriggle room for the plaintiff?

MR GRAY QC:

If we can be confident there is no wriggle room, then I accept that goes a long way to meeting -

ELIAS CJ:

Well we can't help you with that. I mean it's not before us.

TIPPING J:

If a Judge at trial allows a looser meaning or a materially different meaning to be put up from that which is pleaded, you'd have an immediate complaint if it hasn't been pleaded as an alternative. I mean I'm sorry but I don't see the problem with this.

BLANCHARD J:

The real trouble is that you want this Court to act as a law reform body.

MR GRAY QC:

Well I thought that's one of the nice things about this Court Your Honour.

BLANCHARD J:

From time to time.

MR GRAY QC:

I know that the appeal process is a comfort to many but – look I've made the submissions that I wish to make in reply. There is a –

TIPPING J:

I understand your point about how we're not on all fours with England on lesser meaning and qualified privilege, I fully understand that point, but that's as far as I think it can reasonably go.

MR GRAY QC:

Yes I –

TIPPING J:

We must bear that in mind.

MR GRAY QC:

I do ask that you bear it in mind and I do ask you to bear in mind the final point that I made in my submissions which is that in the end in these rules of

practice and procedure what the Court is trying to achieve is a fair contest and we're not asking today for, we don't think we're asking for tactical advantage. We're simply asking for a fair opportunity to defend our story.

TIPPING J:

Of course it must be a comfort to you too, to some extent, that when it goes to meaning the whole of the article, for better or for worse as it were, is capable of being invoked ex facie.

MR GRAY QC:

Yes Sir.

TIPPING J:

Isn't it? So, you know, you're not completely without ammo in relation to some of these things that you want to get in for other purposes.

MR GRAY QC:

We have plenty. We don't necessarily accept that all the articles that can be read together. In relation to the one that we've shown you no one is named. Unless it can be shown that the plaintiffs are notorious at the time that article is published, all that the articles can be read together, the question is what's the defamatory effect of that article. So we have plenty of arguments ahead of us.

TIPPING J:

Well if in your article you've got Sir Geoffrey saying there's no evidence at the moment but it's something that ought to be looked out, surely that's relevant to what the ultimate imputation is from the article?

MR GRAY QC:

Precisely Your Honour. So –

TIPPING J:

It's available to you in that context it's just you want it to be available in a more problematic context.

MR GRAY QC:

The position that I began with and that I finish with is that Court judgments and the debates in the House of Representatives were an important part of the narrative that led to the writing of the story. They are an important part of the narrative generally. We say it is artificial for them not to be available to the jury in respect of all defences. Of course they will be available to the jury in respect of qualified privilege. Of course they will be available in respect of honest opinion. It's artificial to be then saying to the jury, but put them out of your mind when considering whether or not these particular words are true. Those are my submissions.

ELIAS CJ:

Thank you Mr Gray. Thank you counsel for you assistance. We will reserve our decision in this matter.

COURT ADJOURNS: 2.31 PM