Tonga

Fotofili and others v. Ipeni Siale

Privy Council Court of Appeal, Nuku'alofa
3 August 1987
H.M. The King, Ministers of the Crown, Sir Clinton Roper presiding

Constitutional law – Constitution – Legislative Assembly – bills – procedure by which a bill becomes an Act.

Constitutional law – Constitution – Legislative Assembly – what are "internal proceedings" – Article 62.

Constitutional law – Constitution – courts – jurisdiction – investigating the Legislative Assembly's "internal proceedings" – Article 90.

Constitutional law – interpretation – gap in the law – application of the Civil Law Act – common law rule of the courts investigating "internal proceedings".

On 1 July 1986 the Sales Tax Act came into force and members of the Legislative Assembly held fono meetings for the general public to explain this Act. Section 17 of the Legislative Assembly says ". . . the Assembly shall have the power to make such provision as it thinks fit for the members during the session." Members received allowances for these fonos and the plaintiff (Siale) challenges the validity of these payments. In the Supreme Court the judge held that, there being no provision in Tonga for the Court to control the "internal proceedings" of the Assembly, the common law was applicable by the Civil Law Act. Under common law, Parliament has absolute privilege over its "internal proceedings". The courts have no power to overrule, intervene or investigate allowances the Assembly has allowed, for this is part of its internal proceedings. But the Assembly determined that specific allowances should be paid to members and the Court can investigate whether the allowances paid were calculated correctly, that being a question of fact and not part of the "internal proceedings" of the Assembly. The defendants appealed on the ground that allowances paid are part of the "internal proceedings" of the Assembly.

HELD:

(1) There being no provision under any Act or Ordinance giving the Court jurisdiction to inquire into the internal proceedings of the Assembly, the common law of England is applied (Civil Law Act (Ch. 14)).

(2) At common law Parliament in the United Kingdom has the exclusive right to determine the regularity of its own internal proceedings.

(3) Tonga having a written Constitution, the Court has no jurisdiction to enquire into the validity of the Assembly's internal proceedings where there is no breach of the Constitution.

OBSERVATIONS: A statutory provision can be examined and struck down if it is contrary to an express provision of the Constitution even though its passage through the House was not attended by any irregularity :p. 348.

Cases referred to in judgment:
Adegbenro v. *Akintola* [1963] A.C. 614; [1963] 3 All E.R. 544
Armstrong v. *Budd* [1969] 1 N.S.W.L.R. 649
Bradlaugh v. *Gosset* (1884) 12 Q.B.D. 271
Bribery Commissioner v. *Ranasinghe* [1965] A.C. 172; [1964] 2 All E.R. 785
British Railways Board and another v. *Pickin* (1974) A.C. 765; [1974] 2 W.L.R. 208; (1974) 1 All E.R. 609
Church of Scientology of California v. *Johnson-Smith* [1972] 1 Q.B. 522; [1971] 3 W.L.R. 434; [1972] 1 All E.R. 378
Fenton v. *Hampton* (1858) 11 Moo. P.C. 347; 14 E.R. 727
Hinds v. *The Queen* [1977] A.C. 195; [1976] 1 All E.R. 353
Kenilorea v. *Attorney-General* [1986] L.R.C. (Const.) 126
Kielly v. *Carson* (1842) 4 Moo. P.C. 63; 13 E.R. 225
Liyanage v. *The Queen* [1967] 1 A.C. 259; [1966] 1 All E.R. 650
Namoi Shire Council v. *Attorney-General for New South Wales* [1980] 2 N.S.W.L.R. 639
Roberts v. *Hopwood* [1925] A.C. 578
Stockdale v. *Hansard* (1839) 9 Ad. & E. 1; 112 E.R. 1112

Legislation referred to in judgment:
Bill of Rights 1689, Article 9 (U.K.)
Constitution, Articles 4, 62, 73, 78, 90
Civil Law Act
Legislative Assembly Act, section 17

Civil Proceeding:
This was an appeal by the defendants from Martin J.'s refusal to strike out the plaintiff's application.

Solicitor General D. Tupou and *W.C. Edwards* for the appellants
L.M. Niu for respondent

(The judgment of Martin J., Supreme Court, 9 January 1987, is set out below. The judgment of the Privy Council follows at p. 346. The plaintiff in the Supreme Court became the respondent in the Privy Council.)

BETWEEN:

'IPENI SIALE
(Ta'anea, Vava'u) *Plaintiff*

AND:

1. NOBLE KALANIUVALU FOTOFILI (Lapaha, Tongatapu)
2. NOBLE MALUPO ('Uiha, Ha'apai)
3. NOBLE MA'AFU (Vaini, Tongatapu)
4. NOBLE LASIKE (Lakepa, Tongatapu)
5. NOBLE TU'IHA'ATEIHO (Tungua, Ha'apai)
14. SIONE TA.P.A. (Kolonga, Tongatapu)
15. NOBLE FAKAFANUA (Pangai, Ha'apai)
16. MA'AFU TUPOU (Neiafu, Vava'u)
17. JOE TU'ILATAI MATAELE (Kolofo'ou, Tongatapu)
18. TANIELA MANU (Kolofo'ou, Tongatapu)

6. NOBLE VEIKUNE
(Longomapu, Vava'u)
7. NOBLE LUANI
(Tefisi, Vava'u)
8. NOBLE FOHE
('Ohonua, 'Eua)
9. NOBLE FUSITU'A
(Faletanu, Niuatoputapu)
10. NOBLE VAEA
(Kolofo'ou, Tongatapu)
11. NOBLE 'AKAU'OLA
(Kolofo'ou, Tongatapu)
12. JAMES CECIL COCKER
(Kolofo'ou, Tongatapu)
13. LANGI HU'AKAVAMEILIKU
(Ha'ateiho, Tongatapu)
(Hihifo, Niuatoputapu)
19. SITILI FINEANGANOFO TUPOUNIUA
(Kolofo'ou, Tongatapu)
20. LOPETI TOFA'IMALA'E'ALOA RAMSAY
(Pangai, Ha'apai)
21. TEISINA FUKO
(Pangai, Ha'apai)
22. HOPATE SANFT
(Neiafu, Vava'u)
23. MASAO PAASI
(Tu'anekivale, Vava'u)
24. LILO VAKA'UTA
(Pangai, 'Eua)
25. LAPUKA MAEA

Defendants

MARTIN J.

Judgment:

Background

The background to this action is shortly stated. On 1 July 1986 the Sales Tax Act (No. 3 of 1986) came into force. Members of the Legislative Assembly thought that this should be explained to the general public. Fonos were held throughout the Kingdom. Various members attended and spoke about the new Act.

Certain allowances were paid to those members. The statutory authority for making such payments is section 17 of the Legislative Assembly Act (Cap. 4).

This action is brought by Ipeni Siale, a citizen, taxpayer and voter of Tonga. He challenges the validity of those payments, which were of course made out of public funds.

No point was taken on the standing of the plaintiff to bring this action. In other jurisdictions the action would proceed by the Attorney-General at the relation of the plaintiff. No similar procedure is possible in this Kingdom, and I shall assume that the plaintiff has sufficient interest in the subject matter of the proceedings to entitle him to bring this case.

The defendants seek to have the action struck out. They say this Court has no power to determine the issues raised. This is a matter, they say, over which the Legislative Assembly has absolute jurisdiction, and which therefore cannot be investigated by the Court. This, they say, is a matter protected by parliamentary privileges and the Court cannot question it. They cite a series of cases decided in England over the centuries, which they say are binding on this court by reason of sections 3 & 4 of the Civil Law Act (Cap. 14).

The action raises an issue of greater importance than payments to members of Legislative Assembly. It is this: to what extent, if at all, are the actions of members of Legislative Assembly in Tonga subject to the control of the Court?

The Position in England

Let me deal first of all with the position in England. The Court there accepts that there *is* such a thing as parliamentary privilege. It recognizes that there are some

matters concerning Parliament over which the Court has no supervisory power. In general, the extent of that privilege is well recognized. But it is for the court, and not for Parliament, to determine whether a matter is covered by privilege. In so doing a court may have to decide what is the extent of that privilege, or even whether the privilege claimed exists at all.

Denman L.C.J. expresses the point clearly in *Stockdale* v. *Hansard* (1839) 9 Ad. & E.1; 112 E.R. 1112. The House of Commons had passed a resolution declaring that the House had sole and exclusive jurisdiction to determine the existence and extent of its privileges. Denman L.C.J. would not accept that as binding on the Court. He said (at p. 1167 of the E.R.) "Clearly ... the Court must enquire whether it be a matter of privilege, or a declaration of general law; as undisputably, if it be a matter of general law, it cannot cease to be so by being invested with the imposing title of privilege." Further on, he comments:

> In truth, no practical difference can be drawn between the right to sanction all things under the name of privilege, and the right to sanction all things whatever, by merely ordering them to be done.
>
> The second proposition differs from the first in words only. In both cases the law would be superceded by one assembly; and however dignified and respectable that body, in whatever degree superior to all temptations of abusing their power, the power claimed is arbitrary and irresponsible.

The Extent of Privilege

Certain privileges are well established. They are necessary for Parliament to function properly. Their purpose is to enable members to carry out their duties effectively – without interruption; and fearlessly, – without fear of consequences.

For this reason it is now well recognized that the control of Parliament over its internal proceedings is absolute, and cannot be interfered with by the Court.

In *Bradlaugh* v. *Gossett* (1884) 12 Q.B.D. 271 Stephen J. stated (at p. 278): "I think that the House of Commons is not subject to the control of Her Majesty's courts in its administration of that part of statute law which has relation to its own internal proceedings."

And further (at p. 280):

> It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned: and that, even if that interpretation should be erroneous, this court has no power to interfere with it directly or indirectly.

And he further explained (at p. 282):

> For the purpose of determining on a right to be exercised within the House itself, ... the House and the House alone could interpret the statute, but ... as regards rights to be exercised out of and independently of the House ... the statute must be interpreted by this Court independently of the House.

The principle was upheld as recently as 1972 in *Church of Scientology of California* v. *Johnson-Smith* [1972] 1 Q.B. 522; [1971] 3 W.L.R. 434; [1972] 1 All E.R. 378. The headnote [All E.R.] adequately sums it up: "what was said or done in Parliament in the course of proceedings there could not be examined outside Parliament for the

purpose of supporting a cause of action even though the cause of action itself arose out of something outside Parliament. . . ."

Commonwealth Decisions

These principles have been followed in a modified form in many Commonwealth countries.

In *Kielly* v. *Carson* (1842) 4 Moo. P.C. 63; 13 E.R. 225 the Privy Council held that the Newfoundland Houses of Assembly did not have the same exclusive privileges as the Houses of Parliament because it was created by statute; but that it did have every power reasonably necessary for the proper exercise of its functions and duties.

In *Fenton* v. *Hampton* (1858) 11 Moo. P.C. 347; 14 E.R. 727 the same reasoning was applied to Tasmania.

More recently in Australia there was the case of *Armstrong* v. *Budd* [1969] 1 N.S.W.L.R. 649. There Herron C.J. declared (at p. 657) ". . . this Court has a jurisdiction to determine whether in a particular case the House has exceeded the power conferred on it by the Constitution . . ." He had earlier stated (at p. 652) ". . . in the absence of express grant the Legislative Council possesses such powers and privileges as are implied by reason of necessity: the necessity which occasions the implication of a particular power or privilege is such as is necessary to the existence of the Council or to the due and orderly exercise of its functions." And later (at p. 656) "The requirements of necessity must be measured by the need to protect the high standing of Parliament and to ensure that it may discharge, with the confidence of the community and the members in each other, the great responsibilities which it bears."

And in *Namoi Shire Council* v. *Attorney-General for New South Wales* [1980] 2 N.S.W.L.R 639 McLelland J. held that the common law of England did not apply in Australia because the Legislature was created by statute (as is the Legislature in Tonga) and its privileges were therefore limited to those expressly conferred or necessarily implied.

The Position in Tonga

These cases are, of course, not binding on this Court but of persuasive influence only. And I bear in mind the distinctions pointed out by Mr Edwards during the course of his argument for the defendants.

In particular, none of the Commonwealth countries mentioned has a statute which specifically incorporates English law generally into its own law.

Sections 3 and 4 of the Civil Law Act (Cap. 14) provide:

> (3) Subject to the provisions of this Act, the Court shall apply the Common Law of England and the rules of equity, together with statutes of general application in force in England.
>
> (4) The common law of England, the rules of equity and the statutes of general application referred to in section 3 of this Act shall be applied by the Court.
>
> (a) only so far as no other provision has been, or may hereafter be, made by or under any Act or Ordinance in force in the Kingdom.
>
> and
>
> (b) [is irrelevant for the purpose of this action].

There *is* "other provision" for the purpose of section 4(1). It is contained in the

Constitution and the Legislative Assembly Act (Cap. 4).

Section 30 of the Constitution divides the government of this Kingdom into three: the King, Privy Council and Cabinet (executive); the Legislative Assembly; and the Judiciary.

Section 56 of the Constitution gives the King and the Legislative Assembly the power to enact laws.

Section 17 of the Legislative Assembly Act (Cap. 4) authorizes the payment of allowances to members. It reads (insofar as relevant): "... the Assembly shall have the power to make such provision as it thinks fit for the members during the session".

Insofar as these statutory provisions are relevant to an issue raised before the Court, the Court is entitled to – indeed must – consider whether what has been done in the House is in accordance with Tongan Constitution and statute. No claim to privilege can alter that. That is clear on principle, and from a number of cases cited by counsel for the plaintiff:

> *Kenilorea* v. *Attorney General* [1986] L.R.C. (Const.) 126 (a Solomon Islands case), *Liyanage* v. *The Queen* [1967] 1 A.C. 259; [1966] 1 All E.R. 650 (a Ceylon case), *Bribery Commissioner* v. *Ranasinghe* [1965] A.C. 172; [1964] 2 All E.R. 785 (another Ceylon case)

and there are dicta in

> *Hinds* v. *The Queen* [1977] A.C. 195; [1976] 1 All E.R. 353 (a Jamaican case) and *Abegbenro* v. *Akintola* [1963] A.C. 614; [1963] 3 All E.R. 544 (a Nigerian case). I will not refer to them in detail. Suffice it to say that the Court held in each case that it was entitled to pronounce whether Parliament had acted in accordance with the written constitution and statute of the country concerned.

Where there is no statutory provision, this Court must apply the common law and statute of England.

Decision

There is no definition in Tongan statute of allowances which may be paid to members. The only provision is in section 17 of the Legislative Assembly Act: "... the Assembly shall have the power to make such provision as it thinks fit for the Members during the session." That is a very wide power. No guidance is given as to how allowances should be calculated. On the face of it the decision is one for the Legislative Assembly alone.

Is that decision subject to the supervision of the Court? To find the answer to that question I must turn back to the common law of England and the cases I have already mentioned.

There is one clear thread running through all those cases. Parliament is entitled to absolute privilege over its "internal proceedings". That includes speaking and voting on proposals to make law. It includes bringing matters of concern to the attention of the House. It relates to all things said and done for the purpose of carrying out the duties and functions of the House. It includes all decisions made by the House in its collective capacity. On all these matters the Court has no power to intervene. It is highly undesirable that it should. The Court has no more right to interfere with the proper working of the House than the House has to interfere with

the proper working of the Court.

There is no Tongan statute which limits the authority of the House to decide its own allowances. Accordingly I hold that whatever the House has decided, in its collective capacity, that members shall be paid by way of allowances is part of its "internal proceedings", and the Court has no power to overrule it, or to investigate the reasons for that decision.

That decision, however, is not sufficient to dispose of this action. The statement of claim pleads (at para. 15) that the House determined that specific allowances should be paid to members; and (at para. 19) that members have been paid greater sums than those so authorized. This is a question of fact.

Counsel for the defence argued that even this issue cannot be determined by the Court. He says it would necessitate the investigation of things said and done in the House; and the House cannot be required to produce such evidence because of parliamentary privilege. He cited the *Church of Scientology* case.

I do not agree. The Court is entitled to ascertain, as a fact, whether there has been a collective decision of the House on this issue; and if so, what it is. It cannot question that decision. But it can look at that decision as it would a statute. It must accept the decision as a binding authority. Starting from there, the Court can investigate whether the allowances in fact paid to each member were calculated correctly in accordance with that decision. The actions of individual members in claiming and receiving their allowances have nothing to do with the basic function of the house. They are not "internal proceedings". In the words of Stephen J. in *Bradlaugh* v. *Gossett,* these are "rights to be exercised out of and independently of the House". Accordingly these matters are open to investigation by the Court. They are not the subject of parliamentary privilege.

In my judgment this Court has jurisdiction within the limits indicated. The claim will not be struck out as a whole, but it follows that certain parts of it must be.

(1) The acts of the Speaker, acting in that capacity, cannot be investigated by the Court. Paragraph 20 of the statement of claim and prayer (a) will be struck out.

(2) The claim against the Minister of Finance, in that capacity, cannot be sustained and paragraphs 21 and 23 and prayer (b) will be struck out. The argument that payments were in breach of the Appropriation Act and therefore unlawful cannot succeed. I was invited to read the Estimates with that Act. I am not entitled to do so. They form no part of the Act. In any event if there were any overspending the House could authorize the balance by a Supplementary Appropriation Act and this Court could not interfere.

Paragraphs 24 and 25 of the statement of claim contain inaccurate statements of law. There is no restriction in law on the power of the House to authorize such payments to its members as it thinks fit. It is pleaded that the members owe a "duty of trust and care towards the people of the Kingdom". That is no doubt philosophically accurate but this Court has no power to determine whether they have discharged that duty. The remedy, if one is required, is political and not judicial. These paragraphs also will be struck out.

JUDGMENT OF THE PRIVY COUNCIL:

This is an appeal and cross appeal against the judgment of Martin J. delivered on 9 January 1987 in a case concerning the important issue of parliamentary rights and privileges.

On the 23rd October 1986 'Ipeni Siale, described as "a Tongan subject by birth and a substantial citizen resident in the Kingdom of Tonga" issued proceedings out of the Supreme Court, purportedly on his own behalf "and on behalf of all Tongan subjects", against the Hon. Kalaniuvalu Fotofili, then Speaker of the Legislative Assembly, Noble Malupo, Chairman of the Committee of the House, seven named Nobles (being representatives of the Nobles in the Assembly), five Cabinet Ministers, two Governors and nine peoples' representatives. Only three members of the Assembly were excluded from the action.

The crux of Siale's claim against them was that each had knowingly and unlawfully received payments by way of parliamentary allowances for their services as members of the Assembly to which they were not entitled. He sought the following orders:

(1) A declaration that the Hon. Fotofili as Speaker had knowingly and unlawfully signed payment vouchers whereby members of the Assembly had been paid in excess of their proper entitlements.
(2) A declaration that the Hon. James Cecil Cocker as Minister of Finance (the twelth appellant) had unlawfully paid such excess sums out of Treasury.
(3) A declaration that each of the twenty five defendants had knowingly and unlawfully received sums in excess of their entitlement.
(4) An order for repayment to Treasury of the excess by each defendant.

The defendants filed statements of defence challenging the jurisdiction of the Supreme Court to adjudicate on the issue, and moved for an order that the action be struck out on that ground, it being argued that the issue of the alleged unlawful payments was a matter protected by parliamentary privilege not open to review by the Court.

After reviewing the law in other jurisdictions Martin J. considered the state of the law in Tonga and concluded that it was for the Assembly and the Assembly alone to decide what remuneration and allowances its members should receive, and that its decision in that regard was part and parcel of the "internal proceedings" of the House and not reviewable by the courts.

However, Martin J. did not regard that conclusion as justification for striking out the proceedings, and for this reason: it was pleaded in the statement of claim that the Assembly altered the rates for salary and allowances for members as presented by the Minister of Finance in the Annual Estimates for the year ending 30 June 1987. Martin J. concluded that it was open to the Court to enquire whether there had indeed been a prior decision of the Assembly fixing the rates for salary and allowances for the relevant period, and whether what was actually paid to the members conformed with that decision. He did however conclude that no action would lie against the Speaker for signing the payment vouchers, or against the Minister of Finance for making payment out of Treasury and struck out the passages in the statement of claim bearing on those issues.

The specific grounds of appeal will be referred to later but in essence the appellants challenged Martin J.'s conclusion that the Court could enquire into

whether there had been a decision of the Assembly and whether the payments conformed; while the respondent on his cross appeal argued that the reasonableness of the decision itself was open to review. There was a further ground of cross appeal relating to the striking out of the separate causes of action against the Speaker and the Minister of Finance but this was abandoned, Mr Niu acccepting that their reinstatement would serve no good purpose.

At the commencement of the appeal hearing Mr Edwards sought leave to introduce a further ground of appeal, namely, that the respondent was not, as he claimed, a Tongan subject but a citizen of the United States. It is not clear what was hoped to be gained by raising that issue for there is no restriction on non-Tongans issuing proceedings (Article 4 of the Constitution) although different considerations may apply in a proceeding such as the instant one, but in any event leave was refused with leave reserved to raise the issue in the Supreme Court should the case proceed.

The background to the disputed payments is that the Sales Tax Act 1986 came into force on 1 July 1986 and the Assembly resolved that it should be explained to the general public by members holding 'fono' meetings in their electoral districts. These took place between 21 July and 1 August 1986.

The authority relied on for the payments is section 17 of the Legislative Assembly Act (Cap. 4) which reads:

> 17. When the Assembly has been convoked the Premier shall make all arrangements as to the arrival and departure of the members of the Legislative Assembly and the Assembly shall have the power to make such provision as it thinks fit for the members during the session.

It is, as Martin J. said, "a very wide power". The extent of the "provision" is left in the absolute discretion of the Assembly, with no guidance as to how it should be exercised.

The grounds of appeal and cross appeal can be dealt with more expeditiously if the rights and privileges of the Assembly and its supremacy are considered in a general way in the first instance; the more particularly as what we have to say in this appeal is relevant to one which follows.

The starting point is the Bill of Rights 1689 after the "revolution" against the claimed powers of James I. The omnicompetence of Parliament, at least in the United Kingdom, was established by the Bill. In *British Railways Board and another* v. *Pickin* [1974] A.C. 765; [1974] 2 W.L.R. 208; [1974] 1 All ER 609, Lord Reid said at p. 782 (A.C.); p. 213 (W.L.R.); p. 614 (All E.R.): p. 614:

> I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded insofar as it was contrary to the law of God or the law of nature or natural justice but since the supremacy of Parliament was finally demonstrated by the revolution of 1688 any such idea has become obsolete.

Article 9 of the Bill of Rights reads:

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

It follows that in England the validity of an Act of Parliament is not open to

challenge on the ground that its passage through the House was attended by any irregularity.

The same is not true in Tonga where there is a written Constitution. If, on a true construction of the Constitution some event or circumstance is made a condition of the authentic expression of the will of the legislature, or otherwise of the validity of a supposed law, it follows that the question whether the event or circumstance has been met is examinable in the Court, notwithstanding that the question may involve internal proceedings of the Assembly.

Again, a statutory provision can be examined and struck down if it is contrary to an express provision of the Constitution although its passage through the House was not attended by any irregularity.

The position is then that the Assembly of Tonga, and indeed any parliamentary body based on a written Constitution, does not have the privilege of supremacy over the courts enjoyed in the United Kingdom.

Apart from the question of supremacy there are other privileges and immunities which must be available to a legislative body, which are incidental to its existence and status, or necessary for the reasonable and proper exercise of the functions vested in it.

In the United Kingdom the common law recognizes the parliamentary privileges of freedom of speech in debate and freedom from arrest while the House is in session and these privileges are embodied in Article 73 of the Constitution of Tonga. One of the most important privileges available to Parliament in the United Kingdom is the exclusive right to determine the regularity of its own internal proceedings. There is ample authority for the proposition that when a matter is a "proceeding" of the House beginning and terminating within its own walls it is outside the jurisdiction of the courts (see *Stockdale* v. *Hansard* (1839) 9 Ad. & El. 1; and *Bradlaugh* v. *Gossett* (1884) 12 Q.B.D. 271).

In the *Pickin* case ([1974] A.C. 765; [1974] 2 W.L.R. 208; [1974] 1 All E.R. 609) Lord Morris said at p. 790 (A.C.); p. 220 (W.L.R.); p. 619 (All E.R.).

> The conclusion which I have reached results, in my view, not only from a settled and sustained line of authority which I see no reason to question and which should I think be endorsed but also from the view that any other conclusion would be constitutionally undesirable and impracticable. It must surely be for Parliament to lay down the procedures which are to be followed before a bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of Justice to embark on an enquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an enquiry whether in any particular case those procedures were effectively followed.

What then is the position in Tonga? The Constitution itself is silent on the role the courts might play in inquiry into proceedings in the Assembly and simply provides in Article 62 that "The Assembly shall make its own rules of procedure for conduct of its meetings."

A court in Tonga faced with a plea that it should inquire into the internal proceedings of the Assembly will obtain no help from any Act or Ordinance in force in Tonga in determining its jurisdiction so to do. In such a delicate constitutional situation the Court would look for a clear mandate to proceed. We are of the firm opinion that in that situation the Civil Law Act (Cap. 14) must be called in aid. That Act provides in short that in the absence of relevant provision under any Act or Ordinance of the Kingdom, the common law of England shall be applied. It follows that in determining its jurisdiction to inquire into internal proceedings of the Assembly it must apply the English common law regarding the privilege of Parliament to determine the regularity of its own proceedings, provided of course the Assembly has not acted contrary to the provisions of the Constitution in the course of those proceedings, for in such a case the Court is given jurisdiction by Article 90 of the Constitution, which reads, so far as is relevant:

> The Supreme Court shall have jurisdiction in all cases in law and equity arising under the Constitution and laws of the Kingdom . . .

We conclude then that there is no jurisdiction in the Court to inquire into the validity of the Assembly's internal proceedings where there has been no breach of the Constitution.

Turning now to the present case, it is convenient to deal with the cross appeal first. Martin J. did in fact correctly apply the English common law pursuant to the Civil Law Act, and determined that whatever the House had decided in its collective capacity regarding the payment of allowances came within the Assembly's "internal proceedings" which the Court had no power to investigate.

Mr Niu's first submission was that the Learned Judge erred in applying the provisions of the Civil Law Act because there was no common law in England to the effect that Parliament had unlimited power to determine its own allowances. The submission misconceives the issue. In Tonga there is express power in the Assembly to fix its own allowances, and the real question was whether the Court could inquire into the decision process. It is at that point that the common law of England is brought to bear. For reasons already stated the submission must be rejected.

Mr Niu's next submission was that as the Assembly's discretion to fix allowances was unfettered, it was open to the Court to enquire whether the allowances fixed were "reasonable", applying such cases as *Roberts* v. *Hopwood* [1925] A.C. 578. That case, and others cited by Mr Niu, relate to remuneration payable to officers and employees of local government and can have no relation to a supreme authority under the Constitution. The notion of the courts enquiring into the "reasonableness" of Parliament's decisions does not warrant serious consideration. It was for the Assembly to determine its allowances, and only self restraint, influenced by fair mindedness and expediency are available to prevent abuse of its privilege not to have its decision investigated.

Mr Niu next relied on Article 90 of the Constitution as giving jurisdiction to the Supreme Court to investigate. The substance of that Article has been set out earlier in this judgment. If, in the process of making its decision concerning allowances the

Assembly had breached a provision of the Constitution then we agree that the Court would have jurisdiction, but that is not the case here.

Mr Niu's final point was that indeed the Assembly had breached the Constitution, and in particular Article 78, which deals with the passing of estimates of expenditure for the public service. It provides inter alia that Ministers shall be "guided" by the estimates. Mr Niu's point was that in the Tongan version the wording is such that Ministers "must act in accordance" with the estimates, the inference Mr Niu would have us adopt being that once the estimates are fixed there can be no deviation from them in the way of excess expenditure. Such an interpretation is not in accord with long established custom, and in any event the English interpretation prevails.

Turning now to the appellants' submissions. Martin J. held that while he could not inquire into the Assembly's decision regarding allowances, he could inquire into whether a decision had in fact been made and whether the allowances paid were in accordance with the decision.

At this point we must part company from Martin J.

This is the Learned Judge's reasoning for his decision on this aspect of the case:

> The Court is entitled to ascertain, as a fact, whether there has been a collective decision of the House on this issue; and if so, what it is. It cannot question that decision. But it can look at that decision as it would a statute. It must accept the decision as a binding authority. Starting from there, the Court can investigate whether the allowances in fact paid to each member were calculated correctly in accordance with that decision. The actions of individual members in claiming and receiving their allowances have nothing to do with the basic function of the house. They are not "internal proceedings". In the words of Stephen J. in *Bradlaugh* v. *Gossett,* these are "rights to be exercised out of and independently of the House". Accordingly these matters are open to investigation by the Court. They are not the subject of parliamentary privilege.

It is not disputed, and indeed the respondent alleges as much in his statement of claim, that the Speaker of the Assembly signed the vouchers authorizing the payments to members and the Minister of Finance, who was himself a recipient of an allowance, (as was the Speaker) paid the allowances from Treasury.

The only inference open on those accepted facts, and the fact that the allowances were paid only to Fono meeting attenders, is that the payments made to members were made pursuant to a decision of the Assembly, which Martin J. rightly accepted was not open to review by the Court. Further, the Trial Judge held that he had no jurisdiction to investigate the acts of the Speaker or the Minister of Finance but such an investigation would necessarily result if the Court embarked on an inquiry as to whether a decision was in fact made by the Assembly. When one considers that the vouchers authorizing payment were signed by the Speaker, who is traditionally the guardian of the privileges of the House, and the interpreter of the House's rules and procedure the inquiry Martin J. proposed would inevitably have amounted to an inquiry into the internal proceedings of the House.

What we have already said concerning the facts and law in this case cover the grounds of appeal of the appellants and it is unnecessary to refer to them in detail. Counsel on their behalf referred to the common law principle that internal proceedings of the House cannot be inquired into and submitted that what Martin J. had proposed amounted to such an inquiry. We agree. Lord Morris said it all in this

passage, earlier cited, from the *Pickin* case:

> It would be impracticable and undesirable for the High Court of Justice to
570 embark on an inquiry concerning the effect *or the effectiveness* of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed.

We therefore allow the appellants' appeal and dismiss the respondent's cross appeal and order that the substantive proceedings be struck out. As for costs, there was some suggestion made on behalf of the appellants that the action was frivolous, vexations and an abuse of the Court process. We do not agree. The issues raised were of importance and the respondent was entitled to his day in court. We make no order
580 for costs.

Reported by: T.K.F.