IN THE SUPREME COURT OF NEW ZEALAND SC 11/2011

[2011] NZSC Trans 20

BETWEEN THE ATTORNEY-GENERAL OF NEW ZEALAND

First Appellant

AND LINDSAY GOW

Second Appellant

AND ERIN ALICE LEIGH

Respondent

Hearing:	16 August 2011
Court:	Elias CJ Blanchard J Tipping J McGrath J Anderson J
Appearances:	J W Tizard and A J Connor for the Appellants J G Miles QC and S E Trafford for the Respondent J C Pike and P J Gunn for the Speaker of the House of Representatives as Intervener

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CIVIL APPEAL

MR TIZARD:

If your Honours please, I appear with my learned friend Ms Connor for the appellants.

ELIAS CJ:

Thank you Mr Tizard, Ms Connor.

MR PIKE:

Yes, may it please the Court, I appear together with Mr Gunn for the Speaker.

ELIAS CJ:

Thank you Mr Pike, Mr Gunn.

MR MILES QC:

Yes, may it please Your Honour, I appear with Ms Trafford as an Amicus.

ELIAS CJ:

Thank you Mr Miles, Ms Trafford. Yes, Mr Tizard.

MR TIZARD:

If your Honours please. I want to start, if I may, by putting to one side my written submissions and articulate what I submit is the critical issue which is, whether the courts have any jurisdiction to entertain a claim where that necessarily involves any inquiry into the circumstances under which a Minister of the Crown initiates an inquiry to enable him to answer a question for oral answer in the House of Representatives and then answers that question, based on information supplied to him pursuant to his request.

ELIAS CJ:

You're going to unpack that –

MR TIZARD:

I will indeed but that's –

ELIAS CJ:

– a very rolled up question –

MR TIZARD:

– a rather large sentence.

ELIAS CJ:

Yes. Well it's not the largeness of it, it's the fact that there are a number of different issues within the one question, as you posed it.

MR TIZARD:

Indeed.

ELIAS CJ:

Yes.

MR TIZARD:

Although in defamation proceedings, it is usual to describe the matter at issue here as the defence of absolute privilege, in my submission, it may be somewhat misleading to do so. That is because it suggests that the plaintiff has a cause of action to which the defendant has a defence. That is, an affirmative defence. Whereas, in my submission, it would be more accurate to say that the facts simply do not give rise to a cause of action. In other words, they're not justiciable in the courts of law.

Now, comparing absolute privilege with qualified –

ELIAS CJ:

Well sorry, does that say – does that go further than saying that it's an immunity?

MR TIZARD:

Um –

ELIAS CJ:

Characterising it as no cause of action?

MR TIZARD:

Well it's – perhaps it may be better to describe it as an immunity. In fact, it's interesting if one looks at the dissenting judgment, unofficial of course, of Lord Denning which was published subsequently in the House of Lords case, where the opinion of the Judicial Committee was sought on the question of whether there was a privilege in the *Strauss* case and that's annexed in the bundle that the Speaker has produced to you.

Lord Denning takes the approach that as soon as the Court – he says Courts have jurisdiction to – you can file your proceeding in the Court but once the Court becomes aware that it involves questioning what goes on in the House, the Court simply must refrain from entering into the matter and strike the claim out, suggesting that it has no power to go into the matter.

TIPPING J:

Will it make any substantive difference whether it's characterised as a lack of a cause of action or a defence?

MR TIZARD:

In my submission it does in a sense, in that in – at the outset one is saying one has a claim. Whereas, in fact in my submission, the proper way to view it is as soon as it's Parliament, one doesn't have a claim in the Court at all.

Of course, sometimes when proceedings are filed, that may not be evident because the matter is not pleaded in a way in which the true facts emerge but once the true facts emerge, then in my submission there no longer is in effect any cause of action.

TIPPING J:

I thought the real issue in this case was whether it is absolute or qualified privilege.

MR TIZARD:

Well that's why I commenced by approaching it in this manner and of course, the Court of Appeal has held that it is qualified privilege but in my submission, if one accepts the argument which I shall go on to develop, that anything done in connection with the answering of a Parliamentary question is a single process. That is, it commences with the written question and it finishes with the Minister's answer and whatever is done by the Minister or anybody deputed by him to provide him with the necessary information to answer that question is subject to the privilege of the House, and it is part of the proceedings of the House and therefore does not give rise to a cause of action in a court of law.

ELIAS CJ:

Mr Tizard, you will come on to explain to us, won't you, why your starting point is the correct starting point, why one starts with the question in Parliament because on one view of the matter we have a member of the Executive seeking advice from his department, how he uses it is perhaps another question but, for myself, I'm not sure that one should start with the Parliamentary question, I'm still at that stage.

MR TIZARD:

Well, I therefore need to tackle that one head on, if your Honour pleases and my submission is, that is the whole genesis of the issue. If one looks at it from the point of view of the civil servant, the civil servant had no interest whatsoever in making any information available about this matter. The whole genesis of it was, in a series of Parliamentary questions, followed by a request by the Minister to the head of the

Ministry, who then deputed that task to Mr Gow to find answers to specific matters so that he could answer in the House.

ELIAS CJ:

Well I understand that that is the Minister's motive in seeking the question but he questioned his department as Minister for that department, that's an executive action perhaps rather than – you're characterising all of this as having started with the question in Parliament but I'm not so sure –

MR TIZARD:

But with respect Ma'am, it's not –

ELIAS CJ:

– that that's the right way.

MR TIZARD:

– a matter that he is requesting vis-à-vis the department in the conduct of the department. He is asking that question because he is required to answer written questions in the House. But for the written question in the House, the question would never have been directed at the Chief Executive of the Ministry. Mr Gow would never have embarked upon the course that he was required to do. Of course a civil servant is accountable ultimately to his Minister but one might fairly say that this is outside the normal course of what a civil servant would be doing. He is answering a request here to enable the Minister to answer a Parliamentary question. It's the nexus with the Parliamentary question which is critical. I wouldn't, for a moment, suggest that a civil servant has anything other than qualified privilege, were it to be an answer unrelated to a matter in the House.

ELIAS CJ:

Well is that your complete answer on that point?

MR TIZARD:

Essentially.

ELIAS CJ:

All right. That would mean that there would be very different results in terms of the advice tendered to a Minister according to whether his motive in seeking it was to make a statement in the House or not.

MR TIZARD:

I have a little problem with this motive question. I think that the true answer is the purpose. If the purpose – the Minister might have all sorts of motives.

ELIAS CJ:

All right, well, then using your word of "purpose" it would be a very different result according to whether the purpose of the Minster was obtaining information to use in answer to a question in the House or in some other way.

MR TIZARD:

Indeed.

ELIAS CJ:

Thank you.

MR TIZARD:

Perhaps I will return to why I am arguing that the kind of privilege that we're talking about here is different from qualified privilege which is truly an affirmative defence. There there is a cause of action and a defendant then sets out his moral duty or other facts which warrant the application of the defence of qualified privilege. The classic one, of course, is response to an attack which is being made on the individual who is subject to the – who is the defendant in the proceedings. Now that is a case where the Court clearly can examine all the facts whereas this, in my submission, is a case where what's the connection with the House and the actions of the defendant in complying with the request of the Minister in order to enable the Minister to answer the question in the House, truly makes it a jurisdiction issue and the Court simply says we cannot go there. It is Parliament who controls that, not us.

McGRATH J:

Because there is a connection with the proceedings of the House?

MR TIZARD:

Of the House.

McGRATH J:

Any sort of connection?

MR TIZARD:

Well it must be a necessary connection.

McGRATH J:

What do you say to the indication in *Chaytor* of the sort of connection that's required?

MR TIZARD:

I'd prefer the way it has been expressed in *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 in the Canadian cases. That if it is reasonably necessary to the performance of the member's duty then it is protected.

BLANCHARD J:

Why is it necessary here?

MR TIZARD:

Because, I'll come to deal with this, otherwise – first of all the civil servant doesn't volunteer this. He has no choice. He has to make available to the Minster whatever the Minister requires.

BLANCHARD J:

He can choose whether to be motivated by ill will.

MR TIZARD:

But he can't be – he can't choose what to provide the Minister. Let's put aside the question of ill will, which in my submission is not the test as to whether he's fulfilling the purpose of the Minister.

BLANCHARD J:

Well it's, it surely goes to the question of necessity? Is it necessary to have a protection greater than qualified privilege?

MR TIZARD:

In my submission it is, and first of all I'd want to answer that by saying that one shouldn't categorise the question in the way in which Your Honour has put it to me, that's my submission to Your Honour, because that is suggesting that one kind of privilege or another is adequate. The question is, is it so connected with the House that it is the House which has jurisdiction over the person who supplies the information. If the House does then the Court doesn't. That's the way I want to approach it.

BLANCHARD J:

But the House doesn't have jurisdiction except in cases where it is necessary.

MR TIZARD:

Well the House can summon Mr Gow. Let's – I want to go on and develop some of these examples. Let's take the situation where Mr Gow comes across some material which is potentially defamatory. Let's assume, and I'm saying nothing about the facts of this case, this is simply an academic example, let's assume that the civil servant has some concerns about how the Minister might, in fact, use this material, having regard to past conduct of the Minister. So the civil servant has concerns about how responsibly, if one can put it that way, the Minister might deal with the matter. He's then put in the position of having to decide whether or not he has to make this information available to the Minister. If he's protected by qualified privilege only there must be pressure on him to say to himself, this material is so dangerous that if it is used I will end up as the supplier of this material facing a claim and I will have to prove my case. Why should he be put in that position? In my –

TIPPING J:

He won't have to prove his case. The other side will have to prove that he's motivated by ill will or otherwise takes improper advantage.

MR TIZARD:

That's true but he still has to face proceedings which are not of his making and not of his choosing. He is simply performing his duty to give to the Minister, warts and all, what is on the file.

ELIAS CJ:

But that could arise in a case where there is no question of answering a question in Parliament so –

MR TIZARD:

Of course I accept that –

ELIAS CJ:

– your argument is a very, it bites off perhaps more than it can chew.

MR TIZARD:

It is true that you might well say there are other circumstances in which that same pressure might arise but in the case of Parliament the civil servant could actually be summoned before the House to produce this information. Let me turn it around another way.

ELIAS CJ:

But if the civil servant was summoned before Parliament –

MR TIZARD:

Yes.

ELIAS CJ:

– then what is said in Parliament presumably is subject to Parliamentary discipline or –

MR TIZARD:

Correct.

ELIAS CJ:

– whatever the word was that you used.

MR TIZARD:

Well let me put it another way. A question, a written question for oral answer in the House is a, what has been described in one of the UK reports, as being a way of dealing with short issues in which Parliament makes its enquiry, or the House makes its enquiry, so members ask questions. Parliament could equally enquire by

establishing a committee as they do to enquire into matters. If a person gives information to a committee, the person has the benefit of the privilege of the House. In my submission there is nothing, in principle, different between the formulation of a written question the process which then follows it resulting in an answer. It deals with shorter matters but it is nonetheless a proceeding of the House. So if in fact the civil servant were to say to the Minister, I don't want to answer that, the House could summon the civil servant and he would be obliged to answer. Now in my submission there's absolutely nothing in principle different between a member phrasing a question, the Minister then going away, getting in the information required, coming back and answering that, and a committee enquiring into a matter, it's obviously of greater moment, if one is going to engage a whole committee, but the process is essentially the same, it's a Parliamentary process.

TIPPING J:

Are you suggesting that if there is no absolute privilege, there is something of a perverse incentive which will make Parliament have to go through a process, where the person is then protected by absolute privilege?

MR TIZARD:

Well a cautious civil servant may well do that, he simply says, well I'll keep the –

TIPPING J:

I'd prefer to appear in the House and tell them.

MR TIZARD:

I'd rather go in the House, if we're going to get into this.

TIPPING J:

This is the argument is it? Essentially?

ELIAS CJ:

How far do you take it though? If the Minister is obliged to answer a question in Parliament and he makes inquiries more widely than of his department, wouldn't your argument extend to any information that he obtains?

MR TIZARD:

Yes it would, but it would have to be governed, that it must be reasonably necessary to answer the question.

ANDERSON J:

I'd have thought it was necessary for the purposes of the proper functioning of Parliament that the information supplied by people to Ministers is not actuated by ill will, and is offered bona fide?

MR TIZARD:

Well, one might take that view, but in my submission it's actually irrelevant to the privilege, because I've no doubt there are times when Ministers are motivated by ill will in giving their answers. But that doesn't destroy their privilege. The question of ill will in my submission is not the essential issue. The essential issue is the connection with the Parliamentary process.

ANDERSON J:

And do you say that makes it a Parliamentary proceeding?

MR TIZARD:

Correct. In my submission it's quite artificial to say it's a Parliamentary proceeding when the written question is tabled by 10 o'clock in the morning, the Parliamentary proceeding ceases when the Minister runs away to try to get the information and when he comes back, sometimes shortly after 2.00 in the afternoon and gives his answer, it suddenly becomes a Parliamentary proceeding again. That's what I would call slicing and dicing the issue. In my submission it's one continuous process, and that is the fair and proper way to look at it.

TIPPING J:

What if someone, a member, is preparing a speech, and goes and gets some research done by someone else, and incorporates their research into that speech. Does it go that far?

ELIAS CJ:

Well he's answered that it does.

MR TIZARD:

In my submission it does.

TIPPING J:

Well I thought the previous question wasn't quite along those lines.

ELIAS CJ:

Yes it was exactly along those lines.

TIPPING J:

Was it? I'm sorry.

McGRATH J:

What about if the member rings a constituent and asks for information so he can answer the question?

TIPPING J:

I thought it was the Minister.

MR TIZARD:

So long as it is properly and reasonably connected with the answer he is to give.

McGRATH J:

So long as there is a connection –

MR TIZARD:

Indeed.

McGRATH J:

– with the answer, you say it's part of the Parliamentary proceeding?

MR TIZARD:

Indeed.

McGRATH J:

Isn't there authority against that? The Earl of Wilton or someone like that?

MR TIZARD:

The Earl of Wilton doesn't deal with that at all with respect. I deal with that later, but *The Earl of Wilton* doesn't discuss Parliamentary privilege, it treats the matter at issue, as being one of qualified privilege and nobody has raised the issue of Parliamentary privilege in that case.

McGRATH J:

But it has never been held that Parliamentary privilege extends to communications with constituents.

MR TIZARD:

With respect, I don't think that's fully correct. I think it is fair to say that it has never been contended that merely communicating with a constituent gives protection by way of Parliament privilege, and nor would I contend that. I see a distinct difference between a situation where a constituent raises a concern with the member which he asks the member to raise in the House, which is a voluntary action on the part of the constituent, and a decision by the part of the member, the member is no doubt protected in what he says, but this is a quite different situation where the Minister is under an obligation to answer the House and the civil servant isn't under an obligation to answer to the Minister, so the Minister can answer, so the whole genesis of this is from the House, whereas dealing with constituent, the genesis is from the constituent.

McGRATH J:

Doesn't that mean then, to explore the distinction you've just drawn, we should not be looking more closely at the sort of connection with the Parliamentary process that's involved, and deciding whether the privilege of Parliament is necessary to give protection in that situation?

MR TIZARD:

Um –

TIPPING J:

Which is really what *Chaytor* would say.

MR TIZARD:

In my submission all you need do is to – once it is conceded that the answer was given to the Minister to enable the Minister to answer in the House, then unless there was material which was unrelated to the request, then it attracts the privilege of the House.

McGRATH J:

It does seem to me you're urging a soft test on us. It would cover a lot more than what was necessary.

MR TIZARD:

Well if the Minister is to answer, I find that difficult to say that's a soft test. If the Minister wants to answer, the Minister is entitled to all the information that the Minister might reasonably perceive may be relevant to the answer he chooses to give.

TIPPING J:

But you're not placing it on the basis of the Minister's duty to answer, you've agreed with the Chief Justice and apparently I asked the same question, but it would go further than that, it would go to people just making speeches. I can understand the distinction between a duty to answer –

MR TIZARD:

Well for the purposes –

TIPPING J:

– but you're not making that distinction.

MR TIZARD:

For the purposes of this case, I'm certainly prepared to accept that if that's all it were, that's all I need argue for.

TIPPING J:

Well that's what I think we were exploring with you, how far it would logically then have to go. But you put it as resting only on the fact that the Minister has this duty to the House to answer.

MR TIZARD:

I put it primarily on that basis. What I am submitting is even if there – even if there is some question as to how much further it goes, that is to members, at least where the Minister is under a duty to answer to the House, the privilege applies.

TIPPING J:

That would all have to turn on the duty, because an ordinary member making a speech hasn't got a duty to make a speech.

MR TIZARD:

Indeed, indeed. Absolutely, he doesn't have a duty to make a speech and he's protected from making his speech.

TIPPING J:

I'm not necessarily with you, but I wanted to identify sharply –

MR TIZARD:

No, no, I understand.

TIPPING J:

– where you might be able to distinguish between this case and the broader worry.

MR TIZARD:

And I think your Honour has touched on a point which has vexed various committees of the House in the UK, on this very issue, that is, notes –

TIPPING J:

The Minister presumably has a duty to give a candid answer –

MR TIZARD:

Indeed.

TIPPING J:

– and to make the necessary inquiries –

MR TIZARD:

Indeed.

TIPPING J:

In order to put him in the position of making a candid answer.

MR TIZARD:

Indeed. And the civil servant shouldn't have to second-guess what it is that the Minister is going to do with it, or feel that he become, or may become, a target of proceedings, justified or unjustified, in performing his duty to the Minister, who in turn has a duty to the House.

ELIAS CJ:

But his duty to the Minister, sorry to keep harping back to this, but his duty to the Minister is the same, whatever use the Minister wishes to put the information to, but on your argument, there would be very different results. Because in one case he would be protected by qualified privilege and in the other he would be protected by the absolute privilege.

MR TIZARD:

It may well be that a civil servant might perceive his duty somewhat differently, depending on the use to which it is put.

ELIAS CJ:

I can't understand that, because just as the Minister has a duty to be candid in answering questions to Parliament, I would've thought that public servants have a duty to be candid in answering questions from their Ministers?

MR TIZARD:

Yes, I think one would have to accept that.

TIPPING J:

But candid doesn't run as far as ill will, or improper use.

MR TIZARD:

Candid is not the same as ill will or improper use.

TIPPING J:

No, to be candid you don't have to –

MR TIZARD:

And one might –

TIPPING J:

It's the –

MR TIZARD:

– one might even say that a civil servant who misled his Minister might face some consequences but it's beside the point in this context, in my submission, because this is part of the one process.

TIPPING J:

I'm not sure that I quite accept that it's beside the point. The question of necessity surely can't be divorced from whether it is necessary to have absolute or only qualified privilege to allow Parliament to act effectively?

MR TIZARD:

Well I come back to my argument that in effect what – the way in which you then have to view it is that it is not part of the one process, it is not so intimately connected with the parliamentary process that the Court may inquire into it.

Now, the danger in that is that potential litigants go behind what the Minister said to try to find out what he was advised by people who do not have the privilege and that –

TIPPING J:

The necessity to –

MR TIZARD:

– then puts the barriers up for free, frank and candid advice to Ministers.

TIPPING J:

But the necessity test is only required where it is not literally within Parliament because if it's literally within Parliament, no issue.

MR TIZARD:

Correct.

TIPPING J:

The necessity test has been developed as a means of drawing boundaries for statements that are not strictly in Parliament.

MR TIZARD:

Yes but it's the – the 'necessary' relates to the communications, not to the motivations of the individuals. In my submission, motivation is irrelevant. It's the occasion of the communication. It's the – however malicious, it's irrelevant because it's the act of communicating information in accordance with a request by the Minister. That it's the act you focus on, not the motivation of the individual who performs the act. It's the purpose and the nature of the act.

TIPPING J:

Well the question then is, is this an occasion for which it is necessary to have absolute privilege?

MR TIZARD:

In my submission, is this an occasion which is necessary to enable the Minister to answer the question.

ANDERSON J:

I thought the basis of your argument was that such activity is properly classified as a proceeding of Parliament.

MR TIZARD:

Correct.

ANDERSON J:

And only if that goes against you, you then get into the next argument well, it's necessary.

MR TIZARD:

Indeed.

ANDERSON J:

It maybe a bit circular perhaps but –

MR TIZARD:

Yes, I think Your Honour fairly sums my argument up in saying I first of all say you can't split the process off, it's all a continuum.

ANDERSON J:

Yes, rather than – on that argument, it's more appropriate to say that we're not talking about absolute privilege, we're talking about Parliamentary privilege which happens to be absolute?

MR TIZARD:

Indeed which is why I opened up in the manner in which I did, by saying if you keep looking at it as an absolute privilege, or the qualified privilege, then as Wittgenstein would say you're asking the wrong question, and you're bound to get the wrong answer because it's not that. What I'm arguing for is Parliamentary privilege.

ANDERSON J:

This process is properly categorised as a parliamentary process.

MR TIZARD:

Indeed and the Minister could do it himself and in days gone by no doubt he did.

ANDERSON J:

I doubt whether that's relevant. I mean, what you're saying is, a question is asked which a Minister is required to answer?

MR TIZARD:

Indeed.

ANDERSON J:

And to answer it, inquiries have to be made?

MR TIZARD:

Indeed.

ANDERSON J:

And then the question is answered, in light of those inquiries and the inquiries are so closely bound up with the question and the answer that the process, the whole process, is properly categorised as a proceeding of Parliament?

MR TIZARD:

Indeed.

ANDERSON J:

Thereby attracting Parliamentary privilege?

MR TIZARD:

Indeed.

ANDERSON J:

It's a definitional approach, rather than a –

MR TIZARD:

Indeed and –

ANDERSON J:

– privilege approach –

MR TIZARD:

– in looking at what acts are part of the proceedings of the House, cases such as the Canadian cases, say the test is, is it so directly and necessarily related to what goes on in the House, that it can be fairly categorised as being part –

ANDERSON J:

Now this is the argument in support of your proposition?

MR TIZARD:

Indeed. It's my submission that in principle there is nothing to be distinguished between the Minister making his own inquiries, finding the information himself, and deputing somebody to do it, it's still part of the same process.

ANDERSON J:

How is that relevant to your argument, it may just be a consequence of it rather than a justification for it?

MR TIZARD:

Yes, it's a consequence of it but I don't think anyone has ever suggested that if a Minister went and found his own information and made notes of it, of what he found, that the protection doesn't apply throughout the whole of the process.

ANDERSON J:

Well how would he find out? He'd either consult a book, or he'd consult a person. If he consulted a –

MR TIZARD:

Indeed.

ANDERSON J:

– book there's no publication, if he consulted a person there is.

MR TIZARD:

Indeed. If he consults a person there is.

ELIAS CJ:

Under a Westminster system, Ministers of the Crown are responsible to Parliament for the operation of their departments. I'm just wondering, to what extent it is essential that there is the trigger of a specific Parliamentary question because that's just a way the House organises its business but the obligation to be answerable is always present. Do you have to go as far as saying that any information the Minister obtains from his Ministry to prepare him to be able to answer to Parliament, is subject to this privilege?

MR TIZARD:

No, I don't think I would necessarily want to go that far. I'd want to know more about the circumstances but, with respect, it does seem to me that a Parliamentary question is a Parliamentary procedure, a formalised procedure of the House.

I've really dealt with some further matters that I was going to suggest might test the proposition that Justice Anderson has put to me, has really stated my position which is comparing what would happen if the civil servant in fact declined to make the information available to the Minister. Plainly, he could be summoned before the House, civil servant and made to –

BLANCHARD J:

But the civil servant wouldn't have to decline to make the information available, providing that he spelt out the necessary caveats.

MR TIZARD:

Indeed and of course one –

BLANCHARD J:

And then there would be no question of ill will.

MR TIZARD:

Yes and indeed, I accept it's true that the plaintiff has to prove the ill will but it doesn't take away from the essential character of what the civil servant is doing which is really doing the Minister's job so the Minister can answer the question.

TIPPING J:

If this is not part of a proceeding in Parliament, do you seek nevertheless to claim absolute privilege for it on some necessity test?

MR TIZARD:

I don't think I could fairly promote that proposition.

TIPPING J:

Because I thought that's what you answered to my brother Anderson?

MR TIZARD:

No, if I created that impression that was not my intention. My intention was to simply draw to your Honours the cases which say, in determining what is a proceeding of the House –

TIPPING J:

Yes.

MR TIZARD:

– the acts in question must be a necessary part. It's the necessity, or the necessary connection, is in categorising what is part of the proceedings of the House. So that's the test that one might use –

TIPPING J:

It all comes down to the ultimate question of whether this is to be treated as part of a proceeding –

MR TIZARD:

Indeed.

TIPPING J:

– in Parliament.

MR TIZARD:

Indeed.

TIPPING J:

Thank you.

MR TIZARD:

I think I have to say, quite plainly, that's what I hang my hat on.

TIPPING J:

Yes.

MR TIZARD:

Now there were some miscellaneous issues I was going to deal with in my learned friend's submissions for the respondent, unless your Honours wanted to pursue me on these matters further then I thought I might deal with and then perhaps come back to the end.

TIPPING J:

Just before you move on, are you really saying that to ask whether qualified privilege is, or would be, sufficient, is to ask the wrong question?

MR TIZARD:

I am. I'm saying it's not an either/or. It is a case of simply determining whether it is part of the proceedings of the House and my argument is –

TIPPING J:

If it is, it's absolute, if it's not –

MR TIZARD:

It's not.

TIPPING J:

It's not absolute.

MR TIZARD:

It's not absolute.

ELIAS CJ:

It's qualified.

MR TIZARD:

It's qualified. I accept I'm back in qualified when it comes to that. But that is a true affirmative defence whereas –

TIPPING J:

Is it not at least a legitimate enquiry as to deciding whether or not this should be treated as a proceeding in Parliament, because it's not literally a proceeding in Parliament?

MR TIZARD:

Well historically the words "proceeding" in the House have never been treated as simply the four corners and –

TIPPING J:

Well I'm mindful of the decision of the Privy Council in *Buchanan v Jennings* Mr Tizard, which seemed to –

MR TIZARD:

Well I might be with Your Honour on that.

TIPPING J:

Well don't let's raise that hare, but I think it must be said that the tenor of modern authority is to restrict the compass of absolute privilege. Both the Canadian case, *Chaytor*, *Buchanan v Jennings* –

MR TIZARD:

Yes. I think with –

TIPPING J:

Prebble less so.

MR TIZARD:

It's my submission they raise somewhat different issues.

TIPPING J:

Yes but at the higher level there has been no trend towards expanding. If anything the trend has been towards restricting the compass of absolute privilege.

MR TIZARD:

I understand what Your Honour is saying. My argument is you're not being asked to expand it. You're only being asked to recognise what is truly the case. That is that when a question is asked it cannot be answered but for the enquiry.

ANDERSON J:

What is the test for determining whether something is a proceeding in Parliament?

MR TIZARD:

Whether it forms part of the Parliamentary process.

ANDERSON J:

That's just restating the –

MR TIZARD:

Well, perhaps put another way, one could only give examples.

ANDERSON J:

Well hasn't the test really been whether it's conduct which is necessary for the proper functioning of the House?

MR TIZARD:

Indeed.

ANDERSON J:

And so that's the test we have to look at. Is it necessary for the proper functioning of the House that this type of situation should be immune from suit?

MR TIZARD:

No I wouldn't phrase it the way Your Honour has phrased it. I would simply say is it necessary for the proper functioning of the House that the Minister be able to make enquiries and that his enquiries be answered so that he can answer to the House. It –

ANDERSON J:

– one of these cases where the question determines the answer?

MR TIZARD:

Indeed. Because if you say is it necessary to have qualified privilege, you're begging the question, if I can put it that way. You're then getting into not, not to determining whether it's necessary for the proper functioning of the House, you're looking at the consequence and it's my submission that what you have to look at is whether or not this is part of the proper functioning of the House and going away and getting information is clearly necessary, in my submission, to answering a Parliamentary question. Therefore it's part of the process.

ANDERSON J:

No one is suggesting the Minister is able to be sued because he received the information.

MR TIZARD:

No.

TIPPING J:

Or spoke it in the House.

MR TIZARD:

No.

TIPPING J:

But why is it necessary for the proper functioning of the Minister in the House that someone who is motivated by ill will should be protected?

MR TIZARD:

Because the Minister wants to know that he will get free and frank information without fear or favour and that the civil servant will not be looking after himself in that process.

ANDERSON J:

It just seems a very fragile basis to deprive people of rights they'd otherwise have.

MR TIZARD:

You also have to have a look at the time-frame within which all this occurs.

ANDERSON J:

Should have to?

MR TIZARD:

Indeed because it's a, it's clearly a very quick process which of necessity must be prone to the risk of error –

ANDERSON J:

Well in this case there was a two hour window.

TIPPING J:

Look if it's innocent error, qualified privilege will protect you.

MR TIZARD:

Indeed. I accept it would but that's, I come back to the main point, that it –

TIPPING J:

It's the chilling effect on public servants I think is really what you're saying. They're going to be ultra-cautious, lest they be accused of ill will. I think that has to be your primary point.

MR TIZARD:

No, that's a subsidiary argument. My argument, it's all part of the one process. It is part of the proceedings of the House. That is my primary submission. You can't – in my submission you can't fairly categorise the making of enquiries as not being part of a Parliamentary process. It's like Parliament enquiring by way of committee. This is a different procedure. It's a written question. It's answered by a Minister with Minister having the responsibility to get the information. It's all part of Parliamentary process.

McGRATH J:

Is it fair to say, Mr Tizard, that your argument is that even if the events are outside of a Parliamentary proceeding literally, they are to be treated as within the term Parliamentary proceeding, if necessary for the proper functioning of the House?

MR TIZARD:

Yes.

McGRATH J:

Now that does throw the light back on what circumstances are necessary for the proper functioning of the House, doesn't it? And doesn't it throw light back on whether a qualified privilege sufficiently meets the need in that respect?

MR TIZARD:

I still want to come back to the original proposition that Parliament sets in process, it's the Parliamentary procedure for a written question to be answered.

McGRATH J:

Yes.

MR TIZARD:

And the Minister in making enquiries and receiving information undertakes that as part of the Parliamentary process.

McGRATH J:

Well let's just bear in mind that the Minister in doing this, say, is outside the Parliamentary chamber –

MR TIZARD:

Yes.

McGRATH J:

– he is now back in the Beehive and he's called the public servants over –

MR TIZARD:

Correct.

McGRATH J:

– and is talking to them there, we have a geographical separation, if you like, from the actual Parliamentary chamber or the proceedings and so forth and as I understood it you accept that that's, to bring that within what is a proceeding of the House we have to examine the situation to decide whether it is necessary for the proper functioning of the House that these answers be given and so forth?

MR TIZARD:

Indeed and if the answer to that question is that the material cannot be found within the walls of the House, then the House has to work to where the information is.

McGRATH J:

What I –

MR TIZARD:

For example, committees of the House have been known to sit other than in the House. They are nonetheless committees of the House and that's a proceeding in the House.

McGRATH J:

Well I don't think that's the situation we're dealing with here. We're dealing with a situation in which a member of the executive branch of government is calling on those who, within that branch, have constitutional duties to assist him and it seems to me, and I thought you'd acknowledged this, that the assessment we have to make is whether the, this particular part of the exercise is sufficiently necessary for the proper functioning of the House that – to, that it is treated as a proceeding of the House.

MR TIZARD:

But I want to go further and say more than that if Your Honour pleases. I want to say, he's not functioning merely as the executive of the Ministry. He is functioning as a member of the House, accountable to the House. So he's answering to the House.

McGRATH J:

So this is the senior public servant involved?

MR TIZARD:

In effect, he's answering to the House, he's answering to the Minister so the Minister can answer to the House. He knows, he's not simply answering to the Minister for purposes unrelated to the House, he's answering to the House.

McGRATH J:

I think we have to keep our concepts and language fairly focussed here. You have to focus on the concept of a proceeding of the House and what it is falls within that definition. Once we start sort of loosening up, it seems to be we're in danger of getting away from addressing and answering the two questions.

MR TIZARD:

I would want to go back further than that, and say go back to the Bill of Rights. And the purpose of the Bill of Rights was a contest between King, Courts, church and the Houses, that's what the foundation was, and the Bill of Rights says, what we do in the House is our business, and nobody else's business, and I sheet it right back to

that and say, this is a proceeding of the House, it starts with a Parliamentary question, it ends with an answer and what goes on between is all directly related to that Parliamentary process, it's Parliament's business to discipline, Courts don't enter. That's my basic submission.

McGRATH J:

Yes, I think I understand that Mr Tizard.

MR TIZARD:

So I'm really – what I'm really I guess submitting to your Honour, is that when you say, would this be an adequate defence or not, is really beside the point, I'm trying to get across the notion that this is so intimately connected as part of the Parliamentary process, you can't ask the question without the enquiries, it's all part of the proceeding of the House, and therefore it doesn't – the Courts don't go there.

ELIAS CJ:

What is your best authority for such a statement?

MR TIZARD:

I suppose the United States authority is as good as any. I know my friend says the constitutional situation is different –

ELIAS CJ:

That was the Senator, that was the legislative branch, and you have to take it back to our Westminster model.

MR TIZARD:

But the case goes so far as to say anyone who acts under his authority, has the like protection. If he does it himself, he does it by someone else. The someone else has the same protection as he has.

TIPPING J:

He's not doing this by someone else.

MR TIZARD:

Well, in effect the Minister is doing it by someone else. He doesn't have the answer, so he goes to the civil servant and gets the information on the basis of which he makes the answer.

ELIAS CJ:

But he's only able to get the information from the civil servant because he's the Minister, he's a member of the executive, as are the civil servants.

MR TIZARD:

But he is performing a Parliamentary function.

ELIAS CJ:

I understand, I understand the argument.

MR TIZARD:

That's where it comes from. The Canadian case of *Dowson v The Queen* (1981) 124 DLR 124 (3d) 260 (FCA), which my friend suggests is not a parallel, is indeed a parallel, because in that case the person who was to be sued, was the Assistant-Commissioner of the Royal Canadian Mounted Police, who was deputed to make the inquiry. Now, in that case the Parliamentary question was directed to the Attorney-General of Ontario and it related to the alleged conduct of the Royal Canadian Mounted Police towards members of a political party, so the Attorney-General then requested the Solicitor-General of Canada who had the authority over the Royal Canadian Mounted Police to make the appropriate inquiries.

ELIAS CJ:

Wasn't this a State immunity case, rather than a Parliament privilege case?

MR TIZARD:

But it raises the same issue in my respectful submission.

ELIAS CJ:

Well I don't think so, does it Mr Tizard, because that's about – that State immunity is something that can be asserted by the executive branch?

MR TIZARD:

Yes, but there is nothing on the facts to distinguish the comparative positions of the person who communicated the information, and Mr Gow vis-à-vis the Minister.

ANDERSON J:

But it depended really on the status of the actors –

MR TIZARD:

Indeed.

ANDERSON J:

– and the authority, simply that these were acts of State for which State immunity applied.

MR TIZARD:

Well one may argue that when the Minister deputes the civil servant to answer, to find information from him, the civil servant is in the same position.

ANDERSON J:

No doubt the third assistant secretary of whatever, will be quite pleased to learn that he's committing an act of State.

MR TIZARD:

Well I would not have thought the Commissioner of Police was a high civil servant on that argument.

ANDERSON J:

Well the Commissioner of Police has a special position constitutionally in New Zealand doesn't he?

MR TIZARD:

The Commissioner may, but an Assistant-Commissioner doesn't have the same position, it's –

ANDERSON J:

Anyway, the point I was making really is that that case was decided on an act of State basis and how do you extrapolate it to a Parliamentary immunity basis?

MR TIZARD:

Well it's the same principle of delegation, to do the act of the person who is charged with performing the duty, so all that Mr Gow is doing, is what the Minister could do himself if he had the time.

ELIAS CJ:

Is there any particular passage you want – I haven't – I've looked at the head-note to the case and that's all.

MR TIZARD:

I don't think so Ma'am.

TIPPING J:

What you're trying to do is to use the delegation reasoning in this case –

MR TIZARD:

Indeed.

TIPPING J:

– and transfer it across to our case.

MR TIZARD:

Saying it's the same principle.

TIPPING J:

Yes, I think that's a long shot.

MR TIZARD:

But certainly I would rely on the Supreme Court of the United States as establishing that same principle.

ELIAS CJ:

Where do we find that case?

TIPPING J:

It's 132 I think.

ELIAS CJ:

Gravel.

TIPPING J:

Gravel.

MR TIZARD:

Yes, 132 in the first bundle of authorities. Now I may add that throughout that case you'll see discussion with the Bill of Rights so that the – what is known in the United States as the Speech and Debate Clause, is regarded as being essentially the same as the Bill of Rights, freedom of speech and debates. And it's in the head-note on the first page, it's the speech and debate clause applies, and not only to a member of Congress but also to his aide insofar as the aide's conduct would be a protected legislature, legislative act performed by the member himself.

TIPPING J:

But what about the second holding? 'Publication had no connection with the legislative process'.

MR TIZARD:

Well this was a case about the legislative process, whereas –

TIPPING J:

It has to be a necessary connection, one would infer from that, with the legislative, in this case the Parliamentary process.

MR TIZARD:

Well that was because it was a legislative cut –

TIPPING J:

Yes.

MR TIZARD:

In my submission here, what we're talking about is answering a Parliamentary question, so my answer to that is, that what Mr Gow does must necessarily relate to enabling the Minister to answer the question, and I submit it does.

TIPPING J:

Clearly he was assisting the Minister in answering the question, but the real question is whether that was necessary, whether the protection sought is necessary for the proper functioning of the House isn't it?

MR TIZARD:

Well again, I demur from answering it in that way.

TIPPING J:

Well I can understand why.

MR TIZARD:

And my submission is that –

TIPPING J:

Because you can't –

MR TIZARD:

– is it part of the one process.

TIPPING J:

But if you had to answer that question Mr Tizard, and I'm not asking you to, and if you don't feel inclined, but how would you suggest it was necessary?

MR TIZARD:

Because the consequence of not doing so, will be to expose the member or the Minister, and that's illustrated in this case, at least on the pleaded facts thus far. If you get a disjunct between what the Minister says to the House and what the civil servant may have said to the Minister and we are not in the position of any decided facts here but the potential for the Minister saying something different from what the civil servant has said, then opens an inquiry as to what was said in the House.

Turn it round another way. Sue only on the publication to the Minister. The plaintiff starts off with relying on essentially what the Minister said in the House as evidence of what the civil servant said and pleads it but without relying on the actual words. The civil servant then denies having said that to the Minister. You are then in the situation where what is being said in the House is being impeached as a true and

accurate record of what the civil servant said to the Minister. He's in conflict and he's challenging the Minister.

Now in my submission, it is undesirable to go behind that process. The whole point of the Parliamentary process is the Minister answers for what he says to the House and if the Minister is wrong, then the Minister is accountable and the civil servants to him and to the House, not elsewhere.

McGRATH J:

This doesn't seem to have been much of a problem in practice Mr Tizard, does it? I mean, we don't have hundreds of cases of people saying that the public servant said this to the Minister in the private office that they have with only the two of them there. You know, there is a sort of an air of unreality about all of this which, I know on the pleadings of this case, proves to be an exception but it's not a common problem.

MR TIZARD:

No but whether it's common or not, if Your Honour pleases, doesn't affect what the proper principle is.

McGRATH J:

But when we start shaping the principle, there are countervailing issues here. There are other values to be taken into account, including the right of a citizen who considers he has been defamed, to bring proceedings and unless there is a real problem with inhibiting the Minister in discharge of Parliamentary duties, it does seem to me that there is a reluctance to extend the law to cover situations which are largely academic, will never actually occur.

MR TIZARD:

But of course, although I haven't as yet taken your Honour with me, I'm arguing that you're not extending the law. I'm simply arguing that this is and always has been part of the Parliamentary process –

McGRATH J:

Well we would be stating the law in a way that's new to the extent that you haven't yet be able to produce a case that we can follow.

MR TIZARD:

I think it's fair to say that there is no case directly on the answering of a Parliamentary question and my answer to that is that's because no one has ever dared run the issue before and of course, looked at in practical terms there will be very few plaintiffs who are likely to challenge a civil servant on the grounds that they were primarily motivated by malice. If there – plainly, there is at least a qualified privilege situation. So prima facie there's a defence to a claim and you've got the daunting task of proving that when the civil servant was answering the Minister, the civil servant was predominantly motivated by ill will in providing the information to the Minister. That's quite a fair hurdle, so it doesn't surprise me that there are no cases in this situation.

From recollection, looking at the Parliamentary Privileges Committee's discussions in the UK about what things are or are not protected, they certainly seem to have regarded material prepared for the purposes of answering a question in the House as being subject to the privilege. Now, it –

ANDERSON J:

Suppose Mr Tizard, that Mr Gow had said to someone subordinate to him, "I haven't got time to look this up, go and find out for me." What that person told Mr Gow, would that be equally privileged?

MR TIZARD:

I would say it would have to be.

ANDERSON J:

And anyone else down the chain?

MR TIZARD:

Yes, so long as they know the purpose for which it's being required. I think it's different if they don't know what the purpose is.

ELIAS CJ:

Well why, why would it be different if they don't know the purpose, if you're talking about this necessarily being part of Parliamentary proceedings, it shouldn't matter what they think?

MR TIZARD:

No, you're probably right Ma'am because it's the purpose for which it's being done, not the knowledge of the individual. Yes, I think I'd have to accept that.

ELIAS CJ:

I'm not sure that I followed why you said this would be questioning the proceedings in the House, the statement made by the Minister. Were you saying that a few moments ago, I was trying to think why?

MR TIZARD:

Well when this proceeding was heard in both the High Court and the Court of Appeal, one of the issues was, was the publication in the House, a republication of what Mr Gow said and both Courts held, in effect, that would be challenging what was said in the House.

ELIAS CJ:

Yes.

TIPPING J:

That was a hopeless argument.

MR TIZARD:

Yes.

TIPPING J:

I mean, whether or not it was a republication, it was protected by privilege.

MR TIZARD:

Yes but it was argued –

TIPPING J:

Was it really?

MR TIZARD:

Yes, it was argued that the –

TIPPING J:

But I thought your – the point I think the Chief Justice is referring to, was raised by you as part of your disjunct argument which I found quite subtle and I'm not sure that I've fully grasped it either.

MR TIZARD:

Well, if in, if in – take this, let, let us say – is the Minister a compellable witness?

TIPPING J:

Well, as to what –

ELIAS CJ:

Well, why does it matter?

MR TIZARD:

As to what was said to him by the civil servant. Not what he said in the House, what was said to him by the civil servant. If you say this is actionable, then he must be a compellable witness and if the Minister is then to say what he says in the House was what the civil servant told him and then the civil servant says, "I did not tell him that, he made that up, he embellished that," the civil servant is then challenging what is said in the House.

ELIAS CJ:

But it goes nowhere.

MR TIZARD:

But –

ELIAS CJ:

It's not a questioning of what the Minister said in the House.

MR TIZARD:

But it is, it is – I would want to go so far as to say, in reality it is, it's sophistry to say it's not. The Minister has said something in the House, now he's being challenged in Court by the civil servant about his honesty and his credibility and what he –

ELIAS CJ:

But how is what –

MR TIZARD:

– told the House –

ELIAS CJ:

– he said in the House relevant to whether the public servant defamed someone in information given out of the House?

MR TIZARD:

It is true they are different publications but in challenging what he said to the Minister, the civil servant is necessarily challenging what the Minister said to the House because the Minister is saying, "I told the House what the civil servant told me, this is what I was told," and the civil servant is saying, "I didn't tell you that," and what –

ELIAS CJ:

Well that's a matter then for –

MR TIZARD:

– you told the House is wrong –

ELIAS CJ:

– but that's a matter then for the Parliamentary Privileges Committee if it wants to pick it up.

MR TIZARD:

Which is precisely my argument that why –

ELIAS CJ:

But how does it –

MR TIZARD:

– the Court should not get there because the Court – you then have a conflict between what the Minister said in the House, what the Minister says in Court, who, what sanctions are available against the Minister in the House and what sanctions are available for what is said by the civil servant to the Minister.

TIPPING J:

Are you saying there's a risk that the Court will find indirectly that the Minister did not speak accurately to the House?

MR TIZARD:

Correct.

BLANCHARD J:

How does that square with *Buchanan v Jennings*?

MR TIZARD:

Buchanan v Jennings was what I would call a republication case. It was simply –

BLANCHARD J:

But it still could be said, on the type of argument you're advancing, to involve indirectly questioning what the Minister said in the House.

MR TIZARD:

It may and there's an argument that I would have advanced for not finding the way *Buchanan v Jennings* was decided because –

BLANCHARD J:

Well I don't think it was overlooked in *Buchanan v Jennings*.

MR TIZARD:

It may not have been –

BLANCHARD J:

The fact is that it was not accepted.

MR TIZARD:

– but it – it may not have been accepted but with respect it seems to me to be sheer sophistry to say to the man in the street that if you allow a separate proceeding in defamation where a civil servant challenges the voracity of what a Minister said to the House, you are not challenging what the Minister said to the House. It is –

McGRATH J:

Mr Tizard, there is some discussion in Australia, isn't there, this issue, by Gareth Griffith or someone like that. Doesn't he – I think there is some support for your analysis of this in something I've read somewhere.

MR TIZARD:

I think that's –

ELIAS CJ:

It's in the submissions, isn't it?

MR TIZARD:

It's pure submission, yes. It's academic.

ELIAS CJ:

You refer to it in your submission or someone refers to it in –

MR TIZARD:

Yes I think –

ELIAS CJ:

Maybe Mr Pike.

MR TIZARD:

I think Mr Pike did Ma'am. I think he has Griffith or have I. No I have. It's 161 of volume 2. Yes I think it's probably in section 3 which runs from 11 to 15 of his article.

BLANCHARD J:

Well he doesn't like *Buchanan v Jennings* either.

MR TIZARD:

No, no indeed.

McGRATH J:

If you just pinpoint the passages. I'd certainly like to focus on them later.

MR TIZARD:

He starts with the two lines of thoughts at page 181.

McGRATH J:

Yes.

MR TIZARD:

Deals with *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) and he treats cases of subsequent publications is what he calls the historical exception at paragraph 3.3 which is at page 183.

ELIAS CJ:

That's picking up on Mr McGee.

MR TIZARD:

Yes indeed at page 186 and he then goes on to deal with that aspect at page 187, separation of powers. So in effect what he's doing is –

TIPPING J:

You can't avoid *Buchanan v Jennings* on the republication route here.

MR TIZARD:

Yes.

TIPPING J:

You've got to take it head on I think because if *Buchanan v Jennings* is right this indirect attack issue is really foreclosed against you.

MR TIZARD:

Indeed.

TIPPING J:

Although I differed in *Buchanan v Jennings* I must accept that *Buchanan v Jennings* represents the law. Well not absolutely but it is a jolly good start.

MR TIZARD:

Well I will be so bold as to invite you to depart from that for this reason, that you do have the conflict, and a case such as this really highlights it. One can understand a historical, in what I'd call the historical subsequent publication cases why one starts with a proposition that all we are doing is making sense of the subsequent publication because of what people already know. In fact I often have mused about whether one could overcome the hurdle of producing what was said in the House by simply producing what was reported to have been said in the House.

TIPPING J:

Well that, in effect, is the substance of the *Buchanan v Jennings* reasoning, is that you're not really attacking it. You're just using it in aid of what the meaning is.

MR TIZARD:

But if you then – but the foundation of any defamation claim is that the publication is false.

TIPPING J:

Precisely. I'm not necessarily agreeing with that line of reasoning.

MR TIZARD:

Indeed and that's the difficulty.

ELIAS CJ:

But questioning on the *Buchanan v Jennings* approach, questioning is calling to account in another forum. It doesn't mean that in fact you can't question.

MR TIZARD:

Well I think it's fair to say that the way the Bill of Rights has been construed, and in my submission rightly, is that it doesn't stop you from discussing or criticising anyone.

ELIAS CJ:

No.

MR TIZARD:

But what it does is to preclude any legal consequences –

ELIAS CJ:

Yes.

MR TIZARD:

– and that is the point here, that there would be legal consequences.

ELIAS CJ:

Not for the Minister. As to what he says in Parliament.

MR TIZARD:

So just to follow that up one stage further, yes the Minister might be categorised by the Court as having politely 'failed to understand' what the civil servant had said to him. Does that not then open up the possibility of someone complaining that he has misled the House?

ELIAS CJ:

Well then it's a matter for the Privileges Committee of the House.

MR TIZARD:

And then you have the conflict between an adjudication by the Court and an adjudication by the privileges committee.

ELIAS CJ:

And the Privileges Committee has the say on it. The Court isn't dealing with the matter.

MR TIZARD:

And what if the privileges committee decides differently from the Court or wishes to do so?

ELIAS CJ:

Well it's the authoritative determiner.

MR TIZARD:

So we have a conflict.

TIPPING J:

Mr Tizard, I think the more substantial point that you might be able to raise is this. That the civil servant who hears the Minister say "I was told such and such by the civil servant" in the House, cannot defend themselves on the basis that "I didn't say that to them".

MR TIZARD:

Indeed, because you can't raise it. In fact, in fact one might argue, even on the pleadings I have here, that it is challenging what's said in the House.

TIPPING J:

Well it certainly would be challenging for the civil servant to have to go in the box and say "I never told the Minister that".

MR TIZARD:

Indeed.

TIPPING J:

And that, I think, is at the core of this problem. Whether the theoretical possibility of that happening is enough to require absolute privilege.

MR TIZARD:

It's why, in my submission, one shouldn't go there in the first place and why one leaves it with the House, because it's proceeding of the House. The beauty of the solution that I'm contending for is you don't get into those problems.

TIPPING J:

But didn't they have a similar issue in *Prebble*?

ELIAS CJ:

Yes.

MR TIZARD:

Yes.

TIPPING J:

That the person couldn't defend themselves?

MR TIZARD:

Yes.

TIPPING J:

Therefore certain consequences followed.

MR TIZARD:

And the Court of Appeal came up with a very neat solution which was stay it.

TIPPING J:

Stay it. Which is, well –

ELIAS CJ:

Fine if it's the plaintiff, isn't it.

TIPPING J:

Yes.

ELIAS CJ:

That he's seeking to take advantage of.

MR TIZARD:

Well the – I'm sure it's been commented elsewhere. I'm not the first to make this observation, but that is one of the consequences of absolute privilege, or any kind of privilege or immunity, that there will be cases which give rise to what are perceived to be an injustice to one party or the other. Trying to deal with all circumstances so that there, so that you avoid that situation is not possible.

TIPPING J:

Of course if the publication that's actionable is only between a civil servant and the Minister, although there has been defamation the publication is extraordinarily limited.

MR TIZARD:

Indeed. One would wonder why anyone would want to proceed with a case like that but in theory you can.

TIPPING J:

Yes well that, could that have a bearing? On whether it's best to grasp the nettle and say well we'll have absolute privilege anyway?

MR TIZARD:

In my submission it doesn't have a bearing because at the end of the day it's the principle that's at stake. The fact that there maybe logistical difficulties in many cases doesn't alter the true principle underlying the situation.

TIPPING J:

Because it would be to your client's favour if it did impact because it would mean that you weren't fencing out other than the most theoretical claim.

ELIAS CJ:

Well, except there are those authorities that say the, what occurs in the House, although privileged, is relevant to assessment of damages. Is that right?

MR TIZARD:

Not that I'm aware of Ma'am and I would resist that most vigorously. That's like a republication.

ELIAS CJ:

I think there was some reference to that.

TIPPING J:

You can't, I don't think you can increase damages by saying there was a limited publication but it got blared all round the country because of what the Minister said in the House about it.

MR TIZARD:

Indeed.

ANDERSON J:

That was pleaded though, wasn't it?

MR TIZARD:

It was. That's exactly what was pleaded.

ELIAS CJ:

Maybe that's what I'm thinking of.

ANDERSON J:

It was a very odd pleading too in relation to the way that the prayer for exemplary and aggravated damages is stated. As if they're quite independent of general damages.

MR TIZARD:

Indeed.

ANDERSON J:

What I thought was the proper way to plead is to say that the general damages ought to be increased for the following aggravating reasons. The same for exemplary, that's traditional.

MR TIZARD:

Yes. There is a requirement under the Act now, of course, to set out the circumstances, facts and circumstances that give rise to exemplary damages –

ANDERSON J:

There always was a requirement to give particulars but –

MR TIZARD:

Indeed.

ANDERSON J:

– it's just, there seems to be a fallacy these days that exemplary damages are a discrete item of damage.

MR TIZARD:

Indeed. Indeed.

ELIAS CJ:

Mr Tizard, what remains for you to cover in your argument?

MR TIZARD:

I think I've really covered the essence of what I believe to be the true issue that's confronting the Court. There are other incidental matters which I am happy to deal with if your Honours wish me to. I don't know whether it's of any assistance to you at all but there is reference in my learned friend's submissions to the passage of the Defamation Act and the existence of a definition in the Bill about the meaning of the term "proceedings in the House" that did not make its way into the Act and I am happy, if your Honours wish, I don't know if it takes us any further to tell you that the Committee, the Select Committee which dealt with the matter, decided it was too problematic and it would cause more problems than it would solve so they parked it and I can give you the Hansard reference if you wish it but I really don't think it advances us any further on this argument here today. But for completeness that's what did actually occur. Of course the McKay Committee was reported in December 1977. The Bill didn't come before the House until the end of 1988. The Committee reported back on the 3rd of October 1989 and in between that time we had the decisions of Justice Hunt in NSW on the *Murphy* cases which resulted in the enactment of the Commonwealth Privileges Act which Your Honours have a copy of. Section 16 in particular relied on that, that was the direct result of the *Murphy* litigation and how the House of Australia thought the matter needed to be dealt with in order to avoid the consequences of the decisions made in the *Murphy* cases. But unless your Honours have any other –

TIPPING J:

The listed cases that you want to build on, if at all, the reference to increasing the damages is in the Griffith paper at 194 by reference to a Queensland Court of Appeal decision –

MR TIZARD:

Erglis v Buckley.

TIPPING J:

– *Erglis v Buckley*. I just mention that in case anyone's wanting to do any more on that. Highly debatable I would have thought.

MR TIZARD:

Indeed. In fact some reasoning in *Erglis v Buckley* leaves a bit to be desired with respect. That was a case where, as I recall it, the Minister was not sued but the subsequent publication was.

TIPPING J:

And they added to the damages by reference to what the Minister had said –

MR TIZARD:

Said in the House.

TIPPING J:

– in the House.

MR TIZARD:

Which plainly, at least so far as we're here today, wouldn't apply in New Zealand because thanks to the Court of Appeal's decision in this case, it plainly covers that as being impermissible. So that would no longer be an authority for us. So that really deals with me unless your Honours wish me to deal with any other matters?

ELIAS CJ:

No, thank you Mr Tizard.

COURT ADJOURNS: 11.26 AM

COURT RESUMES: 11.47 AM

ELIAS CJ:

Yes Mr Pike.

MR PIKE:

Yes, may it please the Court, the case from the Speaker which the Court will note is a – commences by declining to submit – there has been an occasion of privilege here and has placed the matter in the hands of the Court, is the proposition and the case starts with two propositions, that firstly, this is before I get to the written material that the Court has, firstly the submission is that this case is not about a defamation shield of any sort for State servants or anybody else communicating with the Ministers. There is a corollary to Parliamentary privilege which has that effect but it is not the

Speaker's role to protect the executive or members of the public in relation to their communications with members of Parliament. That is something that may, as we've submitted, incidentally follow but the core of his case is concerned with whether or not article 9, the freedom of speech in the House, is engaged on the pleadings in this case and which he submits is not a novel claim to privilege, when I speak about a new privilege we're simply talking about whether the freedom of speech in the House, in the context of course which Mr Tizard has spoken of earlier, is engaged and whether or not the courts might extend what might be called their protective jurisdiction in relation to Parliament's privileges and its role in a democratic society.

The purpose of the Speaker is to make a modest proposal, as he would submit it is, which is not, in the words of Lord Rodger in the *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684 case, is not intended, by raising the words 'privilege of the House', to dazzle, it is intended to modestly seek a protection for the supplied information in relation to a proceeding in the House. If that has the effect of immunising, as it were, a public servant, or for that matter anybody else, from suit then so be it but that is not the purpose, of course, of the assertion of the privilege.

In this case, we take it as uncontroversial that there was a proceeding in the House to which these events relate and that proceeding of course was the asking of a series of questions by members of the then Opposition which began on the 20th November in 2007 and went through to the 21st where there were another series of questions on the same topic and which led to the production of the written notes, the memo which is sued on in the first cause of action to the Minister from Mr Gow and then there was of course the answers to the questions on the 22nd.

There was another further burst later on on the 22nd but that's irrelevant, on the same point, but what the submission is, with respect, is that there can be little doubt that Parliament was engaged through its members' questions and of course approved for asking by the Speaker, was engaged in an inquiry or an examination into the Minister's – the conduct sorry, of employment relations in the Minister's department. The essence of the allegation is well known to the Court, that the Opposition had sensed political interference at the highest level was occurring in that department by dint of the replacing of one contracted party, the plaintiff, by another, who was seen as a political lackey of the then Government inserted to do its bidding.

This was a matter of concern to the House. The questions were asked. The Minister then, we say, the Speaker points out, the Minister is then under the strictest of obligations to the House to give full and candid answers to those questions. In turn of course the Minister has to get information from his or her department, in this case his department, it was an acting – because it was an acting Minister who was dealing with the actual questions on the floor. The information was provided in two ways. One was by a briefing note, short briefing note, on what Mr Gow, or what the State, public servant believed to be the circumstances of the plaintiff's departure from office, the contract office she held.

The second cause of action was based on oral communications, a briefing of the Minister. By this time the State Services Commission was involved. So there was a briefing, outside obviously, the walls of the debating chamber, in the executive wing, by those two departments and the Minister then went into the House and answered the questions asked of him, acting on the basis of the information given.

So what the plaintiff sought to do was to sue in relation to and I think it's fair to say the Court of Appeal makes no bones of it and nor does the plaintiff, to sue on the basis that the defamation had – there were defamatory comments, they were false and defamatory of the plaintiff. The real sting of the defamation came because of what the Minister had said in the House and of course we don't need to re-traverse about republication, or can you aggravate damages because of that, but that is the sense of the proceeding which is nevertheless important to grapple with because that is why the Speaker is here. There is extensive reference to Parliamentary materials including, for the second cause of action, and I trust I'm not wrong on this, I'll be corrected immediately from either flank – but the second cause of action, as I understand it extant, does require an examination of what the Minister said in the House for the purposes of drawing inferences of what the State sector agents must have told the Minister in the oral briefing.

So to that extent there are two very clear steps, or two very clear issues as to the use of Parliamentary materials. The first cause of action is the written material, so that does not require per se the production of the record of the House to establish it, it stands at – construed in its own right. The oral statements however, are very different. That part of the pleading does require an examination of the records of the House for the purposes of impeaching indirectly the Minister clearly but directly in

terms of legal obligations, suing the civil servant which the House would submit and that's that side of it, that second use is a clear breach of the privileges, his privileges.

The first one rests on a different basis. The basis the first one rests on is that the Speaker respectfully submits to the Court that the – essentially that if the lines of communication to the House are interfered with by a plaintiff in joining a jurisdiction of the Court, then the ability of the House to be fully and frankly appraised of the facts and circumstances of a matter it is inquiring into, may evidently be compromised and the – my learned friend Mr Tizard, has indicated how that might happen. The Speaker certainly would support the idea of chilling, the idea that if the civil servant is subject to attack, collateral attack as it – be that as it may, via defamation or whatever, or breach of confidence, whatever it might be, that that will affect the flow of information which the House would see as vital to the fundamental democratic role it has. That is the second major –

ELIAS CJ:

But the interest is in full and frank information provided with malice?

MR PIKE:

Well with respect, the House, as Mr Tizard has said, if it is provided with malice then that is a question of so be it. That is a matter which would be a breach of the privilege of the House immediately and the civil servant would be expected to be brought before the privileges committee of the House and if that person had acted dishonourably in that way, that would be where the matter should be resolved. We say that it matters not these – the difficulty is with Parliamentary privilege in the sense it is all-encompassing. It matters not what is provided to the House or under what circumstances. The question – the point the House would make is that it has mechanisms to deal with that.

Firstly, the correcting statements within the House itself, where there's a right of reply in latter – there has been in the last few years, for a statement to be made by the agreed person, to be read into the record of the House, refuting what was said by a member of Parliament. The second point of course is the fact that the malice of the – or the notional malice of the State servant involved would be dealt with in two ways. One by the Privileges Committee. The other one would be thought by the State Services Commission. These would be grave misconduct –

TIPPING J:

Is this –

ELIAS CJ:

Why – sorry. Why isn't that questioning on your argument?

MR PIKE:

Well –

ELIAS CJ:

I mean, would disciplinary proceedings –

MR PIKE:

A disciplinary proceeding could well be –

ELIAS CJ:

Yes –

MR PIKE:

– in that sense. We've had – that occasion has arisen in relation to certain matters arising in the fishing licences case, in which case there has been a very fine line that had to be trod. Yes, it does engage the privileges of the House and very great care has to be taken to ensure that while the State Services inquiry is not a curial inquiry, it does not involve the exercise of a jurisdiction of another branch of government. It's certainly, we accept unhesitatingly, could involve a breach of Parliamentary privilege itself –

ELIAS CJ:

Well it does engage another branch of government. It engages the executive branch, on the argument that you're putting forward?

MR PIKE:

It does but without powers, curial powers, the –

ELIAS CJ:

Well why is that, I mean, I'm just trying to think of the text of article 8, 6 – sorry, what am I up to?

MR PIKE:

Nine.

ELIAS CJ:

Nine.

MR PIKE:

It's examining in any place out of Parliament.

ELIAS CJ:

Yes.

MR PIKE:

Shall the Court in question – or examined in any place out of Parliament – it has been increasingly the case that that provision primarily reflects the relationship between the judicial branch and Parliament. I mean obviously now in newspapers, public meetings, all sorts of places where people gather, and committees will discuss and criticise proceedings in the House. That is being, the House no longer asserts its privilege and has not done for a very long time.

ELIAS CJ:

But is that – is that a matter that engages the Bill of Rights Act at all, because, the Bill of Rights, sorry, at all, because it's not questioning in the sense of having any consequences.

MR PIKE:

No, well the difficulty there is the – there's the narrow view of questioning is that it must be of a sort that has consequences.

ELIAS CJ:

Mmm.

MR PIKE:

But that is the narrower view. The wider view is that what Parliament is protecting and what has bedevilled the debate, with respect, we can say for years now, is the production of its records. It was until 1980, very clear, and certainly the *Strauss* case made that point clear, *Dillon v Balfour* (1887) 20 LR Ir 600 made that point very clear,

we saw it immediately, that the question was always, and we say remains, but the question was always the jurisdiction of the Court versus the jurisdiction of Parliament.

ELIAS CJ:

Well what argument are you putting to us on behalf of the Speaker, what are you saying it means? It's the narrow version or the wider version?

MR PIKE:

Where the Speaker contends for a wider –

ELIAS CJ:

Yes.

MR PIKE:

But not, we say not intemperately so. The wider version in this case is that proceedings in the House or the production of the documents of the House is apt to prevent an inquiry by a Court into the information given to the Minister who was under direction of the House. We don't go wider, I know the Court has tested Mr Tizard on the point, we do not go, or the Speaker does not wish to be heard on any wider question, although of course setting the rules of law may require such wider questions for the Court, but what we say, what the Speaker says, or the submission, is that the issue of getting, of Parliamentary privilege is a question of essentially admissibility, or jurisdiction. Either way the answer's the same. The fundamental proposition is that the record of the House is not admissible before a Court, and the Court should refuse to have cognisance of it. If the purpose of it, of adducing the Hansard in the House is contrary to the interests of Parliament, as protected by Article 9.

TIPPING J:

But this case doesn't directly involve producing a record thought does it? It involves simply whether or not this – the occasion on which this publication was made in the briefing note.

MR PIKE:

Half of it does, I apprehend, does involve a record.

TIPPING J:

Are you really adopting Mr Tizard's disjunct, if I can call it that for short, argument?

MR PIKE:

Well the oral – well the point of difficulty is, the pleading's based on two courses of action. One the note, the briefing note. Secondly, in matters to be inferred from what the Minister said in the House, it must be inferred from that that the person sued the defendant, had said additional things to the Minister which were further defamatory utterances.

ANDERSON J:

Wouldn't it require the production of the record though, although it wouldn't be a good practice, it's theoretically possibly to just to subpoena everyone who was there and ask them to say what they said. Just drive blind. You may or may not get the result you want.

MR PIKE:

Yes you may Sir, that is true. Whether that would be in a sense, even without the record, we say that the privileges of the House are engaged, because the messengers if we like, the House, the messengers for the House to bring information to the House are being impeached, and the House sees that as a breach of its privileges. That is the real point here. Because it interferes, it's not much different some ways from inhibiting a Minister from bringing a Bill before the House, and we've had *Mangawhero* where we – where the law was undoubtedly quite clear there, would be wrong, no presenting in the House utterly wrong to adjunct the Ministers was done, or the attempt was, to prevent the Minister from actually introducing a Bill, we've seen it driving at the fundamentals, and rightly so, of freedom of speech in the House. And here what we say is that even on the narrow, if we take Lord Phillips in *Chaytor*, even on quite a narrow necessity test, which we don't agree with, being its unduly narrow, that the necessity is that Parliament must be able to fulfil its democratic role, Parliament must be able to have untrammelled access to all relevant information to answer questions that's inquiring into. This proceeding –

TIPPING J:

The second course of action they seek to rely on what was said in Parliament –

MR PIKE:

Yes.

TIPPING J:

In order to infer what must have been said out of Parliament –

MR PIKE:

Yes.

TIPPING J:

But still allegedly as part of the proceedings of Parliament?

MR PIKE:

We say it was part of the proceedings of Parliament Sir, yes. Yes we do, they don't.

TIPPING J:

So the briefing note is direct, there it is on its face?

MR PIKE:

Yes.

TIPPING J:

And the second course of action relies on this double, or this inference from what was said in Parliament?

MR PIKE:

Yes. The Minister could have only said the things the Minister said because he was told them in an oral briefing. And in fact to show the compulsory process that was engaged and interrogatories were directed to the defendants in the case, in this case, to answer as to what they had said, and that answers Justice Anderson's point in a way that there was a – there's another way of dealing with this, certainly interrogatories were to be administered, to have everything that was said in that meeting.

TIPPING J:

So it's an evidentiary point rather than a – they can't sue on it directly for defamation –

MR PIKE:

No.

TIPPING J:

But they seek to use it in an evidentiary sense as proof of an oral communication?

MR PIKE:

Yes, they do. Which for the House is an improper use of its record. The reason it's done that is it's impeaching those who, at the, what we could see as the direction of the House, the servants of the House. In these sorts of inquiries the heartland of democratic accountability of a Minister, the Minister is the servant of the people and of course is accountable in the House for his or her department or other responsibilities.

TIPPING J:

Doesn't Article 9 use the word 'examine'?

MR PIKE:

It does use examine, call and question, examine. Impeach, call and question, examine.

TIPPING J:

Examine.

MR PIKE:

In any place out of Parliament, it uses those words indeed.

TIPPING J:

I mean the normal focus is on questioning, but here in relation to the second course of action, the sharper focus might be examining mightn't it?

MR PIKE:

It is examining, that is the most accurate word as to what would be happening.

ELIAS CJ:

Well then does that mean that we really shouldn't look at Hansard as an aid to interpretation? Because that would be examining what's happened in Parliament?

MR PIKE:

The answer to that is that the comity rule has really settled that, and that's what I'm coming to, we've lost sight of that part of the debate. But no of course the Parliaments in New Zealand, the New Zealand Parliament have for a very long time, as Lord Browne-Wilkinson observed in *Pepper v Hart* [1993] AC 593 (HL) itself, in New Zealand there has never been this inhibition on producing Parliamentary materials to assist the Courts. I mean as a matter of common law, as the Court will know only too well, the usefulness of those materials and recent decisions of the House of Lords before it was dissolved, were such that they overused, but that's another point. The point here is that in Pepper v Hart the Speaker of the House of Commons did assert the privilege of freedom of speech for fear of an inroad into it, and Lord Browne-Wilkinson said, "Well look, I hear what you're saying, but the inroad is such that as servants of Parliament in interpreting its commands, we need this assistance". So it was really with respect, don't be quite so precious about your freedom of speech and Parliament for its part in England, has accepted the outcome. The point here –

TIPPING J:

How do you reconcile this evidentiary point with *Buchanan v Jennings* where likewise it was said that's it's only being resorted to for evidentiary purposes?

MR PIKE:

Well with respect Your Honour the submission in respect of *Buchanan v Jennings* is that it's wrongly decided. The reason –

ELIAS CJ:

Well is that a necessary argument for you to make on your arguments to this Court?

MR PIKE:

Well to the extent we're talking about collateral use of Hansard it's impossible to avoid it and I don't want to make a, lead the Court into a confrontation with great respect on *Buchanan v Jennings* because it does represent the law as has been remarked.

ELIAS CJ:

Well then you can't make the submission that it's wrongly decided. I mean you've got to decide which you're going to do.

MR PIKE:

Yes. In the sense, certainly in the sense that the outcome is not what we were challenging. The sense was the way in which the Privy Council reached the decision that you could look at Hansard without a breach of Article 9 was not the correct way, that's the submission. The difficulty was in that case, and all cases involving Parliamentary privilege, is that up until 1980 – well I'll come back, sorry, I'll go back a few steps. Up until 1980 when the House of Commons passed a resolution abandoning the practice of requiring persons using Hansard in the Courts to seek to petition Parliament for consent to that – up to that point it was quiet clear that what Parliament was protecting was the introduction, admissibility of its record. It fiercely protected the records of the House, notably Hansard, or the Appendices to Journals, whatever it might be. These were fiercely protected. The Court, with great respect to what happened in *Buchanan v Jennings*, the Court had decided, well the Privy Council had held, that because of the 1980 resolution it was no longer required to petition Parliament therefore Parliament had allowed its books to be opened for purposes which the Court decided were a proper purpose, despite the fact that Parliament protested that its freedom of speech was impaired, by dint of doing that –

TIPPING J:

I don't think your evidential argument can succeed unless *Buchanan v Jennings* is wrong and I'm not trying to be provocative here. I'm just simply saying, I don't see how it can mesh with –

MR PIKE:

To the extent that – yes, the extent is that where the privileges of freedom of speech are engaged the fundamental issue for a Court is that if it accepts there is an occasion of privilege, and that the freedom of speech of the House is engaged, it must not look into the record. The difficulty with *Buchanan v Jennings* with respect is that there was a holding of the republication is seen, is really an outcropping of defamation law where –

TIPPING J:

But isn't the point this Mr Pike: that in *Buchanan v Jennings* they said you can look to what was said in Parliament in order to supply as a matter of evidence a meaning to what was said out of Parliament.

MR PIKE:

Yes.

TIPPING J:

Now you are here saying effectively you can look to what was said in Parliament in order to infer the meaning of what was said out of Parliament.

MR PIKE:

Yes you can't do that, that's the case, and I appreciate that the use of Hansard in those circumstances engages the privilege of freedom of speech of the House.

TIPPING J:

Well isn't that the end of the evidential argument? In other words the second cause of action argument.

MR PIKE:

Yes it should do Sir because the, there Hansard is being used contrary to the interests of the protection of freedom of speech in the House, to impeach not the Minister, well at least not directly, but it's certainly impeaching a proceeding in Parliament and it is certainly doing so for the purpose of imposing civil liability on a servant of the House, as the civil servant was at this stage, could be seen that way.

ELIAS CJ:

Well how do you say that? Where's your – are you going to take us to some constitutional principle that supports that proposition?

MR PIKE:

Well the fact – the support for it, with respect, was the position up until the 1980 resolution which has –

ELIAS CJ:

No, no, no –

MR PIKE:

– been followed in New Zealand.

ELIAS CJ:

– you're talking there about the privileges of the House in its record. What you just said was that the public servant is a servant of the House.

MR PIKE:

In the sense, well a messenger, could be seen as a messenger of the – of somebody who was asked to provide information. Using servant of the House in our constitutional arrangements is probably loose so we'll track back on that, I'm quite happy to because it's not necessary to say that. The person, the civil servant's duty could – which could be directly to the House, as my learned friend Mr Tizard has mentioned, it could be enforced in a quite different way –

ELIAS CJ:

Sorry, just holding on that point for a moment. The duty to the House would be no different from any individual summonsed as a witness by the House.

MR PIKE:

That's right.

ELIAS CJ:

Yes.

MR PIKE:

If there was a summons, an issue of a summons by the House, anybody is, all persons are subject to that. That is true –

ELIAS CJ:

I'm just trying to understand what you're saying is the role of public servants vis-à-vis the House in our constitutional arrangements.

MR PIKE:

The role, with respect, is an indirect one nowadays unless, as I said and I'm slightly, red herring to my own argument by talking about the summonsing, which we can come back to, the role though is to, is the Minister's alter ego in this case we would say, we come back to that position, that that person is – the public servant is the holder of the Minister's records which the House has demanded the Minister access for the purposes of answering its questions. So of course the state servant is

responsible to the Minister. It's not primarily responsible in this case directly to the House –

ELIAS CJ:

Yes.

MR PIKE:

– of course not. They're responsible, responsibility is to the Minister. To provide the Minister with the material and the Ministers that the – the Minister must in turn provide to the House. It would be different, and it is often different, where public servants are summonsed to Select Committees. They are primarily responsible then to the House. They must answer the summons contrary to the Minister's wishes if that be the case.

ELIAS CJ:

The Minister wasn't asked though, was he, for any particular material. He was asked to respond –

MR PIKE:

Oh yes.

ELIAS CJ:

– and he obtained information from which he made his response and his response is not able to be questioned?

MR PIKE:

No. No it's not. But what we're saying, with respect, is that it is so integral that what he did in the House, and what the public servant was under a duty to him to do –

ELIAS CJ:

I understand.

MR PIKE:

– was so integral to the process of the House receiving information, that it is very difficult to logically separate it from the same position as if the defendants in this case had been summonsed to a Select Committee to bring their books and records as to the treatment of the plaintiff in a dispute with the employer, in which case the public

servant must bring them. And we would have no difficulty, it is submitted, in saying that if the Courts were enjoined by the plaintiff to injunct that process the Courts would shrink away from doing so because either the exclusive cognisance rule or Article 9, either would suffice.

Here we say there is no other case, or Parliament's case, is there really such a material difference here where in order to fully appraise the House by command of the House in an enquiry into the Minister's department of all relevant matters that seeking to sue or possibly if they had prior knowledge of it, to injunct the supply of that information. We can look at it that way. If there was a lot of notice or a lot of time here this was going on, what if the plaintiff had sought to injunct the state servant from supplying the Minister with the information because it was wrong and defamatory. I'm not saying an injunction would succeed, because I understand from people who know an awful lot more about defamation than I do, that that's not necessarily an easy task where there's a defence where the case has an arguable defence. But theoretically the person could seek to go to the High Court and get an injunction because highly damaging defamatory material was to be provided by the state servant to the Minister for the purpose of the Minister answering a question in the House.

Now there with respect, the Speaker would say this is a clear and direct interference with the business of the House –

ELIAS CJ:

I thought the House was interested in truth, so how does supplying defamatory information assist the purpose of the House? Anyway, I'm sorry, we're just really probably batting this around and you should move on.

ANDERSON J:

Alleged defamatory information?

ELIAS CJ:

Yes.

MR PIKE:

Well alleged, well of course, I mean, the difficulty too is the Court will not be aware of, is that anything can be defamatory, even if it's true, it's a defence of course, it's was

an absolute defence if it's true but it's still defamatory. The difficulty with defamation proceedings, as my friend Mr Tizard has pointed out, the practical result is that masses of material that's provided to the House, I would imagine on a daily basis, could have amongst it elements of matters which could be sued on as defamatory. Hopefully most of them are in fact true so they won't be, or the privilege is such that it's clear the House should have it but the difficulty is the House, or the answer that the House would make, is that it must have untrammelled access to the information held by a department of State for which the Minister is responsible on the floor of the House to a question asked by the Minister which the House is pressing for answer.

In those circumstances we, with respect the Speaker, says that it is not a radical proposal to have recognised by the Courts the protection that Article 9, or the protection of privilege, covers that process to protect it from a flank attack, to protect the suppliers of information to the House. They should not be chilled or inhibited, or interfered with en route to the House with the materials that are properly required by the House.

So with respect, that is what the proposition is in this case and we are, with respect, the Minister is, is – wishes to submit that the Court of Appeal in this case, having gone quite some distance to recognising the point, had adopted such a narrow view of the protections of Parliamentary privilege that were untenable and they really failed to grapple with the underlying issue here which Parliament makes it clear to this Court, is really the essence of its concerns and that is that Parliament has, or Parliament, successive Parliaments have seeded to the Courts essentially, not only the question, the great question of whether a particular privilege exists which is now really an historic issue because Parliament will create no new privileges, or assert them but also has ceded to the Court, it comes to the Court, accepting as successive Attorneys-General have done in this country and in England, accepting that it is for the Courts to determine whether there is an occasion of privilege and so Parliament has yielded up its own jurisdiction and has historically done that really since the great clash in the 1830s of *Stockdale v Hansard* (1839) 9 Ad & El 1; 112 ER 1112 where the two institutions clashed bitterly for the last time.

Well at least, clashed in the Courts, there's certainly not an absence of bitterness in some subsequent days but the point is that, with respect, Parliament has now essentially ceded to the Court its own jurisdiction, such as in this case for instance, it would be unthinkable for Parliament to exercise its contempt powers in relation to the

pleadings but it could do so, that's the real point and that's where the comity issue comes to the fore, we submit. It could but will not do so and the case of the *In re Parliamentary Privilege Act 1770* [1958] AC 331 (JC), decided in 1958, made that very clear, that it was not incompatible with the 1770 Act as to – which allowed proceedings to be issued against parliamentarians in certain circumstances. It was not incompatible, that Act, for Parliament to nevertheless exercise its contempt powers in relation to proceedings laid against the House.

ELIAS CJ:

Mr Pike, all of this is really principally by way of background. What submissions do you want to make us that aren't in your written submissions and in respect of the exchanges that have already been exchanged?

MR PIKE:

Well the submission –

ELIAS CJ:

Because I think we do need to move on.

MR PIKE:

Yes, we are moving on Your Honour. The background, the critically important point we wish to make is to draw the Court's attention to statements not of Parliament but of the Courts, in cases still more though than our – seems outmoded perhaps. We do rely very much on what was said by all of Their Lordships in *British Railways Board v Pickin* [1974] AC 765 (HL), as to the point, the very point there is the relationship between the Courts and Parliament as such, that each senses the other's proper sphere of influence and avoids conflict.

We can't get any more specific than that. That is unfortunately the nature of the beast. In many of these cases, such as possibly this one, although we say this one is a sharper focus, it is the Court sensing whether it is within Parliament's prerogatives to deal with the matter of the supply of this information, without being inhibited by its messengers, or its servants being inhibited by legal process and for its part, Parliament will cede to the Court what is the Courts in sub judice in any other matter which it covers.

So we make the point that the judgment of the Court of Appeal, unfortunately in the Speaker's submission, has picked up on what is a very narrow view in *Chaytor's* case of Parliamentary privilege.

The outcome of course is right in *Chaytor*, of course the members who are fiddling the books should be brought to the Queen's Courts in a criminal trial but the very narrow test of necessity, as respectfully submitted, is not one which is necessary, that the law in this country, we say, should continue to be that wider and moderate expression of the law which starts in *Pepper v Hart* and comes of course in *Prebble v Television New Zealand*, to our own jurisdiction and which followed then of course *Hamilton v Al Fayed* [2001] 1 AC 395 (HL), that is the 'necessarily incidental', the idea that the Parliamentary Privileges Act in the Commonwealth of Australia, as Lord Browne-Wilkinson expressed it in *Pepper v Hart*, is broadly declaratory of that Court's understanding of privilege.

What the Speaker says in an amplification – oh sorry, of his, of the written submission which I will not go through because it's – the constitutional points have been made but what the particular point there is, that is made to be extracted, is that this is applying of information by a Minister – or to a Minister and from a Minister to the House, is such an integrated – so integrated into the proceeding of the House that it would, with respect –

TIPPING J:

Could I just interrupt you, I'd like to get this clear. You say we shouldn't adopt the narrow test of necessary for effective discharge of business, rather, a wider test of necessarily incidental to effective discharge of business?

MR PIKE:

Yes, not strict necessity but reasonably incidental to a proceeding in the House.

ELIAS CJ:

So it's reasonably incidental, rather than necessarily incidental?

MR PIKE:

Yes. It's a question of how narrow or wide you go. If you want to constrict the privilege of the House, of course strict necessity does that trick. If however, the submission is accepted that having yielded its freedom of speech to the Courts, the

comity for the Court for their part, as Lord Reid and all of the Lords and *Pickin* and of course Lord Browne-Wilkinson repeated, it's fundamental to this debate, is that the Courts for their part strive to avoid the conflict by an approach which recognises the importance of Article 9 in the context of a particular case.

TIPPING J:

Don't we have to reconcile in all this the rights of citizens to pursue remedies for wrongs done to them? It's the other side of the equation –

MR PIKE:

It is the other side – well in –

TIPPING J:

– we shouldn't concentrate solely on the – in deciding which of these two tests should be adopted.

MR PIKE:

Well, we are doing that in a sense. Yes, we accept that the remedies, the approaches to the Court, as an important – can be seen as an important value as the protection of the House in the fulfilment of its democratic role but what is said, with respect, in terms of the balancing exercise, is that it cannot be decisive that the person is denied access, a person in a particular case is denied access to law. What the person is denied is the ability, in most cases, is the ability to produce Hansard to advance their cause but this case has half, half of that is true in the second cause of action. In the first cause of action that's slightly more fundamental and that is the freedom of speech requires protection of the full and frank democratic exposure of alleged misdeeds, serious misdeeds in government departments. That, and ultimately if it's accepted, is a more important value than the right of a particular individual to claim money. It is not, the individual is not prevented from making, having a statement made to the House that what is said is defamatory and wrong and they are not, and of course the persons who serve the House or the Minister are not immune from State Services or Privileges Committee inquiry.

ELIAS CJ:

Well you make that point in your written submissions. I think we have got it on board.

MR PIKE:

Yes.

ELIAS CJ:

Is there anything –

McGRATH J:

Mr Pike, can I just ask, is your point really this. That something that occurs outside the House is nevertheless within the expression a proceeding of the House if it's reasonably incidental to something that's a proceeding of the House?

MR PIKE:

That is, that is actually occurring in the House, yes. That is actually occurring. There is an actual proceeding. Not one that might be, contemplated, we're not talking about Ministers who might make a –

McGRATH J:

Which in this case is that, particular questions that were asked of the Minister?

MR PIKE:

Yes, absolutely.

McGRATH J:

So on your test we must examine this matter according to whether it's reasonably incidental to the asking of the Parliamentary questions?

MR PIKE:

Yes. And the value to be protected is the value of accountability of Ministers and of Parliament to expose wrongdoing in the executive, in the public interest. But I don't want to say any more than that. I think we've – the written submission can be taken as read, may it please the Court, and it's proper to make those overarching remarks and I don't want to go further.

McGRATH J:

That would, that is an alternative to the *Chaytor* approach which requires the Court to examine what the adverse approach, the adverse impact would be on the business of Parliament?

MR PIKE:

It's not entirely inconsistent with it Sir and I would also submit that what Lord Phillips ultimately did say in *Chaytor* would, could very well cover, and I couldn't – what's happening in this case, it could not be absolutely predicted that His Lordship would have said in this case that privilege did not apply. It must be said that even on a narrower test this is so integral to the fundamental proceeding of the House, but we say that – but it is ultimately a modified *Chaytor* approach. That is it's not strict necessity which is too narrow a focus. It is whether it is reasonably incidental to what is happening, actually happening in the House, there is an actual proceeding. The House –

McGRATH J:

But it's not a test that requires that regard be had to the adverse impact of upholding the privilege.

MR PIKE:

Not the adverse impact Sir but certainly the rationale. It's – there is an element of that story mainly because our case is still that Parliament would, could well be deprived of information by the Courts, the ability of someone to prevent that flow. So there is an adverse impact element in what the Speaker is saying.

TIPPING J:

You're saying that adverse impact is not the test, it's the rationale for the test?

MR PIKE:

Yes, yes. It may seem unduly subtle Sir, but the overarching point is to identify whether Parliament is engaged in a process to which what is sued upon clearly relates as incidental to that process in which Parliament is engaged in and if it is then the Courts, in the interests of the relationship between the two great institutions of our democracy, should not have cognisance of legal proceedings designed to block the flow of that information.

ELIAS CJ:

Do we have, I can't remember, whether we've got the text of the Parliamentary question?

MR PIKE:

Yes, yes we do, they're in the record. They're in the case on appeal, tab 11, under the affidavit of Mr Lyn so they're there, yes. I should yield to my learned friend now, if the Court is –

ELIAS CJ:

Yes, thank you Mr Pike.

MR MILES QC:

Well now, I'm in this unfamiliar role of an Amicus but I would –

ELIAS CJ:

I wanted to ask you about that because –

BLANCHARD J:

How did you get appointed as an Amicus? I don't think the Court appointed you.

MR MILES QC:

Crown Law. Crown Law suggested that there ought to be somebody advancing the alternative argument.

BLANCHARD J:

Yes, but I think you're still appearing for the respondent?

MR MILES QC:

Well it wasn't actually the –

BLANCHARD J:

I mean, I don't think it matters much, except in terms of who pays you.

ELIAS CJ:

Which we're not concerned with.

MR MILES QC:

You're not, Crown Law has undertaken that –

BLANCHARD J:

Yes.

MR MILES QC:

– difficult role.

ELIAS CJ:

It's just a question of how you are accurately described because it seems to me that until the proceedings are discontinued –

MR MILES QC:

I think they have been, haven't they? No.

ELIAS CJ:

No, they haven't been –

BLANCHARD J:

But the deal was that they wouldn't be, I think.

MR MILES QC:

I, I, yes, yes.

TIPPING J:

You're still alive so to speak.

MR MILES QC:

But my client has given instructions to abandon the proceedings, so while I suppose I'm here technically in that role, I saw my role in the same –

BLANCHARD J:

Yes, understandably. It's just a question of how we describe you.

TIPPING J:

In the heading.

MR MILES QC:

I was hoping that distinction might be recorded –

ELIAS CJ:

Well, at the moment I'm minded and you can come back to us on this if you think that there is some objection to it, to describe you as counsel for the second respondent.

MR MILES QC:

I, in –

BLANCHARD J:

The respondent.

ELIAS CJ:

The respondent, is it, it's not the second –

ANDERSON J:

A concerned bystander, Mr Miles.

MR MILES QC:

In practice it's made absolutely no difference to my submissions Your Honour because –

ELIAS CJ:

No.

BLANCHARD J:

That fact was noted when the second copy arrived.

MR MILES QC:

But I certainly did see myself, or I looked at the submissions I suppose through the prism, as it were, of an Amicus to run the argument that I was asked to run. It was easy to run because it happens, I happen to agree with it and it's the argument I would have run if Ms Leigh had still wished to continue with the proceeding.

The only regret I have Your Honours, is that I am not going to be permitted to run the argument that we're entitled to rely on the record to indicate the extent of the damage. I would very much have liked to have run that argument but that wasn't part of –

ELIAS CJ:

We're all going to be spared that.

MR MILES QC:

Yes, that wasn't part of my brief.

ELIAS CJ:

No. All right, sorry, carry on Mr Miles.

MR MILES QC:

Your Honours, you'll have noted that there is a difference of opinion between my friends Mr Tizard and Mr Pike on the appropriate test. Mr Tizard accepts that necessity, as dictated by *Chaytor*, is the relevant test. That was made clear in his written submissions. Whereas my friend Mr Pike, places no reliance and indeed rejects that, that test and puts forward the different proposition that it's something that is reasonably ancillary to the role of Parliament. No authority for that proposition, Ma'am, that I'm aware of. At least there is authority for the proposition of necessity and indeed that's the test that I would suggest is appropriate.

TIPPING J:

But the authority for that is both indirectly *Chaytor*, but more directly *Vaid* isn't it?

MR MILES QC:

Yes Sir, quite, quite.

TIPPING J:

That the Supreme Court of Canada, directly –

MR MILES QC:

That specifically.

TIPPING J:

Specifically embraced the necessity too.

MR MILES QC:

Quite. What *Chaytor* has I think the same premise behind it, but it frames it more on the basis of defining what is the fundamental role of Parliament and what is

necessary to ensure that that runs efficiently. And the difficulty I think with the way that Mr Tizard framed his argument, necessity somehow embraces the requirement that absolute privilege be necessary in these circumstances and he has to ask I think, these questions: what is necessary for the proper functioning of the core business of Parliament? Secondly, the obvious response to that is honest and candid advice is necessary from the civil servants. What is not necessary is advice that is protected if it is dishonest or motivated in some way by malice or ill will.

ANDERSON J:

It's not a novel proposition though is it? Because one has absolute privilege as a witness in proceedings, even if one is perjuring oneself and the question is, is it necessary to spread the immunity so widely for the purposes for which it's recognised at all?

MR MILES QC:

Because the analogy of course is, I suppose, with the witness is the Minister and the Minister's totally protected and no suggestion for the moment that that should –

ANDERSON J:

That's fine.

MR MILES QC:

But how it could seriously be argued that extending protection to a civil servant to, in a sense, relieve the civil servant of any responsibility for dishonest or malicious advice, amounts to an efficient running of Parliamentary activities, is a proposition that is a very surprising proposition, and I think when balanced, as it has to be, against the other core values, and your Honours have discussed that with my friends, with the core values of the protection of reputation, an issue which has constantly concerned the courts over the last 10 or 20 years in particular, which is getting the balance right between the protection of reputations and the protection of free speech and how one looks at the defences of truth and honest opinion and qualified privilege and the courts have been looking at this, the Court of Appeal and this Court of course in *Simunovich* and in *Haines* in particular, where the sense has been that those defences of course are there, but they ought not to be extended when the effect is to impact on the right of citizens to sue, to ensure that their reputation remains intact. And the reason that one has to look so carefully at what is necessary here, particularly when moving outside the obvious core behaviour of the proceedings in

Parliament, within the four walls of Parliament, which is a phrase that actually has been used on a number of occasions, that one has to be so careful when you're moving outside of that because the effect of such protection can be seen in the proceedings that were – of extending that protection, can be seen in the impact that those statements in the House made on the reputation of my client.

I do invite Your Honours to go to the amended statement of claim, I think you'll find it at tab 5 in the bundle, if only to see exactly what happened. You'll see, we actually discuss it briefly in the first few pages of our written submissions, but what became, and certainly what is stated in the statement of claim is that the briefing paper which was produced very quickly, in a matter of a few hours and which contained a number of statements which were highly damaging at this level, and which were incorrect and we know they're incorrect because the Ministry took – it mightn't be an unprecedented step but I think I, it is safe to say an extremely rare step of publicly apologising for the wording of the memorandum and we set out in the amended statement of claim the wording of the apology and I do invite Your Honours to look at it because what the Ministry said in that apology was, well we regret that there were meanings taken from that memorandum which wasn't intended and we record formally that in fact her reputation and her work experience, when working for the Ministry, was impeccable: a conscientious and efficient independent contractor working for the various Ministries and that they regretted that the implication from the memorandum was to the contrary.

Now there's absolutely no doubt when you look at the memorandum – and it's in the statement of claim, there's absolutely no doubt why the Minister took the implications that he did because they're the implications in the memorandum and I can entirely understand why those statements were made in Parliament because the memorandum was written in a way that those implications were inevitable. What is extraordinary is that the Ministry then, some weeks later, after all the controversy had occurred, then delivers this public apology saying that those meanings weren't intended. Whether they were or not, of course, we will never know. But the fact is that on its own admission the memorandum was thoroughly misleading. So given that they have the defence of qualified privilege which of course we all understand, a privilege which is difficult to challenge for a plaintiff, you of course have to show that there's some element of ill will, some ulterior motive behind it, which is always difficult to do, but at least we start with the premise that the memorandum was misleading.

We also note and this is, I think, would have been significant factor, that the copies of the briefing paper were handed out to a significant number of people. We've actually listed it at [3.11] in my written submissions but it's in the statement of claim, but it also happened to include Television New Zealand and TV3.

Now I don't need to remind Your Honours that privilege can be effectively waived if the documents that are relied on have been disseminated too widely but you can just see this is part of the factual matrix, I suppose, leading to the issue of the proceedings. But it is also relevant I think when you're looking at the big picture as to whether there is a need to extend the protection sought by the Speaker and I can only say –

TIPPING J:

He's not suggesting that it should be extended to that sort of publication, he's only suggesting as I understand it, it should be extended to publication to the Minister?

MR MILES QC:

I'm not sure.

TIPPING J:

Well it would be hopeless to otherwise argue.

MR MILES QC:

One would hope not, one would hope not.

TIPPING J:

Well that's my view anyway.

MR MILES QC:

One would hope not.

ANDERSON J:

You said that the memorandum was passed onto the media by the Minister wasn't it, it's the Minister's publication of the memorandum, not Mr Gow's?

MR MILES QC:

I don't – Your Honour might have read the, might have a better memory of the record than I have. I was under the impression that we weren't aware –

ANDERSON J:

Well, whether it was a Minister or someone else from the Ministry, it was a different publication.

MR MILES QC:

The memorandum?

ANDERSON J:

The memorandum was published by Mr Gow to the Minister.

MR MILES QC:

Oh, yes.

ANDERSON J:

The delivery of the memorandum to the media was a different publication of the same material.

MR MILES QC:

I'm sorry Sir, of course it was a different publication, I'm sorry, I thought when you were talking about a publication you meant a different document. No, no, that's a separate publication.

TIPPING J:

And that's the one that I would've thought unarguably not covered by absolute privilege, might not even be covered by qualified privilege

MR MILES QC:

Well, I think it waives qualified privilege immediately.

TIPPING J:

Probably does, but we're not concerned with that.

MR MILES QC:

No. No, no. But you can see how in the real world, that, how these papers, which were prepared for a specific purpose, can be disseminated quite widely now the damage to the reputation can –

TIPPING J:

That doesn't really directly affect the issue does it Mr Miles, I mean, it's a bit of colour.

MR MILES QC:

I think it adds colour yes, yes. And it is colour really, but to say it adds colour your Honour perhaps is a little dismissive, it sets out I think the framework in which –

TIPPING J:

But we have to decide this case as if that hadn't occurred.

MR MILES QC:

Of course. Of course.

TIPPING J:

That's what I think.

BLANCHARD J:

Perhaps all it gets you is in the market.

MR MILES QC:

Yes Sir. Can I just take you to the – to what, I suppose, to those parts of my submissions where we set out what we think are the historical attitude taken to circumstances such as this, and your Honours will remember that when pressed, Mr Tizard was able to give you as his best authority only an authority from the United States, which I thought was a little ironic, given we're talking about a Westminster structure here, and one would've thought that if there was any authority relevant that would support my friend's proposition, you'd have found it somewhere in a system that had adopted the Westminster system, now you do. The only problem is of course my friend disagreeing with them, and that's of course *Chaytor*. There is no authority for this extended definition that my friend is talking about. What you go to though to give indications as to whether *Chaytor* is right or not, you start with

Erskine May on Parliamentary Privilege which I set out at [4.2], where, and this is the *Earl of Wilton* judgment, which is the support for that proposition, but it's not just the *Earl of Wilton*, it's been picked up by Erskine May, that the special position of a person providing information to a member for the exercise of Parliamentary duties has been regarded by the courts enjoying qualified privilege. In answer to I think His Honour Justice McGrath there is a specific reference in the judgment Sir, to the proposition that it might be absolute privilege, the Attorney-General argued it was absolute privilege and it was rejected so you'll see at the beginning of the judgment, that reference.

ELIAS CJ:

Sorry, you're talking about the –

MR MILES QC:

The Earl of Dixon, *Dixon v The Earl of Wilton*.

McGRATH J:

That was a constituent's case, wasn't it?

MR MILES QC:

Yes. I do make the point I suppose that when you look at section 13 of the Act, which talks about proceedings to the House, it does set out in the next subsection what publications would be privileged, there is a whole series of four or five examples of precisely what publications the Act regards as being privileged, you'd have thought that would've been the logical place to have also included publications of this nature if Parliament had intended that it covered those publications. The issue was discussed in the McKay report, and a recommendation from Sir Ian was that 'proceedings in the House' ought to be defined, and it was rejected by the House. That was the opportunity it had to deal with this – with these circumstances, and what I say is the conclusion one draws when from the rewording, if you like, of the 1992 Act, was that they considered these issues and specifically recorded the circumstances in which absolute privilege would be covered. Your Honours at [4.8] of my written submissions we set out what we say really are the two primary rationales for absolute privilege in the House. The first, freedom of speech, and that's of course what's guaranteed by Article 9; and, secondly, the exercise by Parliament of control over its own affairs, known technically as, "exclusive cognisance". Now, those are the two traditional rationales. The exercise by

Parliament of control over its own affairs has, as Lord Phillips and, probably, Lord Rodger as well, pointed out, has gradually been whittled away. It's still relevant Your Honours, because that was the basis of the *Al Fayed* decision, where the courts recognised that the, what the investigative office that was set up to keep an eye, if you like, over the affairs of the House, was a creature of Parliament, controlled by Parliament and overseen by Parliament and, in those circumstances, it had absolute privilege. So you can see exactly where the distinction can be, and the distinction in that case was between that grouping, if you like, or that regulator, and the Ombudsman. The Ombudsman was something quite different and was outside the control of Parliament and, in those circumstances, could be reviewed.

I thought that I would just quickly take your Honours through the relevant paragraphs, I suppose, in particular of Lord Phillips' judgment in *Chaytor,* because it does bear close reading. The Court of Appeal followed it and I will be inviting Your Honours to follow it. It's the first tab of volume 2 of the Oakley Moran [Appellant's] bundle of authorities. You start – I think we really start at paragraph 28, where his Lordship's quoting Erskine May and talking about what the definition or the term, "proceedings in Parliament", what it means, and adopts the paragraph set out there, where he says, "The primary meaning of 'proceedings' –

ELIAS CJ:

Sorry, what paragraph is that?

MR MILES QC:

Paragraph 28.

ELIAS CJ:

Thank you.

MR MILES QC:

"The primary meaning of 'proceedings' is usually a decision taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, the whole process, a principal part of which is debate, by which it reaches a decision." So, that's the big picture, if you like. And the next paragraph, at 29, they note the *Bradlaugh v Gossett* (1884) 12 QBD 271 dictum from Lord Coleridge, "What is said or done within the walls of Parliament cannot be enquired into in a court of law," and this concept of what is done within the walls of Parliament

is something that pervades the following judgments. At [32] they find the comments of Lord Browne-Wilkinson in *Prebble* of limited assistance when considering the extent to which article 9 applies to actions that are incidental and some way connected to proceedings in the House.

Interesting comment by Viscount Radcliffe in *Attorney-General of Ceylon v De Livera* in 1963, and a very helpful comment, if you just see at the bottom of the quote at paragraph 33, or rather on the bottom of that page: "The answer given to that limited question depends upon a very similar consideration: in what circumstances and in what situations is a member of the House exercising his real or essential function as a member, given the proper anxiety of the House to confine its own or its members' privileges to the minimum infringement of the liberties of others? It's important to see that those privileges don't cover activities that are not squarely within a member's true function," to which I say, "That must be absolutely right," and I would invite Your Honours to pick up on that dictum.

ELIAS CJ:

Mr Miles, I'm just conscious that it's 1pm. Do you want to – you may be some time with this case, right?

MR MILES QC:

I'll be five to 10 minutes, Your Honour, yes.

ELIAS CJ:

Yes. If that's suitable, we'll take the adjournment at this stage.

MR MILES QC:

Absolutely.

ELIAS CJ:

Thank you.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.17 PM

MR MILES QC:

Yes, I was taking your Honours through *Chaytor*, and I think we're on paragraph 33. Could we move then to [47], which I think is probably the heart of the judgment, where his Lordship said, "The jurisprudence to which I have referred to is sparse, doesn't bear directly on the facts of the appeals, but it supports the proposition that the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it's necessary to consider the nature of that connection and whether, if such actions don't enjoy privilege, that's likely to impact adversely on the core or essential business of Parliament."

So, the essential question then is not to see whether there's some possible connection, some link between the external activities to the House and the activities in the House. There'll be all sorts of activities of which they will be a necessary part of, the issue always is whether that necessary further element ancillary to the main core business needs the further and, what I would say, draconian level of protection sought by the appellants, namely the absolutely privilege. And the answer from his Lordship is that you take a narrow approach to this and, unless you can show that it falls, that it's absolutely necessary to carry out those core activities, then it's rejected, and it's rejected of course because of that complex balancing formula which I discussed with your Honours beforehand.

If you go to paragraph 61, which was the paragraph I think cited in the Court of Appeal, "There are good reasons of policy for giving article 9 a narrow ambit that restricts it to the important purpose for which it is enacted – freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges," so that's the view expressed by his Lordship.

It was suggested during that argument, of course, that the rights indicated by article 9 are something different to the traditional rights that have been abrogated by Parliament under the phrase "exclusive cognisance," and that is discussed from paragraph 63 onwards, and it's recognised at 63 that what it refers to is the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament. Then at [77], as part of –

TIPPING J:

Was it Lord Rodger who said that the –

MR MILES QC:

Yes.

TIPPING J:

– Article 9 and the exclusive cognisance are really opposite sides of the same coin?

MR MILES QC:

Exactly.

TIPPING J:

Yes.

MR MILES QC:

Yes, exactly, Sir. And, ultimately, it comes down to one question.

TIPPING J:

Yes.

MR MILES QC:

Yes, exactly. It's – I'll come to that in a moment.

TIPPING J:

I'm sorry, I'm anticipating

MR MILES QC:

But it was Lord Rodger, yes.

TIPPING J:

Yes.

MR MILES QC:

At [77] they just discuss *Al Fayed*, and the extract there is helpful because it just rams home that the reason why they opted out of that issue was because the Parliamentary Commissioner for Standards is, as I said, a creature of Parliament,

controlled by and reports to and, hence, probably comes within proceedings. At [78] they just note that extensive inroads have been made into areas that previously fell within exclusive cognisance of Parliament, and I think Mr Pike indicated that that was the case as well, but that's just recorded there. At [89] there's a useful conclusion, "Parliament by legislation and by administrative changes has to a large extent relinquished any claim to have exclusive cognisance of the administrative business of the two houses. Decisions in relation to matters of administration are taken by parliamentary committees and it has been common ground before the Court that these decisions are protected by privilege from attack in the Courts. The 1999 report distinguishes, however, between such decisions and their implementation, expressing the view that the latter is not subject to privilege. I consider that view to be correct."

In the context of this debate, I think it just confirms that an argument based on exclusive cognisance doesn't take the appellants any further than a debate under whether article 9 extends the privilege claimed by the appellants. And Lord Rodger, at paragraphs 104 and 126 – and 104 is the paragraph that His Honour Justice Tipping was referring to, "Even though the appellants put their case by reference to both Article 9 and the exclusive jurisdiction of the House, in truth there's really only one basic question: does the matter for which the appellants have been prosecuted in the Crown Court fall within the exclusive jurisdiction or cognisance of Parliament? If so, then the appellants must prevail; if not, neither Article 9 nor the Bill of Rights nor any other doctrine gives them any further rights." And, at [126], just a recognition by Lord Rodger that it's the core activities of the House itself which is what is looked at when you're looking at the necessity for extending privilege in the way suggested today.

Broadly speaking, your Honours, for the reasons that I suppose I've gone into in slightly greater detail in the written submissions, we say that that principle enunciated in *Chaytor*, while described by my friends as the "narrow principle", is in fact the appropriate principle, which has gradually been delineated over really, one would say, over a very long period of time, but, more particularly I suppose, you get it from *Jennings,* you get it, I think, from that, was it the 1969 decision – it was 1963 decision involving, from Ceylon, from Lord Radcliffe, that I discussed with Your Honours, and it is the principle that the Court of Appeal recognised that's appropriate here. Again, for that balancing process, I would submit strongly that that is the appropriate principle to be adopted today.

Now, I have also referred Your Honours at paragraph 5.2 to a report, the Joint Committee on Parliamentary Privilege report. This was a UK report on parliamentary privilege, and I've set out actually a page and a half in the written submissions, that extract, because it is, I think, a helpful extract. For a start, it deals with the issues of letters to and fro, from members to Ministers or from members, letters to public officials or constituents' correspondence, and it rejects the proposition that they should have absolute privilege.

And the last paragraph on page 15 of my written submissions, from that report, is also helpful. It notes that Article 9 provides an altogether exceptional degree of protection, "In principle, this exceptional protection should remain confined to the core activities of Parliament, unless a pressing need is shown for the extension." So it's clear that *Chaytor* is reflecting not only what we would say are the standard and appropriate mores of the time, but reflecting the views of this committee. And you'll note that towards the, two-thirds of the way down that paragraph, you'll see in evidence the Lord Chief Justice of England, Lord Bingham, and the Lord President of the Court of Sessions, Lord Rodger, both stressed the development of qualified privilege at law and the degree of protection it provides to those acting in official capacity and without malice, so long as handling the complaint appropriate and not risk being held liable, qualified privilege, et cetera, and it is again, I think, of some significance.

Now, we also touch on the arguments that were raised by the appellants relying on certain dicta from Australia. We have to be a little careful with their jurisprudence on this topic, because they amended the relevant Act to extend the definition of proceedings in Parliament. And you find that in volume 1 of my friend's bundle of authorities, at page 22, where they've set out the relevant section, which is section 16 of the Parliamentary Privileges Act 1987, and section 16 kicks off at subsection, section 1, "For the avoidance of doubt, it is declared and enacted that provisions of article 9, et cetera, applies," and then –

McGRATH J:

Sorry, can you just work out exactly where you're at the moment? You said your friend's bundle, this is presumably the appellant's bundle?

MR MILES QC:

I'm – yes, yes.

McGRATH J:

And page 22, did you –

MR MILES QC:

22, volume 1, page 22, yes.

McGRATH J:

Right, thank you.

MR MILES QC:

And you'll see under section 2(a), (b), (c) and (d), they define the circumstances where absolute privilege is maintained: giving of evidence before the House, of course, presentation or submission of a document to a House and, "(c) the preparation of a document for purposes of or incidental to the transacting of any such business." Now, if such a provision was included in our Defamation Act or the equivalent of this, then my submissions would be less compelling. And, of course, it's that subsection that consistently underpins the relevant Australian authorities which are relied on by my friend.

TIPPING J:

Do we have to part company with Lord Browne-Wilkinson on this point, where I think he said, didn't he, that this actually represents the common law anyway?

MR MILES QC:

Now, you have to be very careful with that, Sir. What he said was section 16(3), subsection (3), which is the next subsection, reflects the common law as he understands it.

TIPPING J:

Oh, was it that, not the document –

MR MILES QC:

Not the whole section.

TIPPING J:

Not the whole thing.

MR MILES QC:

No. It's so careful, it's 16(3).

TIPPING J:

(3), right.

MR MILES QC:

And 16(3) is entirely traditional. "In proceedings in any Court or tribunal it's not lawful for evidence to be tendered, received, questions asked, et cetera, concerning proceedings in Parliament."

TIPPING J:

Thank you.

MR MILES QC:

So, very – you find that, by the way, at page 7 in *Prebble,* that particular comment of Lord Browne-Wilkinson's.

TIPPING J:

So it's not addressing – what here is the critical dimension –

MR MILES QC:

Quite.

TIPPING J:

– of this legislation?

MR MILES QC:

Quite and when you look Sir at the comments which I've set out at page 5.6 of my written brief, where I've recorded the comments of later Australian Judges who are sceptical, to put it mildly that the whole of section 16 in fact records the law as always understood, what – and I'm just – you'll see the reference there at [5.6] what Justice Pincus in *Laurance v Katter* [1996] QCA 471; (1996) 141 ALR 447 said was, "I referred above to the view of the Privy Council that section 3 merely sets out the

effective Article 9. If there were no other reason to reject the authority of that statement, the fact the effect of Article 9 is so uncertain, even after three centuries, is sufficient reason to do so." So it's a pretty robust approach by his Honour but he went onto say, "It's unnecessarily comprehensively to illustrate the proposition that s 16(3) doesn't merely reproduce the law as it was understood to be under Article 9", so he doesn't even get into the previous section which I imagine he would significantly more –

TIPPING J:

Or he'd be even more apoplectic?

MR MILES QC:

Much more apoplectic. And similarly you'll see in *Rann v Olsen* (2000) 76 SASR 450 (SASC), a similar comment by Justice Perry and comments also by Chief Justice Doyle, indications that Parliament contemplated and might extend the previously existing powers and similar comments by Justice McPherson in *O'Chee v Rowley* (1997) 150 ALR 199 (QCA). So there is a clear, I suppose, line of scepticism coming through these comments that one should not assume that any part of that section simply reflects the common law. And you may recall my friend also relied on the Canadian case, *Dowson v The Queen* and there was some discussion between your Honours and my friend on their relevance of that authority and I think your Honours quite rightly picked up that that case was all about immunity, state immunity. It was argued that article 9 also assisted and the Court expressly declined to make a finding on that and I've given you the reference at [5.9] from Justice LeDaine where he's, he not only considered it unnecessary to say whether in those circumstances you could run an absolute privilege argument but again, in a very, perhaps in a slightly more polite way than his Australian brothers, there is real scepticism that the walls of Parliament, if you like, can be extended to cover that situation.

So one comes back then, your Honours, to two quite distinct tests being advanced by the appellant, neither of which can one pick any clear authority that supports them. On the contrary the indication – not the indications, the clear preference in Canada and in England and some judicial scepticisms in Australia for the more limited role of the – an extent of absolute privilege to which I say, your Honour, that ought to be maintained for the two obvious reasons that the necessity for frank advice from the, from civil servants is of course a truism. The problem that the appellants have had

from the start is showing that that has been affected by giving them merely the protection of qualified privilege. And I think it was his Honour Justice McGrath, who when questioning Mr Tizard and I think your Honour was saying, "well is there any evidence that this has been an issue over the years", to which my friend I think had to say, "well there isn't" – and there isn't. Had there been any concern that qualified privilege is inadequate and that there has been, in some way or form, a difficulty in giving proper advice to Ministers, then we'd have got some indication from some parliamentary committee or report that would have indicated that this concern was there, and given some basis for amending the Act to include that further protection. Not only has there never been a hint of that, but the one opportunity Parliament had to extend the power in the Defamation Act, even with the indications from Sir Ian that it would be appropriate to do so, they declined the offer.

TIPPING J:

Was Sir Ian suggesting an extension, or simply a statutory definition, or did the latter necessarily embrace the former?

MR MILES QC:

Yes, it's, he thought there ought to be a definition.

TIPPING J:

Yes, but did that necessarily mean that –

MR MILES QC:

And it was an extension but, and…

TIPPING J:

Well, I didn't necessarily understand him to be batting for an extension, just simply clarification.

MR MILES QC:

Primarily clarification. If you read it, you might get a sense that there is a slight pushing out, but certainly nothing as explicit as is now suggested.

TIPPING J:

No.

MR MILES QC:

In conclusion, can I just say that discussion, I think primarily with his Honour Justice Tipping and my friends, on the pleadings, and in particular the second cause of action, where the oral statements at the meeting were relied on as a separate publication, the suggestion that the plaintiff was also relying in the statements in the House for an evidentiary purpose, to boost, if you like, the arguments that this is what was said at the meeting. I can say that if that is the impression it's given, it certainly wasn't the intention. What the pleadings do say, however, is that they rely on the statements in the House as an example of the extent that the publication, the initial publication, had, and the damage that resulted. It's an argument that you can rely on what is said in the House as a historical statement, not challenging for a moment what the Minister said or didn't say, but just the historical fact that it was said and then picked up by the media and given wide publicity, and hence a statement that originally had its genesis in a document that is unlikely to have been read by many, a meeting at which there were a number of people present – and we've set that out in the statement of claim – but a meeting where even there the statements had obviously a very limited publication, turned into something that became a national sensation. And there is authority, and it's referred to – the *Erglis v Buckley (No 2)* [2005] QCA 404, [2006] 2 Qd R 407 judgment in the Queensland Court of Appeal, I think, where by a majority they considered that you could use statements in the House for that purpose.

Now, we're not debating that today, but I wouldn't want it to be thought that the reason, the references to what was said in the House in the statement of claim and, in particular, supporting the second cause of action, were there for an evidentiary purpose in a sense that it was needed to and would be relied on, if you like, to indicate meaning, because the moment you did that then we get into *Jennings*, of course, and –

TIPPING J:

What were they there for, that was legitimate?

MR MILES QC:

Yes, because – yes, because they got into the media.

TIPPING J:

No, no, what I mean is, why were these pleadings legitimate, in your submission? This reference to the Minister's statement in the House must have been in aid of something.

MR MILES QC:

It was in aid of the extent of the publication.

TIPPING J:

But the publication – you mean the wider publication –

MR MILES QC:

Yes, yes, sorry.

TIPPING J:

– which we're not concerned with.

MR MILES QC:

It's purely the wider publication.

TIPPING J:

Right, I see, because the civil servant wasn't necessarily privy to the wider publication.

MR MILES QC:

No, no, although we did say there was a reasonable expectation that, that the Minister would repeat what was said and –

TIPPING J:

Oh, yes, in the House, but not spray it all around the town.

MR MILES QC:

Oh, I'm not talking about that, Sir, I'm talking about it was then picked up by the media, not illegitimately or not via the –

TIPPING J:

But it's not really relevant to what we've got to decide today.

MR MILES QC:

Not at all, it was just part of the debate.

TIPPING J:

Part of – I see.

ANDERSON J:

Well, it's a can of worms really, isn't it? Can you increase the level of damages through a protected publication and fully protected publication?

MR MILES QC:

If you knew, it is a can of worms your Honour, but if you knew that as a result of what you said to A was that A is likely to say it in a particular forum and that as a result of that statement the newspapers and the media will pick it up, then we would say that was a, that we could rely on that to indicate why we're entitled to more damages.

ANDERSON J:

It's more likely, I would have thought, to indicate ill will?

MR MILES QC:

No, although that – not necessarily Sir. It was there primary I think, which again is the *Erglis v Buckley* argument that you could use it as to why a reputation which we would say had been trashed to a very small group –

ANDERSON J:

I understand the argument and it's moot and I don't want to –

MR MILES QC:

No, no.

ANDERSON J:

– distract you.

TIPPING J:

But what is not moot Mr Miles – can you help on this question of the disjunct argument of Mr Tizard's, the disjunct argument of Mr Tizard's – you remember what I mean by that, that the – that the defendant, the civil servant might be forced into

saying, I didn't tell the Minister what he said to the House, I told him. Now what would you say as to that argument?

MR MILES QC:

It's, it is the ultimate red herring with respect. The – we've only sued the, that the civil servant –

TIPPING J:

Right.

MR MILES QC:

And he's entitled to say, to deny it and to explain what he said and it is absolutely irrelevant what the Minister said. We don't –

TIPPING J:

But what if by denying it or explaining what he said he is questioning what the Minister says he said in the House?

MR MILES QC:

I don't under – I don't understand why – I can understand why one might say it would follow that – you know if the Court for instance upheld the, the civil servant's argument, then it would leave dangling I suppose the issue of what was said and the legitimacy of what was said.

TIPPING J:

Well it would lead to an inevitable conclusion that the Court thought that the Minister had misled the House?

MR MILES QC:

But it's not challenging it for a moment, it's not bringing it into – it's not even analysing what the Minister said, it's analysing what the civil servant said. So you don't even get into what – you could just put a complete blank over that – you wouldn't – the only reason that it's even in the pleadings is for the reason I've just discussed but just suppose I didn't bother with that, just suppose we –

TIPPING J:

Well I don't think it depends on the pleading –

MR MILES QC:

No, it doesn't.

TIPPING J:

– Mr Tizard raises it as a point of – he hopes – a point of principle, where we shouldn't, the Court shouldn't go there because of this potential.

MR MILES QC:

I don't see it for a moment as questioning what was said in the House any more than *Buchanan v Jennings* questioned what was said in the House. It has an element of that, but it's not the essential question. The essential question's what the, what Gow said and that's the only question that the Court would be considering.

TIPPING J:

No, I accept that. But I suppose the real answer to it Mr Miles is that by parity of reasoning if it was all right in *Buchanan v Jennings*, in other words it didn't attract the absolute privilege there, it wouldn't attract the absolute privilege here.

MR MILES QC:

I think it's an even clearer case as a matter of fact because you don't even have to – at least with *Buchanan v Jennings* you have to go into the – what was said in the House –

TIPPING J:

You had no option but to.

MR MILES QC:

Yes. But you do have an option in this case, you don't even have to go near it. The plaintiff could win or the defendant could win without mentioning the Minister. It is simply an inquiry about the meaning of the memorandum –

TIPPING J:

But the defendant might not be able to defend themselves without mentioning them and saying, well what the Minister said I said, is not so.

MR MILES QC:

I don't believe you'd need to mention it Sir. I –

TIPPING J:

Well wouldn't they be cross-examined, surely you know – what you're now saying is inconsistent with what the Minister said you said. You see that would –

MR MILES QC:

Well I'm sure a Judge wouldn't tolerate that for a moment.

TIPPING J:

I know, that's the whole problem –

MR MILES QC:

Yes but –

TIPPING J:

– or potential problem.

MR MILES QC:

But well it's not a problem though because it just wouldn't happen. What a Judge would say is, what we're interested here is what was said at the meeting, what the memorandum says and you live or die by that. And, but once again, so the issue I suppose comes back to, in this extended circumstance is absolute privilege necessary for core activities of the House? And I think that's a side show, what my friend raised. What is significant is, would this prevent the free flow of candid information from the civil servant to the Minister, and qualified privilege has, must be the appropriate protection there. And –

TIPPING J:

Is it arguable that it might prevent candour by the Minister, if the Minister was anxious not to drop the civil servant in it?

MR MILES QC:

Sounds uncharacteristic.

ELIAS CJ:

Well, would it be contrary to his obligations, so do we need to worry about it I suppose?

ANDERSON J:

You can't assume that there'll be a dereliction of duty.

TIPPING J:

I'm only putting to you because I detected a hint of that in the arguments, but…

MR MILES QC:

It was pretty muted, Sir. And, once again, if there in fact has been the slightest concern about that expressed over the years, there's not been a hint of it to anyone.

ELIAS CJ:

And it isn't chilling really, doesn't that only operate where people have choices, and neither the public servant nor the Minister has a choice in terms of candour.

MR MILES QC:

And – quite. And I, I suppose I've been guilty over the years of raising the chilling argument, on the odd occasion.

ELIAS CJ:

I think we should put it in the freezer really.

MR MILES QC:

It's –

ANDERSON J:

A carcinogenic argument.

MR MILES QC:

Yes, I mean, it's typically of course –

ANDERSON J:

Cryogenic.

MR MILES QC:

It is, in circumstances of course where –

ELIAS CJ:

Where the press has a choice whether to publish or not.

MR MILES QC:

And it's in the public interest that scandals ought to be exposed. And it is done genuinely, it is believed that that is the case, and all the other sort of fundamental requirements, none of which are covered by circumstances where they're now seeking the protection for dishonest or malicious advice.

Now, unless there is anything further that I can assist your Honours with, that is where I propose to stop.

ELIAS CJ:

Thank you, Mr Miles. Yes, Mr Tizard.

MR TIZARD:

May I first take up one point raised by Justice Tipping about the oral statements? Since my learned friend has enjoined me to be real, I'm delighted to get real, and one can look at what really happened in this case. The plaintiff could not sue the Minister. It was that statement, what was said in the House that created the damage. So the problem was how to get around it. How you get around it? You sue the civil servant, and you say, "That communication is not protected." Now –

TIPPING J:

And you rely, do you, for the, what the civil servant said to the Minister, on the statement made by the Minister in that context in the House?

MR TIZARD:

Exactly, exactly. And, so far as the oral statement is concerned, the plaintiff has absolutely no evidence whatsoever of what Mr Gow said to the Minister. All the plaintiff has is what the Minister said in the House. Now, in the history of this litigation the defendants made an application to obtain further and proper particulars in regard to the oral statements. In fact the defendants went further and said, "Because the document that exists was handed over to the Minister in the course of a briefing, there was in fact only one publication", and that is, you can't separate the words and what was said at the meeting and the written memorandum out, they are published on the one occasion. But we haven't troubled your Honours with that

because we'd been ruled against in the High Court and again in the Court of Appeal, but for my own part I do not accept that is a proper analysis of what the publication is because quite patently –

BLANCHARD J:

Well, you're not arguing that point again are you?

MR TIZARD:

No, no I'm not but the point that I want to make about it is that what is said may affect what is written and the only way the plaintiff can get to what is written is by seeing what was published in the House –

ELIAS CJ:

Sorry, have you put that round the wrong way?

MR TIZARD:

Sorry, what was said was in the House?

ELIAS CJ:

Yes.

MR TIZARD:

Now the plaintiff, the plaintiff's answer to that was, well I can interrogate. I might find out from the civil servant, but of course the objection to interrogation is that the civil servant in answering that is calling into question what the Minister says in the House because that's the only basis upon which interrogatories could be administered unless they were pure "fishing" in the first place. Now that illustrates the problem with this whole situation where the real damage is what is said in the House and it's a device to get around that problem and attack what was said in the House.

TIPPING J:

But that way of presenting it is not very attractive, in the sense that the – what you're suggesting Mr Tizard is that the real problem here is absolute privilege in the House but we've got to somehow or other edge our way round that by some device.

MR TIZARD:

But that's the way the plaintiff has to view it. My argument remains this was a Parliamentary process and it is outside the purview of the Courts in consequence, so we don't get there in the first place. This is part of a process which is a Parliamentary process. Now taking up what *Chaytor* said, when one looks at the facts of *Chaytor,* it's quite clear that the matter at issue was fraudulent claims for Parliamentary expenses, nothing to do with speech and debate, nothing to do with the business of the House as such, merely the question of an entitlement to be reimbursed for expenses properly incurred where Parliament is in no different position from any other organisation which is responsible for payment of expenses. Quite properly, in my submission, that was held not to be covered by the privilege of the House and most importantly the House itself did not assert any such privilege. In this case the House does pursuit the privilege and this is something which is directly concerned with speech and debate, it is directly concerned with the answer to be given by the Minister to the House when the Minister is called to account by the Parliamentary question.

Now for my part, taking up Justice Tipping's point about section 16 of the Australian Act, yes it is true that Lord Browne-Wilkinson said section 16 is no more than declaratory of the common law –

TIPPING J:

Now he actually said section 16(3) didn't he, which is what Mr Miles –

MR TIZARD:

Well I think he actually says in that Act, which doesn't really help us, but for my own part I would accept that it is dangerous to use words expressed in a general context when dealing with a particular problem and apply them more generally because the Court's attention in those circumstances is not drawn to the same factual situation and quite clearly Lord Browne-Wilkinson was referring to speech and debate, the speech and debate aspect of Parliamentary privilege, so even though section 16 says, "For the avoidance of doubt," which would suggest all it was doing was clarifying what the law was understood to be, that to me in the end is a bootstrap argument, the Australian Parliament could be wrong in construing what it was. It might have preferred a version or enacted provision which actually did go beyond what Parliament privilege was historically understood to be.

But using that same argument, it's my submission that *Chaytor* should not be used in such a similar way in this case because *Chaytor* was concerned with something which was definitely not concerned with speech and debate and not concerned with accountability in the conduct of the business of the House. This case is, this case is concerned with the Minister's responsibility and his means of discharging it. Now although the 1999 Joint Committee Report has never been accepted by the House as accurately expressing what the privilege was understood to be, I do note that there are passages in there which would indicate that certainly the House Privileges Committee in the UK understood the documents prepared in connection with Parliamentary debate enjoyed the same protection.

If I can refer the passages to you, they are in my friend's bundle and it's under tab 6 and page 119, paragraph 99. "Thus the House of Commons Select Committee on the Official Secrets Act 1939 considers proceedings in the House" – I'm sorry I should go to the next one, [100]. "The position regarding certain activities is reasonably clear. In the category are debates, motions, proceedings on bills, Parliamentary questions. These are all proceedings in Parliament, statements made and documents produced in the course of these proceedings and notices of these proceedings all appear to be covered." When you come to paragraph –

TIPPING J:

But wait a minute, that doesn't cover here –

MR TIZARD:

118, if you could to paragraph 118 on page 121. "Members frequently employed personal staff and research assistants of their own to assist with their Parliamentary duties. The material produced for members by their staff and assistants may sometimes be protected by parliamentary privilege as material directly related to proceedings in Parliament, but, as with House staff, other material enjoys no parliamentary privilege." Now the acceptance seems to be that if the document is prepared for the purpose of the actual business before the House, then the document itself is protected. And that was the point of my analogy with preparations and briefs of evidence, it – of course it's true there are two different people involved here but the important analogy is that a brief of evidence has a prior existence to the evidence being given in Court, it's the evidence which is given in Court which is absolutely privileged. But that privilege extends back to the preparation of what is necessary to give that evidence –

ELIAS CJ:

It's hard to know what's meant by this, "May sometimes be protected," because it envisages that it won't always be protected which is really what you're contending for here.

MR TIZARD:

Yes and I accept it won't always be protected. What I am arguing for is that it protected in this circumstance because the actual matter is before the House and the Minister is getting the material in order to advance the proceedings of the House, it's part of the proceedings of the House, whereas if somebody prepares something in advance of, perhaps even deciding whether or not to raise an issue before the House, that may fall into a different category. Now that's what I would call the, the unhappy constituent who may raise a matter with the member. I see no reason to extend or to regard that as being part of the proceedings in the House, even if the member may ultimately use some of that material in the initial step, it is not already part of the proceeding of the House, here this is different.

TIPPING J:

Is paragraph 116 immediately above 118 at some moment Mr Tizard, do you think?

MR TIZARD:

Well they've raise the problems rather than –

TIPPING J:

Well they said that, "The protection –

MR TIZARD:

– articulate the –

TIPPING J:

– provided by qualified privilege at law should not be underestimated."

MR TIZARD:

Well of course I accept a protection may exist but –

TIPPING J:

That suggests that librarians are seldom guilty of malice but –

MR TIZARD:

And of course one can raise the same argument about civil servants. Of course, what reason generally would they have to mislead their Minister? To me again the misses the point, which is that it's part of the, of a proceeding which has already commenced in the House and in respect of which the enquiry is necessary in order to discharge the duty to the House. That is not always the case, in dealing with correspondence which members have, they are not necessarily related to what is actually going on in the House at the time. Now, this has a temporal and logical connection. The communication from Mr Gow to the Minister has a temporal and logical connection, which mere correspondence in the hands of a member or, indeed, even a Minister, does not necessarily have ordinarily. And I think that that's the important point to distinguish.

TIPPING J:

There's some pretty good advice at the end of 116, but probably outside our present compass.

MR TIZARD:

Yes, indeed.

ANDERSON J:

Do you think 118 might be referring to the type of work that is really, really raises agency considerations, that it's the Minister's own work in reality, conducted by agents?

MR TIZARD:

And is not Mr Gow in effect the Minister's agent?

ANDERSON J:

Well, he's an executive, member of the executive.

MR TIZARD:

He may be, but he doesn't do this because he does it of his accord. He does it because he's directed to do so by the Minister.

ANDERSON J:

It's a slightly different issue, but I think it might be significant that in 118 it talks about personal staff "employed", so where a parliamentarian gets an allowance for research purposes and engages someone to do it. It's quite different from a member of a department tendering advice to a Minister.

MR TIZARD:

Well, with respect, I would see, if the Minister directs it to anyone, the position is the same, the Minister is asking him for the information. In my submission, the fact that the Minister happens to employ someone is beside the point, because his duty is to the House and he seeks to obtain the information to enable him to discharge that duty.

One minor matter that I should perhaps draw to Your Honours' attention, and I didn't do so earlier, was that when the Bill came back to the House, the Defamation Bill came back to the House, it also included a clause which is referred to as "45A" in the Bill, but is actually 54 in the Defamation Act itself, which preserves all the rights and privileges of the House, so that clause is an addition. So that, in considering the question of parliamentary privilege, all the existing privileges are preserved by the Defamation Act, and that clause was specifically included, along with the deletion of the definition clauses.

My point in response to my friend's suggestion that it would be relieving the civil servant of responsibility is that the civil servant is not relieved of his responsibility, he remains responsible, but he's responsible to the House. So it is not a case where there are no sanctions and no accountability or responsibility.

I can't resist the temptation of commenting on my learned friend's wonderful address to the five jurors about the facts, which of course aren't the fact, they're only the allegations. They are disputed, and the only issue here, as Your Honours have pointed out, is assume that the words are defamatory, we accept the circumstances of the publication, that is, they were published by the – by Mr Gow in response to the Minister's request, that is the only issue we're concerned with. In fact, as the judgment in the High Court records, the distribution to other parties was not sufficiently particularised, it was denied that they were distributed by those who were charged with liability for them, that is the appellants, and particulars of those were ordered. Likewise, trying to obtain meanings from what was published subsequently

is not legitimate and indeed Justice Dobson struck out a number of the meanings contended for, reversed them in Court of Appeal, but it illustrates the danger of getting involved in elaborations of the fact. The only facts for this Court are determining whether the privilege applies or whether the Court has jurisdiction in the circumstances set out.

Now I'd like to draw your attention to some further passages in *Chaytor* which I think may assist. First at paragraph 61 and I've taken from the – Mr Pike's bundle which is under tab 9, you will see there one important fact for the Court there was that Parliament had no criminal jurisdiction. These fraudulent expense claims, if that's what they were, clearly involved criminal activity and that is what the charges were and in respect of which the defendants all endeavoured to avoid by invoking the Parliamentary privilege. Now that was clearly an important issue for their Lordships that Parliament couldn't discipline these members criminally because Parliament had no criminal jurisdiction to do so.

ELIAS CJ:

Parliament has no ability to censure defamation either. I'm just trying to work out why you think that that is so significant, the fact that Parliament has no criminal jurisdiction.

MR TIZARD:

Because it was patently clear that members who had made fraudulent claims should be subject, in the absence of strong countervailing reasons to the contrary, for their actions and they could not be made accountable properly without criminal proceedings.

ELIAS CJ:

But why is that not similar to the present case in that Parliament has no jurisdiction to grant a remedy for a tort?

MR TIZARD:

I accept Parliament has no jurisdiction to grant remedy for a tort but in this case there is an overall jurisdiction issue that I've contended for, that is that what goes on in the House is the exclusive jurisdiction of the House and Courts do not interfere. Here Parliament did not claim any jurisdiction, didn't have jurisdiction therefore to

prosecute someone in those circumstances was not interfering with their jurisdiction, that's the point I would make out of that.

ELIAS CJ:

You mean Parliament didn't assert its privilege in *Chaytor*?

MR TIZARD:

Correct. It didn't assert its privilege and didn't assert that it was not competent for the Courts to prosecute members who made fraudulent claims.

TIPPING J:

Well Parliament had no – if this is going to be important and frankly I see it as collateral, but if Parliament had no criminal jurisdiction, it clearly had a jurisdiction to punish for breach of privilege?

MR TIZARD:

I accept it would.

TIPPING J:

So, if prosecution would in a sense cut across that, if there was this exclusive, I just don't see where this gets us. You've accepted the necessity criterion –

MR TIZARD:

I take the – the conflict remains though in a slightly different way, instead of having criminal possibly even loss of liberty consequences, there would – might still be disciplinary consequences. I suppose my only answer to that in the end must be that Parliament didn't assert it enjoyed any privilege in those circumstances and therefore there was no conflict of jurisdiction whereas here it asserts there is.

TIPPING J:

But are we not more concerned with the principles that *Chaytor* establishes rather than observations or collateral factors along the way, I think that's the use Mr Miles sought to make of *Chaytor*?

MR TIZARD:

Yes and my submission is that *Chaytor* does recognise that Parliament has – the House does have its own separate jurisdiction but it is confined to that which is truly

within its jurisdiction, that is its own proceedings, not things which are outside its own proceedings.

TIPPING J:

But isn't there a risk of begging the question here? The question is whether or not it's within or without exclusive Parliamentary jurisdiction and Article 9, the two marching together?

MR TIZARD:

Indeed and I'm, my submission is that is within.

TIPPING J:

Of course.

MR TIZARD:

Yes. But I don't see, I don't see the fact that someone was criminally prosecuted for fiddling expenses is – provides a proper ground for saying, for arguing that someone answering a – responding to a –

TIPPING J:

It's miles away, I don't think anyone's suggesting there's an analogy on, in fact.

MR TIZARD:

No. No, but my submission is it's quite clear when you look at the facts that it does nothing to impinge on freedom of speech and debate.

TIPPING J:

Yes.

MR TIZARD:

Whereas it's our submission that this clearly does.

TIPPING J:

This is the point you've been making.

MR TIZARD:

Indeed. Indeed. Now unless there are any other matters that Your Honours want to ask me I think I've exhausted my time.

ELIAS CJ:

Thank you Mr Tizard. Thank you counsel, we'll reserve our decision, thank you for your assistance.

COURT ADJOURNS: 3.12 PM