IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 196/95

BETWEEN: SU'A RIMONI D AH CHONG of Apia, Western Samoa, Controller and Chief Auditor of Western Samoa:

Plaintiff

A N D: THE LEGISLATIVE ASSEMBLY OF WESTERN SAMOA established pursuant to Article 42 of the Constitution of Western Samoa:

First Defendant

A N D: THE ATTORNEY-GENERAL OF WESTERN SAMOA sued on behalf of the Prime Minister and the Government of the Independent State of Western Samoa:

Second Defendant

A N D: MAIAVA IULAI TOMA, FAAFOUINA IOFI, TULIAUPUPU PALA LIMA, PAPALII JOHN RYAN, AGNES STEWART, LEIATAUA DR KILIFOTI ETEUATI all of Samoa, members of the Commission of Inquiry appointed to report on the Controller and Chief Auditor's Report to the Legislative Assembly:

Third Defendants

Counsel: G P Barton QC, J P Ferguson (both of the New Zealand Bar) and R Drake for plaintiff
T S Apa (Attorney-General of Western Samoa) and W D Baragwanath QC, W Akel, T J Walker (all three of the New Zealand Bar) for defendants

Hearing: 18 & 19 October 1995

Judgment: 23 January 1996

JUDGMENT OF SAPOLU, CJ

This judgment concerns an application by all defendants to strike out the causes of action contained in proceedings brought against them by the plaintiff. The first of these causes of action is against the first defendant, the second cause of action is against the second defendant, and the third and fourth causes of action are against the third defendants. All defendants were represented by the Attorney-General and counsel appearing with him in these proceedings.

Background:

The plaintiff is the Controller and Chief Auditor who holds office under article 97 of the Constitution and the provisions of the Audit Office Ordinance 1961. His salary, powers and functions are provided for under articles 98 and 99 of the Constitution respectively as well as the provisions of the Audit Office Ordinance 1961 and the Audit Office Regulations 1976. The first defendant is the Legislative Assembly of Western Samoa as established and constituted under Part V of the Constitution. The second defendant is the Attorney-General who is being sued on behalf of the Prime Minister and the Government of Western Samoa. He is not a Cabinet Minister but holds office and performs his functions as chief legal adviser to the Government. The third defendants are the chairman and members of a commission of inquiry appointed by the Head of State of Western Samoa on the advice of Cabinet pursuant to a resolution passed by the Legislative Assembly.

In the exercise of his constitutional and statutory powers and functions, the Controller and Chief Auditor carried out an audit of the relevant funds and public accounts for the period beginning 1 January 1993 and ending 30 June 1994. His report of that audit was forwarded to the Speaker of the Legislative Assembly

on 8 July 1994 by cover of a letter dated 6 July 1994 and was tabled before the Legislative Assembly at its session which was then current in July 1994. The report is critical of the Government in general and of certain Ministers, departmental heads, government bodies and employees in particular. It also expresses concern regarding certain deficiencies and irregularities which the report states were discovered in the course of the audit carried out by the Controller and Chief Auditor and the Audit Office.

The report, after it was tabled in the Legislative Assembly, was discussed by the Assembly on 12 and 13 July 1994. The relevant pages of Hansard which contain the record of the Assembly's discussion of the report is annexed to the affidavit filed by the Controller and Chief Auditor in the present proceedings. I shall have more to say about the extent to which usage may be made in proceedings before a Court of the record of proceedings before the Legislative Assembly or Parliament when I come to the relationship between the Courts and Parliament and the question of Parliamentary privilege. Suffice at this stage to refer in broad and general terms to the pages of Hansard introduced in this case in order for the Court to be able to deal later in this judgment with the issues that came up in the course of the arguments by counsel.

It is clear that at the sitting of the Legislative Assembly on 12 July 1994 the Prime Minister moved a motion, which was duly seconded, for standing order 29(1) to be suspended to allow for discussion of the Controller and Chief Auditor's report by the Legislative Assembly before the report was referred to the Public Accounts Committee for examination and report back to the Assembly. The Assembly's discussion took two days and a number of Members spoke during the

discussion. On 13 July the original motion by the Prime Minister was withdrawn and it became clear towards the end of the discussion on that day that the Legislative Assembly had reached a general consensus that the Controller and Chief Auditor's report should be referred to a commission of inquiry. It was then that the Prime Minister formally moved the motion for the Controller and Chief Auditor's report to be referred to a commission of inquiry to be appointed by Cabinet in accordance with the provisions of the Commissions of Inquiry Act 1964. The motion was duly seconded by two Opposition Members and it was carried by the Assembly. That was also the end of the discussion by the Assembly on the Controller and Chief Auditor's report.

There was no resolution by the Legislative Assembly or express provision in the Prime Minister's motion for any report by the commission of inquiry to be presented to the Legislative Assembly. But that must have been the underlying intention and understanding - the report of the commission of inquiry was to be submitted to the Legislative Assembly. In fact that was what happened. The Court was informed, without dispute, from the bar that the Government did present the report of the commission of inquiry to the Legislative Assembly and was debated by the Assembly.

Following the resolution passed by the Legislative Assembly, the Head of State on the advice of Cabinet appointed by warrant dated 21 July 1994 a seven member commission of inquiry under the provisions of the Commissions of Inquiry Act 1964. Two of the members including the Attorney-General resigned following their appointment, but the Attorney-General was reappointed to the commission of inquiry as counsel assisting the commission. The other member who resigned was

replaced. The Controller and Chief Auditor complains against the composition of the commission of inquiry. He says that the Attorney-General and the Secretary to Government (a member of the commission of inquiry) are in their official capacities so clearly connected with the executive arm of Government that they should not have been involved in the commission of inquiry. It was also pointed out that the Controller and Chief Auditor's report contains allegations against the Ombudsman who was the chairman of the commission of inquiry, the Secretary to Government and the Attorney-General. The clear inference is that these public office holders should not have been involved in the commission of inquiry.

The terms of reference of the commission of inquiry were also set out in their warrant of appointment. It would be useful to set out those terms of reference (as revised on 26 July 1994) as follows :

(a) To examine in detail all matters raised in the Auditor General's Report;

(b) To give opportunity to those whose performance of their functions and duties are mentioned in the Report to respond to matters raised in the Report regarding such performance which had been carried out in a matter they believed to be consistent with established policies and practices;

(c) To investigate in detail records, evidence and statements which form the basis of matters submitted in the Report and in particular the basis of the various statements contained in the Report;

(d) To clarify the functional relationships prescribed by the Constitution and Legislation as between the established position of

the Auditor General on the one hand and the following positions and entities on the other hand :

(i) Departmental Heads and employees;

(ii) Staturory Corporations;

(iii) Other Government enterprises;

(iv) Cabinet;

(v) Cabinet Minister;

(vi) Parliament; and

(vii) Members of Parliament;

(e) To examine Cabinet's role as the executive branch in the determination of national policy and the scope of its authority and obligations in this regard under the Constitution;

(f) To clmment on all matters mentioned in the Report;

(g) To look into other important matters which may be relevant and to which it may be desirable to extend the inquiry.

The Controller and Chief Auditor complains that the terms of reference of the commission of inquiry are ultra vires the Commissions of Inquiry Act 1964. He also complains that the procedures adopted by the commission of inquiry in the conduct of its inquiry were in breach of the rules of natural justice.

I shall set out herein the constitutional provisions on the office of Controller and Chief Auditor.

Constitutional Provisions on office of Controller and Chief Auditor:

"97. **Controller and Chief Auditor** - (1) There shall be a Controller "and Chief Auditor, who shall be appointed by the Head of State,

"acting on the advice of the Prime Minister.

"(2) A person who has held the office of Controller and Chief Auditor "shall not be eligible for appointment to any other office in the "service of Western Samoa within a period of 3 years of his having "ceased to hold the office of Controller and Chief Auditor.

"(3) The Controller and Chief Auditor shall hold office until he "reaches the age of 60 years :

"Provided that the Legislative Assembly may by resolution extend the "period of office of a Controller and Chief Auditor who has reached "the age of 60 years.

"(4) The Controller and Chief Auditor may at any time resign his "office by writing under his hand addressed to the Prime Minister "but shall not be removed from office except on the like grounds and "in the like manner as a Judge of the Supreme Court.

"(5) The Head of State, acting on the advice of the Prime Minister, "may at any time when the Legislative Assembly is not meeting suspend "the Controller and Chief Auditor from his office, and such suspension, "unless previously revoked, shall continue in force until the end of "the next ensuing session and no longer.

"98. **Salary of Controller and Chief Auditor** - The salary of the "Controller and Chief Auditor shall be determined by Act and shall "be charged on the Treasury Fund, and that salary shall not be "diminshed during the period of office of the Controller and Chief "Auditor, unless as part of a general reduction of salaries applied "proportionately to all persons whose salaries are determined by Act.

"99. **Audit of accounts** - (1) The Controller and Chief Auditor "shall audit the Treasury Fund, such other public funds or accounts "as may be established, the accounts of all Departments and offices "of executive government and the accounts of such other public, "statutory or local authorities and bodies as may be provided by "Act.

"(2) The Controller and Chief Auditor shall report at least once "annually to the Legislative Assembly on the performance of his "functions under this Article and shall in his report draw attention "to any irregularities in the accounts audited by him".

Legal Basis For Striking Out A Cause of Action:

It is common ground between counsel on both sides that the principles applicable to an application to strike out on the ground of no reasonable cause

of action are those stated in the judgment of the New Zealand Court of Appeal in *Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641* where it is stated at p.645 :

> "The principles governing an application to strike out on the "grounds of no reasonable cause of action are well known and "need not be repeated at length. The jurisdiction is to be "sparingly exercised and only in a clear case where the Court "is satisfied that it has all the requisite material to reach "a definite and certain conclusion; the plaintiff's case must "be so clearly untenable that it cannot possibly succeed and "the court will approach the application; assuming that all "the allegations in the statement of claim are factually correct".

For the purpose of present proceedings I am content to apply the above statement of principles as accepted by counsel on both sides. But it must be pointed out that while an application to strike out for no reasonable cause of action is determined primarily on the pleadings, the Court may also have regard to any affidavits filed in support of or in opposition to the application to strike out. And if no reasonable cause of action is apparent from the pleadings but it can be seen from the affidavits that properly pleaded an arguable cause of action could be raised, then instead of striking out the Court may grant leave to amend so as to properly plead a cause of action. The application to strike out may again be made against the amended cause of action. See the judgment of Tipping J in *Marshall Futures Ltd v Marshall [1992] 1 NZLR 316 at 323, 324.*

Cause of action against the Legislative Assembly:

(a) Particulars:

The cause of action against the Legislative Assembly is that the Legislative Assembly acted unconstitutionally by :

(i) failing to refer the Controller and Chief Auditor's report to the Public Accounts Committee pursuant to standing order 137, and instead accepting the Prime Minister's motion that the report be referred to a commission of inquiry;

(ii) resolving that the Controller and Chief Auditor's report be referred to a commission of inquiry under the Commissions of Inquiry Act 1964 when that commission of inquiry was to be appointed by the Head of State acting on the advice of Cabinet and was to be required pursuant to section 4 of the Act to report to Cabinet and to no one else on the matters set out in the commission's terms of reference;

(iii) approving reference of the Controller and Chief Auditor's report to a commission of inquiry, and thus sanctioning a procedure which prevented the Controller and Chief Auditor from carrying out his duties under the Constitution, and in particular nullifying the effectiveness of his constitutional functions to report to the Legislative Assembly and to draw attention to irregularities in the public accounts audited by him; and

(iv) failing to protect the independence of the Controller and Chief Auditor under the Constitution in his relations with the Government.

I have set out the cause of action against the Legislative Assembly in full to ensure that no part of it is left out from consideration. But as the argument by Mr Barton for the Controller and Chief Auditor unfolded, it became clear that his principal concern was the protection of the independence of the office of the Controller and Chief Auditor under the Constitution as, according to Mr Barton, the steps taken by the Legislative Assembly in resolving to refer the Controller

and Chief Auditor's report to a commission of inquiry have affected and undermined the independence of the office of the Controller and Chief Auditor. This argument, which I will deal with in detail later in this judgment, does give rise to the question of privileges of Parliament and the Legislative Assembly.

(b) Parliamentary privileges:

Mr Baragwanath for all defendants placed much reliance and emphasis on the privileges of the Legislative Assembly and presented a comprehensive survey of the authorities on the question of parliamentary privileges. I refer now to some of those authorities which are judgments of some of the highest Courts in other jurisdictions.

I will start with the English authorities on the subject. In *Bradlaugh v Gossett (1884) 12 Q.B.D. 271* the Lord Chief Justice, Lord Coleridge stated at p.275 :

> "What is said or done within the walls of Parliament cannot be "inquired into a Court of law. On this point all the judges "in the two great cases which exhaust the learning on the "subject - *Burdott v Abbott (1811) 14 East 1* and *Stockdale v "Hansard (1839) 9 Ad & E 1* - are agreed, and are emphatic".

In the next case of *British Railways Board v Pickins [1974] AC 765* which was a decision of the House of Lords, Lord Morris of Borth-y-Gest stated at p.794 :

> "It must be for Parliament to decide whether its decreed "procedures have been followed. It must be for Parliament "to lay down and to construe its Standing Orders and further "to decide whether they have been obeyed : it must be for "Parliament to decide whether in any particular case to

"dispense with such orders.... It would be impracticable
"and undesirable for the High Court of Justice to embark
"upon an inquiry concerning the effect or the effectiveness
"of the internal procedures in the High Court of Parliament
"or an inquiry whether in any particular case those procedures
"were effectively followed".

In the same case, Lord Simon of Glaisdale in his judgment stated at pp.798-799 :

"Parliamentary privilege is part of the law of the land (see
"*Erskine May's Parliamentary Practice* 18th ed. 1971, Ch.V).
"Among the privileges of the House of Parliament is the
"exclusive right to determine the regularity of their own
"internal proceedings".

In New Zealand which still retains the Privy Council as its highest Court, Lord Browne-Wilkinson in delivering the judgment of the Privy Council in *Prebble v Television New Zealand Ltd [1993] 1 AC 321*, which was an appeal from New Zealand, stated at p.332 :

"Article 9 of the Bill of Rights 1689 provides :

"'*Freedom of Speech* - That the freedoms of speech debates or
"'proceedings in Parliament ought not to be impeached or
"'questioned in any Court or place out of Parliament'....
"In addition to article 9 itself, there is a long line of
"authority which supports a wider principle of which article 9
"is merely one manifestation, viz, that the Courts and Parlia-
"ment are both astute to recognise their respective constitu-
"tional roles. So far as the Courts are concerned they will
"not allow any challenge to be made to what is said or done
"within the walls of Parliament in performance of its legis-
"lative functions and protection of its established privileges :
"*Burdott v Abbott (1811) 14 East 1*; *Stockdale v Hansard (1839)*
"*9 Ad & C 1*; *Bradlaugh (1884) 12 Q.B.D. 271*; *Pickin v British*
"*Railways Board [1974] AC 765*; *Pepper v Hart [1993] AC 593*. As
"Blackstone said in his *Commentaries on the Law of England*, 17th
"ed. (1830), vol.1, p.165 :

"'the whole of the law and custom of Parliament has its original
"'from this one maxim, that whatever matter arises concerning
"'either House of Parliament, ought to be exercised, discussed,
"'and adjudged in that House to which it relates, and not else-
"'where'".

When that case was before the New Zealand Court of Appeal as *Television New Zealand Ltd v Prebble [1993] 23 NZLR 513* Richardson J stated at p.526 :

"the courts must always be sensitive to the rights and privileges
"of Parliament and the constitutional importance of Parliament's
"retaining control over its own proceedings. The rule which has
"emerged is that it is for the Courts to determine whether a
"particular privilege exists and for the House to be the judge of
"the occasion and of the manner of its exercise....".

In Canada the position with regard to Parliamentary privileges was stated by the Supreme Court of Canada in the case of *New Brunswick Broadcasting Co. v Nova Scotia (1993) 100 DLR (4th) 212.* At page 224 of his judgment Lamer CJ said :

"Parliamentary privilege, and immunity with respect to the exercise
"of that privilege, are founded upon necessity. Parliamentary
"privilege and the breadth of individual privileges encompassed by
"that term are accorded to members of the Houses of Parliament and
"the legislative assemblies because they are judged necessary to
"the discharge of their legislative function....

"The content and extent of parliamentary privileges have evolved
"with reference to their necessity".

Then at pp.232-233 of his judgment, Lamer CJ goes on to say :

"Historically, the Courts have been careful to respect the
"independence of the legislative process just as legislators
"have been careful to protect the independence of the judi-
"ciary.... There is a clear parallel between the doctrines

"of independence of the judiciary and of parliamentary
"privilege as the latter is the means by which the Houses of
"Parliament protect their independence. In Canada, it is
"through the exercise of the privileges inherent in all legis-
"lative bodies that the provincial Houses of Assembly are able
"to control their own proceedings and thereby maintain the
"independence of the legislative process".

In the same case, McLachlin J in her judgment stated at pp.265-266 :

"It has long been accepted that in order to perform their
"functions, legislative bodies require certain privileges
"relating to the conduct of their business. It has long
"been accepted that these privileges must be held absolutely
"and constitutionally if they are to effective; the legis-
"lative branch of government must enjoy a certain autonomy
"which even the Crown and the Courts cannot touch.... The
"Courts could determine whether a parliamentary privilege
"existed, but once they determined that it did, the Courts
"had no power to regulate the exercise of that power".

Her Lordship then goes on at p.270 of her judgment and lists some of the main parliamentary privileges as follows :

"Among the specific privileges which arose in the United
"Kingdom are the following :

"(a) freedom of speech, including immunity from civil
" proceedings with respect to any matter arising from
" the carrying out of the duties of a member of the House;

"(b) exclusive control over the House's own proceedings;

"(c) ejection of strangers from the House and its pre-
" cincts; and

"(d) control of publication of debates and proceedings
" in the House".

McLachlin J also made it unmistakeably clear in her judgment that the test for

determining whether a privilege existed was that of "necessity", that is, is the privilege claimed necessary to the proper functioning of Parliament. If that test is satisfied, the Courts will not interfere in the exercise of the privilege.

I realize that I have quoted at some length from judgments by the Courts from the major common law jurisdictions. I have no regret for doing so. The question of parliamentary privilege is very little known to a few and unknown to many in Western Samoa. To give only a summary of the relevant position, is to present an incomplete picture which may not assist in any proper understanding of parliamentary privileges as they exist at common law.

At this point, it should be pointed out that the United Kingdom and New Zealand do not have written constitutions. The question of parliamentary privilege is therefore governed purely by common law. Canada does have a written Constitution and because of its special wording, the Court in *New Brunswick's* case was able to decide that parliamentary privileges are part of the Canadian Constitution and therefore enjoy constitutional status and validity. I will turn now to the authorities in some of those countries with written constitutions which do not contain the special wording of the Canadian Constitution.

I start with Australia. In *Cormack v Cope (1974) 131 CLR 432* Barwick CJ in the High Court of Australia drew the distinction between the law-making process of Parliament in the United Kingdom which has no written constitution and Parliament in Australia whose law-making process is controlled by a written Constitution and then stated at p.453 :

"Whilst it may be true the Court will not interfere in what I "would call the intra-mural deliberative activities of the "Parliament, it has both a right and a duty to interfere if "the constitutionally required process of law-making is not "properly carried out".

And at p.454 of his judgment, His Honour further stated :

"Whilst the Court will not interfere in what I have called "the intra-mural deliberative activities of the House, "including what Isaacs J called the 'intermediate procedure' "and the 'order of events between the Houses', there is no "parliamentary privilege which can stand in the way of this "Court's right and duty to ensure that the constitutionally "provided methods of law-making are observed".

In the Kingdom of Tonga, the Privy Council of Tonga in the case of *Fotofili v Ipeni Siale [1987] SPLR 346* held at p.349 :

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

In Zimbabwe, the Supreme Court of Zimbabwe in *Smith v Mutasa (1990) 1 LRC (Const) 87*, stated at p.94 :

"The Constitution of Zimbabwe is the supreme law of the "land. It is true that Parliament is supreme in the "legislative field assigned to it by the Constitution, "but even then Parliament cannot step outside the bounds "of the authority prescribed to it by the Constitution".

In the Cook Islands, its Court of Appeal in *Robati v Privileges Standing*

Committee and Speaker of the Parliament of Cook Islands (unreported judgment delivered on 7 February 1994, CA 156/93) accepted and applied the principles from the cases of *Cormark v Cope* and *Smith v Mutasa* as stated above and held as by Quilliam CJ :

> "If it is the case that the [Privileges Standing] Committee "purported to deal with the Plaintiff on 23 August for an "offence which did not come into existence until the following "day.... then the Committee was acting contrary to the pro- "visions of Article 65(1)(g) and so in a manner which was "unconstitutional. In such circumstances it must be proper "for the Court to intervene".

And in Niue, the High Court of Niue in *Jackson v Kalauni and Anor* (unreported judgment delivered on 20 September 1995) also applied the principles as stated in *Cormack v Cope*.

It appears to me that the historical and well-established privileges of Parliament at common law on the ground of necessity, would give way where there is a real conflict with the Constitution. The Constitution being the supreme law prevails to the extent it is in conflict with any of the common law privileges of Parliament. Privileges are part of the law of the land. That being so, where their exercise or application is inconsistent with the Constitution in any particular case, that exercise or application of a parliamentary privilege must be void to the extent of the inconsistency : see article 2 of the Constitution. However, the conflict or inconsistency must be very clear from the language of the Constitution before the well-established privileges of Parliament which have been so repeatedly recognised and emphasised for more than a century by the Courts may be excluded. In my view, so fundamental a constitutional principle

as the privileges of Parliament must not be easily or lightly excluded unless the Constitution has expressed itself with irresistable clarity on a particular matter. It appears to me from the cases of *Smith v Mutasa* and *Jackson v Kalauni and Anor* that the Constitution was very clear on the point in issue in each of those cases so that there was no mistake there was a real conflict between the Constitution and the privilege claimed.

In Western Samoa there are three sources for parliamentary privileges. The first is the Legislative Assembly Powers and Privileges Ordinance 1960. That Ordinance does not make exhausitive provision for all the privileges that the Legislative Assembly may have. It declares only *certain* privileges. Section 3 of that Ordinance provides :

> "No member of the Legislative Assembly shall be liable to any "civil or criminal proceedings in respect of -
>
> "(a) Any speech or debate in the Legislative Assembly or a " committee thereof;
>
> "(b) Any words written in a report to the Assembly or any " committee thereof or in any petition, bill, motion, or " other matter brought or introduced by him therein".

This privilege is declaratory of the common law privilege mentioned by McLachlin J in *New Brunwick's* case as the freedom of speech, including immunity from civil proceedings in respect to any matter arising from the carrying out of the duties of a Member of Parliament. The Legislative Assembly Powers and Privileges Ordinance 1960 forms part of the existing law and is accordingly preserved by article 114 of the Constitution.

The second source of parliamentary privilege in Western Samoa is article 62 of the Constitution which provides that the privileges of the Legislative Assembly, any committee thereof, and Members of Parliament may be determined by Act. We do not have such an Act at this point in time. The third source of parliamentary privilege is article 111 of the Constitution which provides in so far as relevant :

> "'Law' means any law for the time being in force in Western Samoa;
> "and includes this Constitution, any Act of Parliament...., *the*
> "*English common law* and equity for the time being in so far as
> "they are not excluded by any other law in force in Western Samoa..."
> (italics mine).

I do accept Mr Baragwanath's argument that article 111 by its application of the English common law to Western Samoa, in so far as the common law is not excluded by any other law in force in Western Samoa, does introduce into Western Samoa the long and well-established common law privileges of Parliament, there being no law in force which excludes the application of those privileges. Those common law privileges have already been referred to in this judgment.

Having referred in detail to the question of Parliament's privileges, I should point that in other jurisdictions there has been no objection to the use of Hansard in Court proceedings for the purpose of ascertaining the intention of Parliament where there is an ambiquity in a statute. The reason for this is because in a situation of statutory ambiquity, the Court is using Hansard to ascertain Parliament's intention in order to be able to give effect to that intention.

(c) Argument:

Mr Barton's argument is that the actions, as set out in the cause of action pleaded, which were taken by the Legislative Assembly in referring the report of the Controller and Chief Auditor to a commission of inquiry were unconstitutional because they affected the independence and status of the Controller and Chief Auditor as recognised by the Constitution. He elaborated on this argument by saying that given the importance of finance as recognised in Part VIII of the Constitution and the requirement stated in article 99 that the Controller and Chief Auditor is to report to the Legislative Assembly on the functions he performs and to draw attention in his report to any irregularities in the accounts audited by him, that means there is an implied duty on the part of the Legislative Assembly to give proper consideration to the report of the Controller and Chief Auditor instead of giving the report to a commission of inquiry. He further stated that the Attorney-General who was counsel assisting the commission of inquiry and the Secretary to Government who was a member of that commission are in their official capacities closely connected with the executive arm of Government.

Articles 97 and 98 provide certain safeguards for protecting the independence of the office of Controller and Chief Auditor. Those safeguards are that the office of Controller and Chief Auditor is not under the control of the Public Service Commission; the holder of the office of Controller and Chief Auditor is not eligible for appointment to any other office in the service of Western Samoa within 3 years after he ceases to hold office as Controller and Chief Auditor; he may not be removed from office except on the like grounds and in the like manner as a Judge of the Supreme Court; and his salary during his

period of office may not be diminished except as part of a general reduction of salaries. Any action taken by the Legislative Assembly which is in violation of those constitutional safeguards for the office of Controller and Chief Auditor while they existed must be unconstitutional. But Mr Barton's argument is not that the actions taken by the Legislative Assembly in referring the report of the Controller and Chief Auditor were in violation of any of those expressed constitutional safeguards. In fact there was no such violation in this case. His argument is that the actions taken by the Controller and Chief Auditor affected the independence and status of the office of the Controller and Chief Auditor as recognised by the Constitution. With respect, I do not accept this part of the argument.

In the first place, I am of the view that the constitutionality of any action alleged to have affected the independence of the office of Controller and Chief Auditor must be judged on the basis of whether that action is in violation of the constitutional safeguards and not on the basis of some general notion of independence whose parameters are so difficult to define. Secondly, if a general notion of independence is accepted as the criterion for determining whether an action is constitutional or otherwise, then that will necessarily create an exception to article 109 of the Constitution which the Constitution itself has not done. Article 109 provides that any provision of the Constitution may be amended by Act of Parliament following certain procedures. That includes the provisions of articles 97 and 98 which provide the constitutional safeguards for protecting the independence of the office of Controller and Chief Auditor. If Mr Barton's argument is accpeted then it follows that any action taken by Parliament to enact legislation to weaken or repeal any relevant provision of

articles 97 and 98 would be unconstitutional because it affects the independence of the office of Controller and Chief Auditor. That could not have been the intention of the framers of the Constitution.

I turn to the more specific part of the argument which is that the importance of finance and the requirement in article 99 for the Controller and Chief Auditor to report to the Legislative Assembly on the performance of his functions and any irregularities in the accounts he audits give rise by implication to a duty on the part of the Legislative Assembly to give proper consideration to the report by the Controller and Chief Auditor and not to refer it to a commission of inquiry. I am also unable to accept this part of the argument.

The first reason is that the Constitution had already expressly provided in some detail in articles 97 and 98 for safeguards to protect the independence of the office of Controller and Chief Auditor. If the framers of the Constitution had intended to provide an additional safeguard in article 99 by imposing on the Legislative Assembly a constitutional duty of giving proper consideration itself to a report of the Controller and Chief Auditor they could have easily done so. That they did not do so after making express provision in articles 97 and 98 for specific safeguards to protect the independence of the office of Controller and Chief Auditor clearly suggests that the framers of the Constitution did not intend to impose on the Legislative Assembly the duty which is now claimed. Secondly, if the implied duty as claimed is accepted, then not only will that involve the Court in monitoring the proceedings of the Legislative Assembly but it will also undermine the common law privileges and the

independence of the legislative process without clear and express authority from the Constitution. As Lamer CJ stated in *New Brunswick Broadcasting Co v Nova Scotia (1993) 100 DLR (4th) 212 at p.233*, 'parliamentary privilege is the means by which the Houses of Parliament maintain their independence and the independence of the legislative process'.

There are three privileges of the Legislative Assembly which will be affected if it is imposed with an implied duty to give proper consideration to a report by the Controller and Chief Auditor. The first will be freedom of speech and debate because the only realistic way for a Court of law to determine whether the Assembly has or has not given proper consideration to a report is by looking at the record of the debate on the report. The Assembly does not consider a report in silence, they think aloud. The second privilege which will be affected is the Assembly's immunity from civil proceedings for what is said in the legislative chamber if they fail to discharge their duty of giving proper consideration to a report. The third privilege which will be affected is the Assembly's right to exclusive control over its own proceedings. But these are long and well-established common law privileges of constitutional importance which are necessary for the proper functioning and for securing the independence of Parliament. Before the privileges of Parliament are excluded and its independence curtailed in order to enhance the independence of the office of Controller and Chief Auditor, the Constitution must express itself with irresistable clarity. The Constitution has not done so on the particular point in issue here.

In any event, the Legislative Assembly did consider the report of the

Controller and Chief Auditor during two days of debate. For reasons given by the Members in their speeches it was resolved to refer the report to a commission of inquiry on a motion by the Prime Minister seconded by two Opposition Members. Even though the commission of inquiry that was set up was required by the provisions of the Commissions of Inquiry Act 1964 to report to Cabinet and to no one else, the report of the commission of inquiry was in fact tabled in the Legislative Assembly and debated by the Assembly after that report was presented to Cabinet. There is also no Western Samoan law which prohibits the Legislative Assembly from referring the report of the Controller and Chief Auditor to a commission of inquiry. Mr Baragwanath drew my attention in this regard to a passage in the judgment of Richardson J in the New Zealand Court of Appeal in the case of *Television New Zealand Ltd v Prebble [1993] 3 NZLR 513*, where His Honour said at p.531 :

> "The second [privilege] is that Parliament has the right
> "to provide for or institute official inquiries relating
> "to any subject within the legislative competence of
> "Parliament".

As to the complaint against the composition of the commission of inquiry which included the Attorney-General as counsel assisting the commission and the Secretary to Government as a member because of their close connexion with Government, I pointed out to counsel at the hearing that if the Legislative Assembly were to retain the report by the Controller and Chief Auditor for its own consideration, then the same complaint could be made against the composition of the Assembly in which Government holds the controlling majority. Likewise if the report was referred to the Public Accounts Committee the majority of the

members of that Committee are also members of the political party which is in Government, and the same complaint against the composition of the commission of inquiry could also be levelled against the composition of the Public Accounts Committee. Therefore the argument that the Assembly or the Public Accounts Committee should have considered the report by the Controller and Chief Auditor, and not the commission of inquiry in which the Attorney-General and Secretary to Government were involved as that would affect the independence of the office of the Controller and Chief Auditor, loses much of its force when one considers that Government with its controlling majority sits in the Legislative Assembly and the majority of the members of the Public Accounts Committee are also members of the governing political party.

As for non-compliance with standing order 137 which requires the Public Accounts Committee to examine the report of the Controller and Chief Auditor, the authorities are clear that non-compliance with standing orders does not invalidate proceedings of the Legislative Assembly : see for instance *British Railways Board v Pickin [1974] AC 765 per Lord Morris of Borth-y-Gest at p.790.* In *Jackson v Kalauni and Anor* (unreported judgment of High Court of Niue delivered on 20 September 1995) Quilliam CJ said :

> "While I have already noted that in the present case Standing "Orders were not complied with in a number of respects, I think "these must be regarded as the 'intra-mural activities' of the "Assembly. Certainly I would not think that a simple failure "to observe Standing Orders will give the Court jurisdiction "to interfere. Those matters are properly the province of the "Speaker or of the Assembly itself".

The position of course will be different if the Constitution requires compliance

with standing orders in any particular case. The Controller and Chief Auditor in his report also complains against the Public Accounts Committee about the performance of its functions and against the Committee's chairman in a non-parliamentarian capacity.

One final matter. Article 59 of the Constitution in so far as it is relevant provides :

> "Subject to the provisions of this Part and of the Standing "Orders of the Legislative Assembly, any Member of Parliament "may.... propose any *motion for debate*.... and the same shall "be considered and disposed of under the provisions of the "Standing Orders".

The motion by the Prime Minister to refer the report by the Controller and Chief Auditor to a commission of inquiry was obviously not for debate as it was moved at the end of the debate when there was a clear consensus in the Assembly for the report to be referred to a commission of inquiry. After the Prime Minister's motion was moved and seconded by two Opposition Members, it was carried by the Assembly. The proceedings on the report by the Controller and Chief Auditor then ended. Therefore the provisions of article 59 which apply to a motion for debate do not apply to the Prime Minister's motion to refer the report to a commission of inquiry as that motion was not for debate.

For all those reasons, I am of the view that there is no reasonable cause of action against the Legislative Assembly. Accordingly the cause of action against the Legislative Assembly is struck out.

Cause of action against the Attorney-General:

The cause of action against the Attorney-General who is being sued on behalf of the Prime Minister and the Government of Western Samoa alleges that the Prime Minister and the Government, at all material times, acted unconstitutionally and in particular breached article 99 of the Constitution by :

(a) adopting and following a course of action calculated to ensure that the Report should not be referred to the Public Accounts Committee of the Legislative Assembly for proper scrutiny;

(b) proposing that a Commission of Inquiry should be constituted under the Commissions of Inquiry Act 1964 to investigate the Auditor General's Report when the Commission of Inquiry was to be appointed on the advice of Cabinet and was to be required, pursuant to section 4 of the Commissions of Inquiry Act 1964, to report to Cabinet and to no one else on the matters referred to in paragraphs 13 and 14 hereof;

(c) promoting a procedure which prevented the Auditor General from carrying out his duties under the Constitution and in particular preventing his reporting to the Legislative Assembly and drawing attention to irregularities in the Public Accounts audited by him;

(d) improperly placing political pressure on the Auditor General by complaining about the content of his Report in various respects and endeavouring to force the Auditor General to remove matters from the Report which were politically sensitive and disadvantageous to the Government; and

(e) undermining the constitutional position and independence of the

Auditor General and by endeavouring to pressure him contrary to the Constitution to become responsible to the Government rather than to the Legislative Assembly in the performance of his functions under the Constitution and the law.

Much of what has been said in relation to the cause of action against the Legislative Assembly also applies to the present cause of action. It appears that the matters alleged in parts (a), (b) and (c) do relate and touch upon what was said during the debate in the Legislative Assembly on the Controller and Chief Auditor's report. As already stated in this judgment, what is said in the chamber of the Legislative Assembly is protected by the parliamentary privilege of freedom of speech and debate and immunity from civil proceedings. For what is said in the legislative chamber, the Legislative Assembly is accountable to the people at the ballot box and not to the Courts. So for more than a century the English Courts have consistently maintained that they will not intervene in the proceedings of Parliament. In jurisdictions which have now adopted written Constitutions, the Courts while upholding the supremacy of Parliament and acknowledging the privileges of Parliament, have intervened where there has been a breach of the Constitution which is acknowledged as the supreme law of the land. That is in order to uphold the integrity of the Constitution which has been adopted by the people of the country. The question therefore in each case where there is a written Constitution is : has there been a breach of the Constitution? As I have already stated, my view is that a breach of the Constitution must be shown with irresistable clarity before the Courts will intervene and look behind such a fundamental and well-established constitutional principle as the privileges of Parliament.

As to the first part of the present cause of action, counsel for the Controller and Chief Auditor says the actions by the Prime Minister and Government in adopting and following a cause of action calculated to ensure that the report by the Controller and Chief Auditor was not referred to the Public Accounts Committee for proper scrutiny but to a commission of inquiry was unconstitutional and in particular was in breach of article 99 of the Constitution. It is not clear how article 99 which provides the functions of the Controller and Chief Auditor has been breached because the Controller and Chief Auditor had performed and completed his functions when he submitted his report to the Speaker who in turn tabled the report in the Legislative Assembly. Perhaps what is really claimed here is that the alleged actions by the Prime Minister and Government are inconsistent with the independence of the office of Controller and Chief Auditor as provided in the Constitution for that is what is asserted in one of the relief sought. That is in effect asking the Court to look at what was said in the debate by the Assembly on the report of the Controller and Chief Auditor.

I think one must not overlook that what is involved here is not only the independence of the office of Controller and Chief Auditor which has been asserted; what is also involved is the independence of Parliament as protected by its constitutional privileges. Each side is now forcefully asserting its independence in the present proceedings. And this Court has been asked to decide. I have already made that decision in respect of the claim against the Legislative Assembly which has been struck out.

Even though the actions alleged in the present cause of action are against

the Prime Minister and Government, they are the same actions which were taken within the walls of the Legislative Assembly which I have already considered in relation to the cause of action against the Legislative Assembly that has been struck out. I have also decided that what was said in the Assembly does not conflict with any of the safeguards provided in articles 97 and 98 of the Constitution for the protection of the independence of the office of Controller and Chief Auditor. It would therefore serve no useful purpose to go over the same ground again.

However in case I am wrong in the view I have taken in respect of this part of the cause of action against the Prime Minister and Government, I will therefore look at the factual basis of the claim. From the Controller and Chief Auditor's affidavit annexing the relevant parts of Hansard, it is clear that the Prime Minister at the commencement of the first day of debate moved a motion to suspend standing order 29(1) so that the Legislative Assembly could discuss the report of the Controller and Chief Auditor before it was referred to the Public Accounts Committee. That motion was seconded by an Opposition Member. During the discussion on the first day, another Opposition Member suggested that appropriate personnel from overseas should be brought in to work with the Controller and Chief Auditor so that those affected in the report could be made fully aware. Then at the beginning of the second day of the discussion, a Government Member suggested that a special committee be appointed to look at the report by the Controller and Chief Auditor. An Opposition Member followed. After that Member, the Prime Minister then suggested a commission of inquiry to look at the Controller and Chief Auditor's report. As the discussion progressed, support from both sides of the Assembly continued to increase for the Prime

Minister's proposal for a commission of inquiry. When it came to the turn of the Leader of the Opposition to speak on the question of a commission of inquiry, he supported the proposal for a commission of inquiry. It was during the course of the second day of discussion that the Prime Minister then withdrew his original motion that the report be discussed by the Assembly before it was referred to the Public Accounts Committee. And at the end of the debate the Prime Minister moved a fresh motion that the report be referred to a commission of inquiry. That motion was seconded by two Opposition Members. So the idea of a commission of inquiry came up in the course of the debate in the Assembly contrary to the original motion by the Prime Minister to refer the report to the Public Accounts Committee after discussion by the Assembly.

The Controller and Chief Auditor in his affidavit also says that for several years the Public Accounts Committee has not reported back to the Legislative Assembly on any of the Controller and Chief Auditor's report referred to that Committee by the Legislative Assembly. An Opposition Member who supported the proposal for a commission of inquiry also stated his opinion that the Public Accounts Committee was not adequately equipped and did not have enough time. Whether those remarks against the Public Accounts Committee are in fact true or false is not for this Court to say. But in law the Court has to assume that the matters pleaded by the Controller and Chief Auditor are capable of proof for the purpose of a strike-out application. If, however, the subject-matter of these complaints is true, I would be surprised if the Assembly was not aware of it when they discussed the Controller and Chief Auditor's present report.

Thus the first part of the present cause of action which alleges that the

Prime Minister and Government adopted and followed a cause of action calculated to ensure that the Controller and Chief Auditor's report was not to be referred to the Public Accounts Committee *for proper scrutiny* is not supported by the evidence adduced and pleaded.

The second part of the present cause of action obviously refers to the proposal made by the Prime Minister in the Legislative Assembly to refer the report of the Controller and Chief Auditor to a commission of inquiry. That is of course protected by parliamentary privilege. And I see no clear mandate from the provisions of the Constitution for the Court to intervene. Nor do I find a clear breach of the Constitution to justify intervention by the Court and look behind the privileges of the Assembly. I should also reiterate that there is an established constitutional principle that the Court will not investigate the motives of the Legislative Assembly.

As for the concern expressed about the commission of inquiry being appointed by Cabinet and required to report to Cabinet and to no one else under the Commissions of Inquiry Act 1964, the position would not be that different if the report of the Controller and Chief Auditor had been referred to the Public Accounts Committee as counsel for the Controller and Chief Auditor had argued. As already pointed out, the majority of the Members of the Public Accounts Committee are also members of the governing political party. Even though the Public Accounts Committee is appointed by the Legislative Assembly, it is in effect appointed by Government who holds the controlling majority in the Assembly. I have also referred to complaints made about the Public Accounts Committee. If on the other hand, the Legislative Assembly itself was to consider

the report, then Government of course has the controlling majority in the Assembly. The report of the commission of inquiry in this case was also tabled in the Assembly and debated by the Assembly. So the argument that the proposal for the appointment as well as the appointment of a commission of inquiry which was to report to Cabinet is inconsistent with the constitutional independence of the office of Controller and Chief Auditor loses much of its force.

The third part of the present cause of action also does not stand up upon close analysis. I would only point out that the actions of one Parliament are not binding upon any future Parliament. So the procedure adopted in this case in respect of the report by the Controller and Chief Auditor is not binding on any future Parliament. If the people of Western Samoa does not like what the present Legislative Assembly has done, their remedy lies in the ballot box and not in the Courts.

The fourth and fifth parts of the present cause of action relate to statements alleged to have been made by the Prime Minister to the Controller and Chief Auditor after the commission of inquiry had presented its report to Cabinet. These statements were made outside of Parliament and the Controller and Chief Auditor is saying those statements undermine or conflict with the constitutional independence of the office of Controller and Chief Auditor and are therefore unconstitutional.

It was pointed out for the defendants that the Prime Minister like every other citizen of Western Samoa has a constitutional right to freedom of speech and expression. I have been unable from my own research to find any authority

that is directly on the point in issue. It appears from some of the relevant literature that the parameters of the freedom of speech and expression have not yet been defined with sufficient clarity. The law in this respect is still developing. I therefore consider the issues raised in the fourth and fifth parts of the present cause to be still arguable.

Given the views I have expressed, paragraph (a), (b) and (c) of the present cause of action against the Attorney-General who is being sued on behalf of the Prime Minister and Government are struck out. Consequentially, part I of the relief sought is also struck out.

First cause of action against Commission of Inquiry:

The first caust of action against the commission of inquiry is that its terms of reference are ultra vires the Commissions of Inquiry Act 1964. Particulars are given to show why those terms of reference are ultra vires.

With respect, I am of the view that the particulars do not support the cause of action. It is said that the commission of inquiry was required under the Commissions of Inquiry Act 1964 to report to Cabinet. But that is exactly what the Act permits the commission of inquiry to do. Section 4 of the Act provides :

> "The Head of State, acting on the advice of the Cabinet,
> "may appoint any person or persons to be a Commission to
> "inquire into and *report to Cabinet and to no one else...*".

So clearly, it will not be ultra vires the Commissions of Inquiry Act 1964 if the terms of reference require the commission of inquiry to report to Cabinet. That is what the Act says the commission of inquiry must do.

Then it is said that by article 99 of the Constitution the Controller and Chief Auditor is required to report to the Legislative Assembly. And further it is alleged that the commission of inquiry itself is ultra vires the Commissions of Inquiry Act 1964 because its inquiry intrudes into the powers, rights, duties and privileges of the Legislative Assembly and the Controller and Chief Auditor granted by the Constitution.

Taking the first of these particulars, I see no connexion between the constitutional function of the Controller and Chief Auditor to report to the Legislative Assembly and the question whether the terms of reference of the commission of inquiry are ultra vires the Commissions of Inquiry Act 1964. If the terms of reference are in conflict with the constitutional function of the Controller and Chief Auditor to report to the Assembly then they are void on that ground. It matters not whether the terms of reference are ultra vires or intra vires the Act. The Constitution prevails. But that is not what this cause of action is saying. Secondly, the Controller and Chief Auditor has performed and completed his constitutional function by submitting his report to the Speaker who in turn tabled the report in the Assembly. The terms of reference of the commission of inquiry were drawn up after the Controller and Chief Auditor had completed the performance of his constitutional function.

Furthermore, the commission of inquiry was set up pursuant to a resolution

of the Legislative Assembly, so it cannot be an intrusion into the powers, rights, duties and privileges of the Legislative Assembly. The commission of inquiry is an exercise by the Legislative Assembly of its powers, rights, duties and privileges which I have already held was not unconstitutional. The Legislative Assembly was using one of its own statutes to inform itself as Mr Baragwanath put it. Likewise the commission of inquiry set up pursuant to a resolution of the Legislative Assembly is not prohibited by any law of Western Samoa.

However it is argued that the particulars of the present cause of action address the conflict between appointing a commission of inquiry which was to report only to Cabinet and the constitutional function of the Controller and Chief Auditor to report to the Legislative Assembly. But that takes the issue back to the question of parliamentary privilege and whether the Legislative Assembly had the constitutional competence to pass a resolution referring the report of the Controller and Chief Auditor to a commission of inquiry which was to be appointed by the Head of State on the advice of Cabinet. And I have already disposed of that question when dealing with the cause of action against the Legislative Assembly.

Having regard to the provisions of the Commissions of Inquiry Act 1964 itself, I am unable to say that the terms of reference of the commission of inquiry are ultra vires the provisions of that Act. And there was no argument that the terms of reference of the commission of inquiry are ultra vires on that basis. The essence of the argument appears to be that the terms of reference and the commission of inquiry are unconstitutional and on that basis the terms of

reference are ultra vires the Act. That, as I have said, takes us back to the constitutional questions I have already dealt with.

For those reasons, the first cause of action against the commission of inquiry is not a reasonable cause of action and is struck out.

Second cause of action against Commission of Inquiry:

The second cause of action against the commission of inquiry is that the conduct of the commission of inquiry in the course of its hearing and deliberations constituted a breach of natural justice as against the Controller and Chief Auditor.

In essence the particulars cited in support of this cause of action allege that the commission of inquiry failed to cite the Controller and Chief Auditor as a party to its proceedings and to hold those proceedings in public. The commission of inquiry also failed to permit the Controller and Chief Auditor to be present at its hearings and hear the evidence of witnesses or to give him a transcript of the evidence. Furthermore the commission of inquiry failed to give timely notice to the Controller and Chief Auditor of what was said by various witnesses on matters about which the commission of inquiry proposed subsequently to question the Controller and Chief Auditor. Finally the commission of inquiry failed to provide the Controller and Chief Auditor with its draft report and to discuss its draft report with him.

The law with regard to natural justice was recently restated by the High Court of Australia in *Ainsworth v Criminal Justice Commission (1992) 106 ALR 11.*

In a joint judgment by Mason CJ, Dawson, Toohey and Gaudron JJ it is stated at p.18 :

> "it is now clear that a duty of procedural fairness arises,
> "if at all, because the power involved is one which may
> "'destroy, defeat or prejudice a person's rights, interests
> "'or legitimate expectations'. Thus, what is decisive is
> "the nature of the power, not the character of the
> "proceedings which attends its exercise".

Further on, the same judgment goes on to say in the same page :

> "... as the law has progressed.... the only question
> "which now arises is whether the report [by the
> "Criminal Justice Commission] adversely affected a
> "legal right or interest, including an interest
> "falling within the category of legitimate expecta-
> "tion, such that the Commission was required to
> "proceed in a manner that was fair to the appellants".

And at p.22 it is stated in respect of the question of declaratory relief :

> "The person seeking [declaratory] relief must have
> "'a real interest' and relief will not be granted
> "if the question 'is purely hypothetical', if
> "relief is 'claimed in relation to circumstances
> "'that [have] not occurred and might never happen'
> "or if 'the Court's declaration will produce no
> "foreseeable consequences for the parties'".

In a separate judgment, Brennan J stated at p.23 :

> "In a majority of cases in which an act or decision
> "is judicially reviewed, an exercise of statutory
> "power affects the applicant's rights adversely or
> "there is a failure to exercise a statutory power
> "which, if exercised, would or might affect the

"applicant's rights beneficially. In such cases, "where a person's rights or liabilities will or "might be affected by the exercise or non-exercise "of a statutory power following upon an inquiry, "that person is prima facie entitled to be accorded "natural justice in the conduct of the inquiry. "*Failure to accord that person natural justice "ordinarily results in the setting aside of an adverse "exercise of the power or in an order to exercise the "power, as the case may be. The order made in such "cases does not operate on the failure to observe "the rules of natural justice or on the findings "made on the inquiry but on the consequential exer- "cise or non-exercise of the power.* Thus in *Mahon v "Air New Zealand Ltd [1984] AC 808; 50 ALR 193* where "a Commissioner of Inquiry was found not to have "accorded natural justice to a party against whom he "made an adverse finding in his report, the Privy "Council set aside the Commissioner's order awarding "costs against that party...." (italics mine).

Applying those principles to the present cause of action, the commission of inquiry has made its report and submitted it to Cabinet who in turn had the report tabled in the Legislative Assembly. The report has also been debated by the Assembly. The real question therefore is whether the commission of inquiry's report has adversely affected a right or interest of the Controller and Chief Auditor such that the commission of inquiry was required to observe the principles of natural justice or procedural fairness. The answer to that question is not clear from the pleadings. However in view of what has already been pleaded and the affidavit filed by the Controller and Chief Auditor, I am of the view that proceedings in respect of this cause of action should be adjourned for the Controller and Chief Auditor to file an amended statement of claim. The amended statement of claim is to show whether the Controller and Chief Auditor has any right or interest which has been adversely affected by the report of the commission of inquiry. The commission of inquiry of course will

still have the liberty to bring back its strike-out application after any amended statement of claim has been filed and served.

I wish to acknowledge with gratitude the thoroughly researched legal arguments and citations of authorities presented by both Queen's Counsel which have been of real help to the Court in this case.

Formal orders:

(1) The cause of action against the Legislative Assembly is struck out.

(2) Parts (a), (b) and (c) of the cause of action against the Attorney-General and part I of the related relief sought are also struck out; other parts of this cause of action and related relief remain.

(3) The first cause of action against the commission of inquiry is also struck out.

(4) The application to strike out the second cause of action against the commission of inquiry is adjourned sine die with leave to bring the application on again within 21 days following the filing and service of the amended statement of claim which the plaintiff is required hereunder to file if it is considered that the amended statement of claim discloses no reasonable cause of action.

(5) The Controller and Chief Auditor is required to file and serve on the relevant party within 30 days an amended statement of claim giving all necessary particulars of any adverse effect of the report of the commission of inquiry on any right or interest he may have.

(6) I have allowed here for the afore-mentioned time limits as counsel involved in this case are overseas counsel.

(7) I will not order a statement of defence at this stage until all interlocutory matters relating to the statement of claim have been finalised.

(8) All questions of costs are reserved.

TFM Sapuan

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CHIEF JUSTICE