IN THE EMPLOYMENT COURT
WELLINGTON

WC 17/08
WRC 12/06

IN THE MATTER OF	proceedings for breach of contract and for personal grievances removed from the Employment Relations Authority
AND IN THE MATTER OF	preliminary issues of privilege
BETWEEN	ALAN WITCOMBE Plaintiff
AND	CLERK OF THE HOUSE OF REPRESENTATIVES Defendant

Hearing: 14 and 15 November 2006
And by further submissions filed on 21 November 2006, 17 and 31 July and 9 August 2007
(Heard at Wellington)

Appearances: GC Davenport, Counsel for Plaintiff
PJ Gunn, Counsel for Defendant

Judgment: 26 September 2008

INTERLOCUTORY JUDGMENT OF JUDGE GL COLGAN

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Nature of preliminary questions

[1] The two preliminary issues for decision in these proceedings removed to the Court for hearing at first instance are:

- whether the defendant as employer is required to disclose to the plaintiff the content of draft employment investigation reports that the defendant says are subject to legal professional and/or litigation privilege; and

- the extent, if any, to which parliamentary privilege precludes consideration by the Court of the issues, and evidence that may be given, in the case.

Background

[2] Alan Witcombe alleges that he was dismissed constructively by his employer, the Clerk of the House of Representatives. I note for clarity that although the nominated defendant is the statutory officer, these events involve the now former Clerk, Mr David McGee. I will refer to him in this judgment as "the Clerk". Mr Witcombe claims that the Clerk began an investigation into two allegations of misconduct against him. The first was that he had attended improperly a prime ministerial press conference at which the date of the 2002 general election was announced. The second allegation was that a report that Mr Witcombe wrote was submitted improperly to a parliamentary select committee.

[3] Mr Witcombe became so dissatisfied with the investigative process followed by the Clerk that, prior to its conclusion, he resigned or abandoned his employment alleging, as I understand the pleadings, that the Clerk as employer had so seriously

and repeatedly breached their contract of employment that the Clerk should be held to have repudiated it. Mr Witcombe says his election to resign was, in law, a constructive dismissal that was unjustified.

[4] Additionally or alternatively, the plaintiff's pleadings may be interpreted to include an allegation that the defendant's proposed future non-adherence to express and implied terms of the parties' employment contract amounted to a constructive dismissal of the plaintiff.

[5] Although Mr Witcombe's principal claim is one of unjustified constructive dismissal, he has a separate cause of action in unjustified disadvantage and another separate cause of action for breach of contract.

[6] The remedies claimed for the three causes of action include: distress compensation of $10,000 for unjustified disadvantage; distress compensation of $15,000 for unjustified dismissal; compensation for reputation damage of $10,000; compensation for other losses sustained including medical and counselling costs and legal costs incurred during the period up to his constructive dismissal; recommendations under s123(1)(ca) of the Employment Relations Act 2000 ("the ER Act") as to workplace practices for the conduct of investigations in a manner free from bias and/or the appearance of bias; an order for reimbursement of all wages and benefits lost as a result of his unjustified dismissal; and the costs of and incidental to these proceedings.

[7] Although this case concerns only Mr Witcombe's proceedings against the Clerk as his employer, it is linked inextricably to the circumstances of another employee, Andrew Fieldsend, against whom the same allegations of misconduct were made by the defendant, and in respect of whom a parallel employment investigation was conducted. Mr Fieldsend gave notice of his resignation on 2 July 2002, with effect a month later, although then left open the option of pursuing a claim for unjustified constructive dismissal. At least until the cessation of his employment by resignation, many of the relevant events for Mr Witcombe concerned and applied also to Mr Fieldsend. Some important elements of Mr Witcombe's case

arise from interactions between the Clerk and Mr Fieldsend but dealing with matters concerning both employees.

The status in law of the defendant and his employees

[8] In several respects, employment in the Office of the Clerk of the House of Representatives is, if not unique, significantly different from that of many other employees in New Zealand. Among the reasons for that difference are that employees such as the plaintiff are officers of the House of Representatives. In addition to the usual rights and obligations between employer and employee, persons such as the plaintiff are subject to Parliament's own rules set out in Standing Orders or otherwise evidenced by rules of practice of the House. Such employees owe significant obligations not only to their employer, the Clerk, but also to others including chairs and members of select committees, other Members of Parliament, and the Speaker of the House of Representatives. Who is entitled at law to deal with the rights and obligations of such employees, and of their employer who is also a statutory officer of the House, is at the heart of the second issue for preliminary determination. This involves identifying and applying the principles of parliamentary privilege. For the first time in New Zealand of which I am aware, this Court has to address the respective rights of the parties and of the legislative (and perhaps the executive) and judicial branches of Government affecting employment relations.

[9] The Clerk of the House of Representatives is an officer of Parliament. The Clerk's functions and powers are established by statute, the Clerk of the House of Representatives Act 1988 ("the CHR Act"). Section 3 includes among the functions of the Clerk:

> *(d) To ensure that the members of the staff of the Office of the Clerk of the House of Representatives carry out their duties (including duties imposed on them by law or by the Standing Orders or practice of the House of Representatives) and maintain—*
>
> *(i) Proper standards of integrity and conduct; and*
> *(ii) Concern for the public interest.*

[10] Section 18 of the CHR Act provides that staff of the Office of the Clerk (which included Mr Witcombe) are *"officers of the House of Representatives"*.

[11] Section 23 provides:

> *The Clerk of the House of Representatives may, subject to any conditions of employment included in any award or agreement, remove any employee appointed under section 18 of this Act from that employee's office or employment.*

[12] Section 24 on which Mr Witcombe relies expressly provides:

> *The Clerk of the House of Representatives shall operate a personnel policy that complies with the principle of being a good employer by following, subject to this Act, as closely as possible and as if he or she were the chief executive of a Department, the provisions of sections 56 and 58 of the State Sector Act 1988.*

[13] Although not yet addressed in evidence, I shall assume compliance by the Clerk with the obligation to operate a personnel policy complying with the principle of being a good employer. It is reasonable to infer that such a personnel policy would deal, among other things, with fair investigations of, and decision-making about, allegations of misconduct against the employees. So Parliament has legislated expressly for employment relationship problems to be addressed not only by the statutory provisions of the ER Act but also, and more particularly in the case of employees of the Clerk, by a personnel policy that complies with good employer principles. Such principles include fair and reasonable treatment of employees generally but may, and indeed are very likely to, include particular provisions reflecting the nature of the work of staff of the Clerk.

[14] It follows, in my judgment, that Parliament must be taken to have legislated expressly for employment obligations such as protecting the defendant's employees from unjustified action in, or dismissal from, employment. But it must also be taken to have intended that the statutory mechanisms for challenging such events in employment, including in the courts, would be as available to employees of the defendant as they are to other employees whose employment is not subject to the

CHR Act. Parliament has not created any exemptions to those obligations on the Clerk as employer that might have reflected the particular nature of the employment.

[15] So the initial presumption must be that an employee of the Clerk, such as the plaintiff, is entitled to the rights and protections afforded by those legislative provisions including the right to challenge the employer's acts or omissions affecting the employee's employment and that the Clerk is to justify employment disadvantages or dismissals if called upon to do so.

[16] Indeed, s25 of the CHR Act provides that, with one exception that is irrelevant to this case, the provisions of the Act apply in relation to employees appointed under s18 of the CHR Act as Mr Witcombe was.

[17] The ER Act is now the statutory basis of much, but not all, law governing employment in New Zealand. It, and judgments applying to it, include such principles as the requirements that an employer cannot disadvantage an employee in employment or dismiss an employee from employment, except justifiably with the onus of justification resting on the employer. Proceedings such as these under the ER Act may include hearing evidence, whether strictly legal evidence or not, as the Court considers in equity and good conscience it should receive: s189.

[18] The procedures by which Parliament may allow aggrieved persons to be heard and be given remedies where such persons are affected adversely by things said or done under parliamentary privilege, extends to employees of the Clerk. However, I do not think it can be said that Parliament has reserved to itself any separate jurisdiction to deal with complaints of aggrieved parliamentary employees. It has allowed for these to be remedied in the same or similar ways as for other employees through the Employment Relations Authority or the courts. Section 25 of the CHR Act is a clear statement of Parliament's intention to this effect, that employment relations' issues involving parliamentary employers and employees should be dealt with by the judicial branch of Government. I return to these questions in the later parts of this judgment.

[19] The difficulty illustrated by this case is where things done and said by parliamentary employers and parliamentary employees occur in Parliament (as broadly interpreted) and may be the subject of decision by organs of Parliament, but affect integrally employment questions for determination by the judicial branch of Government.

Facts relevant to claim to legal professional and litigation privilege of documents

[20] The relevant factual background necessary to determine this question is as follows. The Clerk of the House asked the Clerk-Assistant (Andrew Beattie) to investigate the allegations of misconduct against Mr Witcombe and to submit the outcome of those investigations in the form of a written report. By early September 2002 both Mr Witcombe and the Clerk had lawyers acting for and advising them, in the case of the Clerk, the Crown Law Office. Also by that time and on at least two occasions, Mr Witcombe had become so concerned about the process by which the Clerk was investigating these allegations that his solicitors had indicated their intention to invoke litigation to halt or change the process. There were discussions between lawyers and although agreement had not been reached about the process, the Clerk had advised Mr Witcombe's solicitors of the nature of future steps to be taken and the plaintiff had accepted these, although reserving his rights of challenge to them at a later stage.

[21] The Clerk's intended process for dealing with the Clerk-Assistant's investigation was to be that a draft report would be sent to Mr Witcombe's solicitors for his comment and input before being finalised, taking into account those comments. Clearly neither the draft investigation report to be sent to Mr Witcombe's solicitors, nor the final report from which it was developed, could have been the subject of a claim to privilege. There is no indication from the draft evidence or documents that have been presented to the Court for the purpose of deciding this issue, that the Clerk told Mr Witcombe that the Clerk-Assistant's draft report would be sent to Crown Law for advice before that draft was "finalised".

[22] The Clerk-Assistant began preparation of his written draft report. On 17 September 2002 the Clerk-Assistant sent a draft of the draft report (what I will call

the first preliminary draft) to the Crown Law Office and asked orally for advice and comment on it. The document sent to Crown Law does not appear to have been accompanied by a covering letter or other similar written communication. Also subject to the Clerk's claim for privilege (and not challenged by Mr Witcombe) are notes of a telephone conversation on the following day between the Clerk-Assistant and Crown counsel, Mrs Roanna Chan, about the matter.

[23] On the following day, 18 September, the Clerk-Assistant e-mailed Crown Law *"a refined draft"* with a request that the earlier draft document be disregarded. I refer to this as the second preliminary draft. It appears that the plaintiff was then unaware of these interactions between the Clerk and Crown Law but it is not surprising that these events came to his knowledge only in the document disclosure process of his litigation.

[24] On the next day, 19 September, Crown Law received advice by fax from Mr Witcombe's solicitors that they considered that his employment was at an end, that he had been dismissed constructively. The letter from Mr Witcombe's solicitors advised of the commencement of a personal grievance claim. Having been the recipient of this advice, I assume Crown counsel did nothing further about the preliminary draft reports, at least pending further instructions. On 24 September the Clerk instructed Mr Beattie to discontinue his investigation into the allegations against Mr Witcombe.

[25] Apart from Crown counsel making handwritten notations on the second preliminary draft report received on 18 September, no further input to it was provided by Crown Law in view of the plaintiff's advice of 19 September.

[26] Finally, on 10 October 2002, the Clerk notified formally Mr Witcombe's solicitors that the investigation into this alleged misconduct had ceased upon the giving of notice of termination of his employment by Mr Witcombe on 19 September 2002.

[27] There is no suggestion that Mr Witcombe knew of the contents of the Clerk-Assistant's preliminary draft reports that were sent to Crown Law. His claims

depend, however, on the manner in which he was treated by his employer. The unjustified disadvantage grievance will turn first on whether Mr Witcombe can establish that he was disadvantaged in his employment by the actions of the defendant. His cause of action in breach of contract will also rely upon what the defendant said and did. The cause of action based on constructive dismissal will depend for proof, in part, of whether, as a result of things said and done to him, the plaintiff can establish a repudiation of their employment contract by the defendant. What preliminary draft reports whose contents are still unknown to the plaintiff can establish to support these particular causes of action, is uncertain. At best, the contents of the preliminary draft reports may corroborate other evidence to be called for the plaintiff about the manner in which he was treated by the defendant.

Disclosure of documents and privilege

[28] The grounds upon which a party may object to disclosure of a document or class of documents is set out in reg 44(3)(a) of the Employment Court Regulations 2000. This provides:

> *(3) The only grounds upon which objections may be based are that the document or class of documents —*
> *(a) is or are subject to legal professional privilege; or*
> …

[29] The defendant relies upon both varieties of legal professional privilege, solicitor/client privilege and litigation privilege.

Decision on litigation privilege of documents

[30] This is at the same time both a narrower and broader category of privilege than its solicitor/client cousin. It is narrower in the sense of requiring more particular circumstantial tests to be established. It is broader in the sense that it may cover communications to and from persons other than legal advisers. In this case, however, the litigation privilege asserted is in respect of legal advisers.

[31] It is common ground that two tests must be satisfied[1]. The first is that at the time the documented communication that is said to be the subject of the privilege was created, litigation was pending or was reasonably contemplated by the party asserting the privilege. The second test, that is cumulative on the first, is that the document or documents were created for the dominant purpose of obtaining or giving legal advice in that litigation.

[32] The first test (litigation pending or reasonably contemplated) is met in this case. On several occasions before 17 September 2002, Mr Witcombe's solicitors had threatened proceedings in the Employment Relations Authority about the process that the Clerk was then undertaking to investigate the allegations of misconduct against Mr Witcombe. Even when the Clerk had advised the plaintiff's solicitors of the process he intended to follow including an additional step or steps and the plaintiff had stayed his hand, Mr Witcombe nevertheless reserved expressly the right to seek relief, including interlocutory relief. The spectre of pending litigation was present or was certainly reasonably contemplated by the Clerk when the Clerk-Assistant, Mr Beattie, sent the first preliminary draft report to the Crown Law Office for legal advice on 17 September 2002.

[33] The second necessary test is, however, more difficult for the defendant to satisfy if there is to be litigation privilege. The *"dominant purpose"* for which the first and second preliminary draft reports were prepared by Mr Beattie was not for litigation pending or even contemplated. Rather, the predominant purpose in preparing those reports was to record Mr Beattie's investigations and to report to the Clerk to enable him to make decisions about Mr Witcombe's employment including, potentially, whether it was to continue. The obtaining of legal advice about litigation that had been threatened by Mr Witcombe's solicitors or that might even have been pending was, at best, a secondary purpose of the first and second preliminary draft reports prepared by Mr Beattie.

[34] Mr Gunn for the Clerk relied on a subsequent judgment of the Court of Appeal in which the *Guardian Royal Exchange* dominant purpose test was affirmed and

[1] *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA)

developed. In *General Accident Fire & Life Assurance Corporation Ltd v Elite Apparel Ltd* [1987] 1 NZLR 129, 133, the Court had to consider reports about the financial position of an insurance claimant and about the cause of a fire. The Court of Appeal accepted that the dominant purpose of reports investigating factual issues, in addition to the advice of a solicitor, would enable a decision about liability to be made and that this was inseparable from the purpose of advising upon the conduct of the apprehended litigation. The documents were therefore found to be privileged because a decision to be reached by the insurer about cover depended in substance on legal advice and the documents were prepared to enable that advice to be given. Mr Gunn drew parallels with the case now for decision saying indeed that there is a stronger claim to privilege than in the *Elite Apparel* case. Counsel submitted that the dominant purpose for which the draft report was created by the Clerk-Assistant was to obtain legal advice with respect to threatened litigation. The report was in draft and was submitted to counsel for advice and possible amendment.

[35] Mr Gunn submitted that it was likely that the preliminary draft report would have been amended as a result of legal advice and may even have been substantially amended. That is, however, speculative, at least for the plaintiff and the Court, as is any more than the admitted possibility that the investigation may have proceeded in a different direction or reached a different set of conclusions as a result of the advice provided by counsel. I accept also as a general proposition that it is desirable for parties to take professional advice before acting in significant employment issues. So too, in general principle, is the need to preserve the confidentiality of such advice in the context of employment disputes.

[36] To the extent that the judgment of the Court of Appeal in *Elite Apparel* is authority for the proposition that there may be considerable overlap between the creation of a document for the purpose of litigation (actual or reasonably anticipated) and for an earlier purpose that is related to the litigation, I think it is distinguishable. In *Elite Apparel* the documents for which privilege was claimed were created beginning almost immediately after the event that gave rise to the litigation (a fire). So too was the reasonable apprehension of litigation from about the same time.

[37] In this case, by contrast, the decision to create a report by the Clerk-Assistant to the Clerk occurred as early as about 13 June 2002. Although the draft evidence is not entirely clear, it seems probable that from about that time, the Clerk intended to put the inquiry into alleged misconduct by Mr Witcombe in the hands of his Assistant, Mr Beattie, for investigation and reporting back to him. It was only after that investigative process had begun, and steps undertaken in it that upset Mr Witcombe, that there was a threat of litigation. It is not asserted, and I do not think it could be reasonably, that the Clerk as employer could have had a reasonable contemplation of litigation instigated by Mr Witcombe from the time that allegations of misconduct came to the Clerk's notice. Although that has indeed occurred, such cases are the exception rather than the rule. The Clerk was expected to approach allegations of misconduct by a staff member with an open mind and there is nothing (at least yet) to suggest, if only at those early stages, that the defendant did otherwise.

[38] I conclude that Mr Beattie's report, initially in the form of a draft or drafts, was not prepared in response to litigation, actual or reasonably anticipated. The dominant purpose of the report was not to assist the Clerk's position in litigation but, rather, to record an investigation into allegations of misconduct.

[39] It follows that the defendant cannot assert litigation privilege in respect of the first and second versions of the preliminary draft.

Claim to legal professional privilege of documents

[40] Simply because the Clerk is unable to assert litigation privilege in respect of the documents does not mean that there may not still be legal professional privilege in the same documents. In material respects and as already noted, this is in some ways a broader ground of privilege and does not depend upon the dominant purpose for which there was a communication or the time at which this was made.

[41] Although it is not clear from the evidence, I will assume that there are at least two copies of both preliminary draft reports. The first copies are those sent to Crown Law Office and which may or may not have been notated by Crown counsel. I

assume, also, that the Office of the Clerk held further copies of both preliminary draft reports, whether in hard copy form or electronically. The retention of more than the original document by the defendant, or if held electronically, more than one original, may be significant in view of the case law in determining what is privileged and what is not.

[42] As noted in the Laws of New Zealand (Discovery) (LONZ) at paragraph 63 (Solicitor-client privilege) as a general principle:

> *Any communications passing between a party and his or her solicitor are privileged from production, provided they are confidential, are spoken or written to or by the legal adviser in a professional capacity, and are made for the purpose of getting or giving legal advice or assistance.*

[43] There are a number of authorities for this proposition but I rely simply on the judgment of the New Zealand Court of Appeal in *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA) followed in more recent cases.

[44] Privileged communications include *"…a statement of facts drawn up by the client or at the client's direction for submission to the solicitor."* (*Southwark and Vauxhall Water Company v Quick* (1878) 3 QBD 315 (CA) at 323)

[45] The common law of legal professional privilege has been examined extensively and restated authoritatively by the House of Lords in a recent judgment, *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610. The leading judgment of Lord Scott of Foscote considered the policy justifications for the existence of legal professional privilege, its permissible scope, the sorts of communications that could be the subject of a claim and whether legal professional privilege should be allowed to "play" where the advice or assistance sought is not advice or assistance about the client's legal rights or obligations. This is what was described by the House of Lords as presentational advice.

[46] Relevant principles from the judgment of Scott LJ in *Three Rivers* include that it is an essential ingredient of privilege that the communication or document for which it is sought is a confidential one although this is not, by itself, sufficient to

enable privilege to be claimed (paragraph 24). Presentational advice or assistance by lawyers to parties whose conduct may be brought into question should attract the protection of privilege if it is otherwise warranted (paragraph 35). The essential question for the Court is whether the advice relates to the rights, liabilities, obligations or remedies of the client, either under private or public law. If not, then legal advice privilege will not apply. If so, then the Judge still needs to consider whether the communication falls within the policy underlying the justification for legal advice privilege in law: *"Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one."*

[47] Although I am unaware of the nature of the advice sought by the Clerk-Assistant from Crown counsel, or of such advice that was able to be given before the inquiry concluded, I accept that it may have extended to what is referred to in the *Three Rivers* case as presentational advice or assistance. That would not be surprising because of the emphasis in employment law upon procedural fairness as well as substantive justification in law. So my decision is not dependent upon the nature of advice sought or given but, rather, the fact that advice was sought from, and given by, a legal adviser and related to the rights, liabilities, obligations or remedies of the client..

[48] As to drafts being the subject of legal advice, *Cross on Evidence*[2] notes at paragraph 10.21, p330:

> *Drafts, including the client's drafts, and other working papers are an essential part of the process of advising and being advised and therefore attract legal professional privilege.* [Saunders v Commissioner Australian Federal Police *(1998) 160 ALR 469*]

[49] As also noted in LONZ (Discovery) at paragraph 62 (*Extent of privilege*):

> *Drafts and working papers, including file notes that have been prepared as part of the process of advising and being advised, are protected* …[Kupe Group v Seamar Holdings Ltd *[1993] 3 NZLR 209 at 213*] …

[2] New Zealand Ed DL Mathieson (8th NZ edn)

> *The test of whether a communication was made confidentially for the purpose of legal advice is to be construed broadly.* [Equiticorp Finance Group Ltd v Collett *(1991) 3 PRNZ 509*] … *Communications that pass in the course of the transaction [between client and legal adviser] are privileged if their overall aim is to obtain appropriate legal advice, since the whole handling is experience and legal skill in action, and a document passing during a transaction does not have to incorporate a specific piece of legal advice to be privileged.* [Balabel v Air India *[1988] Ch 317; [1988] 2 All ER 246 at 256 (CA)*] *Further, legal advice is not confined to merely telling a client the law; it includes advice about what prudently and sensibly should be done in the relevant legal context.* [Balabel *above*] *It is immaterial that a client is merely seeking affirmation of a recommendation that he or she has made in a communication to the solicitor.* [Hague Marketing Ltd v New Zealand Insurance Co Ltd *(1987) 2 PRNZ 528*]

[50] Mr Gunn, counsel for the Clerk, submitted that the Clerk-Assistant's preliminary draft report sent to the Crown Law Office was a communication on which advice was sought about what should prudently and sensibly be done in the relevant legal context. I accept that this was the nature of the advice sought by the Clerk-Assistant and that any advice so given should be protected by legal professional privilege. There is no question that the advice of Crown counsel to the Clerk-Assistant is privileged. What is more difficult to determine is whether the material provided by the defendant, upon which advice may have been given, is privileged in all the circumstances. That is what Mr Witcombe wishes to have on discovery.

[51] Mr Witcombe relies on part of a sentence in a letter sent from the Crown Law Office to his solicitors on 24 March 2003, I infer in support of a submission that privilege has been or will be waived. In the letter that sentence, appearing immediately after an assertion to privilege in respect of the Clerk-Assistant's draft reports, reads:

> *However, our client has instructed that when all legal issues have been resolved between the parties, he would be prepared to release the draft report prepared by Mr Beattie to your clients.*

[52] Precisely what this is intended to convey is not entirely clear but I do not think in any event it is a waiver of privilege that is still being maintained pursuant to the assertion earlier in the letter. It does not avail the plaintiff on this question of privilege.

[53] Next, Mr Witcombe asserts that the document sent by the Clerk-Assistant to the Crown Law Office on 17 September 2002 cannot be regarded as being a "draft" because that is inconsistent with what Mr Witcombe says was the Clerk-Assistant's advice to the Clerk on 9 September 2002: *"I have concluded my investigation in respect of Alan Witcombe and have enclosed two reports, …"*. I accept, however, the defendant's argument that it is more probable than not that this was a draft letter prepared in anticipation of sending the report to the Clerk but which was not sent, although it has been disclosed. In these circumstances the reference to the conclusion of the investigation is erroneous and it follows that what the Clerk-Assistant sent to the Crown Law Office on 17 September 2002 was a draft of the draft report that the Clerk had agreed to send to Mr Witcombe.

[54] Finally, to resolve the question of privilege, Mr Witcombe proposes that I inspect the document sent to Crown Law Office on 17 September 2002 to better enable me to determine whether it is privileged. While that is a course sometimes adopted where the content of a document claimed to be privileged is in doubt, it is not always necessary for a Judge to inspect the document to determine whether it is privileged. I conclude I do not need to do so, at this stage at least.

[55] Support for a conclusion of the inextricable linking of the preliminary draft reports with the legal advice is said by Mr Gunn to be found in the judgment of the High Court (Tipping J) in *Duraphos International (N.Z.) Limited & Ravensdown Fertiliser Co-operative Limited v G.E. Tregenza Limited HC Timaru*, C.P. No.78/88, 26 June 1989. That was, however, a case of a draft agreement prepared by a solicitor and enclosed with a solicitor's letter giving advice to a client. Here the position is different: the preliminary draft investigation report was the client's document, not the legal adviser's.

[56] The judgment of the Tompkins J in *Kupe Group Ltd & Ors v Seamar Holdings Ltd & Ors* HC Auckland, CP.2826/88, 18 July 1995 referred to and adopted the principles propounded by the English Court of Appeal in *Balabel v Air India* [1988] 2 All ER 246. These are that the purpose and scope of privilege is still to enable legal advice to be sought and given in confidence. The test is whether the communication or other document was made confidentially for the purposes of legal

advice. Those purposes must be construed broadly. Where a transaction involves protracted dealings, advice may be required or appropriate on matters at various stages and there will be a continuum of communication and meetings between solicitor and client. Where information is passed by the client to the solicitor or vice versa as part of the continuum aimed at keeping both informed, and so that advice may be sought and given as required, privilege will attach. Legal advice is not confined to telling the client the law: it includes advice as to what should be done prudently and sensibly in the relevant legal context.

[57] Finally, Mr Gunn referred me to the pertinent and very recent judgment of Allan J.in *Simunovich Fisheries Ltd & Ors v Television New Zealand Limited & Ors* HC Auckland, CIV 2004-404-3903, 10 July 2007 on the question of privilege of drafts held by solicitors[3]. That was a defamation case and the judgment addressed whether draft programme scripts retained, not by the first defendant broadcaster but by its solicitors, were inspectable. The draft scripts were sent by the defendant to its solicitors for the purpose of obtaining legal advice, although they differed from the script ultimately broadcast that was said to have been defamatory. No original or copy draft was retained by the broadcaster: the only versions retained were those sent to the lawyers. The party seeking disclosure asserted that the scripts were relevant because they would assist the Court to determine allegations of ill will and malice and, thereby, to quantify damages for the allegedly defamatory broadcast. The first defendant resisted disclosure of these drafts on grounds of relevance, necessity and legal professional privilege.

[58] So although not precisely the same issue as in this case, there are helpful analogies that can be drawn here.

[59] Addressing the ground of legal professional privilege, Allan J in *Simunovich* reviewed comprehensively the authorities but concluded that none considered directly the situation that he faced, namely the creation of documents with a dual purpose in mind.

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[3] This is an example of the fulfilment by counsel of his professional obligations to draw to the attention of the Court an authority or other material that may ultimately disadvantage counsel's client, although of course seeking to distinguish it. I express my appreciation to Mr Gunn for doing so as the case has enabled me to determine a difficult issue.

[60] That is also the position with which I am faced. In *Simunovich* the purposes were, first, the preparation of the television programme itself and, second, the intention to obtain legal advice on each draft script as it was prepared. In this case the first of the dual purposes was the preparation of a report on Mr Witcombe's alleged misconduct. The second purpose was to seek legal advice about the process of that investigation and the content of the report.

[61] In *Simunovich*, the High Court Judge himself found only one judgment of direct assistance, that in *Auag Resources Ltd & Anor v Amax Gold Mines New Zealand Ltd & Ors* HC Auckland, CL59/93, 17 June 1994. There the challenge was to a claim of privilege in draft minutes of joint venture directors' meetings. Henry J in *Auag* concluded that a communication sent to solicitors, seeking advice on the contents of draft minutes, attracted privilege although, as originally prepared, the draft minutes did not. Draft minutes of a meeting could not be said to be intended to be confidential to the compiler and to be made for the purpose of obtaining legal advice. Rather, such a draft was clearly intended to be a record of the meeting, not generated for the purpose of obtaining legal advice. The Judge in *Auag* continued:

> *The fact that advice is also being sought on a particular matter referred to in the draft minutes does not mean that the draft arose from the seeking out of advice, and disclosure in this situation does not indirectly defeat a legitimate privilege. Whether these defendants are in possession only of copies of the draft minutes as returned by the solicitors, which by way of annotation contains their advice or notes of their advice, I am unsure. Such copies would in my opinion be privileged, as would correspondence (whether by way of facsimile cover sheet or otherwise), although the original draft would not.*

[62] As Allan J noted and concluded in *Simunovich* however:

> *[27] It will be observed that Henry J drew a distinction between copies of the draft minutes provided to and returned by the solicitors on the one hand, and other copies of the draft minutes, including the original, which would not be privileged. He expressly referred however, only to the notional case of the return by solicitors to their clients of copies of the draft minutes, bearing by way of annotation, notes of the solicitors' advice. He does not refer to the status of draft minutes returned by the solicitors without annotation.*
>
> *[28] In my view it is necessary to endeavour to keep in balance the right of the parties to discovery and inspection of all relevant documents on the one hand, and the sanctity of privileged communications on the other. In a*

> *case such as the present, that balance is achieved in my opinion, by drawing a distinction between different copies of the transcript. Those copies prepared for the purpose of furtherance of preparation of the programme, will need to be discovered in the usual way. But a copy of the transcript which is handed to the second defendant's solicitors for the purpose of enabling of legal advice to be given and taken, will attract legal professional privilege, because it is "… part of the continuum aimed at keeping both informed, so that advice may be sought and given as required":* Balabel v Air India *p 254.*

[63] I infer from *Simunovich* that because the only versions of the draft scripts still in existence were those sent to and held by the broadcaster's solicitors, they were not available for inspection on discovery. I also infer, however, that had other versions of the same drafts been in existence, these would have had to be made available to the plaintiff on discovery. That is consistent with the reasoning in *Auag* that Allan J followed.

[64] Following *Simunovich*, Mr Davenport submitted that Mr Witcombe is entitled to inspect and copy all copies of the draft report in the possession of the defendant (but not in the possession of its legal adviser) with the sole exception of copies returned by Crown Law Office to the defendant *"with legal notation and advice attached or recorded on them."*

[65] Mr Gunn argued, however, that the judgment in *Simunovich* supports the Clerk's claim to privilege, saying that it confirms the well established authorities that privilege attaches to documents prepared by a client for submission to a solicitor in order to obtain legal advice. Counsel submitted that it must be plain that the intention in this case was that after receipt of legal advice about the draft report, the defendant would finalise it and send it to the plaintiff's solicitors. He says it must be equally plain that the report was not to be sent to the plaintiff's solicitors until legal advice had been obtained, considered, and possibly adopted.

[66] In this way, the defendant seeks to distinguish the draft report in this case from the draft minutes of a meeting in *Auag* because in that case the advice sought was on matters referred to in the draft minutes, not on the minutes themselves. In this case, the defendant says, he sought legal advice on the draft report itself. Mr Gunn

submitted that the plaintiff's argument is flawed because, if correct, privilege would exist in the documents handed to the solicitors for the purposes of obtaining legal advice to be given and taken but would be defeated simply by obtaining another copy of the same document remaining in the client's possession.

[67] Mr Gunn also relies on the contention that the draft report in this case was prepared for the purpose of enabling legal advice to be given and taken and privilege against production must continue to apply. I do not agree with the factual basis of that contention. Realistically, the draft report was prepared for the purpose of the creation of a final report that would also, in turn, be given to Mr Witcombe. That the draft report might be referred to counsel for legal advice is unsurprising but does not mean that the draft report was prepared for that purpose. The obtaining of legal advice was an ancillary and process element of the report, rather than its purpose, in the sense that it enabled the legal adviser to read and consider the material on which the advice was sought.

Decision of claim to legal professional privilege of documents

[68] Although not without some difficulty because of the apparently unique circumstances of this case, I conclude that the defendant is entitled to claim legal professional privilege in respect of both preliminary draft reports that were sent to the Crown Law Office on 17 and 18 September 2002. Privilege does not extend, however, to the originals or other copies of these documents that were retained by the defendant or otherwise not sent to its legal advisers. Following the reasoning in the materially analogous cases of *Auag* and *Simunovich*, the documents were not prepared for the purpose of obtaining legal advice. The privilege that I find attaches to the copies sent to Crown Law will ensure that such advice as was provided to the defendant is protected from disclosure.

[69] Mr Gunn's point that to require disclosure of the versions of the reports not sent to Crown Law will destroy the effect of privilege in those so sent, is not without some initially attractive force. However, determining privilege is a balancing exercise. Although Mr Gunn is correct in respect of privilege in relation to what the

Crown counsel wrote or told Mr Beattie, based on what was given to Crown Law, that should be the extent of privilege. Where, as here, the document has been prepared for another purpose and the communications to and from the lawyers about legal advice are privileged, the subject-matter of a document prepared for another purpose should not be privileged.

[70] For the foregoing reasons I uphold the defendant's claim to privilege in the preliminary draft reports that are known to the parties as documents 1.60 and 1.59. This is only to extend to those versions or copies sent to the Crown Law Office on 17 and 18 September 2002. Other versions or copies (including electronic copies) of these documents retained by the defendant are not privileged.

Parliamentary privilege – onus and burden

[71] The plaintiff has posed as an issue for the Court the question of which party has the onus of establishing the privilege and its scope. As Mr Davenport points out correctly, it is the defendant who has pleaded parliamentary privilege in both declining to plead to certain parts of the amended statement of claim and has, subsequently, asserted the inability of the plaintiff to lead certain evidence in support of his case and, by implication, to cross-examine the defendant's witnesses in some respects. Mr Davenport for the plaintiff submitted that in these circumstances, the defendant bears an onus of persuading the Court of the application and extent of privilege because the Clerk has sought to invoke it.

[72] Parliamentary privilege is not, however, like an affirmative defence that should be established by the proponent of it, or like an allegation of disputed fact that should be proven on the balance of probabilities by its maker. Parliamentary privilege is a pervasive principle of law that demands recognition and compliance by courts where it is identified (including by the Court itself) as being in issue. Although the defendant has identified what he says are elements of the plaintiff's case in which privilege may be in issue, I do not agree that there is then an evidential onus on the defendant to establish to a standard that the privilege applies and, by implication, failing which, the plaintiff's case is untrammelled. That is not least because the

privilege is Parliament's, not the Clerk's or indeed that of any other officer of the House including the Speaker. As the texts and cases illustrate, the privilege is that of the House and even the Privileges Committee that hears breach of privilege questions, reports ultimately to the House that determines questions of privilege.

[73] It is not a question, as Mr Davenport submitted, of any one party *"seeking to invoke that privilege"*. The privilege is not one to be invoked by a party to litigation. I do not accept that the judgment of the Privy Council in *Jennings v Buchanan*[4] is authority for the proposition that a party seeking to invoke privilege must establish its application. Nor do I so read the statement of the Supreme Court of Canada in *Canada* (*House of Commons) v Vaid* [2005] 1 S.C.R. 667, 2005 SCC 30 that "*The burden of proof is on those who assert [the privilege]* …", at least in the New Zealand context.

[74] Ultimately, however, I do not think it matters much whether an onus has been satisfied because the matter of parliamentary privilege has been raised by the Clerk and addressed very comprehensively by submissions from both parties enabling a decision to be made about the application of parliamentary privilege and its scope in this case. Determining and applying parliamentary privilege is not simply an evidence admissibility exercise that is in the Court's discretion and, because of s189(2) of the ER Act, may be determined differently than in the ordinary courts in civil proceedings. The application of parliamentary privilege is a constitutional principle that transcends the rules of evidence of particular courts. It is a principle applicable to court proceedings generally and in respect of which I consider there are no special statutory exemptions for the Employment Court.

Parliamentary privilege – the relevant issues and evidence

[75] The Clerk says that Mr Witcombe is not entitled to both raise a number of issues for determination by the Court, and to call, or cross-examine on, certain evidence that he intends to adduce, because to do so would be to infringe upon the privilege of Parliament. So far as I am aware, this is the first time in which these

[4] [2005] 2 NZLR 577

questions have arisen in an employment case in New Zealand and, in particular, about a parliamentary employer and employee.

[76] The defendant's main argument is that the allegations in paragraph 30 of the amended statement of claim, and evidence intended to be called about those, calls into question proceedings of Parliament that cannot be challenged before the courts. The defendant says that the plaintiff seeks to bring into question things said or done in Parliament, including before a Select Committee of the House of Representatives. The privilege arises from Article 9 of the Bill of Rights 1688, part of the law of New Zealand, that is discussed more fully later in this judgment.

[77] I identify first the parts of the plaintiff's amended statement of claim to which this argument relates. After having set out 29 paragraphs of background to which no objection is taken, at paragraph 30 Mr Witcombe particularises allegations of what he says confirm the Clerk's repudiation of the parties' employment agreement. I highlight by underlining the parts of paragraph 30 of the amended statement of claim that the Clerk says ought to be excluded by the Court:

> *30. The Plaintiff's concerns regarding the investigation process and the role of decision maker were well founded and related to various aspects of the Clerk's conduct, including that this conduct gave raise (sic) to unfairness and/or bias and/or an appearance of bias, including in the following respects:*
>
> *(i) the Clerk made statements to the Finance and Expenditure Committee, which he has subsequently affirmed and/or effectively repeated in correspondence and verbally, which contained conclusions adverse to the Plaintiff about the very issues the Clerk then purported to have investigated;*
>
> *(ii) the investigator appointed by the Clerk, the Clerk Assistant Mr Beattie, accompanied the Clerk when those comments were made, and also reports to the Clerk;*
>
> *(iii) the investigator, Mr Beattie, also subsequently affirmed the prior statements made by the Clerk to the Finance and Expenditure Committee;*
>
> *(iv) the Clerk's assertion in the disciplinary process that a submission had been made by the Plaintiff to the Finance and Expenditure Committee was also incorrect, and was contrary to information provided by a Mr Kersey which was directly relevant to this issue;*
>
> (my emphasis)

[78] In respect of each of these identified passages, the Clerk says in his statement of defence to the amended statement of claim that it "… *questions or impeaches a proceeding before a parliamentary select committee and he does not plead to that paragraph having regard to article 9 of the Bill of Rights 1689 (sic),* ….

[79] To the extent that the plaintiff repeats the allegations made in paragraph 30 of his amended statement of claim in support of alternative causes of action, the Clerk similarly seeks to have these struck out.

[80] Turning to the second broad area of challenge, Mr Witcombe's intended evidence, I will attempt to summarise the disconnected portions of his evidence brief, that runs to 171 paragraphs, as well as the intended evidence of two other witnesses.

[81] In an attempt to avoid any offence to the privileges of Parliament through the giving of inappropriate evidence, I directed both parties to file and serve briefs or proofs of the evidence that each might wish to call if permitted to do so. I have had recourse to these drafts not to determine the truth or otherwise of their contents but, rather, to be able to indicate the acceptability of issues or evidence affecting them.

[82] Unfortunately the position is not assisted by the loose nature of the contents of the briefs of evidence intended to be called by the plaintiff. By this I mean that they include complaints of others which are not before the Court for determination, hearsay that may or may not be admitted, submissions as well as evidence, and opinion on what will be ultimate issues for the Court. Even without offending parliamentary privilege as the defendant contends, the intended evidence of the plaintiff needs to be tightened and focused so that it assists the Court to establish relevant facts going to the questions for decision. These are whether the plaintiff was disadvantaged unjustifiably, was dismissed constructively and, if so, unjustifiably, and whether there were breaches by the defendant of their employment contract.

[83] In general terms, Mr Witcombe wishes to lead evidence of, and rely upon, what the Clerk said to the Finance and Expenditure Select Committee ("the FESC") about him; about the actions the Clerk took in requesting a report be produced and

presented to Parliament; and the actions that the Clerk took in respect of the content of that report. The plaintiff says that this evidence will be part of the historical background to the actions of the Clerk that he seeks to impugn which occurred both later and outside Parliament.

[84] Mr Gunn for the defendant has identified a number of passages in the draft briefs of evidence of the plaintiff's three intended witnesses that he says offend the privilege. Particular examples include:

- Julian Kersey (another employee of the Clerk) asserts that a report of the Finance and Expenditure Select Committee ("FESC") contained *"slightly inaccurate"* wording.

- Paragraph 14 of Mr Kersey's brief of evidence asserts that statements made by the Clerk to the FESC raised *"natural justice issues"*.

- Paragraph 19 of Mr Kersey's brief of evidence asserts that an *"inaccurate document"* was agreed by the FESC and presented to the House.

- Paragraphs 9 and 10 of Mr Fieldsend's brief of evidence contradict directly the report of the FESC.

- Paragraph 19 of Mr Fieldsend's brief of evidence takes direct issue with what the Clerk said to the Committee.

- Paragraph 27 of Mr Fieldsend's brief of evidence calls into question the genuineness of the Clerk's submission to the Committee.

- Paragraph 31 of Mr Fieldsend's brief of evidence alleges that the Clerk's advice to the committee was wrong, even although that contradicts the Committee's own report.

- Paragraphs 30 and 51 of Mr Witcombe's brief of evidence purport to state that the document he sent to the Committee was not a submission, contradicting directly the Committee's report to the House.

- Paragraph 77 of Mr Witcombe's brief of evidence purports to criticise the Clerk for not advising the Committee to follow Parliament's own natural justice rules when compliance with such rules is a matter for Parliament.

- Document 58, upon which Mr Witcombe will rely (a letter from Mr Fieldsend to Mr Beattie), that states that the Clerk had appeared before the FESC and had told it that Mr Fieldsend had made a submission to that Committee without the Clerk's authority. Mr Gunn says that this statement is entirely consistent with the Committee's own report to the House. Yet Mr Witcombe proposes to contend, in reliance on document 58, that this allegation was without substance, it seriously damaged Mr Fieldsend's professional representation and standing in the Office of the Clerk, was made without proper investigation, and without offering Mr Fieldsend an opportunity to respond. This is said to be a clear and direct challenge to the proceedings of the House.

- Paragraph 91 of Mr Witcombe's brief of evidence directly calls into question the Clerk's motivations and actions when appearing before the FESC.

- Paragraph 94 of Mr Witcombe's brief of evidence asserts that, contrary to the Committee's report to the House, the plaintiff's communication to the Committee was not a submission.

- Paragraphs 144, 145, 146 and 147 of Mr Witcombe's brief of evidence are claimed by the defendant to be particularly objectionable and challenge directly the procedures and status of the House and are inaccurate in the sense that Parliament had approved the Committee Report.

- Paragraphs 165 and 166 of Mr Witcombe's brief of evidence are said to be submissions and not evidence, with the latter being a misrepresentation of what was said by the Clerk.

Background facts relevant to parliamentary privilege claim

[85] These are briefly as follows. In April 2002 the committee clerk of the FESC sought comment from employees in the Clerk's office about the contents of a questionnaire to be prepared and circulated for the FESC's purposes. The plaintiff made proposals in response to that request and, in the form of a report, these came to be appended to the FESC's report to the House. That appears to have been as a result of a resolution of the FESC that the written reports of Mr Witcombe and his colleague, Mr Fieldsend, be appended to the Committee's report.

[86] There is disagreement between the parties as to the status of Mr Witcombe's report, whether it was evidence or submissions or something else. Also sought to be challenged as part of his attack on the propriety of the defendant's conduct, is the process by which the Chair of the FESC prepared its report and, in particular, an allegation by the plaintiff that the defendant drafted the report which was subsequently signed off by the Chair of the FESC. The defendant says that these are questions solely within Parliament's province and the Court is not entitled to examine or determine them because to do so will infringe upon the privilege of Parliament.

[87] The defendant says that this material prepared by the plaintiff was evidence presented to the FESC by the plaintiff because it has been so categorised by the Chair of the FESC in its report to the House and the Court is not entitled to go behind or otherwise gainsay that conclusion.

[88] Further, the Clerk says that the committee clerk of the FESC, Mr Kersey, who is intended to be called by the plaintiff to give evidence, cannot tell the Court whether he considered Mr Witcombe's report to be *"submissions"* or indeed whether the report was addressed to the Committee or provided directly to it. Mr Gunn says this is because such evidence would be at odds with the FESC's own summary and

conclusion and the Court is not able to entertain an argument to the contrary because Parliament has received and accepted the FESC's report.

[89] In the defendant's submission, further evidence intended to be called from Mr Kersey should be excluded likewise. Mr Kersey purports to comment on the accuracy of the FESC's report and to explain why parts of it may be inaccurate. Next, Mr Gunn challenges the entitlement of Mr Kersey to comment adversely on statements that the defendant made to the FESC following what he, Mr Kersey, had said to the defendant. Further, the defendant says that Mr Kersey's assessment of whether the plaintiff was afforded *"natural justice"* in these matters dealt with by the FESC, is not competent for this Court to determine.

[90] Next in Mr Kersey's intended evidence, the defendant challenges the propriety of evidence about what the defendant may have said to the FESC about Mr Witcombe's activities while the defendant was conducting an investigation into these.

[91] At paragraph 19 of Mr Kersey's intended evidence he proposes to say that he had informed Fay Patterson who, with the defendant, was involved in redrafting the FESC's draft report, that the changes that had been made were inaccurate and, in particular, described inaccurately the nature of Mr Witcombe's report. There are similar passages in paragraph 20 of Mr Kersey's intended evidence.

[92] There are further and similar passages in the intended brief of evidence of Mr Fieldsend that, Mr Gunn says, call into question the accuracy of evidence given before, or submissions made to, the FESC that infringe upon the principles of parliamentary privilege.

[93] Turning to the intended brief of evidence of Mr Witcombe himself, the plaintiff wishes to focus on his request of the Clerk, that was refused, to appoint an independent investigator and decision maker in light of what he says were the allegations that had been made against him by the defendant including before the FESC. Mr Gunn for the defendant says that there must be an inextricable link between the plaintiff's motives for seeking such an appointment and the defendant's

refusal to make such an appointment, on the one hand, and the statements made by the defendant to the FESC on the other.

[94] Mr Davenport relied particularly on what is known as document 136 in the plaintiff's bundle of documents. Although counsel complained that, having discussed this document, the Clerk cannot now assert parliamentary privilege in respect of it, that is to confuse the two privileges at issue in this case. Parliamentary privilege is, as already noted, not assertable by the Clerk as may be the very different privilege involved in obtaining legal advice about the Clerk's own documents for example. There is nothing in that objection by the plaintiff.

[95] Document 136 is a draft account, apparently prepared by the Clerk, of his attendance at the meeting of the FESC on 13 June 2002. As I understand this document, it is a draft of notes that the Clerk prepared for himself about what had taken place at the meeting after it had taken place. Mr Davenport submitted that document 136 is relevant to the questions at issue in this case but not in the sense of questioning or challenging what the FESC did or members of it said as might be recorded in those notes. Rather, it is said to be illustrative of the Clerk's state of mind about the employment investigation into alleged misconduct by Mr Witcombe.

Parliamentary privilege – the general principles

[96] As already noted, the doctrine of parliamentary privilege is sourced to Article 9 of the Bill of Rights 1688 that is part of the statute law of New Zealand[5] and provides (in modern English):

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

[97] The privilege is based on ancient statutory words but their literal meaning does not necessarily reflect accurately at the beginning of the 21st century where the boundary is to be drawn between the courts and Parliament and, more particularly, the nature and scope of Parliament's jealously guarded privilege.

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[5] Imperial Laws Application Act 1988

[98] Before turning to a number of recent cases that assist in determining the principles applicable in this case (although none that I have found is to do with the employment in New Zealand of an officer of Parliament), the following general principles are established in texts including, in New Zealand, the leading authority[6] authored by the former Clerk himself.

[99] Section 242 of the Legislature Act 1908 gives the privileges of the House of Representatives statutory force and deems them to be part of the general public law of New Zealand. As already noted, it is unnecessary to plead these privileges and all courts and judges must take judicial notice of them.

[100] That the Legislature must enjoy an autonomy from control by the Crown and the Crown's courts, is an aspect of the constitutional separation of powers[7]. The privileges that a legislature enjoys form part of a constitutional expression of parliamentary autonomy and are a means to achieving an effectively functioning legislature. Parliamentary privilege is designed to remove any impediments or restraints to the Legislature going about its work.

[101] As McGee also notes at p605:

> *The privileges, powers and immunities conferred on the legislature as parliamentary privilege inevitably involve the imposition of corresponding duties, liabilities and disabilities on other persons who are made subject to the exercise of those privileges or powers or who have those immunities invoked against them. The public interest in the promotion of the functioning of the parliamentary system of government and the maintenance of the separation of powers legitimates the derogation from any standards of legality that this may entail.* [Prebble v Television New Zealand Ltd *[1994] 3 NZLR 1*; A v United Kingdom 2002 *(35373/97)*] <u>*Nevertheless, the existence of other interests that may be infringed or abridged by the operation of parliamentary privilege justifies restricting the privileges to activities having a real connection with the operation of the legislature, and confining their scope in respect of such activities so as not to trespass on other rights unnecessarily.*</u> [Re Ouellet (No 1) *(1976) 67 DLR (3d) 73 … and …* Canada (House of Commons v Vaid *2005 SSC 30]*.
> [my emphasis]

[6] McGee Parliamentary Practice in New Zealand 3rd edn (2005)
[7] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* (1993) 100 D.L.R. (4th) 212 at 265 noted by McGee at p605

[102] The privileges at issue in this case and as are recognised in New Zealand include:

- freedom of speech;

- exclusive control of the House's own proceedings;

- the privileges in the nature of immunities from legal process that might otherwise apply and operate in respect of individuals who participate in the work of the House including officers of parliament, witnesses and petitioners;

[103] As to the privilege of freedom of speech, nothing said or done in the House or a parliamentary committee may be called into question in proceedings outside the House. As McGee notes at p609-610:

> … *As the privileges enjoyed by the House are part of the general law, the House can expect that if, in a case before a court, the possibility of a breach of privilege becomes apparent, the court, in simply applying the law, will take that fact into account and protect the House's privileges.* …
> …
> *Parliamentary privilege, as part of the law, is liable to be abrogated in whole or in part by legislation amending the law. Thus, the extent to which legal immunities flowing from the House's freedom of speech may have been overridden or modified by subsequent legislation has been questioned, and the House's power to inquire into particular bodies or insist on production of certain evidence has been challenged, on the ground that these privileges are subject to other legal rules.*
>
> *Parliamentary privilege is only part of the law. Though it is a (more or less) well-defined category of law, it is not self-contained and must coexist within the general corpus of legal rights, powers and immunities that are established and recognised by legislation and the common law. Since parliamentary privilege is of constitutional import, the public policy that it promotes is entitled to a high level of priority when it conflicts with other values protected by law* [Prebble v Television New Zealand Ltd *[1994] 3 NZLR 1*]. *But it is not a body of higher or fundamental law that automatically overrides all other law. It is, in principle, therefore, subject to statutory abrogation.*

[104] I have already noted the words of Article 9 of s1 of the Bill of Rights. As McGee notes, from this famous statement of parliamentary privilege flow a number of immunities which apply to the House, its members and other participants in

parliamentary proceedings. The rationale underlying Article 9 has been described by the Privy Council as *"the need to ensure so far as possible that a member of the legislature and witnesses before Committees of the House can speak freely without fear that what they say will later be held against them in the courts"*: *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1, 8. The important public interest is to ensure that members or witnesses at the time of speaking are not inhibited from stating fully and freely what they have to say.

[105] As McGee also notes at p621, the meaning of the term *"proceedings in Parliament"* has never been defined legislatively in the United Kingdom or New Zealand. Nor has its meaning been declared by the House. In an Australian Federal statute (Parliamentary Privileges Act 1987 s16(2)), a definition of the term has been enacted and this statement is the most detailed official exposition, although not intended to be comprehensive. The Australian statement has been accepted by courts in New Zealand[8] as representing the scope of Article 9 in this country. Relevant for the purpose of this case, the Australian definition of *"proceedings in parliament"* means:

> *… all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee and, without limiting the generality of the foregoing, includes —*
> *(a) the giving of evidence before a House or a committee, and evidence so given;*
> *(b) the presentation or submission of a document to a House or a committee;*
> *(c) the preparation of a document for purposes of or incidental to the transacting of such business; and*
> *(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.*

[106] So, as McGee notes at p621:

> *Actions of the House, committees, members, officers, witnesses and petitioners which are either the transaction of parliamentary business themselves or which are directly and formally connected with the transaction of such business are proceedings in Parliament and are thus subject to the privilege of freedom of speech. This encompasses all actions taken by the House itself whether of a legislative or a non-legislative nature.*

[8] See *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1

[107] Committee proceedings are as much parliamentary as are those in the Chamber or on the floor of the House. This includes giving evidence orally and in writing to a committee *"… and the advices and draft reports generated during a committee's work, provided that these are published in the course of the committee's proceedings. Publishing such documents outside the confines of the committee is not a proceeding in Parliament."* Likewise, tendering a committee's report to the House is a parliamentary proceeding[9] but, again as McGee notes at pp621-622, a press conference given by the chairperson and members of a committee following the presentation of a report is not the formal proceeding of the committee and is not protected.

[108] A member's action in releasing information outside the House attracts no parliamentary privilege even when material released is a copy of a speech delivered in the House by the member. McGee opines at p624 that persons delivering petitions to members or written evidence and other material to a select committee, are engaged in proceedings in Parliament.

[109] A report of what occurred in Parliament (other than the official report made under the House's authority) is not itself a proceeding in Parliament and is not protected by parliamentary privilege from any legal liability that may arise thereby. However, other protections such as qualified legal privilege against defamation liability may be available. Officers of the House are affected by the privilege found in Article 9 of the Bill of Rights, as are witnesses to select committees and petitioners.

[110] At p625 McGee notes:

> *Although it may not be an historically correct analysis of the phrase "questioned or impeached", this two-pronged modern meaning of article 9 is conveniently expressed by today's understanding of the two words. Freedom of speech is understood to be "impeached" where it is sought to make a member or another person liable in criminal or civil proceedings for what they have said or done in Parliament. Freedom of speech is understood to be "questioned" when it is sought to use what a member or another person has said or done in Parliament in criminal or civil*

[9] *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114

> *proceedings in a way that involves a critical examination of that statement. [Attorney-General's submission in* Pepper v Hart *[1993] AC 593 at 638.]*

[111] If a Member of Parliament subsequently refers outside the House to a speech made in Parliament in a way that can be interpreted as adopting or effectively repeating it, the speech can be examined in a court and support legal proceedings: McGee at p627. The same rule must be applicable to persons other than Members whose communications may be subject to parliamentary privilege. However, a Member who merely acknowledges having made a speech would not adopt it or effectively repeat it in these circumstances, and what was said could not thereby support legal proceedings: McGee at p627.

[112] At p635 McGee notes:

> *By Standing Order, the House has provided that neither the Clerk, any other officers of the House (which includes all staff of the Office of the Clerk), nor any other person employed to make a transcript of proceedings before the House or any committee of the House, may give evidence of proceedings in Parliament without the authority of the House. [Standing Order 402]* …
> …
>
> *Applications for officers to give evidence can be made by way of petition to the House or they can be dealt with on a motion for which notice is necessary. During an adjournment of the House, where it is not convenient to wait until the House will next sit, the Speaker may give authority on behalf of the House unless, in the Speaker's opinion, the matter should await consideration by the House itself.*

[113] Dealing with the important question whether Parliament may have relinquished a part of its privilege, McGee regards as *"too extreme a position to adopt"* that only an express provision in a statute is capable of abrogating parliamentary privilege. *"Privilege will be surrendered if there is a necessary implication from a statute that this is so, for otherwise the statute would not work"*.

[114] One way of approaching the question whether a statute has abrogated a privilege is to ask whether, if the privilege continues, an inconsistency is thereby produced or the statutory purposes thereby stultified: *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) at para [59]. In this sense, parliamentary privilege may be subject to abrogation by necessary implication if otherwise the enactment would effectively be disapplied.

[115] In a recent New Zealand paper in *New Zealand Law Review* (Part 1, 2006) entitled *"Constitutional Law"*, leading academic commentator Philip Joseph notes that courts have narrowed the scope of what is described as *"exclusive cognisance"*, that is the right by application of privilege of Parliament to be the sole judge of its own proceedings. Joseph opines that the judgment of the Court of Appeal in *Awatere Huata v Prebble* [2004] 3 NZLR 382 signals a readjustment of the balance between the courts and Parliament while the subsequent judgment of the High Court in *Queen v Speaker, House of Representatives* [2004] NZAR 585 went further.

[116] Joseph notes:

> *Article 9 is a statutory provision that is fundamental to the separation of powers. It contains imperative language that can be neither waived nor read down. Contrary to the suggestion in* Queen*, the courts retain no discretion to intervene where there exists (to quote) "a prejudice sufficiently grave to justify this Court threatening a constitutional crisis". Article 9 trumps the inherent jurisdiction of the High Court to controvert the application of legislation to the House on whose meaning the House has ruled (provided that no third-party rights are in issue).*

Parliamentary privilege – the Privy Council opinions in the *Prebble* and *Jennings* cases

[117] In *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1, the Privy Council addressed the position of defences pleaded to an action in defamation that included references to speeches in Parliament and other materials generated within the proceedings of Parliament. The principle was re-stated that parties to litigation cannot bring into question anything said or done in the House by suggesting, including by direct evidence, cross-examination, inference or submission, that the actions performed or words spoken were inspired by improper motives or were untrue or misleading. Such matters lie entirely in the jurisdiction of the House, subject to any statutory exceptions. This does not, however, extend to an exclusion of all reference in court proceedings to what has taken place in the House. So, for example, the journals of the House (Hansard) can be used to prove what was said and done in Parliament as a matter of history. The Privy Council added at p11, lines 17 and following:

> *But Their Lordships wish to make it clear that if the defendants wish at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course.*

[118] *Prebble* was followed in *Jennings*[10] in which the question of parliamentary privilege in New Zealand was again for consideration by the Privy Council.

[119] The principles enunciated in this case dealing with parliamentary privilege are central to the cases of both parties even although *Jennings* (like *Prebble*) was a defamation case so that the privilege asserted was advanced as a defence to the claim for defamation.

[120] Mr Jennings, a Member of Parliament, made a statement in the House that was defamatory of Mr Buchanan. Mr Jennings then made a statement outside the House in which he was reported as saying that he did not resile from the claims that he had made when protected by parliamentary privilege. The Privy Council affirmed that Mr Buchanan was entitled to sue on the extra-parliamentary statement the meaning of which could be taken or contributed to by the statements made in the House. The parliamentary record will supply only the text and prove the historical fact that the words were uttered, but the claim must be founded on the extra-parliamentary publication.

[121] In *Jennings* the defendant did not repeat his parliamentary statement outside the House but confirmed it by reference only. It was therefore necessary for the plaintiff to rely, as he did, on what Mr Jennings said in the House. The question facing the Privy Council was whether that reliance on what was said in the House infringed the protection afforded by Article 9 of the Bill of Rights.

[122] Privy Council adopted and relied on its statement in *Prebble* that in addition to Article 9 of the Bill of Rights itself, there are broader principles established by long followed authorities, that the courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.

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[10] [2005] 2 NZLR 577

[123] The Judicial Committee in *Jennings* also cited with approval the conclusion of Lord Brown-Wilkinson at p8 of *Prebble*:

> *Moreover to allow it to be suggested in cross–examination or submission that a member or witness was lying to the House could lead to exactly that conflict between the Courts and Parliament which the wider principle of non–intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House; if a Court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue.*

[124] As the Privy Council pointed out in *Jennings*, parliamentary privilege is an absolute privilege in the sense that it matters not that the maker of the statements in Parliament may have been motivated improperly or maliciously.

[125] Mr Witcombe in this case relies upon what he says were subsequent references by the Clerk to what he had done and said to and before a select committee of Parliament. He says this is analogous to permitting reference to be made to privileged statements to interpret and give meaning to subsequent confirmations of those which were not subject to the same privilege.

Effective repetition outside Parliament

[126] This situation arises in this case because some of the intended evidence that is impugned falls into this category. Joseph summarises concisely the effective repetition principle following *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 as follows:

> *… it is permissible to lead evidence in court of parliamentary proceedings to establish, as a matter of historical record, that particular words were spoken in the House on a particular day. Article 9 precludes adducing evidence only where the purpose is to* question *or* impeach *proceedings in Parliament. It is permissible, for instance, for litigants to adduce Hansard as evidence to support a particular statutory construction, or to identify the person at whom extra-parliamentary statements were directed, or simply to prove that a member was in the House on a particular day. …*

[127] Joseph also deals with parliamentary privilege and effective repetition in light of *Jennings v Buchanan* [2005] 2 NZLR 577. The author reiterates his own advice to Parliament's Privileges Committee in December 2004 that the effective repetition

principle is potentially of broader scope than simply in the law of defamation. He reiterates that it may also be used to establish contempt of court, statutory breaches involving the imposition of penalties, civil liability for breach of confidentiality, and criminal liability. Although not mentioned expressly, one might add to that list, liability in employment law.

[128] As the Joseph article also confirms, in its report to the House, the Privileges Committee recommended restating the protection of Article 9 as follows:

> *The Privileges Committee recommends that the Legislature Act be amended to provide that no person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.*[11]

[129] It would appear that despite an announcement of the introduction of legislation to overturn the effective repetition principle, this has not been addressed by the current Parliament. The Parliamentary privilege may not therefore reach out to catch effective repetition, outside Parliament, of statements made under its privilege within.

[130] There are two instances that the plaintiff claims amount to effective repetition by the defendant of what he told the FESC at his appearance before it on 13 June 2002 in respect of which it is accepted that the privilege applied. These subsequent repetitions, said not to attract privilege, were, first, a letter from the Clerk to Mr Witcombe's colleague, Mr Fieldsend, in respect of whom the Clerk was conducting a parallel investigation in respect of identical or at least very similar allegations of misconduct. Mr Witcombe seeks to introduce the contents of that letter to Mr Fieldsend to establish the Clerk's state of mind in his investigations generally.

[131] The second piece of evidence upon which Mr Witcombe seeks to rely is what was said by the Clerk to a member of the Committee, Mr David Cunliffe MP (now Hon David Cunliffe) after the Clerk's appearance before the FESC on 13 June 2002.

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[11] Report of the Privileges Committee, *Question of Privilege referred 21 July 1998 concerning Jennings v Buchanan*, AJHR 2005, I.17G, Appendix D

Although at present there is no direct evidence from Mr Cunliffe as to what was said to him by the Clerk, there is hearsay from Mr Witcombe as to what he says Mr Cunliffe told the plaintiff the Clerk had said to him (Mr Cunliffe). Mr Davenport for the plaintiff accepted that it may be appropriate, if not necessary, for the plaintiff to call Mr Cunliffe to give that evidence at trial. However, he submitted in the meantime that there is a sufficient account of the Clerk's advice to Mr Cunliffe for the Court to determine that there may have been an effective repetition of otherwise privileged communications permitting the Court to have recourse to the record of those privileged communications to properly explain the non-privileged communication.

[132] Mr Davenport emphasised that Mr Witcombe is seeking neither to challenge, impeach or question the proceedings of the FESC, nor to challenge the decision of his employer, the Clerk, to attend the Committee's meeting on 13 June 2002. Nor, the plaintiff submitted, is he seeking to question the propriety of the Clerk or his state of mind or motive or intention in saying what he did to the FESC. In this regard, Mr Davenport acknowledged that the Clerk is entitled to make statements within parliamentary proceedings, including meetings of a select committee, akin to the right of a Member of Parliament to speak his or her mind without risk of incurring resulting liability. What the plaintiff says are the critical issues for his case are the Clerk's subsequent repetition of statements outside the FESC process and, in particular, in response to a challenge to his refusal as a decision maker not to alter the methodology of his inquiry notwithstanding what the plaintiff says was the appearance of bias by the defendant.

[133] Addressing the defendant's assertion that the FESC had determined conclusively the nature of Mr Witcombe's report that formed the basis of the Clerk's misconduct investigation, Mr Davenport submitted that a careful and objective reading of the Committee's report to the House discloses that it did not go so far as to reach such conclusions that would, if they had been reached, have been unassailable in this proceeding.

[134] Addressing the Committee's report to the House that the defendant says establishes conclusively the nature of Mr Witcombe's communication to the FESC,

Mr Davenport submitted that it records what the Committee was told rather than its conclusions about the nature of Mr Witcombe's actions. This is supported, counsel submitted, by the Committee's words: *"The Clerk asked to appear before us to point out that although the submissions were given by persons in their capacity as staff of the Office of the Clerk they were not made with the Clerk's authority and he repudiated them."* As to the statement in the Committee's report that *"We received evidence from staff"*, Mr Davenport submitted that there is no or at least insufficient clear evidence as to the identity of the staff being spoken about and this could have been intended to refer equally to Mr Kersey alone, rather than to Mr Witcombe and/or Mr Fieldsend. The significance, Mr Davenport submitted, is not the assessment of the material as *"evidence"* but, rather, as to who submitted it to the Committee. Counsel says that the evidence to be called in court will establish that the "evidence" was submitted to the Committee by Mr Kersey and not by Mr Witcombe whose only involvement was to send a report or proposals to Mr Kersey as he and others had been invited to do.

[135] Mr Davenport conceded that the plaintiff must accept the Committee's conclusion that it received *"evidence"* but said that the critical question in the case was from whom.

[136] Mr Davenport submitted that if the defendant is correct that the FESC determined conclusively that Mr Witcombe had given evidence to it, the Clerk's subsequent actions in investigating this question as part of his employment inquiry are, at best, inconsistent with that decision. Mr Davenport argued that although the Clerk's terms of reference talked about investigating Mr Witcombe's *"communication"* rather than *"evidence"*, that is a distinction without meaning in the context of this case.

[137] The plaintiff's case in this regard is that the non-privileged restatements of what the Clerk said to the FESC meeting on 13 June 2002, should cause the defendant's subsequent refusal to appoint someone other than the Clerk-Assistant, Mr Beattie, who accompanied the Clerk to the FESC meeting on 13 June:

- to be inconsistent with the statutory good employer obligations of the Clerk including to treat his employees fairly and properly in all aspects of their employment;

- to be such that the Clerk's investigation process was tainted by bias or an appearance of bias;

- to be such that the Clerk was not acting in good faith towards Mr Witcombe;

- to be such that the Clerk was acting in breach of the implied term of Mr Witcombe's employment agreement that the employer would not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

[138] The plaintiff says that the Clerk's appointed investigator, Mr Beattie, both attended upon the FESC on 13 June 2002 and then, in non-privileged communications to the plaintiff, is said to have affirmed the accuracy of the statements made by the Clerk to the Committee. In this regard, the plaintiff relies on evidence that he intends to call that Mr Beattie, on 3 July, advised Mr Fieldsend, in material and identical circumstances to those of Mr Witcombe as to what the Clerk had said to the Committee.

[139] Finally in this regard, Mr Witcombe seeks to challenge the propriety of the Clerk in taking what are described as "*active steps in relation to the formulation of the wording … presented … to the FESC"* for its report to Parliament but subsequently refusing to stand aside as the decision maker in the disciplinary investigation". In this regard, the plaintiff intends to rely upon working notes that were part of the Clerk's investigative process but which are said not to have been covered by parliamentary privilege.

[140] Mr Davenport for the plaintiff also relied on the report of the Privileges Committee (May 2005) on "*Question of privilege referred 21 July 1998 concerning*

Buchanan v Jennings" to which I have previously referred. At page 6 of the report under the heading ***"Effect beyond defamation in a parliamentary context"*** the Committee concluded: *"There is … no guarantee that the new area of potential liability revealed by the* Jennings *case is confined to defamation."* As Mr Davenport pointed out, despite the Privileges Committee's recommendations, Parliament has not legislated to address them.

[141] The effective repetition alleged by the plaintiff to have been made by the Clerk in his letter of 3 July 2002 to Mr Fieldsend, includes the defendant's statements that what he said to the FESC on 13 June 2002 was *"a clarification of a matter of fact"* and was *"entirely warranted on the facts"*.

[142] Next, the plaintiff said he should be entitled to adduce evidence of what Mr Beattie, the Clerk-Assistant, said in the meeting with Mr Fieldsend on 3 July 2002, namely that what the Clerk had said to the Committee was *"fact"* and did not *"break the employment relationship"*.

[143] Next, the plaintiff said that he should be entitled to adduce evidence that the Clerk repeated his earlier statements to the Committee in conversation with Mr Cunliffe MP, this being on an occasion that was not covered by privilege.

[144] Indeed, Mr Davenport submitted that the facts of this case are even stronger than those in *Jennings* in several respects. First, what is said to be the effective repetition was from the Clerk himself. In *Jennings* the publication relied on was that made by the newspaper to whose reporter Mr Jennings was said to have effectively reiterated defamatory statements originally protected by privilege. However, this was in the form of a report by the journalist published in the newspaper (*"Jennings said he did not resile from his claim about the officials' relationship …"*) (p583).

[145] In this case, also, Mr Witcombe will, if permitted, lead evidence that in both the letter to Mr Fieldsend and in his meeting with Mr Cunliffe MP, in the presence of the Speaker of the House, the defendant did not simply refer to what he had told the Committee but also said that he was flabbergasted by what had happened, was

personally offended, and was therefore taking action. I assume the implication is that this was against the employees concerned.

[146] Next, Mr Davenport submitted that, unlike *Jennings*, the plaintiff in this case does not need to establish that what was said by the Clerk to the FESC on 13 June was wrong. The plaintiff's causes of action rely upon the appearance or actuality of bias so that the words and actions speak for themselves. In this regard, and again, the plaintiff emphasised that he is not seeking to challenge or impeach or question what was said by the Clerk to the FESC and indeed has no need to do so in these proceedings. He said that the words said and subsequently reaffirmed in a non-privileged setting, give rise to at least an appearance of bias, if not its actuality.

[147] As to the extension of the effective repetition principle beyond defamation law, Mr Davenport invited me to consider the approach of the Supreme Court of Canada in *Vaid*. At paragraph 39 of the judgment the Court addressed this issue and, interestingly, by reference to an article about parliamentary employment:

> *… Much of the U.K. law of privilege remains unwritten. Being unwritten, it retains a good deal of flexibility to meet changing circumstances, which is considered by some commentators to be a virtue (G.F. Lock, "Labour Law, Parliamentary Staff and Parliamentary Privilege" (1983), 12* Indus. L.J. *28, at p. 34). There has been little formal adjudication of the boundaries of U.K. privilege in the British courts, and Canadian courts are no more bound by a unilateral assertion of privilege by the British House of Commons than, as discussed earlier, would be the courts in Britain itself. In that jurisdiction, the courts exercise due diligence when examining a claim of parliamentary privilege that would immunize the exercise by either House of Parliament of a power that affects the rights of non-Parliamentarians. …*

[148] The Supreme Court of Canada quoted and adopted the following passage from the judgment in *Stockdale v Hansard* (1839) 9 Ad&E 1, 112 ER 1112 at p1192:

> *All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences.*

[149] Mr Davenport referred also to mentions in *Vaid* of the concept of necessity and whether a particular view of parliamentary privilege in a particular situation is necessary for the proper functioning of Parliament and its respective components. Mr Davenport submitted that there is a question in this case whether or not it is necessary for the functioning of a select committee, for the Clerk, in the role of employer, to make extra-parliamentary statements to a select committee about a disciplinary investigation. Counsel conceded that he could not find any reference in New Zealand cases to questions of necessity in this field, but said, nevertheless, that this might be encompassed by the evolution of the common law and of the principles of parliamentary privilege in New Zealand.

Parliamentary privilege – the principles from the *TVNZ* case

[150] On a number of occasions in argument counsel (particularly Mr Gunn for the Clerk) referred to the recent question of privilege affecting Television New Zealand Ltd and its chief executive following evidence that the latter gave to the FESC of Parliament. To have more than an anecdotal account of this precedent, I asked for, and subsequently obtained from Mr Gunn, copies of the interim and final reports of the Privileges Committee in this matter. The contents of the reports have assisted me in deciding the questions I must but may also raise other fundamental questions about the propriety of the actions of the Clerk in purporting to investigate, with a view to *"disciplinary measures"*, allegations about what the defendant categorised as evidence given by Mr Witcombe to a select committee. The Privileges Committee's reports, in addition to case law and academic publications, have assisted my determination of this pre-trial question of the proper scope of the case.

[151] At page 7 of the Privileges Committee's interim report[12]. The Committee noted:

> *It is a contempt of Parliament for an employer to later penalise a person solely on the basis of evidence given to a select committee. We consider that in its effect the letter sent by Mr Boyce does amount to disadvantaging Mr Fraser on account of his evidence given to the Finance and Expenditure Committee inquiry. Furthermore, the actions of the board could well have*

[12] (In full) Question of privilege on the action taken by TVNZ in relation to its chief executive following evidence he gave to the Finance and Expenditure Committee, April 2006.

> *the effect of discouraging or deterring Mr Fraser or others from giving evidence in the future. In conclusion, we are of the view that the actions of TVNZ in respect of Mr Fraser have a tendency to obstruct or impede the House in the performance of its functions.*

[152] Dealing, at the same and following page with ***"Wider issues relating to the protection of witnesses"***, the Privileges Committee continued:

> *We intend to continue to examine the wider issue of the protection of witnesses and the extent to which any action may be taken against them as a result of their appearance at a select committee. While witnesses before select committees, as in courts in general, must be free to give evidence without fear of threats or intimidation, there may be consequences for relationships, particularly where witnesses give prejudicial or critical evidence. For example, if a departmental chief executive, State enterprise board member or official gave evidence critical of a Minister to a select committee, we question whether it is realistic to expect that no action would be taken in response. The matter is not clear-cut and we intend to examine this further. There is a question of balance, and it may be necessary for the House to develop some principles and guidance on the issues.*
>
> *We consider this is an issue of significance to anyone who appears before a select committee or who has a relationship with people who regularly appear before select committees. In particular, the State Services Commissioner will have an interest in respect of departmental officials' interactions with select committees. …*

[153] The Privileges Committee's final report presented to the House of Representatives in October 2006 elaborated on these issues as follows. The committee recommended the revision of guidelines regarding witnesses who appear before select committees. It recommended:

> *The guidance should make it clear that pressure must not be placed on individuals to deter them from giving evidence, or action taken against them as a direct consequence of their giving, to a select committee.*

[154] The Privileges Committee acknowledged the difficulties created when a witness giving evidence to a select committee may do so in such a way that, in other circumstances, may extend to external consequences including an employment relationship.

[155] Having considered common themes on questions of privilege in other jurisdictions, the committee concluded at pages 4-5 of its final report:

It has long been recognised that if parliamentary inquiries are to be carried out effectively, witnesses who give evidence to the House or a committee have to be protected against adverse consequences that they may suffer as a result of giving that evidence. Our starting point, therefore, is that the privilege of free speech is one of the cornerstones of parliamentary democracy. It enables members of Parliament to carry out their responsibilities and Parliament to operate freely and effectively. The protection accorded by this privilege is not restricted to members of Parliament and is equally available to other people who participate in parliamentary proceedings.

This is a long-held rule of law, dating back at least to the Bill of Rights 1688, which immunises parliamentary proceedings from legal liability. The absence of recent case law on this issue in New Zealand or overseas suggests that it is well understood that evidence given by a witness before a select committee cannot be questioned in a court of law.

While it is clear that evidence given before a select committee cannot be admitted into legal proceedings, conduct revealed in the parliamentary evidence would not be immune from investigation or action by other authorities simply because it was the subject of evidence to a committee. A civil action or criminal prosecution would still need to be supported by evidence obtained outside Parliament. But in these circumstances a person could not be said to have been "disadvantaged" and no contempt would be committed.

[156] Subsequently, under the heading *"Discretion to punish for contempt"* the committee concluded:

Protection for witnesses operates from two directions. First, the courts must prevent parliamentary evidence being brought into question before them. It is for Parliament to hold witnesses liable or accountable for their parliamentary evidence, not for the courts. Secondly, the House may punish someone who takes action against a witness on account of the evidence the witness has given. The threat that the House may punish any such retributive action should discourage people from acting against witnesses.

Disadvantaging a person on account of their evidence to a select committee by trying to hold the person legally liable would clearly be a contempt. An employer who censures an employee on account of such evidence may also be held to be in contempt.

… Disadvantaging a witness on account of his or her evidence before a select committee may *amount to a contempt, but whether it does so requires consideration.*

Deciding whether to intervene therefore is a matter of discretion. But the extent of that discretion is not clearly recognised in the Standing Orders. Standing Orders 399 and 400 both say the House "may" hold defined conduct to be a contempt but make no more of it than that. We consider that the discretion to hold in contempt needs to be defined more explicitly by

> *setting out, at least in general terms, the circumstances in which it may be justifiable to invoke the power or not to do so.*

[157] Seeking to preserve to itself the power to address the propriety of conduct before a select committee but to take account of the variable seriousness and consequences of that conduct, the committee confirmed at page 6:

> *On the other hand, even if a witness's evidence is justified or responsible, the House may decide not to use its power to punish for contempt if the action complained of (the disadvantage) could be seen as justifiable or understandable from the point of view of the person taking it. Thus a public servant who, in evidence to a committee, criticised a Minister or Government policy could hardly expect to retain the confidence of the Minister or of his or her department. Moving the public servant to a position that involved no contact with the Minister or to one where the official no longer worked on that policy would be seen as justifiable in these circumstances. However, evidence given to a select committee cannot form the sole basis for an action against the person who gave it. The evidence might act as a prompt for an employer to establish a separate inquiry into the conduct of the staff member, but any action taken against the staff member should be based on the results of the separate inquiry.*
> (my emphasis)

[158] Under a heading *"Further guidance required"* the committee concluded:

> *Public servants are bound by their departmental codes of conduct and the State Services Guidelines. These clearly set out the obligations on and expectations of public servants appearing before select committees. The implications for individuals who fail to follow them can be profound.*
>
> *However, we note that the guidelines refer only to the contempts of releasing confidential committee proceedings and misleading a committee. There is no information about a possible contempt of intimidating witnesses from giving evidence or disadvantaging witnesses as a result of their giving evidence.*

[159] I deal, finally and briefly under this head, with the position in the United Kingdom. The 1999 United Kingdom Joint Committee Report on Parliamentary Privilege[13] provides pertinent commentary on whether privilege should be permitted to cloak actions that, for example, might be relevant to allegations of constructive dismissal. As the Committee noted at paragraphs 56-59:

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[13] UK Joint Committee on Parliamentary Privilege Report (vol 1) HL43I/HC214-I), 9April 1999, (UK, 1999) (HL Paper 43-I, HC 214-I), ch 2, para 40.

> … *Sometimes a ministerial decision may affect rights of an individual whose protection lies in a different form of court proceedings. An instance would be if a minister were to make a statement in Parliament about an official in his own department in terms that the official then wished to use in support of a claim for constructive dismissal.* (para 56)
>
> … *The minister is accountable to Parliament for his decision. His statement is properly made in Parliament but it ought not, for that reason, to be excluded from the evidence the court can examine when the minister's decision is in issue in court proceedings. Unlike judicial review, these court proceedings will be concerned with the effect of a ministerial decision; for instance, whether the official was correctly dismissed. This difference should not lead to any difference in treatment so far as article 9 is concerned.* (para 57)
>
> … *We are aware of one instance where an official wished to use such a statement in proceedings before an industrial tribunal, but decided not to go ahead [footnote –The case of the late Mr John Marriott, former governor of Parkhurst Prison, was drawn to the committee's attention by Dr Peter Brand MP]. We expect that if the point were to arise in the course of proceedings, the court or tribunal would be likely in practice to look at the extract from* Hansard*. The contrary view, cloaking an executive statement with parliamentary immunity, would be most unjust. We believe Parliament would benefit by expressly accepting the principle involved.*
> (my emphasis) (para 58)
>
> ***We recommend*** *that the exception of judicial review proceedings from the scope of article 9 should apply also to other proceedings in which a government decision is material.* (para 59)

Parliamentary privilege – the *Vaid* case

[160] This Canadian judgment, *Canada (House of Commons) & Anor v Vaid & Anor* (2002), 222 D.L.R. (4th) 339 (CA), was relied upon by Mr Davenport. It is the only employment case found by counsel in which issues of parliamentary privilege have been addressed by a court in a similar jurisdiction. The case was decided by the Federal Court of Appeal in 2002 and, although on narrower and other issues, by the Supreme Court of Canada. The facts are surprising.

[161] An employee was dismissed from employment as chauffeur to the Speaker of the House of Commons. It appears that he pursued a grievance successfully under special parliamentary employment legislation and succeeded in his claim to be reinstated to his position as chauffeur. When he attempted to do so, however, he found that the role of chauffeur had been designated *"bilingual imperative"* and

now, lacking the French language skills to resume his former post that had not formerly required them, the employee was prevented from resuming his duties and instead sent for French language training. Subsequently when the employee wished to resume his former duties, he was told that he was then redundant.

[162] When the former employee alleged that the House of Commons had discriminated against him on the basis of his race, colour and ethnic or national origin by refusing to continue to employ him, the House asserted that it was not subject to the Canadian Human Rights Act because of parliamentary privilege.

[163] Addressing the status of parliamentary privilege in Canada, the Federal Court of Appeal affirmed that courts may determine if the privilege claimed is necessary to the capacity of the Legislature to function, but have no power to review the rights or wrongs of a particular decision made pursuant to the privilege. Put another way, Canadian courts may determine whether circumstances are privileged by reference to a "functioning necessity" test, and only if privilege is found to be necessary by application of that test, are courts in Canada precluded from reviewing the rights and wrongs of that particular decision made pursuant to privilege.

[164] The Court of Appeal in *Vaid* found that the powers claimed by the House were not necessary and consequently did not come within the scope of parliamentary privilege by application of the doctrine of functioning necessity. The Court also concluded that there was no clear parliamentary intention, explicit or implicit, to shield its managerial activities from the application of the Canadian Human Rights Act.

[165] The judgment of the Court of Appeal in *Vaid* notes:

> *[29] In an article entitled* Labour Law, Parliamentary Staff and Parliamentary Privilege (1983) *12 Industrial Law Journal 28, at page 37, the author, G.F. Lock, concluded that: "[s]taff employment rights are at field very remote from the original purpose of this aspect of privilege--the preservation of M.P.'s freedom of speech,--and the exclusion of staff matters from the category 'internal affairs of the House' would not impair the rights which the House actually needs to function.*
>
> *[30] In a Report published on March 30, 1999 by the House of Lords and the House of Commons on Parliamentary Privilege, the authors, dealing*

> *with the right of each House to administer its internal affairs within its precincts, criticized the vagueness of terms like "control of internal affairs". In paragraph 241 of chapter 5: Control by Parliament over its Affairs, they wrote:*
>
> *In one important respect this heading of privilege is unsatisfactory. `Internal affairs' and equivalent phrases are loose and potentially extremely wide in their scope. On one interpretation they embrace, at one edge of the spectrum, the arrangement of parliamentary business and also, at the other extreme, the provision of basic supplies and services such as stationery and cleaning. This latter extreme would be going too far if it were to mean, for example, that a dispute over the supply of photocopy paper or dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way. Here, as elsewhere, the purpose of parliamentary privilege is to ensure that Parliament can discharge its functions as a legislative and deliberative assembly without let or hindrance. This heading of privilege best serves Parliament if not carried to extreme lengths.*
>
> …
>
> *It follows that management functions relating to the provision of services in either House are only exceptionally subject to privilege. In particular, the activities of the House of Commons Commission, a statutory body appointed under the House of Commons Administration Act 1978, are not generally subject to privilege, nor are the management and administration of the House departments. The boundary is not tidy. Occasionally management in both Houses may deal with matters directly related to proceedings which come within the scope of article 9. … For example, the members' pension fund of the House of Commons is regulated partly by resolutions of the House. …*
> (Emphasis added)

[166] The *Vaid* case was determined ultimately by the Canadian Supreme Court in *Canada* (*House of Commons) v Vaid* [2005] 1 S.C.R. 667, [2005] SCC 30. Although the appeal to the Supreme Court was successful, this was on narrow administrative law grounds as to the appropriate forum in which Mr Vaid's case ought to have been brought. The Supreme Court dismissed, however, the challenge by the House and the Speaker to the Court of Appeal's rejection of parliamentary privilege immunity.

[167] Binnie J, delivering the judgment of the Supreme Court, addressed the need for each of the branches of government to pay their proper roles and for each to ensure that none oversteps its bounds by showing proper deference for legitimate activity of the others. The Court went on to hold at paragraph 25 of the judgment, however:

> *At the same time, relations between Parliament and its employees are clearly matters within the legislative authority of Parliament. The statutory language of the* Canadian Human Rights Act*, on its face, is broad enough to*

cover labour relations on Parliament Hill. There is much to be said for the respondents' view that Parliament should not be thought to intend to exempt its employees from access to human rights guarantees which Parliament itself has declared applicable to all "matters coming within the legislative authority of Parliament" (Canadian Human Rights Act, s. 2).

[168] Binnie J noted in his summary of the general principles of parliamentary privilege in Canada that these include:

> *… the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces . . . in order for these legislators to do their legislative work. [Original emphasis]*
>
> *… The idea of necessity is thus linked to the autonomy required by legislative assemblies and their members to do their job.*
>
> *… The historical foundation of every privilege of Parliament is necessity. If a sphere of the legislative body's activity could be left to be dealt with under the ordinary law of the land without interfering with the assembly's ability to fulfill its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist …*
>
> *... When the existence of a category (or sphere of activity) for which inherent privilege is claimed (at least at the provincial level) is put in issue, the court must not only look at the historical roots of the claim but also to determine whether the category of inherent privilege continues to be necessary to the functioning of the legislative body today. Parliamentary history, while highly relevant, is not conclusive: [original emphasis]*
> …
> *… "Necessity" in this context is to be read broadly. The time-honoured test, derived from the law and custom of Parliament at Westminster, is what "the dignity and efficiency of the House" require:*
>
> *If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body. [Original emphasis]*
> …
> *… Proof of necessity is required only to establish the existence and scope of a* category *of privilege. Once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a particular case the* exercise *of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts: …*
> …
> *… The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege …*

…
… Courts are apt to look more closely at cases in which claims to privilege have an impact on persons outside the legislative assembly than at those which involve matters entirely internal to the legislature …

… It should be emphasized that a finding that a particular area of parliamentary activity is covered by privilege has very significant legal consequences for non-members who claim to be injured by parliamentary conduct, including those whose reputations may suffer because of references to them in parliamentary debate, for whom the ordinary law will provide no remedy. …

Parliamentary privilege - Decision

[169] How to draw together the myriad authorities about the nature and extent of parliamentary privilege and, in New Zealand at least, its effect on the law of employment of and by officers of Parliament?

[170] I start with the fundamental proposition that Mr Witcombe's employment by the Clerk was governed by the ER Act. Not only has Parliament so provided in that Act but it has not enacted any special exemptions therefrom in such cases as this. That is to be contrasted with other exemptions to the universality of employment law, whether in whole or in part. Examples of total exemption from the provisions of the ER Act include military personnel. Examples of partial exemptions include the inability of sworn police officers to take strike action. There are others but the important point is the preliminary assumption that the employment relationship between Mr Witcombe and the Clerk was governed by all relevant parts of the ER Act.

[171] In particular, when Mr Witcombe ceased his employment and invoked personal grievances to challenge his employer's relevant acts and omissions, the legislation[14] provides that if Mr Witcombe was dismissed actually or constructively, the Clerk might be called upon to justify this according to the standards of fairness and reasonableness established by the courts.

[172] Next, the Clerk's dealings with Mr Witcombe (and others of his employees), and Mr Witcombe's dealings with the Clerk, are not per se subject to parliamentary

[14] Section 25 CHR Act and s103 ER Act

privilege. The privilege is engaged when the Court is invited to examine and rule on questions that are properly the province of Parliament in its extended definition. In this case, that is principally in the form of the activities of the FESC of Parliament. The actions, omissions, and statements of and to the FESC cannot be examined critically and second-guessed by the Court. They may, however, form the background to things said or done by others outside the bubble of parliamentary privilege. The most difficult area to delineate is where the Clerk or his representatives may have made representations or otherwise given advice to the FESC. Parliamentary privilege means that it is for the Committee or the House, of which it is a constituent, to determine the propriety of such communications and, if improper, the consequences of such impropriety.

[173] As McGee notes in his text, *"… the existence of other interests that may be infringed or abridged by the operation of parliamentary privilege justifies restricting the privileges to activities having a real connection with the operation of the legislature, and confining their scope in respect of such activities so as not to trespass on other rights unnecessarily."* Such other rights referred to include those of the Clerk as employer and Mr Witcombe as employee. Not only are there rights in law to be respected by parliamentary privilege but so, too, there are obligations. Interactions not having a real connection with the operation of the Legislature will not be subject to the privilege.

[174] It must be remembered that Mr Witcombe may not be without redress for claimed wrongs against him that are protected by parliamentary privilege. Although not aligned to the process of litigation in the courts, including about justification for acts or omissions in employment, the House now provides a mechanism, available to Mr Witcombe, to complain about, and have righted, wrongs to which he may have been subjected in the parliamentary process.

[175] I propose to follow the principles for the application of parliamentary privilege both in determining the particular pleadings and intended passages of evidence identified and, subsequently, in relation to any similar issues that may arise in preparation for or at trial.

- Communications or events to be precluded from consideration by the Court in reliance on parliamentary privilege must have a real connection with the operation of the Legislature.

- Communications or interactions that took place for the functioning of the Legislature cannot be re-examined by the Court for their truth, accuracy, or otherwise.

- To the greatest extent possible, Mr Witcombe's and the Clerk's rights and obligations as employee and employer under employment law (including the Employment Relations Act 2000) should be considered and determined by the Court without restriction by the application of parliamentary privilege.

- The preparation of a document for the purposes of transacting the business of a Select Committee will be the business of the Committee to which privilege attaches.

- Freedom of speech (or other communications) to the Select Committee is the province of Parliament and protected by its privilege.

- Privilege may be surrendered or curtailed not only by express legislative provision but also by necessary implication of a statute.

- Effective repetition of a communication subject to privilege, outside of a privileged situation, will permit the Court to consider the original communication protected by parliamentary privilege to explain or give context to the later restatement.

[176] Applying these principles, I turn now to the pleadings and particular elements of intended evidence to determine whether each is precluded from consideration by the Court by the application of parliamentary privilege. The first is those parts of paragraph 30 of the plaintiff's amended statement of claim that are identified in paragraph [75] of this judgment.

[177] The plaintiff is not entitled to rely on the truth or otherwise of statements made by the Clerk to the FESC. If, however, such statements were subsequently affirmed or effectively repeated, whether in correspondence or orally and even if by reference to their original making to the Committee, and if such subsequent affirmation or repetition was in circumstances that were not privileged, then the plaintiff may rely upon these. This principle extends to the activities of the Clerk-Assistant. The plaintiff is not entitled to rely upon what he says is the incorrectness of the FESC's conclusion that reports made to it were submissions. That is an issue determined by the Committee and is protected from reconsideration or contradiction by the Court.

[178] Paragraph 30 of the amended statement of claim must now be amended accordingly and the defendant must thereafter plead to it.

[179] I agree that to the extent that the plaintiff repeats the allegations set out in the current paragraph 30 of the amended statement of claim that are impermissible by reason of parliamentary privilege, subsequent pleadings must also be revised in a tracked changes second amended statement of claim which must be pleaded to by the defendant in due course.

[180] Correlating each of the bullet point summaries of evidence in paragraph [82] of this judgment, I determine as follows.

- Mr Kersey is prohibited from giving evidence about his view of the accuracy of the FESC's report.

- Mr Kersey is prohibited from giving evidence about the nature of the statements of the Clerk to the FESC and, in particular, his view about whether this raised issues of natural justice. (Paragraph 14 of Mr Kersey's brief of evidence)

- Mr Kersey is prohibited from giving evidence of the accuracy of the FESC's report that was presented to the House. (Paragraph 19 of Mr Kersey's brief of evidence)

- If the FESC's report contains conclusions of fact, Mr Fieldsend is not permitted to contradict these in evidence. (Paragraphs 9 and 10 of Mr Fieldsend's brief of evidence)

- Mr Fieldsend is not entitled to give evidence about the Clerk's statements to the FESC other than to give context to statements made outside the Committee. (Paragraph 19 of Mr Fieldsend's brief of evidence)

- Mr Fieldsend is not entitled to call into question the genuineness of the Clerk's submission to the FESC. (Paragraph 27 of Mr Fieldsend's brief of evidence)

- Mr Fieldsend is not entitled to assert that the Clerk's evidence to the FESC was wrong. (Paragraph 31 of Mr Fieldsend's brief of evidence)

- Mr Witcombe is not entitled to assert, contrary to any FESC conclusion to this effect, that the document in his name sent to the Committee was not a submission. (Paragraphs 30 and 51 of Mr Witcombe's brief of evidence)

- Mr Witcombe is not permitted to criticise the Clerk's advice, or absence of it, to the FESC to follow Parliament's own natural justice rules. (Paragraph 77 of Mr Witcombe's brief of evidence)

- Mr Witcombe is not entitled to contend that the Clerk had not appeared before the FESC or, if contradicted by its records, to contend that Mr Fieldsend had made a submission to the Committee without the Clerk's authority. (Document 58)

- Mr Witcombe is not entitled to assert that these conclusions of the FESC were without substance, had seriously damaged Mr Fieldsend's professional reputation and standing in the Office of the Clerk, and was made without proper investigation or the opportunity for Mr Fieldsend to respond.

- Mr Witcombe is not entitled to call in question the defendant's motivations and actions for doing so when he appeared before the FESC. (Paragraph 91 of Mr Witcombe's brief of evidence)

- Mr Witcombe is not entitled to assert, contrary to the FESC's report to the House, that his communication to the Committee was not a submission. (Paragraph 94 of Mr Witcombe's brief of evidence)

- Mr Witcombe is not entitled, in paragraphs 144, 145, 146 and 147, to challenge directly the procedures and status of the House and, in particular, to assert their inaccuracy.

- Mr Witcombe is not entitled to advance submissions in the guise of evidence at paragraphs 165 and 166 of his brief of evidence, including assertions about what the Clerk said or otherwise conveyed to the FESC.

Future progress of case

[181] I have already directed the plaintiff to re-plead his statement of claim in accordance with the directions given in this judgment. This second amended statement of claim should be filed and served within 6 weeks of the date of this judgment. The defendant may have the period of 30 days thereafter to file and serve her statement of defence to the second amended statement of claim. That will enable a call-over of the case to take place mid to late December to progress the case to a fixture.

[182] I reserve questions of costs on the applications dealt with in this judgment.

GL Colgan
Chief Judge

Judgment signed at 5.25 pm on Friday 26 September 2008