ADVICE FROM MR BRET WALKER, SC

Rowley v. Armstrong

(Advice dated 30 June 2000 from Mr Bret Walker, SC to the Committee of Privileges)

I am asked to advise the Committee of Privileges about the interlocutory judgement of Jones J. of the Supreme Court of Queensland in the defamation action between Michael Rowley as plaintiff and David Armstrong as defendant. These proceedings were one of the subjects of the Committee's 67th Report delivered in September 1997 and adopted by the Senate on 22nd September 1997.

2. The applications decided by Jones J. involved three issues, only one of which is material for consideration by the Committee of Privileges. The two presently irrelevant issues involved the defendant's contention that the action should be struck out by reason of the plaintiff's want of prosecution, and the answering claim by the plaintiff that he should be permitted to take a fresh step in the action. Although the facts and law appropriate to these two issues were obviously critical to the judge's decision and reasoning, and are crucial as between the parties to the action, I make no further comment about them because they do not raise issues of the kind which would concern the Committee. However, their existence does serve to emphasize the interlocutory and arguably obiter nature of James J.'s conclusions about the third issue, which is of concern to the Committee.

3. That issue arose because the defendant contended that the action should be struck out on the ground that it was an abuse of process in light of his argument that the communication in question was to then Senator O'Chee and was protected by Parliamentary privilege so that pursuit of the action would amount to a contempt of the Senate.

4. On 12th April 2000, Jones J. delivered his reasons for dismissing the defendant's application, including on the ground that there was no abuse of process by reason of claimed Parliamentary privilege. The Committee has received a request from Mr. Armstrong, the unsuccessful defendant/applicant, for help in meeting the costs of a proposed appeal against this interlocutory decision. I note that the Committee's 67th Report concluded, at [2.49], by explicitly contemplating that the proceedings *Rowley v. Armstrong* would proceed to an *"outcome"*. The effect of the interlocutory decision by Jones J. is that the case can proceed. In practical terms, therefore, the result of his Honour's recent decision is to permit proceedings to continue which the Committee and the Senate contemplated would continue - albeit after a delay somewhat longer than I would have regarded as reasonable.

5. The Committee may well feel concerned about Jones J.'s approach to the issue which raised Parliamentary privilege, given that his Honour's reasoning both ignores as a matter of consideration and contradicts as a matter of conclusion the Committee's 67th Report. That Report adopted, at [2.2] and [2.4], views expressed by the Clerk of the Senate to the effect that the *Parliamentary Privileges Act 1987* rendered the protection of Parliamentary privilege available for some categories of "*communications of information to senators by other persons"*. By contrast, the Queensland judge has concluded, at [34], that it followed "*clearly enough"* from certain citations to which I will shortly turn *"that an informant in making a communication to a*

parliamentary representative is not regarded as participating in 'proceedings in Parliament' and therefore the provisions of the Parliamentary Privileges Act do not apply".

6. It must be stressed that the issue before Jones J. was whether the proceedings should be stopped in their tracks as an abuse of process. It was not an occasion when a final or binding conclusion on any issue of fact or law could be determined. Indeed, his Honour reflected that quality of the interlocutory application before him, when he immediately followed the conclusion I have quoted in 5 above by the comment, at [35], that this Committee's ruling upon the questions raised by Senator O'Chee did not in any way affect the need "*for the Court to determine the question of liability in circumstances of any claim of privilege which the defendant is entitled to raise" i*n a context which clearly contemplates that these matters are yet to be determined and will therefore be determined only in a final hearing, at the trial of the action.

7. Although there may be some ambiguity involved in his Honour's reference to *"privilege",* the better view is that all he has purported to do, or could do, was to decline to hold that the proceedings were an abuse of process, the abuse being constituted by the supposedly inevitable success of a Parliamentary privilege argument. In my opinion, rejection of the defendant's contention that the proceedings were an abuse of process certainly does not amount to a finding that the Parliamentary privilege argument is bound to fail. (I hold this view, notwithstanding the capacity in some cases, and in appropriate circumstances where e.g. the facts are virtually uncontested, for a court to determine matters of law - even difficult matters of law on a virtually final basis for the purposes of determining whether proceedings would be (technically) an abuse of process on the ground that they are bound to fail by reason of some critical issue of law. Clearly enough, Jones J. did not proceed to take that course.)

8. For these reasons, and quite apart from the defects of consideration and conclusion to which I will now turn, the interlocutory judgement of Jones J. in *Rowley v. Armstrong,* delivered on 12th April 2000, is unlikely to be regarded as adding anything appreciable to the jurisprudence of Parliamentary privilege.

9. As Jones J. correctly observed, at [19], the argument about Parliamentary privilege turned on the provisions of sec. 16 of the *Parliamentary Privileges Act.* That Act, by its long title, sets out *"to declare the powers, privileges and immunities of each House of the Parliament..."* a verbal formulation which is plainly designed to invoke the provisions of sec. 49 of the *Constitution.* The power of the Commonwealth Parliament to enact the provisions, especially those of sec. 16 to which I next turn, is well grounded in sec. 49 and can no doubt extend incidentally by means of placitum 51 (xxxix.). It is also clear that the purpose of sec. 5, and I advise its effect as well, is to ensure that the Parliament did not by its 1987 statute lose any of its Constitutional privileges, which were stipulated by sec. 49 to be those of the House of Commons in Westminster in 1901. In short, except by express provision, the Act does not detract from any of the House-of-Commons-equivalent privileges of the Senate.

10. At least, it is clear that this is the intended purpose of sec. 5 of the Act. I reserve, as not presently relevant, the fundamental question whether any legislation substantively or substantially affecting any of the privileges of the Senate can be enacted without thereby, and by that fact, removing the House-of-Commons equivalence. That argument, which turns on the phrase "*and until declared shall be ...*", in sec. 49 of the *Constitution,* awaits another day: cf. *R. v.*

Richards; ex parte Fitzpatrick and Browne (1955) 92 C.L.R.157 at 168. In any event, in my opinion the effect of sec. 5 of the Act is to give statutory force to the sec. 49 pre-declaration privileges, subject only to express provision "*otherwise"* in the Act.

11. It is necessary to note the unsatisfactory provisions of sub-sec. 16(1) of the Act before passing to the critical provisions of sub-sec. 16(2). Perhaps the opening words of sub-sec. 16(1) signal the uncertainty of its endeavour: in any event, its effect seems to be that Article 9 of the *Bill of Rights is* supposedly applied to the Parliament including its Houses and thus the Senate, but as such is to have the effect of the other provisions of sec. 16 "*in addition to any other operation"*. I suspect these provisions will have a troublesome application in future circumstances. Fortunately, I do not believe that sub-sec. 16(1) will have that effect in this case, because on any view Article 9 does not expressly address words or acts done *"for purposes of or incidental to"* the business of the Senate, and thus the terms of sub-secs. 16(2) and (3) govern the position. It is for these reasons that it becomes, in my opinion, inappropriate to focus the relevant enquiry upon the position in Westminster as at 1901.

12. The provisions of sub-sec. 16(2) of the Act pivot on the notion of *"the transacting of the business of a House..."*. This is the definitional framework within which the expression *"proceedings in Parliament" is* defined by sub-sec. 16(2). Its definition commences by the expression "*all words spoken and acts done in the course of*, *or for purposes of or incidental to, the transacting of the business of a House... "*. It is the words to which I have given emphasis in this quotation which determine the issue which will eventually be before the Supreme Court of Queensland at the final trial of the action in *Rowley v. Armstrong,* and which were fundamental to the interlocutory issue considered by Jones J.

13. The expressly non-exhaustive examples of words and acts within this definition of *"proceedings in Parliament"* include para. (c), viz. *"the preparation of a document for purposes of or incidental to the transacting of any such business"*. In my opinion, the antecedent of the demonstrative adjective *"such"* in that phrase includes the kind of business referred to in paras. (a) and (b) of sub-sec. 16(2), as well as the quintessentially Parliamentary business of debate on proposed legislation, questions, and statements by Members on matters of public importance.

14. As accepted by Jones J., and as found in the Committee's 67th Report, the communications by Mr. Armstrong to Senator O'Chee, for which Mr. Rowley now sues Mr. Armstrong in defamation, were made for the purpose of Senator O'Chee using that information "*in Senate proceedings"*. The proceedings in question included a question of a Minister representing a relevant Minister, a speech on the adjournment and a further question (see the 67th Report at [1.7] and [1.8]).

15. In my opinion, on the basis of this finding by the Committee, there is no doubt that the communication by Mr. Armstrong to Senator O'Chee must be treated by all courts in Australia as being "*proceedings in Parliament"* for the purposes of sub-sec. 16(3) of the Act.

16. I interpolate that the provisions and reasoning referred to in 11 and 12 above sufficiently demonstrate that the preposition "*in"* used in that phrase cannot be taken literally as meaning events occurring inside the Chamber of the Senate or in its traditional precincts. I further interpolate that there can be no doubt about the subjection of the Supreme Court of Queensland to

the provisions of sec. 49 of the *Constitution* and sec. 16 of the Act, given covering cl. 5 of the *Constitution Act* and sec. 109 of the *Constitution.*

17. In my opinion, the reasoning of Jones J. fails to engage with these critical matters of statutory interpretation. His Honour's approach can be mapped as follows. He starts by extracting the relevant provisions of sub-secs. 16(2) and (3) of the *Parliamentary Privileges Act* (at [19]). He irrelevantly refers to the judicial doctrine of reticence in relation to the activities of the other arms of government (at [21] and [22]). He briefly touches on the recent decisions of the Queensland Court of Appeal in *Laurance v. Katter* [2000] 1 Qd. R. 147 (decided in 1996) and *Rowley v. O'Chee* [2000] 1 Qd. R. 207 (decided in 1997), noting his view that it was *"not necessary to re-canvass the issues decided in each of those cases"* (at [23]).

18. It is regrettable that Jones J. passed over those authorities in this fashion, given the centrality of sub-sec. 16(3) of the Act to the former decision and the centrality of sub-sec. 16(2) of the Act to the latter decision - and the centrality of both those provisions to the question before his Honour. In *Laurance v. Katter,* over the powerful dissent of Fitzgerald P., which in my respectful opinion properly found and applied the law, Pincus J.A. held that sub-sec. 16(3) was unconstitutional in its claimed application to the defamation action considered in that case, and Davies J.A. more narrowly construed the Article 9 notion of impeaching or questioning Parliamentary proceedings than the learned President construed it. There was thus no majority for the non-application of the protection of the Act in relation to communications with a Senator for the purposes of the Senator participating in proceedings inside the Chamber. Unfortunately, Jones J. does not explain how, if at all, he applied any part of the split majority reasoning in *Laurence v. Katter* to support his own conclusion.

19. As to *Rowley v. O'Chee,* again over the powerful dissent of Fitzgerald P. on certain important aspects, the actual result of the reasoning and decision of McPherson J.A. and Moynihan J., to some extent also supported by the learned President, emphatically accepted the extension by sub-sec. 16(2) of the Act to cover communications broadly similar to those in question in the proceedings considered by Jones J. It is very difficult to understand how Jones J. felt able to confine his consideration of the matter to the quotation extracted, at [33], from McPherson J.A.'s reasoning at [2000] 1 Qd. R. 224.41 - 225.8. Moreover, it is obscure, to put it mildly, what *"the very issue"* was considered by Jones J. to be, which he thought was dealt with by that quoted extract - which deals in unexceptionable manner with two matters of substance, first the presently irrelevant matter of the sufficiency of evidence that a threatened breach of privilege interfered with the Senator's ability to pursue a subject in the House, and second the equally presently irrelevant matter of the privilege pertaining to Parliament rather than to the Senator or his informants.

20. To return to the map of Jones J.'s reasons. Following this unproductive reference to the authority noted in 17 - 19 above, his Honour turned to cite an English decision, viz. *Rost v. Edwards* [1990] 2 Q.B. 460 at 478, to no particular effect (at [24]). The passage quoted from that authority manifestly does not inform the interpretation of sub-sec. 16(2) of the Act, and does not draw definitional lines which may have been persuasive for the case before his Honour. It is, nonetheless, immediately following that citation where his Honour concluded that Mr. Armstrong's "*act of communicating with the Senator was not 'a parliamentary proceeding' as*

that term is contemplated by the statute .." (at [25]). It is simply not possible, to that point in his reasons, to descry how the authorities cited by him, or other reasoning, led to that conclusion.

21. The difficulty continued (at [27]), when his Honour described Article 9 of the *Bill of Rights* as the *"starting point"* and cited four decisions, three of which concerned Westminster and one of which concerned the Westminster equivalent in New Zealand, and none of which moved from the historical genesis in Article 9 to the present statutory expression in sub-sec. 16(2) of the Act. The quotation from the reasons of the Court of Appeal (of England and Wales) in *Hamilton v. Al Fayed* [1999] 1 W.L.R. 1569 at 1585H illustrates the difficulty in this part of Jones J.'s reasons, not least because the Court of Appeal, whose judgement was delivered by Lord Woolf M.R., cast some doubt (without any decision) on the authority of *Rost v. Edwards* - specifically on Popplewell J.'s approach to the definition of "*proceedings in Parliament"*.

22. And in *Hamilton v. Al Fayed* itself, it was decided that an inquiry and report by a Commissioner, who was not a Member of Parliament, amounted to proceedings in Parliament including for the purposes of Article 9. There is no exploration by Jones J. of how that expansive definition supported his conclusion. Of course, in my opinion, an English interpretation of Article 9 in an English case is not authority which has any particular usefulness in construing the special words of sub-see. 16(2) of the Act which very overtly extend beyond the words of Article 9.

23. Next, Jones J. quoted two passages from textbooks, the first from the 21st edition of *Erskine May,* at 133, commencing with the assertion that the protection of Parliamentary privilege was not *"afforded to informants ... who ... provide information to members"* (at [28]). It is very clear that this esteemed work of authority was not opining, and could not be taken as opining, on the meaning of the words in sub-sec. 16(2) of the Act which explicitly extended the definition of "*proceedings in Parliament",* being the critical phrase which provides the touchstone for the protection given by Parliamentary privilege. This first citation is therefore quite inadequate to support Jones J.'s conclusion.

24. The second textbook citation by Jones J. has nothing whatever to do with the issue before his Honour. It consists (at [29]) of anodyne generalizations about certain privileges, and neither constitutes authority nor persuasive opinion on the question before his Honour. I intend no disrespect to the late Professor Fleming, its author (the work being his famous *Law of Torts,* 7th edition), it being crystal clear that the passage could not have been written with anything like the provisions of sub-sec. 16(2) of the Act in mind.

25. Finally, in the set of "*references"* from which Jones J. said his conclusion followed *"clearly enough"* (at [34]), his Honour cited and quoted relatively extensively from the decision of Allen J. at first instance in the Supreme Court of New South Wales, R. *v. Grassby* (1991) 55 A. Crim. R. 419. This is a decision about the privileges of the Houses of the New South Wales Parliament, and is thus manifestly not an authority about sub-sec. 16(2) of the Act. Nothing in the reasons of Allen J. touches on the relevant statutory issue argued before Jones J. I am at a loss to understand how this was considered the precedent which warranted the most extensive quotation in his Honour's reasons.

26. For all these reasons, there are profound weaknesses in the reasoning of Jones J. In my opinion, for the same reasons, his Honour's conclusion on the ambit of Parliamentary proceedings

for the purpose of considering the question of Parliamentary privilege under the Act is fatally flawed, and of no weight whatever as an authority.

27. It is, sometimes, an appropriate response to a very weak judicial decision to ignore it, confident in the expectation that it will not affect the body of doctrine. I am tempted to this view in relation to *Rowley v. Armstrong.* However, in my opinion the egregious deficiencies in the decision should be addressed by an appellate court not least because the conclusion about sub-sec. 16(2) is so clearly wrong and even so may mislead in other proceedings.

28. On the hearing of an appeal, it is likely that proper doctrine would be upheld, by vindication e.g. of the reasoning adopted by the Committee in its 67th Report, being reasoning which accords with the Queensland Court of Appeal approach in *Rowley v. O'Chee.* This result would considerably strengthen the intended effect of sub-secs. 16(2) and (3), including lifting the chilling effect of uncertainty from would-be informants to Members of Parliament. On the other hand, the Court of Appeal may not regard the matter as one where the proceedings should have been dismissed as an abuse of process - but this is not a matter which I will further consider.

29. Finally, since the decision of Jones J. in *Rowley v. Armstrong* there has been delivered the very interesting decision of the Full Court of the Supreme Court of South Australia, sitting a bench of five, in *Rann v. Olsen* [2000] SASC 83. Nothing in the main reasons of their Honours (particularly those of Doyle C.J.) affects the conclusions I have reached and expressed above about *Rowley v. Armstrong.* The particular issue in *Rann v. Olsen* is sufficiently different from that in *Rowley v. Armstrong* to prevent its direct application in support of my opinion. Nonetheless, there is tangential support for my views in the South Australian authority, and no contradiction.

30. The issue generally is one which, in my opinion, would attract the interest of the High Court, were an unsuccessful party to an appeal to seek special leave to appeal further to the High Court, unless the decision turned on the mundane question of an abuse of process, as opposed to the law of Parliamentary privilege.

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ST. JAMES' HALL.
28th June 2000 Bret Walker

P.S. Examination of the transcripts of the applications for special leave to appeal in the High Court with respect to *Laurence v. Katter* and *Rowley v. O'Chee* supports my prediction that the issue presented in this case will sufficiently interest members of the High Court, but also reveals that their Honour's hearing an application for special leave to appeal could well prefer the issue to be presented only after there is a set of full facts which have been either agreed or found at trial.