CA09/23
CA10/23

IN THE COURT OF APPEAL OF SAMOA

BETWEEN:	**THE SPEAKER OF THE LEGISLATIVE ASSEMBLY**
	Appellant/First Cross-Respondent
A N D:	**HON. TUILAEPA LUPESOLIAI DR. SAILELE MALIELEGAOI MP**
	First Respondent/First Cross-Appellant
A N D:	**HON. LEALAILEPULE RIMONI AIAFI MP**
	Second Respondent/ Second Cross-Appellant
A N D:	**ATTORNEY GENERAL**
	Third Respondent

Coram: Hon. Justice Blanchard
Hon. Justice Young
Hon. Justice Nelson

Hearing: 23 November 2023

Further Submissions: 11 & 22 December 2023 and 23 January 2024

Counsel: B Keith & G Latu for the Appellant/First Cross-Respondent
R E Harrison KC, S Ainuu & M Lemisio for the First and Second Respondents/Cross-Appellants
R M Lithgow KC, D J Fong and V Leilua for the Third Respondent

Judgment: 5 February 2024

JUDGMENT OF THE COURT

INTRODUCTION

[1] This appeal concerns the powers of the Legislative Assembly of Samoa ("the Assembly") to discipline its members for contempt of Parliament. Those members are the first and second respondents/cross-appellants, the Hon. Tuilaepa Lupesoliai Dr. Sailele Malielegaoi MP and the Hon Lealailepule Rimoni Aiafi MP ("**the suspended MPs**"). The Hon Tuilaepa is the former Prime Minister and Leader of the Human Rights Protection Party (HRPP). The Hon Lealailepule is an official of that party. In these proceedings the Assembly is represented by its Speaker ("**the Speaker**") but the powers challenged are primarily those of the Privileges and Ethics Committee of the Assembly and of the Assembly itself. In this Court the Attorney General has remained neutral and counsel's appearance was for the most part in the nature of a watching brief.

THE CONTEMPT OF COURT DECISION

[2] As the Supreme Court remarked in its judgment of 22 March 2022 (*Fa'atuatua i Le Atua ua Tasi (FAST) & Anor v Tuilaepa Sailele Malielegaoi & Ors* [2022] WSSC 7 ("**the contempt of court decision**"), the Samoan general election of 9 April 2021 was followed by a period of political turmoil. The courts gave a series of decisions clarifying the legal position. That position was that the current Prime Minister, the Hon. Fiamē Mata'afa and her FAST party had won the election. In that decision the Supreme Court found that some of the respondents in that case, who included the suspended MPs, had been guilty of "the gravest possible examples of contempt of court..... committed repeatedly over a sustained period". The Court said that they had damaged the fabric of Samoa. Its judgment was intended to help in overcoming that damage, as well as to clarify aspects of the law of contempt of court that may not have been obvious to those involved. The Supreme Court also recorded that those respondents who had committed contempts had largely retracted their damaging remarks, admitted their wrongdoing and apologised.

[3] The Supreme Court concluded its judgment by taking notice that on 15 February 2022 an agreement had been reached and recorded in a document ("**the Harmony Agreement**") signed by the Leaders of the two political parties, HRPP and FAST, which stated that, rather than cause further disagreement and disharmony, the contempt proceedings would be discontinued:

> "...to emphasise and uphold their shared respect, and their support for all Samoa to respect, for the Supreme Court, the Court of Appeal and the judiciary of Samoa; and to record their agreement to move forward under the Constitution, with which Samoa is blessed and under which the courts of Samoa were able to resolve the unprecedented disagreements of the past year."

[4] A copy of the Harmony Agreement was annexed to the contempt of court decision. However, because of the need the Supreme Court saw to publicly condemn conduct of the kind committed by the respondents in that case, and whilst applauding the efforts of the parties to bring the dispute to an end, the Court declined to accept discontinuance of the contempt of court proceedings. It found the suspended MPs were both in contempt of court (both were found guilty of scandalising the Court) in respectively making certain statements which the Court set out at paragraphs 60 and 86 of its judgment.

[5] The Court did not impose penalties on those it found guilty of contempt of court. Among its reasons for taking that course was the existence of the Harmony Agreement, which it said overshadowed all other penalty considerations. The Court stated:

> "The agreement was in fact no more than a proposal which was never adopted by the Court. However we have attached great significance to the views expressed in it by the current Prime Minister and the FAST party. They feel strongly that it is time for Samoa to put these election arguments behind them. That would allow Samoa to unite in addressing greater challenges that lie ahead such as Covid and climate change. To that end they were prepared to discontinue the contempt proceedings altogether. If we had accepted the discontinuance it would have left the respondents without penalty."

There was no appeal from the contempt of court decision.

THE BREACH OF PRIVILEGE COMPLAINT

[6] But the contention did not rest there, for, just over a month later, on 28 April 2022, the new Deputy Prime Minister, the Hon Tuala Tevaga Iosefo Ponifasio, wrote to the Speaker making a formal complaint under Standing Order 178 of the Assembly's Standing Orders against the suspended MPs. The letter of complaint, a copy of which is annexed to the judgment now under appeal, alleged numerous breaches of Parliamentary privileges by the suspended MPs, including:

(a) being found guilty by the Supreme Court of scandalizing the Court;
(b) being found by the Court to have made comments and statements which denigrated and insulted the Assembly "by suggesting or inferring that the new Government is in some way illegitimate arising from a coup d'état by the judiciary" and describing the government as unconstitutional, which "undermines the status, authority and dignity" of the Assembly;
(c) being found in the decision of the Supreme Court to have made comments and statements which denigrated and insulted other Members of Parliament and the FAST party and had undermined the rule of law;

It was alleged that this behaviour and conduct was undignified, inappropriate and fell below the standards to be expected of members of the Assembly; that it had brought shame and embarrassment upon the institution of Parliament and its members, past and present, and had undermined public support and respect for the role of an MP and the institution of Parliament which needed to be addressed and if possible restored.

[7] The letter of complaint set out some examples of what the suspended MPs had said on occasions between 30 July and 14 August 2021. It affirmed that the swearing in of Parliament, the Speaker, the Prime Minister and all associated appointments on 24 May 2021 had been declared valid by the Court of Appeal on 23 July 2021 (*Attorney General v Latu* [2021] WSCA 6) and that the Government had been authorized to take power from the latter date. The Speaker had, and had laid claim to, all Parliamentary privileges under Standing Order 11 from 24 May 2021 onwards, and "during which *[sic]* the two MPs appear to have breached a number of those privileges", which the complaint then enumerated. These included acting contrary to the Parliamentary Oath of Allegiance and to the Code of Parliamentary Ethics in Standing Order 15 and contempt of Parliament under Standing Order 186.

[8] The Deputy Prime Minister invited the Speaker to refer his complaint to the Privileges and Ethics Committee ("**the Committee**") convened and appointed under Standing Order 177. The Speaker did so.

[9] The suspended MPs responded to the complaint with a joint statement to the Committee in which they contended that:

(a) the Supreme Court had already ruled on the subject matter of the complaint;
(b) The complaint was contrary to the terms of the Harmony Agreement between FAST and HRPP; and
(c) The complaints were not matters of privilege and therefore did not attract Standing Orders 178, 185 and 187.

[10] The report of the Privileges and Ethics Committee, although recording the allegations made by the Deputy Prime Minister and the response of the suspended MPs, was mostly concerned with matters of, at best, peripheral relevance. It concluded, without any real analysis that "Parliamentary privileges have been breached as well as the Oath of Allegiance (Standing Order 14) and the Code of Parliamentary Ethics (Standing Order 15)". It then "[l]ooked into the effect and contempt of Parliament in this matter", setting out a statement the Hon Tuilaepa had made on 30 July 2021 that there had been "acts of treason against Parliament" and a statement by the Hon Lealailepule on 25 July 2021 that a "coup by the judiciary [had] brought in an unconstitutional government." The Committee concluded that Standing Order 186(j) was "fitting for the matter". (This Standing Order says that "Parliament may treat as a contempt.... reflecting on the character or conduct of the Assembly or a Member in the Member's capacity as a Member of Parliament", presumably meaning a statement to that effect.)

[11] The Committee then asked itself whether the comments of the suspended MPs did so reflect on that character or conduct. It said that their statements "clarified" an attempt by them to undermine the Parliament and some members. This was also said to be within para (a) of Standing Order 186 (the breach of one of the privileges of Parliament). It found there had been a contempt committed.

[12] The Committee then referred to the need under its terms of reference set by the Speaker to "[l]ook into the effect of a Member of Parliament who has been found to breach Parliamentary privileges and confirmed [sic] an act of contempt of Parliament". But without discussing any effect on the Assembly and its members, the Committee said only that the effect was provided for in Standing Order 187(4) (which provides for a reprimand or suspension for such time as the Assembly may determine). It also said, without identifying them, that it had looked into cases in the past and recommendations in those cases. The report then set out its advice to the Assembly that the two MPs be suspended from Parliament from the day commencing on the day the Assembly should approve the report "until such a time", and that under Standing Order 187(5) there would be no eligibility to any salary or parliamentary allowance.

[13] On 22 May 2022 the Assembly voted to suspend the two members "sei iai se aso" (translated in Hansard as "until such time") for contempt of parliament without any salary or Parliamentary allowance (**"the first suspension"**).

[14] The suspended MPs then issued these proceedings against the Speaker (on behalf of the Assembly) challenging that decision. This was done by a notice of motion for declaratory orders and/or coercive orders and judicial review. As amended on 24 June 2022, that notice of motion sought declarations that the decision of 24 May 2022 to suspend them indefinitely was illegal and unlawful as being contrary to the Constitution and laws of Samoa. The grounds advanced in support of the orders sought were, as presently relevant, that the penalty of indefinite suspension was unconstitutional and unlawful, and that the Assembly had breached the principles of natural justice in respect of the Hon Tuilaepa as he was not afforded the opportunity to be heard on the issue of penalty before it was imposed. They also pleaded that the Speaker had erred in law in referring the complaint of breach of privilege to the Committee "when such complaint lacked legal basis (illegality)" and they had not breached any privilege or ethics and were not in contempt of Parliament.

THE FIRST SUSPENSION JUDGMENT

[15] In a judgment delivered on 30 August 2022 (*Malielegaoi v Speaker of the Legislative Assembly* [2022] WSSC 35) ("**the first suspension judgment**") a Full Court of the Supreme Court (Perese CJ and Nelson and Tuala-Warren JJ) said that the issues for resolution could be articulated as follows:

> (i) Is the Legislative Assembly's disciplinary process exclusively a matter that must be left to the judgment of the Legislative Assembly?
> (ii) If the process is subject to constitutional challenge, then what constitutional provision is the process inconsistent with?
> (iii) If the suspension is either unconstitutional or unlawful, should the Court exercise its discretion to make a declaration in this case? (at para 37)

Addressing the first of these issues, the Court began with Article 62 of the constitution:

> "**62. Privileges of Legislative Assembly** - the privileges, immunities and powers of the Legislative Assembly, of the committees thereof and of Members of Parliament may be determined by Act:
> **PROVIDED THAT** no such privilege or power may extend to the imposition of a fine or to committal to prison for contempt or otherwise, unless provision is made by Act for the trial and punishment of the person concerned by the Supreme Court."

The Court then quoted from *Erskine May Parliamentary Practice* (25ed, 2019) para 12.1 the following definition of parliamentary privilege. The Court emphasised the portions in bold below:

> "Parliamentary privilege is the sum of certain rights enjoyed by each House collectively as a constituent part of the High Court of Parliament; and by Members of the House individually, without which they could not discharge their functions and which exceed those possessed by other bodies or individuals. **Some privileges rest solely on the law and custom of Parliament, while others have been defined in statute.**
>
> Certain rights and immunities such as freedom from arrest or freedom of speech are exercised primarily by individual members of each House. **They exist in order to allow members of each House to contribute effectively to the discharge of the functions of their House. Other rights and immunities, such as the power to punish for contempt and the power to regulate its own constitution, belong primarily to each House as a collective body, for the protection of its members and the vindication of its own authority and dignity.** Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members. **The Speaker has ruled that parliamentary privilege is absolute.**"

[16] The Court also referred to the following passage from Professor Joseph in *Joseph on Constitutional and* Administrative Law 5th ed. (Thomson Reuters NZ, 2021) at 14.2.1:

> "All privileges are, in truth, the corporate privileges of Parliament. They fall into two categories. The first category exists primarily to enforce Parliament's collective authority. Examples include: the power of the House to punish for contempt, the right of the House to be sole judge of its own proceedings, and the right of the House to

regulate its own composition. The second category exists primarily to facilitate the work of Parliament but which also consequently benefits members themselves. Examples include members' freedom of speech in debates, immunity from arrest and civil process during the period within 40 days of the beginning and end of each parliamentary session, and freedom from being served with legal process in the Parliamentary precincts".

[17] The Court observed that in *Ah Chong v Legislative Assembly* [1996] WSCA 2 the Court of Appeal had described a principle of non-intervention, in these terms:

> "There is a well-settled principle that what is said or done within the walls of a legislative assembly cannot be questioned in the Courts. It is recognized that the respective constitutional roles of the Courts and Parliament normally require the Courts to refrain from intervening in Parliamentary proceedings. Conflicts between the judicial and legislative organs of the State are to be avoided as far as possible. Generally speaking, a body such as the Legislative Assembly of Western Samoa is left free to regulate and determine its own internal procedure from time to time.
> .....
> Of course, like all principles this one has its limits and they are not always easily discernible. One limit must be that a written constitution such as that of Western Samoa may place upon the Courts some duty of scrutinising Parliamentary proceedings for alleged breaches of constitutional requirements. Thus, while normally it is for a legislative assembly to determine the effect of its own orders and to depart from them if the Assembly sees fit, a Constitution may displace that presumption by making compliance with the standing orders a condition of the validity of the legislation or, no doubt, of the validity of other steps taken by the assembly."

The Court in *Ah Chong* had added that any real ambiguity would be resolved in favour of non-intervention.

[18] However, the Supreme Court said, parliamentary absolutism does not apply in Samoa:

> "The Court of Appeal in *Ah Chong* held that the Constitution of Samoa imposes a duty on the Court to scrutinise Parliamentary proceedings for alleged breaches of constitutional requirements." (at para 50)

[19] The Constitution, in article 53, gave the Assembly power to make Standing Orders:

> **"53. Standing Orders** - Subject to the provisions of this Constitution, the Legislative Assembly may make, amend and repeal Standing Orders regulating its procedure."

The Supreme Court said (at para 56) that there were two important principles in Standing Orders 1 and 2 which it considered relevant:

> "**1. Rights of the Legislative Assembly not restricted:**
> Nothing provided for in these Standing Orders shall diminish or restrict or be deemed in any way to reduce or restrict the rights, privileges, immunities and powers held or enjoyed by the Legislative Assembly or the upholding and exercise thereof.
>
> **2. In cases not provided for Speaker to decide:**

> In all cases not provided for in these Standing Orders the Speaker shall decide guided by the rules and usages and relevant practices of the House of Representatives of New Zealand and other Westminster Parliaments in force, in so far as the same can be applied to the proceedings of this Legislative Assembly."

[20] The Court commented that Standing Order 1 appeared an important restatement of the principle of non- intervention "in so far as the scope of the SO are concerned ". Standing Order 2, however, allowed the Assembly to be guided by the rules and relevant practices of the New Zealand Parliament and other Westminster Parliaments. It noted that among the types of privilege recognised in the New Zealand Parliament were powers to punish for contempt and to discipline members.

[21] In summary (at para 59), the Court said that the privileges of Parliament were found in both a statute, the Legislative Assembly Powers and Privileges Ordinance 1960 (which it had earlier described as setting out "in a non-exhaustive way certain statutory privileges" not relevant in this case) and in the Assembly's own customs. In this case the Court said it was clear that Parliament had a privilege to punish its members for contempt and to discipline its members. It rejected the submission that there was no issue of privilege capable of being referred to the Committee:

> "Respectfully, the uncontested statements made by both the Applicants, and described in the SC contempt proceeding as insulting and which "undermine public confidence in the independence, integrity, and impartiality of the judiciary" and therefore the rule of law, are matters that can properly be considered by the Committee; in particular the effect of the statements on Parliament itself.
> ....
> The scope and relevance of the Harmony Agreement was clearly a matter for the Committee and the House's consideration and does not act as an ouster of the Assembly's right to inquire."

[22] The Court then considered what constituted contempt of Parliament. It noted that, in New Zealand, the House of Representatives was the judge of whether a set of circumstances constituted a contempt. In Samoa, Standing Order 186 listed 19 examples, but they were illustrative, rather than exhaustive. Standing Order 185 provided:

> **"185. Contempt of Parliament**
> Parliament may treat as a contempt any act or omission which:
> (a) obstructs or hinders Parliament in performance of its function;
> (b) interferes with, resists or obstructs any member or officer of Parliament in the discharge of the member's or officer's duty; or
> (c) has a tendency, directly or indirectly, to produce such a result."

It is convenient also to set out here Standing Order 187 as it stood at the time of the first suspension judgement:

> **"187. Penalties:**
> (1) Notwithstanding Standing Order 186, a Member of the Assembly commits contempt of the Assembly who:
> (a) Being a Member or [sic] a Committee of the Assembly, publishes to any person not being a Member of such Committee any evidence taken by the Committee before it has been reported to the Assembly; or
> (b) Assaults or obstructs a Member of the Assembly within the Chamber or precincts of the Chamber; or

(c) Assaults or obstructs any officer of the Assembly while in the execution of his or her duty; or
(d) Is convicted of any offence under the Legislative Assembly Powers and Privileges Ordnance 1960 and this Standing Order.

(2) If it appears that any Member commits contempt, the Assembly may refer the matter to the Privileges and Ethics Committee to investigate the matter; or refer the matter to the Prime Minister with a view to instituting civil or criminal proceedings against such Member.

(3) If on the report of the Privileges and Ethics Committee under subsection (2) the Assembly is satisfied that such Member is guilty of contempt, the Assembly may punish the Member as provided in subsection (4), or refer the matter to the Prime Minister with a view of instituting civil or criminal proceedings against such Member.

(4) Where any Member is guilty of contempt of the Assembly, the Assembly may by resolution reprimand such Member or suspend him from the service of the Assembly for such period as it may determine.

(5) No salary or allowance payable to a Member of the Assembly for the Member's service as such shall be paid in respect of any period during which the Member is suspended from the service of the Assembly under this Standing Order.

(6) Notwithstanding the above contempts, a Member who deliberately lies in Parliament by way of statements made in the Assembly or documents tabled to the Assembly, he or she is guilty of contempt and the Assembly may by resolution punish the Member according to a motion by the Leader of the House. Such punishment proposed by the motion under this subsection may differ from the punishments provided in the Legislative Assembly Powers and Privileges Ordinance 1960."

[23] The Court then addressed whether the penalty of indefinite suspension was unconstitutional or unlawful. It considered that a suspension which was indeterminate would really be a proxy for expulsion and would offend article 44(1) of the Constitution:

> **"44. Members of the Legislative Assembly** - (1) Subject to the provisions of this Article, the Legislative Assembly shall consist of one member elected for each of 51 electoral constituencies having names, and comprising of villages or sub-villages as are prescribed from time to time by Act."

But the Court accepted a submission by Hon Christopher Finlayson QC, of the New Zealand bar, acting as amicus curiae, that the suspension in this case had not been a mask for an expulsion:

> "The suspension appears to have been intended to focus on encouraging good behaviour, and it was not given a specific time limit so that once the contempt had been purged, the relevant party could take his seat." (at para 80)

[24] The Court then considered whether the first suspension was indeterminate and decided that it was not, for the reasons it gave. In doing so, it commented:

> "The issue of penalty involves the contempt itself and the need to reclaim Parliament's dignity, but it is also a decision involving matters of high politics, such as to what extent the Harmony Agreement settled the Contempt of Court and any potential Contempt of Parliament issue. It was an issue raised at the very outset, when the complaint was first served on the Applicants. This Court is not suited to

make calls on the merits of the argument and what view the Assembly should reasonably have come to." (at para 106)

[25] The Court proceeded to look at whether the Assembly had breached the Hon Tuilaepa's right to natural justice by denying him the opportunity to be heard in relation to penalty and decided that the Assembly had indeed breached his rights in this respect.

[26] Before summarising its findings, it said:

> "Given the answer we have given as to breach of natural justice, we do not consider it necessary to offer views on these grounds [error of law and illegality]. Save to note we see these grounds as standard judicial review type challenges. We would need to be persuaded that the general principles of judicial review can limit the principle of non-intervention." (at para 111)

[27] The Court found that it had jurisdiction under the Constitution to scrutinise the Committee's report and the Assembly's resolution with respect to liability and penalty pursuant to its express duty under the Constitution to declare void, "any existing law…which is inconsistent with this Constitution," to the extent of the inconsistency (at para 112(a)). This was a reference to Article 2(2) of the Constitution.

[28] Next the Court said:

> "We find these disciplinary rules and practice do not give the persons who are the subject of adverse recommendations by the Privileges and Ethics Committee, the opportunity to be heard as to penalty before the Assembly. This is a failure which breaches a fundamental plank of the rules of fairness that are secured in article 9(1) of the Constitution - the right to be heard." (at para112(b))

[29] Importantly, the Court recorded, "[t]hat the Assembly's resolution as to the [suspended MPs'] liability for the contempt of Parliament, was not itself directly challenged, and so there is no reason for this Court to consider much less disturb that finding." (at para 112(c)) It found that the suspensions were not indeterminate. (at para 112(d))

[30] It further found that the treatment of both the suspended MPs' rights to natural justice had been inconsistent with their rights preserved under Article 9(1) [the right to a fair trial]. It declared that the part of the Assembly's motion which purported to suspend them was void and suggested that the Assembly might wish to revisit "the penalty aspect consistently with the Constitution, but that is entirely a matter for that body." As at the date of the decision, it said, there was no lawful impediment in the way of the MPs resuming their duties as members. (at para 112(e))

[31] Hon Tuilaepa and Hon Lealailepule were for the time being permitted to resume their roles and duties as Members of the Assembly and their salaries and allowances were resumed, but only with effect from the first suspension judgment.

THE SECOND SUSPENSION AND THE CHALLENGE TO IT

[32] Following the first suspension judgment the Speaker directed the Privileges Committee to reconvene on the question of the penalty. The Committee heard from the suspended MPs and the

Deputy Prime Minister. Its report to the Assembly began by saying that it would focus on revisiting the "penalty aspect", as the Supreme Court had said it might do. It said its appointment was to consider this matter only. It had heard a submission from the MPs. An apology had been made on their behalf by the Hon Lealailepule. They had sought to receive only a reprimand and no further suspension.

[33] In its decision the Committee said the offences had been serious "and there should be measures laid out to control such actions if they happen again in the future", and as a precedent for future decisions on a similar matter. There had been discussion about a penalty of suspension for 36 months but in the end the following recommendations were made and were adopted by the Assembly on 18 October 2022:

> (a) To suspend [Hon Tuilaepa and Hon Lealailepule] from the service of the assembly for the period of 24 months.
> (b) That no salary or allowance is payable to these members as provided for in Standing Order 187(5).
> (c) To give these Members of Parliament the chance to voice their opinions on the penalty as provided for in the constitution. [This had been done before the resolution of the Assembly.]
> (d) The Member who is suspended from the service of Parliament must not do the following;
> (i) Enter into the Chamber and Parliamentary precincts;
> (ii) Serve on a Parliamentary Committee; and
> (iii) Lodge a question or notice of motion from Parliament.

[34] The suspended MPs then came back to the Supreme Court on 28 February 2023 amending their statement of claim in the same proceeding which had produced the first suspension judgment. In their amended statement of claim they pleaded that the finding on 22 May 2022 that they had committed contempt of Parliament was unlawful, asserting several reasons in support of that allegation. They now also sought a declaration that Standing Orders 185-187 were unconstitutional, unlawful and invalid either wholly or in their application to conduct on the part of a member not in the course of the business of the Assembly, or in purporting to confer powers of sanction extending to suspension of and denial of remuneration to an elected member. They asked for an order of certiorari quashing the finding of contempt of Parliament. They also sought the quashing of the Assembly's decision of 18 October 2022 imposing the penalties of suspension for 24 months (effectively for about 27 months when the period of the first suspension is taken into account) and the suspension of remuneration.

[35] On 27 January 2023 the Assembly had amended Standing Order 187 by adding the following paragraphs:

> "(7) Any member who is suspended from the Legislative Assembly due to breach of Parliamentary Privilege or guilty of contempt of Parliament cannot do the following:
> (i) Attend any work of the Assembly or Parliamentary Committees
> (ii) Enter Parliamentary precincts;
> (iii) Question any parliamentary matter;
> (iv) Make any public announcement through any medium which aim to denigrate the Legislative Assembly, Speaker or Committees;

(v) Write to the Speaker or any Member of the Assembly regarding any Parliamentary matter.

(8) If a member does not abide by the conditions under (7), the Legislative Assembly may by motion add another period of suspension of the suspended member."

[36] The amended statement of claim alleged that these amendments were unconstitutional and asked for a declaration accordingly and an order quashing them.

THE JUDGMENT NOW APPEALED AGAINST

[37] The Supreme Court had the case before it for a second time on 24 April 2023 and delivered its judgment, the subject of the present appeal, on 4 July 2023: *Malielegaoi v Speaker of the Legislative Assembly* [2023] WSSC 37 (Perese CJ and Clarke J) ("**the second suspension judgment**").

[38] The first issue that the Court now dealt with was the contention that it was now no longer open to the suspended MPs to claim that the decision of the Assembly that they had committed contempt of Parliament was unconstitutional and unlawful because such a claim was barred by issue estoppel or was an abuse of process in accordance with the rule in *Henderson v Henderson* (1843) 3 Hare 100, 115 because that matter had been dealt with in the first suspension judgment or, if not, the suspended MPs should have raised it there and had failed to do so.

[39] The Court found against the suspended MPs on this issue. It said that in their original pleading they had challenged the findings of breach of privilege and contempt and had sought a declaration that those findings were contrary to the Constitution and the laws of Samoa. But, the Court said, they had not contested the finding of contempt when the case was heard. The Court in the first suspension judgment had found that "the contempt of Parliament was not itself directly challenged." That decision had not determined whether the finding of contempt was lawful. Whilst there was therefore no issue estoppel, the present claim challenging liability for contempt could have and should have been raised in the earlier hearing. (at para 33) Instead, only the legality of the penalty had been challenged. The Court saw no special circumstances justifying departure from the settled principles drawn from *Henderson* and *Johnson v Gore Wood & Co* [2001] 1 All ER 481 at 499 and 525, and, in Samoa, *Fiso v Reid* [2002] WSCA 2. (at para 35) Though pleaded more expressly, the same issues were being raised as in the earlier hearing. The second challenge against the finding of contempt was therefore an abuse of process. (at para 36)

[40] Lest it had erred in making that finding, the Court set out its views on the question of the legality of the Assembly's finding of contempt of Parliament. The suspended MPs through their counsel had argued that Standing Orders 185-187 creating and sanctioning categories of contempt were inconsistent with their empowering provisions, namely articles 53 and 62 of the Constitution; or, alternatively, could not sanction conduct of members not in the course of the business of the Assembly because that was not, in terms of article 53, regulating the "procedure" of the Assembly, or, as a further alternative, that those Standing Orders interfered with the rights of a member (and his constituency) enjoyed under articles 44-47 and 59.

[41] Article 44 says, in the part relevant to this case, that the Assembly is to consist of one member elected for each of the 51 territorial constituencies as prescribed from time to time by Act. Article 45

prescribes qualifications for members and Article 46 for their tenure and when a seat becomes vacant. Article 47 reads:

> **"47. Decisions on questions as to membership** - All questions that may arise as to the right of any person to be or to remain a Member of Parliament shall be referred to and determined by the Supreme Court."

Article 59 permits any member to introduce Bills or propose motions for debate and to present petitions to the Assembly.

[42] It had also been submitted to the Court that the contempt finding was unconstitutional or unlawful because it was without legal or factual merit and/or was made in bad faith and/or with predetermination and not by an impartial tribunal (contrary to article 9(1) or contrary to established Samoan customs recognised in article 71).

[43] It is convenient to again set out articles 53 and 62 which are of central importance in this appeal:

> **53. Standing Orders** - Subject to the provisions of this Constitution, the Legislative Assembly may make, amend and repeal Standing Orders regulating its procedure.
>
> **62. Privileges of Legislative Assembly** - the privileges, immunities and powers of the Legislative Assembly, of the committees thereof and of Members of Parliament may be determined by Act:
>
> > **Provided That** no such privilege or power may extend to the imposition of a fine or to committal to prison for contempt or otherwise, unless provision is made by Act for the trial and punishment of the person concerned by the Supreme Court.

[44] The Court declined to accept a restrictive interpretation of article 53. The privileges of Parliament included its right to control its own processes. "Procedure" as used in the article was not limited to a narrow view of "rules of procedure" but more broadly, to procedures that provided for the control of the conduct of members and punishment for contempt to enable Parliament to control its proceedings. (at para 46) The complaint against the suspended MPs was concerned with their conduct as it affected Parliament - statements directed towards the legitimacy of Parliament and "the formation of what was allegedly an unconstitutional government". (at para 48) In the Court's view, the right of Parliament to control its own proceedings must include the power to hold in contempt those (whether members or not) that obstruct or hinder it in the performance of its functions. (at para 49)

[45] The Court then turned to the challenge based on article 44. It had been submitted that Standing Orders 185 and 186 were invalid because they derogated from the constitutional right and status of an elected member under that article. It had also been submitted that Sapolu CJ's first instance judgment in *Ah Chong v Legislative Assembly* [1996] WSSC 3 had erred in holding that article 111 of the Constitution had introduced into Samoa the common law privileges of Parliament. That article defined "Law" as "being in force in Samoa and includes the Constitution" and:

> "….. any Act of Parliament and any proclamation, regulation, order, by law or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa, and any

custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction."

[46] Mr. Harrison KC had submitted to the Court that the definition of "law" merely defined that expression for the purposes of any other provisions where it was utilised and did not make English common law and equity a source of law in Samoa; and that articles 53 and 62 by their terms excluded common law and equity and English Parliamentary customs and practice inconsistent with those articles.

[47] The Court disagreed. It said article 111 went considerably further than counsel had submitted. The particularised sources of law were in force in Samoa. They were not excluded by articles 53 and 62, which were discretionary and did not occupy the field. (at paras 56 and 57) The Constitution had provided for a Westminster model of Parliament. (The assumption of the Court seems to have been that the English common law as to the powers of the United Kingdom Parliament could be applied to any legislation which had, one way or another, "received" English law.)The Court said that, even if the English common law did not apply, the Court might nevertheless turn to it to understand the nature of the law-making body provided for in the Constitution. (at para 58) The Samoan Parliament had the common law privileges which were essential to its functions and authority. (at para 59) The Court therefore did not accept that Standing Orders 185-187 were unconstitutional or unlawful. The current Standing Orders contained both "procedural", as in administrative or process rules, and "substantive" rules, such as the ones complained about. Parliament had relied on article 53 and on its own powers inherent to its law-making function to make these Standing Orders. (at para 60)

[48] The Court also found no basis in the challenge to the contempt finding by virtue of that determination not being made by an independent or impartial tribunal as required by article 9(1). The Committee that recommended a finding of contempt consisted of both FAST and HRPP members. (at para 61) The contention that Parliament could not be independent and would be driven along party lines would potentially render all determinations of contempt liable to be set aside as in breach of article 9(1) and could not be the case. (at para 62). The Court was also not impressed by the challenge based on the factual merits. It said that the doctrine of separation of powers applied; except when the Constitution was breached, the remedy for a parliamentary wrong must be sought from Parliament, not the courts. (at para 62) The swearing in ceremony and the convening of Parliament on 24 May 2021 had been held to be valid by the Court of Appeal: *Attorney General v Latu* [2021] WSCA 6. Thus Parliament had been convened at the time when the impugned statements had been made. (at para 65)

[49] As far as the Harmony Agreement was concerned, the Court said that the provision in the Constitution about the taking into account of custom in all courts, was discretionary; that there was no duty on Parliament to take it into account. The Committee's report nevertheless had considered the agreement and found it was relevant only for the purposes of the court proceedings. (at para 65)

[50] The Court then addressed the second suspension. It found no merit in the argument founded on the claimed invalidity of the Standing Orders, for the reasons that it had already given. As to the duration of the suspension, and whether it amounted to a de facto expulsion, the Court said that under Standing Order 187(4) there was power to suspend for such period as the Assembly determined. It did not view the constitutional rights in articles 44-48 and 59 as fundamental rights such as were to be

found in Part II of the Constitution. Intramural decisions of the Parliament were open to challenge on constitutional grounds. (at para 69)

[51] A suspension of two years, on top of an initial suspension of three or so months was a "material departure" from the range of suspension periods provided for under Standing Order 92 (which deals with order in the Assembly) and from previous suspensions of members. The Court concluded that the duration of the suspension was of such extent that it derogated from the suspended MPs' constitutional duty as members "and as to the composition of Parliament." (at para 72) It said there were two aspects that arose from the suspensions - the first being an intramural perspective, being the discipline of members, and the second a public law consequence, being the suspension of representative government for the relevant electorates, "a keystone of our political system." (at para 79)

[52] The suspension was an intramural decision, but was it beyond the reach of the Court? The Speaker had responsibly accepted that there was clearly a limit to the permissible extent of a suspension that could be determined or questioned by the Court. The MPs' conduct had to be balanced against the interests of the people of the two affected constituencies. The Court said they were being denied, and therefore deprived, for two years three months of their voice through their chosen representatives on matters concerning:

(a) The making of laws affecting not only Samoa as a whole but those that may directly affect their constituencies;
(b) Affairs of State as debated in Parliament for the good of the country;
(c) Holding the government to account particularly with respect to the budget and other performance issues; and
(d) Issues of relevance to their particular constituencies such as funding for roading and other social services, including health, education and housing, that may affect them for two years and three months. (at para 85)

[53] The Court considered the second suspension therefore breached article 44(1). The action of the suspended MPs had been "reprehensible" but the suspension was inconsistent with the Constitution and Samoa's system of representative and responsible government and was therefore "void from the outset". (at para 87)

[54] Moving to the denial of remuneration and entitlements, the Court said that it had been challenged as contrary to the provisions of the Remuneration Tribunal Act 2003 (**"RTA"**). Under s.3(3) of that Act, its provisions would prevail over any other Act providing for the salary, allowances and other benefits of an office. In the Court's view, however, it was within "the providence [sic] of Parliament" to withhold payment of remuneration and allowances of a suspended MP. (at para 91) The RTA did not bind Parliament, but the executive branch only. Section 3(3) referred to "other Act" but Standing Orders were not an Act of Parliament. However, in light of its decision that the suspensions of the MPs were void, the Court said they were entitled to be paid their remuneration and allowances that had been withheld. (at para 108(b))

[55] The last matter was the alleged invalidity of the new sub-paragraphs (7) and (8) of Standing Order 187 inserted on 27 January 2023: see para 35 above. Mr. Harrison had said in his submissions that they were plainly directed at the suspended MPs. The rationale stipulated for them by the Committee was to "resolve the current problem whereby the suspended members somewhat ridiculing

[sic] the work of the Speaker and Parliament". Mr. Harrison had challenged the new provisions relying on the right of free speech in article 13(1)(a) and the right to be free from discriminatory legislation in article 15(1) and (2). Counsel for the Speaker, Mr. Keith, had argued that the new sub-paragraphs were focused on further disruptions to the orderly functioning of the Assembly by suspended MPs.

[56] The Court had no difficulty in finding that the restrictions in Standing Order 187(7) (i) and (ii) (not to attend work of the Assembly or a Parliamentary Committee and not to enter Parliamentary precincts) did not offend the Constitution. This finding was consistent with United Kingdom practice. (at para 104). The restrictions in Standing Order 187 (iii) – (v), however, extended well beyond the walls of Parliament and were "all-encompassing prohibitions on the questioning of "any Parliamentary matter". They significantly restricted freedom of speech and expression by the suspended MPs on matters of governance and politics, a freedom of enjoyed by the rest of the population and which formed an indispensable part of representative government (at para 105). They were not reasonable restrictions and were not necessary for the Assembly's regulation of its own affairs. They were therefore declared void.

THE APPEAL AND CROSS-APPEAL

[57] From that judgment both sides appeal. The Speaker appeals against the quashing of the two-year suspensions and the voiding of Standing Orders 187(iii) – (v). The suspended MPs, by way of a cross-appeal, contend that their attempt to raise again the issue of the power of the Assembly to hold them in contempt of Parliament was not an abuse of process. If successful on that issue, they seek to have the findings of contempt set aside as being an unconstitutional excess of power by the Assembly. Separately, the suspended MPs also challenge the finding that they are not entitled to remuneration and allowances while suspended.

ABUSE OF PROCESS

[58] We heard the cross-appeal first because it was directed to the liability of the suspended MPs for contempt of Parliament and therefore logically preceded the question of the penalty imposed upon them. The first issue on the cross-appeal concerned the finding of abuse of process by the suspended MPs in seeking to raise again the issue of their liability.

Submissions for suspended MPs

[59] Mr. Harrison drew attention to the statement by Lord Millett in *Johnson v Gore Wood & Co* at p.59 that it was one thing to refuse to allow a party to relitigate a question which had already been decided, but "quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated on". The latter (though not the former), Lord Millett said, was prima facie a denial of the citizen's right of access to the court. Counsel submitted that denying a litigant what would otherwise be his right to advance or argue an issue on its merits by reason of abuse of process was a very serious step, not to be done, as Lord Bingham said in *Johnson*, "without scrupulous examination of all the circumstances" and for which there was a high threshold. Mr. Harrison noted also that the application of the rule in *Henderson v Henderson* and any consequences were matters for the discretion of the court. The test, he said, was not whether the matter in dispute could in theory have been raised in the earlier proceeding but whether, as an essential element it should clearly have been raised.

[60] It was submitted that the suspended MPs had argued before the Court that delivered the first suspension judgment that they were not in contempt of Parliament and that the breach of privilege complaint lacked a legal basis. Having mistakenly concluded that the contempt finding made by Parliament was not being directly challenged before it, counsel said that the Court had not ruled one way or the other upon it either as to fact or law. Therefore, it was submitted, that outcome could not give rise to any estoppel; and the rule in *Henderson v Henderson* could not apply because that aspect of the claim had been pursued at that time.

[61] Counsel said that, contrary to the view expressed by the Court in the second suspension decision, the statement that the pleaded challenge to the contempt finding was "not pursued at trial" was difficult to reconcile with what the first suspension decision had said at paras [110]-[111]:

> "We stress that we do not express a view on the merits of the defence of either Applicant to the charge of contempt and what they might say in relation to penalty. We are only concerned with the question of process. Whether the Hon Tuilaepa, of considerable political and parliamentary experience and skill, would have been able to use his 10 minutes of debate to persuade his colleagues to not suspend him is not a matter for this Court. He was entitled to be heard, and he was not.
>
> **Error of law and Illegality**
>
> Given the answer we have given as to breach of natural justice, we do not consider it necessary to offer views on these grounds. Save to note we see these grounds as standard judicial review type challenges. We would need to be persuaded that the general principles of judicial review can limit the principle of non-intervention."

[62] Mr. Harrison contended that this plainly conveyed that that aspect of the suspended MPs' challenge to the contempt finding, in counsel's words, "remained live, but in the circumstances did not need to be addressed". As those matters had not been ruled on, there was no public interest in the finality of litigation relating to any decided matter capable of outweighing his clients' important interests in being able to challenge their second suspension on all available legal grounds not previously determined against them.

[63] Furthermore, it was submitted that, although it was not necessary to establish special circumstances, there were some. The first suspension litigation was conducted under considerable time pressure with a necessary focus on the "indefinite" suspension. The suspended MPs were not merely re-litigating the issues raised earlier in the proceedings. The Assembly had chosen, in alleged defiance of the regime in Part V of the Constitution to impose a far more severe second suspension. Crucially, the proposed illegality challenge was a constitutional challenge in respect of which there was a public interest, namely that MPs should only be subjected to suspension, and their constituents deprived of representation, pursuant to powers legally conferred on the Assembly. There was no prejudice to the Speaker or the Assembly. And the suspended MPs could not as the successful party have appealed against the failure to rule on their challenge to the contempt finding.

Submissions for the Speaker

[64] Mr. Keith said that the rule in *Henderson v Henderson* as developed by the courts was concerned not only with decided matters but also with claims that clearly could have been raised earlier. The suspended MPs had, as recorded in the second suspension judgment at para 30, pleaded

that the contempt decision was unlawful on a series of grounds and had made submissions accordingly at that stage of the proceeding. The Court in the first suspension decision at para 32 had noted the arguments of illegality then made to it and had said at para 59 that:

> "... It is clear the Parliament has a privilege to punish its members for contempt and to discipline its members. We reject the Applicants' submission that there was no issue of privilege capable of being referred to the Committee."

[65] The Court had gone on to say that the uncontested statements made by both the MPs described in the contempt of court proceeding were matters that could properly be considered by the Committee: "in particular the effect of the statements on Parliament itself". In making its findings in the final para of its decision (para 112(c)), the Court had recorded that the Assembly's resolution as to the liability of the MPs for contempt of Parliament "was not itself directly challenged" and so the Court had "no reason to consider much less disturb that finding".

[66] Mr. Keith submitted that the first suspension decision had actually dismissed the substantive arguments made on the issue and had declined to disturb the finding of contempt. When the Court had, at para 111, addressed "Error of law and Illegality" it was in fact not dealing with the finding of contempt but with certain other pleadings, namely those alleging errors by the Speaker in referring the complaint to the Committee and in appointing its Chair, and by the Committee in being improperly constituted, treating the complaint as a breach of ethics and contempt rather than a breach of privilege, and consequently erroneously recommending penalties that applied to the former.

[67] As to whether the special circumstances were required, Mr. Keith said that there was a division of judicial opinion, but the "simple point" was that some justification for re-litigation was required. The Court below had been correct to say that, though pleaded more expressly, the same issues were being raised as had been raised in the first suspension hearing.

[68] Counsel also made the following responses in relation to the suggested special circumstances. It was not because of pressure of time that the issues of illegality had not been identified and pleaded but, rather, the MPs counsel had not argued them; written submissions had been filed over two months after the impugned contempt decision; the second suspension was not necessarily far more severe as the Hon Tuilaepa was continuing to reject the contempt finding and so the first suspension might well have persisted. All that had happened was that a new penalty had been imposed. The original challenge had also been brought on constitutional grounds. As the Court below had said, the attempt now was to bring in new arguments on the issues earlier raised.

[69] Mr. Keith also submitted that although an appeal on the question of legality of the contempt findings might have been difficult given the "limited approach taken at the hearing", it was still possible. It was also incorrect, he said, that there would be no prejudice to the Speaker and the Assembly, who had relied on that approach in subsequently rehearing the question of penalty. A decision had been made to pursue the challenge to the suspension in relatively narrow terms and declined. The Committee and the Assembly had then reconvened, reported and debated the issue of penalty and the suspended MPs had participated in that process, having been informed by the first suspension judgment that it was open for them to revisit the penalty.

Our assessment

[70] This appeal has been argued on the basis of an acceptance by both sides that no issue estoppel arose. On the view we take, it is not necessary for us to question that assumption. Therefore, we need concern ourselves only with whether the suspended MPs' attempt to raise the issue of the Assembly's power to find them in contempt was an abuse of the kind described by Somervell J in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257, in a passage approved by Lord Bingham in *Johnson v Gore Wood & Co* at p.23, namely one where there are:

> "….. issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

[71] In the present case there was no new proceeding but, with the same intended effect, an amendment to the pleadings in the existing proceeding in an expanded argument against the legality of the contempt finding. It is not necessary for there to be two different sets of proceedings for the rule in *Henderson v Henderson* to apply. If a single set of proceedings involves a binding determination at an earlier stage, then the rule may apply to subsequent stages of the same litigation: *Orji v Nagra* [2023] EWCA Civ 1289 at para 46.

[72] Lord Bingham explained in *Johnson* (at p.31) the underlying public interest that there should be finality in litigation and that one party should not be twice vexed in some matter. He continued:

> "This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional elements such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

[73] Lord Bingham added:

> "While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances."

[74] As Lord Millett pointed out in the same case (at p.59), the doctrine is a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression.

[75] In this jurisdiction, in *Fiso v Reid*, the abuse was that a party tried to bring a cross-appeal out of time against a part of the first instance judgment after an appeal by the party on the other side had already gone to the Court of Appeal and judgment had been given. The Court refused leave for the proposed cross-appeal saying that the opportunity of cross-appealing had not been taken.

[76] The pleading on which the present matter went to trial in August 2022 did attack the legality of the contempt of Parliament finding. It sought a declaratory order that the decision to suspend the MPs was "illegal and unlawful as being contrary to the Constitution and laws of Samoa". One of the grounds asserted was that the MPs "did not breach any privileges or ethics *nor were they in contempt of Parliament"* (emphasis added) That is plainly not just a challenge to the original penalty of suspension *"se'i iai se aso"*.

[77] The heads of illegality now deployed by the suspended MPs' present counsel, who did not appear for them in August 2022, are much more extensive than those pleaded and, to a limited extent, argued at that time. The suspended MPs had come before the Court on that former occasion complaining that the finding of contempt of Parliament was unlawful. However, their then counsel chose to concentrate on the legality of the penalty and made their argument against the legality of the finding of contempt, at best, only faintly. The Court therefore confined itself to saying that:

> "In this case it is clear that Parliament has a privilege to punish its members for contempt and to discipline its members." (at para 59)

Later (at para 110), the Court said that it was not expressing a view on the merits of the defence to the charge of contempt because it was concerned only with the question of process. That question related to the way in which the penalty had been imposed. The Court understood that what was, in the end, being asked of it was to decide if the penalty had been imposed following a proper process. Because it had decided there had been a breach of natural justice in the imposition of the penalty, it said it did not need to offer its views on the asserted error of law and illegality, a comment which in any event was directed to other pleaded grounds, as Mr. Keith suggested in his submissions.

[78] The Court had then stated (at para 112(c)) that the Assembly's resolution "as to the Applicants' liability for the contempt of Parliament" had not itself been "directly challenged" so there was no reason for it "to consider much less disturb that finding". The Court was thus leaving the liability finding in place, having earlier concluded that Parliament did have the power to punish for contempt. That has the appearance of a determination by the Court binding on the suspended MPs, subject only to any appeal which they might bring.

[79] The suspended MPs elected not to appeal against the Court's decision on liability and seem to have decided to take their chances on a reconsideration of the penalty by Parliament. It was only after that went badly for them that they sought to reopen the question of liability. Even then, they did not do so by seeking to appeal against the Court's failure to disturb the Assembly's liability finding. Such an appeal might well have appeared to have had its difficulties in view of the limited way the issue had been pleaded and run at trial, but it was not attempted.

[80] The suspended MPs have not said, and could never say, that they were taken by surprise when the Speaker again referred the question of penalty to the Committee. That possibility had been flagged in the Court's judgment. They were then required to appear before the Committee and, even at that point, did nothing about the issue of liability. It was only after the Assembly's decision on the

two-year penalty that they revived the proceeding with an expanded pleading on liability. In the meantime, Parliament had proceeded on the basis that liability had ceased to be an issue in August 2022.

[81] The considerations which we have listed in the immediately preceding paragraphs, if viewed in isolation, might provide substantial support for the argument that there is an abuse of process. But, although the suspended MPs can fairly be criticised for their conduct of the proceedings in failing to pursue the legality question when the case first came before the Supreme Court and then for failing to appeal against the first suspension decision, so that the Assembly proceeded to reconsider the penalty in the belief that its finding of contempt was no longer challenged, there is a factor of such importance that it persuades us that they were not abusing the processes of the court in raising the issue again after the two year suspension was imposed

[82] That factor is that the suspended MPs are wishing to argue that the contempt finding is not authorized by the Constitution; that the Assembly has exceeded the powers given to it under the Constitution. The Supreme Court in the second suspension decision did record in passing that the suspended MPs were arguing that the contempt finding was inconsistent with the Constitution, but it seems to have given little or no weight to that consideration. It therefore overlooked an important public interest, namely that any constitutional limitation on the powers of the Assembly must be respected. If in fact the Assembly has exceeded its powers, that should be determined. That consideration must be given greater weight than the public interest in the finality of litigation. **If an unlawful decision of the Assembly is not set aside by a court simply because of a failure by a challenger to raise it in a timely manner, an erroneous interpretation of Samoa's basic law will be allowed to persist, at least until some future litigant pursues the issue.**

[83] Indeed, even if the issue were properly to have been treated as having actually been adjudicated on between the parties in the first suspension judgment, that would not necessarily have precluded its reopening between the parties in the present circumstances. As the editors of *Wade & Forsyth's Administrative Law* say in the 12th edition at p. 286, *res judicata* plays a restricted role in administrative law, since it must yield to two fundamental principles of public law, namely that jurisdiction of a public body cannot be exceeded, and that statutory duties and powers cannot be fettered. The first of these principles is in play in the present case, especially when the jurisdiction (that of the Assembly) is conferred by and is subject to Samoa's Constitution.

[84] In her concurring judgment in *Re Wakim* [1999] HCA 27, 198 CLR 511 at [80], Gaudron J commented:

> "Where a litigant has unsuccessfully challenged a legislative provision on constitutional grounds and a later decision reverses the earlier holding, the court has a discretion whether to extend time to allow the litigant once again to challenge the legislation."

It seems to us that a similar discretion must exist in circumstances like the present. Gaudron J added that ordinarily the discretion should be exercised in favour of the citizen, although cases might arise where it was unfair to the defendant to allow a fresh challenge to occur having regard to the lapse of time and a change of circumstances on the part of the defendant. In the present case, the constitutional issue was not the subject of a reasoned decision against the suspended MPs, and seemingly went by default. There has been very little lapse of time and, although the Assembly relied upon the first

suspension judgment, it cannot really be said to have been prejudiced if the legality question is reopened.

[85] In a situation in which even a plea of *res judicata* might well not have availed the Speaker, the suspended MPs should not have been found by the Supreme Court to have been misusing or abusing the process of the Court in seeking to raise again the legality of the contempt finding. If it was unlawfully made, the Assembly has exercised a power it does not possess. There is a great public interest in having that matter correctly determined.

[86] At the conclusion of the oral hearing of this appeal we were inclined to think that there was no merit in the suspended MPs' argument, as then presented, on the constitutional question and were therefore leaning in favour of declining to allow the matter to be further pursued. However, as a result of our own research, and having sought and received further submissions on the point, we are now of the view that the suspended MPs ought not to be prevented from challenging the Assembly's power to hold them in contempt. To that issue, we now turn.

THE LEGALITY OF THE CONTEMPT FINDING

Submissions for the suspended MPs

[87] Mr. Harrison submitted that article 53 of the constitution conferred power on the Assembly to make, amend and repeal Standing Orders "regulating its procedure". Article 62 then provided that the privileges, immunities and powers of the Assembly and of its members "may be determined by Act". In this context, rules of "procedure" must be contrasted with substantive laws or rules. Article 53 did not empower the making of substantive rules of conduct for MPs or for others, nor the sanctioning of conduct for breach. The article 53 empowerment would certainly not extend, counsel said, to sanctioning conduct not occurring in relation to the proceedings of the Assembly. There was no reason to interpret article 53 more broadly since article 62 could support the creation of necessary substantive rules, including penalties.

[88] Mr. Harrison said that by reason of article 62 the privileges of the Assembly and its members could be determined only "by Act", which, in terms of the definition in article 111(1) did not include a Standing Order. It meant an Act of Parliament or an Ordinance. It was common ground that the 1960 Ordinance did not confer the necessary power. And the definition did not have the effect of introducing into Samoan law the common law privileges of a Westminster Parliament. It was merely a definition for the purposes of any other provision of the Constitution where that word was used. Article 62 occupied the field and was inconsistent with the existence of any common law contempt powers.

Submissions for the Speaker

[89] Mr. Keith said that articles 53 and 62 fell to be interpreted against the context of basic and common principles of parliamentary government. A reading down of the word "procedure" was inconsistent with those common principles which were inherent to parliamentary government under the Constitution. Contempt powers were found in Standing Orders in most, if not all, parliamentary jurisdictions as well as, to varying degrees, in legislation. There was no reason to read the provision for Standing Orders under article 53 restrictively. There was also no reason to limit the article 53 power to conduct within the course of Assembly business. The premise of parliamentary privileges,

including the power to sanction for contempt was "the necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld", citing *New Brunswick Broadcasting v Nova Scotia* [1993] 1 SCR 319 at 383.

[90] Mr. Keith submitted that the power to suspend MPs for misconduct was a common, if not universal, means of upholding the efficiency, dignity and integrity of parliamentary systems. He said that the statements made by the suspended MPs adversely reflected on the Assembly and that it was well placed to make that assessment. Allegations by MPs that the swearing-in of the Assembly constituted a coup d'état tended to obstruct or hinder its function.

[91] In supplementary written submissions made at the request of the Court so that counsel could address the line of Privy Council decisions which are discussed below, Mr. Keith contended that it would be incongruous to apply to the legislature of an independent state like Samoa the reasoning from those cases, which were directed at concerns over small colonial legislatures. What he called the modern standard of reasonable necessity should be used to assess claims to the existence of a particular privilege as had recently been done by the Supreme Court of Canada in *House of Commons v Vaid* [2005] 1 SCR 667 and *Chagnon v Syndicate de la function publique et parapublique du Quebec* [2018] 2 SCR 687. He pointed out that the Privy Council had taken note of the fact that other colonial legislatures had routinely exercised powers of punishment for contempt and that this argument from usage was rejected only because of lack of proof of such usage in the particular jurisdiction. He also submitted that the Privy Council had recognised in some of the cases that it was open to legislatures to establish privileges by statute and/or standing orders.

Some preliminary observations

[92] Before we consider the roles that articles 53 and 62 play in Part V of the Constitution dealing with Parliament, we make four preliminary observations. The first is that the paramount Samoan law is of course the Constitution which provides in article 2 that "This Constitution shall be the supreme law of Samoa". In interpreting the Constitution, we agree with the Court below that "although the Constitution is the supreme law and although it is to be read generously, the Courts do not have the power or ability to go beyond the clear and unequivocal words used" (at para 45).

[93] The second is that under the Constitution the law of Samoa is composed of various elements or strands which are spelled out in article 111(1):

> " "Law" being in force in Samoa; and includes this Constitution, any Act of Parliament and any proclamation, regulation, order, by-law or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa, and any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction."

Article 114(a) provides for "existing law", which under article 111(1) includes English common law and equity, to continue in force until repealed by an Act.

[94] Read together these provisions explain what the law of Samoa consists of (although by saying what it "includes" article 111(1) leaves open the possibility of other sources of law, such as international law, treaties and the like). It starts, of course, with the highest law, the Constitution

itself, and proceeds down the hierarchy of an Act of Parliament, through various forms of subordinate or local legislation and then to "English common law and equity for the time being" (i.e. not frozen in time at independence in 1962) and "any custom or usage which has acquired the force of law in Samoa or any part thereof". But common law has force only so far as it is not excluded by any other law and Samoan custom only if recognized by the provisions of an Act of Parliament or by a judgment of a Court of competent jurisdiction. (Article 71 permits, but does not require, customs to be taken into account in all courts).

[95] That leads us to our third preliminary observation. English common law was introduced into Samoa by an indirect route. Samoa was never a colony of England, nor of New Zealand. The common law became part of Samoan law because article 2 of the League of Nations' mandate under the Versailles Treaty in 1919 authorised the New Zealand government, acting on behalf of the Crown, to apply New Zealand laws to Samoa as if it were an integral part of New Zealand. (From 1947 Samoa was administered by New Zealand under a United Nations trusteeship agreement but nothing turns on that transition.) By section 349(1) of the Samoa Act 1921 the New Zealand Parliament declared that the law of England existing on 14 January 1840 was to be in force in Samoa save so far as it was not inconsistent with any Act or any Ordinance or regulation or was inapplicable to the circumstances of Samoa. (The stipulated date had been the reception date for the arrival of English laws and statutes into New Zealand under the English Laws Act 1858 (UK)). Section 349 also expressly provided that all rules of common law or equity relating to the jurisdiction of the superior courts of common law or of equity in England should be construed as relating to the jurisdiction of the High Court of Western Samoa.

[96] The common law, including that part of it dealing with parliamentary matters, accordingly, takes its place as a residual source of law in Samoa, as it does in comparable jurisdictions. It can have effect where neither the Constitution nor a legislative provision deals, or deals wholly, with a particular matter or where it can inform the interpretation of the Constitution or other law.

[97] Our fourth point is that the Legislative Assembly established under Part V of the Constitution is plainly intended to be, and has always operated as, a Westminster-style Parliament. But, unlike the Parliaments in the United Kingdom and New Zealand, it is one whose powers to pass legislation and its other powers, privileges and immunities, are subordinated to the superior law found in the Constitution. Thus, as relevant to this appeal, the Assembly is authorised to make Standing Orders as prescribed by article 53 and to determine its privileges by an Act in accordance with article 62. However, anything purportedly done under either of those articles but in excess of what they authorise is void under article 2(2) to the extent of that excess. Parliament cannot derogate from the Constitution and can amend it only by an Act in the manner laid down in article 109. The Courts can intervene to investigate and, if necessary, declare void any excess of power.

[98] It follows that the constitutional position is necessarily different from that in the United Kingdom and New Zealand. That contrast was acknowledged by this Court in *Ah Chong* at pp. 7-8 in the passages quoted in the first suspension judgment and set out at para [17] above.

The common law

[99] It might be assumed, as the Supreme Court did, that as a Westminster-style Parliament of an independent state the Assembly has the same common law power to declare and enforce its privileges as the Houses of Parliament possess in the United Kingdom. But an examination of the relevant

legislation against the background of the common law received in 1921 and confirmed in the Constitution reveals that not to be the case. The drafters of the Constitution appear to have understood that history, to which we now turn.

[100] *Erskine May Parliamentary Practice* (25ed, 2019) states at para 12.1 in footnote 4 (to which we drew counsel's attention) that the position of Parliament in the United Kingdom (described in the passage cited in the first suspension judgment: see para [15] above) differs from that of "independent Commonwealth or colonial legislatures". To understand why this is so, it is necessary to go back a considerable distance. As Lamer CJ explained in *New Brunswick Broadcasting Co v Nova Scotia Speaker of the House of Assembly)* at p.344, in the United Kingdom privilege evolved from a history of conflict between the Houses of Parliament, the Crown and the courts:

> "In essence, it was a struggle for independence as between the different branches of government.
>
> ……..
>
> Initially, the Houses simply claimed privilege on their own behalf. They did not request its recognition by the Crown in statute, or by the courts in common law. Thus parliamentary privileges were in a sense outside the law, or a law unto themselves. It was referred to as a part of the *lex parliamentis* or the law of parliament, not as part of the statute or common law.
>
> …….
>
> Over time, with some acquiescence on all sides, the exercise of privilege became less confrontational. With the acquiescence of the Crown, much of the law relating to privilege was codified in [English] statute…. The courts conceded some jurisdiction to the Houses through the common law. In turn, the Houses conceded some jurisdiction to the courts, appearing before them pleading privilege and trusting them to dismiss an inappropriate claim on that basis."

[101] Thus, Lamer CJ said (at pp.345-346), privilege in the United Kingdom finds its source in the *lex parliamentis*, the common law and statute law. But in colonial legislatures, parliamentary privileges were derived from common law or statute law only. In common law, they were held to have certain inherent powers simply by virtue of their creation. But it was not accepted that those powers were as extensive as those of the Houses of Parliament in the United Kingdom simply because they were bodies with analogous functions. In the context of a power to punish for contempt, Lamer CJ said (at p.347), a further historical factor was highly relevant. The penal jurisdiction of the Houses of Parliament in the United Kingdom was in large part derived from the fact that at one time they had been part of the "High Court of Parliament", the judicial function of which had been as important as its legislative function.

[102] The first case in which it was held that a Westminster-style legislature did not possess the same powers in respect of contempt as the House of Commons and the House of Lords was the decision of the Privy Council in *Kielley v Carson* (1842) 4 Moore 63, 13 ER 225. It was a case of such importance that it was argued twice, the second time before a Bench of eleven eminent judges. Their advice was delivered by Baron Parke. The main question, he said, was whether the House of Assembly of Newfoundland had the power, such as was possessed by both Houses in England, to adjudicate upon a complaint of contempt or breach of privilege. The Speaker of the Newfoundland

House, acting in accordance with an order of the House, had caused a non-member to be arrested and brought before the House after it had found him guilty of contempt for threatening one of its members. The Newfoundland House had been established in 1832 by a Crown Commission under the Great Seal. The Commission was entirely silent on the subject of the necessary power.

[103] The question, Baron Parke said, was reduced to whether by law the power of committing for contempt, not in the presence of the Assembly, was incident to every local legislature. That question was answered in the negative. The Privy Council found (at pp. 234-5) that as a matter of common law the only powers possessed by such a legislature were "such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute." The Assembly had the right of protecting itself from all impediments to the due course of its proceedings:

> "But the power of punishing anyone for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature, whether representative or not."

[104] Baron Parke also said (at p. 235) that the reason why the House of Commons had such a power was not because it was a representative body with legislative functions but by virtue of ancient usage and prescription, namely:

> "...the *lex et consuetudo Parliamenti* which forms part of the common law of the land and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one."

[105] The Privy Council also found that the Newfoundland Assembly, "a subordinate legislature", did not possess such a power by analogy to the English courts of record. It was not a court of record and had no judicial functions. Nor was there any evidence that it had exercised a power to punish for contempt without objection so that by usage it had become "an incident attached by the common law, though not on the ground of necessity".

[106] In *Fenton v Hampton* (1858) 11 Moore 347, 14 ER 727 the Privy Council followed *Kielley v Carson* in a case in which the local legislature was created by an Act of the British Parliament, not by the Crown.

[107] *Kielley v Carson* was again followed in *Doyle v Falconer* (1866) LR 1 PC 328, 14 Moore NS 203, 16 ER 293 where there had been disorderly conduct by a member while he was addressing the Legislative Assembly of Dominica. The Privy Council found that while the Assembly had inherent power to remove him, or exclude him for a time, or even expel him for that conduct, it had no power to punish him for contempt:

> "[T]here is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another." (at p.299)

Their Lordships commented that they had to consider not what privileges the House of Assembly ought to have but what by law it had: p.300. A power to punish was not essential to the existence of the Assembly.

[108] In *Landers v Woodworth* (1878) 2 SCR 158 the House of Assembly of Nova Scotia was found by the Supreme Court of Canada to have no power to order a removal of one of its members from the chamber for contempt unless he was actually obstructing the business of the House. It was not lawful for him to be removed because he was refusing to apologise for a breach of privilege that had been committed on an earlier occasion. The House had "no power to punish for any offence not an immediate obstruction to the due course of its proceedings" and the proper exercise of its functions.

[109] These cases can be contrasted with the Board's decision in *Dill v Murphy* (1864) 1 Moore NS 487, 15 ER 784. It was an appeal from the Colony of Victoria. There the Legislative Assembly had been constituted by an Imperial Statute but this statute, unlike the one in *Fenton v Hampton,* stated that it should be lawful for the legislature for Victoria, by any Act or Acts, to define the privileges, immunities and powers to be held, enjoyed, and exercised by the Assembly and its members, provided that they should not exceed those possessed at the date of the Imperial Statute by the British House of Commons. In exercise of this power the Colonial Parliament had by an Act of the Legislature declared that the privileges, immunities and powers of the Legislative Council and the Legislative Assembly should be those enjoyed by the British House of Commons. This was held to be a valid exercise of power by the Victorian Parliament and the Assembly therefore possessed the privilege of arrest for contempt.

[110] The next case is *Barton v Taylor* (1886) 11 AC 197 (PC). The issue on which it turned was whether a resolution of the New South Wales Assembly suspending one of its members for obstructing its proceedings operated beyond the sitting during which the resolution was passed. It was held that it did not. Having determined that question, the Privy Council confirmed the principle that a colonial assembly had (without an express grant) protective and self-defensive powers only, and punitive powers were not necessary:

> "The principle on which the implied power is given confines it within the limits of what is required by the assumed necessity" (p.204)

The case is of particular relevance to the present appeal, however, because the Board stated (at p. 207) that it entertained no doubt about the validity of a Standing Order of the Assembly adopting, so far as applicable to its proceedings, the rules, forms and usages which were in force in the British House of Commons at the time when that Standing Order was passed and assented to by the Governor, and that the express powers given by the Constitution Act 1855 (NSW) were not limited by the principles of common law applicable to those inherent powers which must be implied, without express grant, from mere necessity. Section 35 of the 1855 Act gave the Assembly power to adopt "such standing rules and orders as shall appear to the.... Assembly.... best adapted for the orderly conduct of such.... Assembly". The Assembly could, therefore, have given itself the necessary power under a Standing Order to punish the obstructing member, or remove him from the legislative chamber, for a period longer than the sitting during which the obstruction occurred. But crucially, it had not given itself that power.

[111] In *Fielding v Thomas* [1896] AC 600 (PC), *Barton v Taylor* was distinguished because the necessary powers to punish a contempt by way of a libel against one of its members had been explicitly conferred upon the Nova Scotia Provincial Assembly.

[112] The last of the Privy Council decisions was *Harnett v Crick* [1908] AC 470 in which it was accepted that the common law power of the Assembly of New South Wales to act in self-defence of the regularity of its proceedings could extend, "in special circumstances", to suspending a member because he was facing a criminal charge of bribery and corruption. The member was still insisting on being able to participate in its proceedings. A suspension pursuant to a Standing Order until the verdict of the court was held to be within the powers of the Assembly.

[113] Finally, there is the decision of a full Bench of the NSW Supreme Court in *Armstrong v Budd* (1969) 1 NSWR 649 in which it was held that the State Legislative Council had an inherent power to expel a member if that was necessary to protect the orderly exercise of legislative function, but no inherent power to expel as punishment. A judgment in a civil case had made findings against a member that he was prepared to procure false evidence and had made threats against someone which put that person in fear for the safety of himself and his family. The Court held that the Legislative Council had power arising out of necessity to act for the protection of the integrity of its proceedings in relation not only to conduct within the chamber but also arising from misconduct outside the House that it held to be of sufficient gravity to render the member unfit for service. But the Court emphasised that the Council was not empowered for the purpose of punishing the member: "Necessity stops short where punishment begins", per Sugarman JA at p.663.

[114] In summary, the general reception of English law does not result in the law as to the privileges of the British Houses of Parliament carrying over to newly established legislatures. No legislature other than the British Houses of Parliament with their unique constitutional history, including originally a jurisdiction as a court of record, possesses an inherent power to adjudicate upon a complaint of breach of privilege. Other legislatures possess only such defensive powers as are necessary to protect themselves from obstructions to their proceedings. They have power to order the removal of a member or a non-member obstructing their proceedings for the rest of the sitting, but no further. They can do so where necessary to protect their own processes, but not simply to punish past misconduct. In special circumstances this power can extend to conduct outside the Assembly of sufficient gravity to render a member unfit for service, or until it is established whether the member has been guilty of such conduct. It is, however, possible for such a legislature to be given powers of punishment conferred directly by the Imperial Parliament or indirectly by the colonial legislature acting under an authority from the Imperial Parliament to confer upon itself such powers (as in *Dill v Murphy*). That could include power for the legislature to do so by way of Standing Orders (as in *Barton v Taylor*). It was also recognized in *Kielley v Carson* that by long usage a colonial legislature might be found to have acquired powers that went beyond the merely defensive, but no such usages were upheld in that or any subsequent case to which we have been referred.

New Zealand statutes

[115] We can now move to the legislative history in New Zealand. Originally, section 52 of the Constitution Act 1852 (UK) had empowered both the Legislative Council and the House of Representatives to adopt such standing rules and orders as appeared best adapted for the orderly conduct of their business, with the proviso that no rule or order should be of force to subject any non-member or officer to any pain, penalty, or forfeiture. By an amending Act of the Imperial Parliament

in 1857 power was given for the local legislature to amend section 52. It was then repealed by the Parliamentary Privileges Act 1865 (NZ), section 4 of which declared that the Council and the House should hold, enjoy and exercise the like privileges, immunities and powers as the House of Commons had on 1 January 1865 so far as they were not inconsistent with or repugnant to the Constitution Act. A like provision was carried forward into the Legislature Act 1908 (and see now the Parliamentary Privileges Act 2014, section 8). None of these provisions, related only to the New Zealand Legislature, ever extended to Samoa. Their present significance is that the drafters of the Samoan Constitution would have been well aware of what had been necessary to give the New Zealand Parliament its powers concerning privileges and contempt.

The Samoan legislative provisions

[116] We have seen how the Samoa Act 1921 (NZ), in accordance with the terms of the League of Nations mandate, extended the rules of common law or equity to Samoa, and how they have been confirmed by the Samoan Constitution. The 1921 Act also created a Legislative Council with a membership limited to certain members of the Samoan public service and others appointed by the Governor-General. The question of any privileges does not appear to have been addressed until the Samoa Amendment Act 1947 (NZ) created a legislature that was somewhat more representative of Samoan society. It was empowered to make Standing Orders regulating its procedures. As well, its general legislative competence was sufficient to have enabled it to confer on itself by Ordinance privileges of a Parliamentary character (albeit that it appears not to have done so).

[117] In 1957 New Zealand once again amended the Samoa Act in preparation for independence. The 1957 Act of the New Zealand Parliament created a Legislative Assembly for Samoa that was rather more representative and democratic. Procedural provisions (for instance, as to the Speaker) gave the new Assembly substantial, though not complete, autonomy from the control of the New Zealand appointed High Commissioner.

[118] Section 29(7) of the 1957 Act gave the Assembly power "to make standing orders regulating its procedure". Section 30 dealt with the privileges of the Assembly and its members. Subs (1) prevented the validity of its proceedings from being questioned in any court. Subs (2) – (4) provided for certain immunities for officers or members in relation to the exercise of their powers, and for members speaking or voting in the Assembly or a committee, and for persons publishing by the authority of the Assembly any report, paper, vote or proceeding. Subs (5) enabled privileges to be determined by Ordinance. It took the following form:

> (5) Subject to the provisions of this section, the privileges of the Legislative Assembly and of the committees thereof, and the privileges of members of the Assembly and of the persons entitled to speak therein, may be determined by Ordinance:
> Provided that no such privilege may extend to the imposition of a fine or to committal to prison for contempt or otherwise, unless provision is made by Ordinance for the trial and punishment of the person concerned by the High Court.

[119] In 1959 the Assembly adopted Standing Order 128 in the following form:

> "The Assembly may, on Motion without notice, adjudge guilty of contempt any person, whether a Member or not, who wilfully disobeys any lawful order of the Assembly, or who commits any breach of the privileges of the Assembly, whether or

not such privileges be set out in the Standing Orders of the Assembly or else according to the law and usage of Parliament or otherwise howsoever."

This Standing Order contained no express power of punishment. If that was intended to be implicit, it would seem to have exceeded the Assembly's powers, as we explain below. But the Assembly could under its inherent common law powers have enforced a finding of contempt in relation to the disruption of its proceedings by having the guilty person temporarily removed from the chamber and the precincts of the Assembly.

[120] In the following year the Assembly enacted the Legislative Assembly Powers and Privileges Ordinance 1960. It provides for certain immunities for members and enables a committee of the Assembly to compel persons to give evidence before it. It also protects the Assembly against conduct by non-members causing hindrance or obstruction in the chamber or its precincts. Section 21 of the Ordinance provides that a member commits contempt by publishing evidence taken by a committee before it reports to the Assembly, or by assaulting or obstructing another member within the chamber or its precincts or by assaulting or obstructing an officer of the Assembly in the execution of his or her duty or being convicted of an offence under the Ordinance (which offences include the acceptance of bribes relating to the proceedings of the Assembly). Section 21(2) provides that allegations of contempt may be referred to the Privileges and Ethics Committee of the Assembly or to the Prime Minister for possible civil or criminal proceedings against the member concerned. Under section 21(4) a member found guilty of contempt by the Assembly can be reprimanded or suspended from the service of the Assembly for such period as it may determine. **But that power relates only to the kinds of contempts listed in the section.** Under subs (5), no salary or allowance is payable during suspension.

[121] As is common ground between the parties, nothing in the 1960 Ordinance provides a statutory basis for the findings of contempt made against the suspended MPs. Although it was never intended to be an exhaustive statement of powers and privileges, it is largely, if not wholly, comprised of what the case law characterises as self-defensive measures.

[122] In the same year as the Ordinance was enacted, a draft of the Constitution was debated and adopted at a Convention. It was approved by a referendum in 1961 and came into force on 1 January 1962 when Samoa became an independent State. The Constitution essentially repeated, in articles 53 and 62 (see para [43] above) the powers given to the Assembly under the 1957 Act of making Standing Orders regulating its procedure and declaring its privileges (but now that was to be done by an Act of Parliament rather than by an Ordinance).

Our assessment

[123] We need first to consider whether article 53 of the Constitution gives the Samoan Assembly power under a Standing Order to make a finding of contempt in circumstances not within s 21 of the 1960 Ordinance. If not, we then need to determine whether the Assembly has an inherent power, recognised by the common law, to suspend Members of Parliament for misconduct and has acted within the scope of such a power.

[124] Having considered the position at common law by way of background and examined more particularly the statutory history, what was said at the Convention in 1960 and the language chosen in the Constitution, especially in articles 53 and 62, we are now in no doubt that it was not intended that

the Assembly should be able to give itself, without resort to article 62, further privileges and powers of punishment going beyond both those recognized by the common law as inherent by virtue of its establishment and those already enacted by the 1960 Ordinance.

[125] In our view, the drafters of the Samoa Amendment Act 1957 and of the Constitution have very carefully addressed the separate questions of the making of rules about the manner in which the business of the Assembly is to be conducted (its procedure) and the way in which it can go about enlarging its privileges and its powers to punish breaches of those rules and other misconduct relating to parliamentary matters (only by an Act of Parliament). The proviso to article 62 mandates that only pursuant to an Act of Parliament can any person be fined or imprisoned for contempt or otherwise.

[126] The language of article 53 ("regulating its procedures") does not readily lend itself to an interpretation encompassing matters of substantive law going beyond the prescription of the processes of the Assembly's work, and certainly not to events unrelated to business being conducted in the Assembly. A "procedure" is defined in Black's Law Dictionary 7ed as "a specific method or course of action". It connotes steps in a formal proceeding, not the substance or outcome of the proceeding. As Mr. Harrison pointed out, the word is obviously used only in that limited way in articles 25(11) (Council of Deputies), 37(1) (Cabinet), 39(2) (Executive Council), and 88(1) (Public Service Commission).

[127] Furthermore, and very significantly, if article 53 could properly be read as conferring on the Assembly the power to determine its privileges and to punish contempt, article 62 would in practice be a dead letter. Why then give the Assembly power to do by an Act what it could more easily do already by Standing Orders? All it would add would be the prohibition in its proviso on fining or committing to prison.

[128] Article 53 was described as a "machinery" provision in the explanation given by Dr. Davidson, a constitutional expert adviser to the 1960 Convention. As such, it could not have been meant as a way of giving the Assembly by its internal processes, and without necessarily any public debate, powers of punishment of members and non-members which could be very extensive indeed. If the constitutional intention was that the Assembly could simply declare its "privileges, immunities and powers" by Standing Orders, the Constitution would surely have expressly said so and article 62 (save for words equivalent to its proviso) would not have been necessary.

[129] We do not accept Mr. Keith's submission that there is any incongruity in applying to the legislature of an independent state like Samoa the common law's restriction on the privileges and powers of a colonial legislature, noting that *Erskine May* sees it as applicable also to independent Commonwealth legislatures which have not legislated their own powers. In no sense does that common law restriction make the Samoan Legislative Assembly a subordinate (or colonial-type) body. Subject only to the supreme law of Samoa, the Constitution, the Assembly has the full powers of the legislature of a sovereign state, including the power under article 62 to override the common law restriction, and even to amend the Constitution by the process prescribed in article 109. But, until it does, it does not possess the penal powers it purported to use against the suspended MPs.

[130] It goes without saying that the Samoan Assembly is not, and has never been, a court of record with a penal jurisdiction, as the proviso to article 62 demonstrates. Nor, if it had been suggested, could we have accepted that the previous instances in which it relied on its Standing Orders to suspend members for contempt created a "usage", or indeed a custom, which might now justify the

penalising of the suspended MPs. Those prior instances in relatively recent years, after the adoption of the Constitution, were themselves contrary to its provisions.

[131] Before leaving the constitutional provisions we should also mention for completeness that the suspended MPs also contended, rather faintly, that the Assembly's decision to find them guilty of contempt fell foul of article 47 (see para [41] above) which requires questions arising as to the right of any person to be or to remain a Member of Parliament to be referred to and determined by the Supreme Court. As the two MPs were suspended rather than expelled and remained members despite their suspensions, that argument was without any merit.

[132] We pass on now to a consideration of whether the Assembly's actions against the suspended MPs can be upheld as an exercise of its inherent common law powers.

[133] Such a contention faces several difficulties. First, it would assert a use of merely self-defensive powers in May 2022 and again in October of that year in relation to words spoken as long ago as July and August 2021 and, as it happens, at a time when Parliament was not even in session. As far as we have been made aware, the words were not even spoken in the precincts of the Assembly although that in itself would not be fatal. Secondly, although the words were held in the contempt of court judgment to be a contempt of court (or part of one), and so they were unlawfully spoken, that unlawfulness is not of the same character as the alleged bribery and corruption and the procuring of false evidence and making of threats of violence which rendered the wrongdoers unfit to hold the office of members of parliament and were held in *Harnett* and *Armstrong* to provide a proper basis for the action taken by the Assemblies in those cases.

[134] Thirdly, in the present case the actions of the suspended MPs were undoubtedly reprehensible and found to be so by the Supreme Court. But they were in large measure forgiven by the Harmony Agreement, have been the subject of apologies to the Assembly and have not, so far as we are aware, been repeated. It would be drawing a very long bow now to say that the suspended MPs presented either in May or October 2022 any ongoing disruptive element for the proceedings of the Assembly. Its dignity and efficiency had surely long been restored by the contempt of court decision and the apologies. If they did cause disruption they could be removed.

[135] We therefore reach the conclusion that the action of the Assembly in finding the two MPs in contempt and suspending them cannot be justified as having been taken as a matter of necessity to protect the functioning of the Assembly. They therefore amounted to an impermissible punishment. Indeed, it will be seen from our description of the proceedings of the Committee (at paras [10]-[12] and [32]-[33] above) that it in truth saw itself more as meting out a form of punishment to the MPs. Its attitude at the time may have been understandable given the events that led to the contempt of court judgment but, for the reasons we have given, we find that it exceeded its common law powers.

OTHER ISSUES

(a) Remuneration

[136] It follows from the finding that the Assembly lacked power to suspend the two MPs that they were entitled to their remuneration and allowances throughout the periods of unlawful suspension.

(b) The cross-appeal

[137] It also follows that the question of the length of the suspension falls away.

[138] The final issue was the validity of the amendments to Standing Order 187. That Standing Order provides a set of penalties for breaches of Standing Orders 185 and 186 and therefore cannot be valid if and to the extent that those Standing Orders are invalid. We heard no detailed argument concerning them and so express no view about them. They will be invalid to the extent that they purport to treat as a contempt and punish an act or omission which is not within s. 21 of the 1960 Ordinance or purport to authorise any action which is not valid under the common law described above.

[139] Much of Standing Order 187 merely replicates s. 21. Paragraph (7) (i) and (ii) do no more than bar a member lawfully suspended from the Assembly from attending work in the Assembly or a committee or entering the Parliamentary precincts. We agree with the Supreme Court that they are valid. But we also agree with it, for the reasons it gave, that the rest of Standing Order 187(7) is not valid.

ORDERS

[140] The Orders of the Court are:

(a) The Speaker's appeal is dismissed;
(b) The cross-appeal of the first and second respondents is allowed and it is declared that the decision of the Assembly on 18 October 2022 to suspend them from the Assembly had no basis in law and was accordingly void;
(c) The first and second respondents are entitled to be paid their Parliamentary salaries and allowances relating to the period or periods of their suspensions and it is ordered that they be paid forthwith;
(d) The Speaker must pay costs to the first and second respondents in this Court of $5,000 and in the Supreme Court of $10,000 together, in both cases, with disbursements to be fixed by the Registrar if not agreed.

Hon. Justice Blanchard

Hon. Justice Young

Hon. Justice Nelson