England and Wales High Court (Chancery Division) Decisions

Neutral Citation Number: [2005] EWHC 114 (Ch)
Case No: CH/2004/APP/0447

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
09/02/2005

B e f o r e :

THE HONOURABLE MR JUSTICE LIGHTMAN

Between:

DAVID CLAUDE FITZGIBBON	**Appellant /Claimant**
- and -	
HM ATTORNEY GENERAL	**Respondent /Defendant**

Mr Leolin Price QC and Mr Eason Rajah (instructed by Messrs Beynon Nicholls, 27 Chancery Lane, London WC2A 1NE) for the Claimant/Appellant
Mr Jonathan Crow (instructed by the Treasury Solicitor, Queen Anne's Chambers, 28 Broadway, London SW1H 9JS) for the Defendant/Respondent
Hearing dates: 31st January – 1st February 2005

HTML VERSION OF JUDGMENT

Mr Justice Lightman:

INTRODUCTION

1. In this action by a claim form under CPR Part 8 dated the 11th November 2003 (as amended) Mr Fitzgibbon ("the Claimant") seeks declarations relating to the Constitution of Australia ("the Constitution"). In particular he seeks declarations: (1) that the exercise by HM the Queen and her heirs and successors in the sovereignty of the United Kingdom of the functions prescribed in the Commonwealth of Australia Act 1900 ("the 1900 Act") are exercised in right of her and their sovereignty of the United Kingdom; and (2) that the issue of letters patent in respect of the functions prescribed in the 1900 Act must be under the Great Seal of the United Kingdom. The Claimant's case is that in exercise of her powers under the 1900 Act (and in particular under the Constitution), the Queen is acting in right of the United Kingdom, and should accordingly use the Great Seal of the United Kingdom, and is not acting in right of Australia and accordingly should not use (as is her practice) the Great Seal of Australia.

2. The Claimant is a lawyer and British and Australian national resident in Australia and a taxpayer there. He says that: (1) as such he has an interest in the proper operation of the Constitution; and (2) the functions of HM the Queen under the Constitution are not being carried out in accordance with the relevant laws set out in the 1900 Act which is the law of England and Wales; and (3) he has the necessary standing and this court has the necessary jurisdiction to grant the declarations necessary to establish, and lead to the correction of, the longstanding error.

3. By an application notice dated the 18th November 2003, the Attorney General (who is by amendment the defendant in this action) applied to strike out the action. In a reserved decision dated the 25th June 2004 ("the Decision") Master Bowman acceded to the application and struck out the action and ordered the Claimant to pay costs. The Master refused permission to appeal but on the 28th October 2004 Patten J granted permission. The appeal is now before me.

BACKGROUND

4. The 1900 Act constituted the Commonwealth of Australia under the Crown of the United Kingdom and under the Constitution thereby established. References in this judgment to sections are to sections in the 1900 Act. Section 2 (of which the side note reads "Act to extend to the Queen's successors") reads as follows:

> "2. The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom."

5. Section 3 empowered the Queen to declare by proclamation the Constitution and at any time thereafter to appoint a Governor General for the Commonwealth of Australia. Section 9 set out the Constitution. The Constitution makes repeated reference to the Queen. In particular the Constitution provided: (a) (in clause 1) that the legislative power of the Commonwealth should be vested in a Federal Parliament consisting of the Queen, a Senate and a House of Representatives; (b) (in clause 2) that a Governor General appointed by the Queen should be her representative in the Commonwealth; (c) (in clause 42) that every senator and every member of the House of Representatives should swear allegiance to the King or Queen for the time being of the United Kingdom; and (d) (in clause 58) that the Governor General may give the Queen's assent to laws passed by both Houses of the Parliament. The Constitution (in clause 128) provided that a proposed law altering the Constitution must be passed by an absolute majority in each House of Parliament and a majority of electors voting in a referendum.

6. HM Queen Victoria declared the Commonwealth of Australia by Proclamation under the Great Seal of the United Kingdom dated the 17th September 1900. Since that date there has been no attempt to amend clause 2 of the 1900 Act.

7. By Letters Patent dated the 29th October 1900 ("the 1900 Letters Patent") issued under the Great Seal of the United Kingdom permanent provision was made for the Office of Governor General and in particular: (a) the office of Governor General was constituted to represent the Queen in the Commonwealth of Australia and bestowed with power to appoint judges and other officers and ministers and to summon, prorogue and dissolve Parliament; (b) the manner of appointment of the Governor General was prescribed to be by Commission under the Royal Sign Manual and Signet

(which required that they be sealed with the Great Seal of the United Kingdom); and (c) the Great Seal of Australia was created to be kept and used by the Governor General.

8. On the 21st August 1984 Letters Patent ("the 1984 Letters Patent") made by HM the Queen revoked or (according to the Claimant) purported to revoke the 1900 Letters Patent, and made changes to the office of Governor General under the Constitution including provision for the appointment of Governors General by Commission under the Great Seal of Australia.

9. The Claimant contends that the 1984 Letters Patent are invalid and without legal effect because they were not sealed with the Great Seal of the United Kingdom and that the subsequent appointment of Governors General and the amendment of the 1984 Letters Patent on the 15th May 2003 under the Great Seal of Australia are likewise for this reason invalid.

PROCEDURE

10. The Claimant concedes that, since the action raises exclusively questions of public law the Claimant ought not to have brought proceedings under Part 8 of the CPR but should have made an application in the Administrative Court under Part 54 of the CPR seeking permission to bring proceedings for judicial review. The failure to adopt the correct procedure is not necessarily fatal. What the court has to do in such a situation is to inquire whether the adoption of the incorrect procedure has occasioned any significant disadvantage to a party to the proceedings, the public or the court and, if there is no such disadvantage, to give appropriate direction for the continuation of the proceedings as they are or for the transfer of the action to the Administrative Court whichever is the more practical and convenient. Whether there has been any such significant disadvantage in this case depends on whether, if the proceedings had been commenced in the Administrative Court, permission would have been granted to apply for judicial review. The answer to that question, which involves consideration of all the various issues raised by the parties, must be determinative of whether this action should be struck out and accordingly whether this appeal should be allowed or dismissed. If there is no significant disadvantage, directions must be given whether the action should be transferred to the Administrative Court or should proceed in this court.

PRELIMINARY OBSERVATIONS

11. Before I turn to the specific issues raised, I should make four preliminary observations.

12. First I should say a word about the divisibility of the Crown. The old doctrine of the indivisibility of the Crown has given way with the development of the Commonwealth to the current doctrine of the divisibility of the Crown. There is a difference of view expressed by the members of the Court of Appeal in R v. Foreign Secretary ex parte Indian Association of Alberta ("the Indian Association") [1982] 1 QB 892 whether the change occurred during the latter half of the 19th century or during the early part of the 20th century. The transition or recognition of the transition would appear to have been gradual over time and it is not reflected in the 1900 Act. It may be that indivisibility is inconsistent with the distinct existence of autonomous governments within the Queen's dominions: see Halsbury's Laws of Australia 90-2375.

13. Second the formula of words that have been used in this case "in right of the United Kingdom" and "in right of Australia" calls for clarification. A passage in the judgment of May LJ in the Indian Association is worth citing both on this and the first matter:

> "Although at one time it was correct to describe the Crown as one and indivisible, with the development of the Commonwealth this is no longer so. Although there is only one person who is the Sovereign within the British Commonwealth, it is now a truism that in matters of law and government the Queen of the United Kingdom, for example, is entirely independent and distinct from the Queen of Canada. Further, the Crown is a constitutional monarchy and thus when one speaks today, and as was frequently done in the course of the argument on this application, of the Crown 'in right of Canada' or of some other territory within the Commonwealth, this is only a short way of referring to the Crown

acting through and on the advice of Her Ministers in Canada or in that other territory within the Commonwealth."

14. Thirdly the question raised regarding the use of the seal is one of form only, and not of substance. There is no question but that HM the Queen wished and intended the acts done in respect of which use was made of the Great Seal of Australia.

15. Fourthly, whilst the issue raised is an issue of construction of the 1900 Act, a United Kingdom statute, it is an issue that has no significance or consequences in this country. The connection with the United Kingdom is only historical in the sense that the 1900 Act was passed by the legislature here. On the other hand the issue has potentially substantial consequences in Australia. I therefore inquired of Mr Price, Counsel for the Claimant, why any proceedings for the declaratory relief sought were not commenced in Australia rather than here. Mr Price variously answered that Australian judges would be embarrassed determining the issue because the answer might raise questions as to the validity of their appointments as judges; that the Australian courts in other proceedings had shown a marked disinclination to decide the issue in the way sought; and that the Australian courts had no jurisdiction to decide the issue. I need only say that none of these answers have any substance.

JURISDICTION

16. In my judgment this court has no jurisdiction to determine the issues raised in this action: they are not justiciable here. As soon as Australia became independent, the 1900 Act ceased to have any effect as an exercise of sovereign power of the United Kingdom, and whatever effect it then and thereafter had was as part of the law of the sovereign state of Australia, into the validity of which this court has no jurisdiction to inquire: see Buck v. Attorney General [1965] Ch 745 at 771 ("Buck") per Diplock LJ and the Indian Association at 916G-917D, 921 C-G and 928 A-B. As Mr Crow (Counsel for the Attorney General) submitted, when HM the Queen is exercising her functions under the Constitution, she is acting pursuant to Australian law. It is for the Australian courts to apply Australian law to determine the capacity in which HM the Queen is acting, the appropriate seal and the consequences (if any) if the wrong seal is used. It is not for the United Kingdom courts to enter the field proffering its view as to the proper interpretation of the Constitution.

17. Mr Price sought support for his contention that this court can determine the issue raised by reference to the decision of the Court of Appeal in R (Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs [2004] 2 WLR 1 (now on appeal to the House of Lords). That decision however is of no assistance to him. The issue in that case was the validity of an instruction issued by the Foreign Secretary (for the Queen) to an official in South Georgia and South Sandwich Islands, an overseas territory (formerly called a colony). The Claimant issued judicial review proceedings in this country successfully challenging the validity of the instruction. Whilst reaffirming the doctrine of the divisibility of the Crown, the Court of Appeal held that in issuing that instruction the Queen had acted in right of the United Kingdom, and not the overseas territory, by reason of the particular facts of that case, and in particular (i) the fact that it was concerned with a dependent territory, not a sovereign state; (ii) the small size, population and resources of the territory; and (iii) the wording of its constitution. No issue was or could by raised in that case as to the court's jurisdiction. The decision lends no support for the proposition that this court has jurisdiction to determine issues as to the constitutional law of Australia.

COMITY

18. Even if this court did have jurisdiction, as a matter of international comity it should not entertain this case, for to grant the declarations sought would amount to an unwarranted interference in the affairs of an independent member of the British Commonwealth: see Buck at 768F-G per Harman LJ and 770H per Diplock LJ.

PURPOSELESS

19. In my view the action should also be struck out on the ground that it is quite purposeless. No effective relief is sought. The only relief sought is the grant of declarations: no effective relief is sought here or elsewhere and the declarations may be ignored with impunity by Australia. In consequence the grant

of the declarations sought would be (if any) of academic interest only. Mr Price concedes that, whatever this court declares, the challenges made by the Claimant in these proceedings can have no practical consequences unless the challenges are also made, succeed and are followed up in Australia. It would in the circumstances be both improper and contrary to law to grant the declarations sought: see Buck at 768E-F per Harman LJ.

DELAY

20. Permission to bring judicial review proceedings seeking the relief sought would also be refused on the ground of delay. Any challenge to the actions taken using the Great Seal of Australia could have been made in 1984. The Claimant has served no evidence and no explanation is given for his delay. Ignorance of the law can scarcely be assumed: the Claimant is an established practising lawyer.

21. In deciding whether to exercise its jurisdiction to extend time for the commencement of judicial review proceedings beyond the 3 month limit laid down in CPR 54.5, the court must take into account the importance of the question raised to date and in the future, the existence (or otherwise) of good reasons for the delay and whether the delay may have occasioned detriment to public administration. Mr Price referred me to the decision of Roch J to exercise the jurisdiction to extend time in R v. Rochdale MBC ex parte Schemet (1992) 91 LGR 425 at 437. That judgment is authority for the proposition that in a proper case the court may permit a challenge to a decision which is months out of time and indeed it contains a quotation from the judgment of Nicholls LJ in the unreported case of R v. Westminster CC ex parte Hilditch to the effect that in appropriate circumstances a claimant may be allowed to challenge a decision made nearly three years previously. In this case however the delay is some 19 years, there is no explanation or apparent excuse for the delay, the relief sought has no practical value, and the detriment to public administration of the delay is obvious.

INTEREST

22. Likewise it seems to me that permission would be refused on the grounds that the Claimant has no sufficient interest in obtaining the relief claimed, for (as I have already said) the grant of the declaration sought would have no practical effect.

CONCLUSION

23. I have had the benefit of full and detailed argument from Mr Price. Notwithstanding his customary enthusiasm and youthful vigour, I am firmly of the view that the Master's order was right and I accordingly dismiss the appeal.
