[2007] WASC 270

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	SHAW -v- ATTORNEY GENERAL FOR THE STATE OF WESTERN AUSTRALIA [2007] WASC 270
CORAM	**:**	EM HEENAN J
HEARD	**:**	22 OCTOBER 2007
DELIVERED	**:**	22 OCTOBER 2007
FILE NO/S	**:**	CIV 1955 of 2007
BETWEEN	**:**	BRIAN WILLIAM SHAW Plaintiff AND ATTORNEY GENERAL FOR THE STATE OF WESTERN AUSTRALIA Defendant

Catchwords:

Vexatious litigants - Application for leave to commence proceedings - Proposed proceedings vexatious - Leave refused - Objection to judge sitting rejected

Legislation:

Acts Amendment and Repeal (Courts and Legal Practice) Act 2003 (WA)
Constitution Act 1889 (WA), s 73(2)
Supreme Court Act 1935 (WA)
Vexatious Proceedings Restriction Act 2002 (WA), s 6

Result:

Application dismissed

Category: B

Representation:

Counsel:

Plaintiff	:	In person
Defendant	:	Mr C P Wayte

Solicitors:

Plaintiff	:	In person
Defendant	:	State Solicitor for Western Australia

Case(s) referred to in judgment(s):

Attorney General (WA) v Marquet (2003) 217 CLR 545
Attorney General (WA) v Shaw [2004] WASC 280
Commonwealth Bank of Australia v Ridout Nominees Pty Ltd [2003] WASC 215
Shaw v Attorney General (WA) [2005] WASC 149
Shaw v Jim McGinty in his capacity as Attorney General [2006] WASCA 231

1 **EM HEENAN J**: I have been hearing an originating motion of 18 September 2007 issued by Mr Brian William Shaw against the Attorney General for the State of Western Australia and another (who, while not named on the originating motion, must be presumed to be the Commonwealth Director of Public Prosecutions). The application is seeking leave for Mr Shaw to institute proceedings pursuant to s 6 of the *Vexatious Proceedings Restriction Act 2002* (WA). Leave is necessary because Mr Shaw was declared a vexatious litigant on 23 December 2004 in CIV 2264 of 2004 on an application brought in this court by the Attorney General for the State of Western Australia and by the Commonwealth Director of Public Prosecutions: see ***Attorney General (WA) v Shaw*** [2004] WASC 280. Mr Shaw accepts that he was declared a vexatious litigant and that leave is necessary for him to institute any further proceedings in this court.

2 During the course of argument I have gone through at length with Mr Shaw the 24 paragraphs of relief which is sought by the originating motion. Those paragraphs need not be repeated here. The trigger for this application is Mr Shaw's desire to challenge decisions made by Registrar Powell during the taxation of bills of costs in two other proceedings (CACV 83 of 2005 and CIV 1128 of 2005) the results of which were that Mr Shaw was ordered to pay the costs of those proceedings. However, the substance of his application goes much beyond that and it is the substance of the application which seems to me to be of critical importance. That is not to say, however, that it in any way overshadows the legitimacy of a desire to challenge the decisions of a registrar on matters of costs if there are reasonable grounds to do so.

3 The two decisions, from which the orders for costs resulted, are decisions given respectively by McKechnie J in this court (***Shaw v Attorney General (WA)*** [2005] WASC 149) and by the Court of Appeal on an application for leave to appeal from McKechnie J's reasons (***Shaw v Jim McGinty in his capacity as Attorney General*** [2006] WASCA 231). Those judgments of the court, although concerning appeals by Mr Shaw against being declared a vexatious litigant, have the effect of dismissing and rejecting Mr Shaw's present principal argument that the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA) is invalid, void and of no effect. They further reject Mr Shaw's subsequent arguments that other decisions of this court are void, and, indeed, that the jurisdiction of this court and of all judges and registrars has been removed, destroyed or significantly diminished, by the alleged invalid amendment to the *Supreme Court Act 1935* (WA), effected by the 2003 amending legislation.

4 The basic proposition underlying Mr Shaw's contentions, both before McKechnie J, and the Court of Appeal, also in other proceedings and here again today, is that the *Acts Amendment and Repeal (Courts and Legal Practice) Act* - in particular, pt 8 (Amendments about the Crown) - contains provisions in which references to her Majesty or to the Crown have been removed from certain legislation, notably the *Supreme Court Act* (but not only from that Act), and which have been replaced by references to the State or to the State of Western Australia or other cognate descriptions. The substance of the argument advanced by Mr Shaw is that this amendment constitutes a repudiation of allegiance to the Crown and has several far reaching consequences. First, it is, on his argument, a major and unacceptable change to the constitution of the State of Western Australia. Secondly, because there is a repudiation, as he puts it, of allegiance, it constitutes treason.

5 Mr Shaw contends that because the change to the legislation of this State - by, as he puts it, the removal of the oath of allegiance - is so radical, it goes to the very root of the State Constitution. That is, it is a change to the Constitution which requires, if it is to be achieved at all, compliance with the special manner and form requirements of s 73(2) of the *Constitution Act 1889* (WA), including, among other things, approval of the electors of this State by referendum: see ***Attorney General (WA) v Marquet*** (2003) 217 CLR 545. He submits, and it is not contested, that the passage of the *Acts Amendment and Repeal (Courts and Legal Practice) Act* did not involve or comply with those alleged manner and form requirements. Accordingly, Mr Shaw says that the Act is invalid and that the effect of the passage of the invalid act is to deprive the Supreme Court and all its judicial officers of further jurisdiction.

6 A curious side effect of that argument, which Mr Shaw himself acknowledges, is that if it is correct, then this court, and myself as a judge of the court, and indeed other judges, would have no jurisdiction to hear or to entertain the very application which he has brought before the court. This somewhat ironical situation is pointed to by Mr Shaw as illustrating in some way the strength of his argument. It is not, however, necessary to dwell on this point because the substance of the argument can be fully analysed for present purposes on an entirely different basis.

7 That basis is that in the other matters to which I have referred - namely, the decisions of McKechnie J and the Court of Appeal - these very arguments were put forward. They were considered and examined. Reasoned decisions were given rejecting them. The validity of the *Acts Amendment and Repeal (Courts and Legal Practice) Act* was upheld and

these challenges were rejected - it being the decision of the court that none of the alleged manner and form requirements referred to in the *Constitution Act* were in fact required for legislation of this kind because, contrary to Mr Shaw's submissions, it did not relevantly affect the State Constitution.

8 It is therefore the situation that the critical point (and, all the subsidiary points flowing from it) which Mr Shaw seeks to raise in the presently proposed litigation has already been determined against him in final judgments of this court. This court, being a court of general jurisdiction, cannot have its decisions impeached by collateral proceedings for alleged want of jurisdiction. The only avenue of challenge is by process of appeal to a higher court.

9 An application for special leave to the High Court of Australia was apparently made by Mr Shaw from the decision of the Court of Appeal but, for some procedural reason, did not continue or succeed. The situation, therefore, is that, subject to any possible further grant of special leave to appeal, the decision of the Court of Appeal remains binding upon him and cannot be attacked or impeached in collateral proceedings brought by Mr Shaw.

10 I am required to consider the criteria specified by s 6 of the *Vexatious Proceedings Restriction Act*. That section materially provides that:

> (1) An application for leave to institute proceedings, or proceedings of a particular class (in this section called '**the proceedings**'), that is required by an order under section 4(1)(d) is to be made -
>
> (a) in the case of proceedings in the Supreme Court, to the Supreme Court or a Judge;
>
> (b) in the case of proceedings in the District Court, to the District Court or a District Court Judge;
>
> (c) in the case of proceedings before any other court, to the court; or
>
> …
>
> (e) in the case of proceedings before a tribunal, to the tribunal,
>
> and is to be accompanied by an affidavit in support of the application.
>
> ...

> (3) The affidavit accompanying the application for leave is to list all the occasions on which the applicant has made an application for leave under subsection (1) and to disclose all facts material to the application, whether supporting or adverse to the application, that are known to the applicant.
>
> ...
>
> (5) the court or tribunal is to dismiss the application for leave if it considers that -
>
> (a) the affidavit does not disclose everything required by subsection (3) to be disclosed;
>
> (b) the proceedings are vexatious proceedings; or
>
> (c) there is no prima facie ground for the proceedings.
>
> ...
>
> (7) Leave is not to be granted unless the court or tribunal is satisfied that -
>
> (a) the proceedings are not vexatious proceedings; and
>
> (b) there is a prima facie ground for the proceedings.

11 Nothing has been shown before me to illustrate any arguable ground to contend that proceedings such as those proposed by Mr Shaw can be instituted without being vexatious. The prime purpose of the proceedings, perhaps their only purpose, is to challenge final decisions of this court and the Court of Appeal when the time for appealing has already expired and when detailed reasons were given rejecting the very argument now sought to be re-agitated.

12 I understand only too well that Mr Shaw holds very strong views about the validity of the *Acts Amendment and Repeal (Courts and Legal Practice) Act*. He has previously brought those before the proper courts of this State for adjudication. His arguments have been heard and considered but they have been rejected. Those decisions cannot be challenged in these proceedings without being vexatious. For that reason I dismiss the application.

13 A parting word is necessary. At the commencement of these proceedings Mr Shaw foreshadowed an objection to me sitting on this application. As it was enlarged in argument, there were two separate and distinct grounds for the objection. One was that in 2003 I was the judge sitting on an application for an interlocutory injunction, brought by some

litigants named 'Ridout', against a bank seeking relief from the enforcement of a judgment which resulted in the seizure of their property. Mr Shaw was a friend of the Ridouts and sought to assist them in that application. The Ridouts failed in their application (***Commonwealth Bank of Australia v Ridout Nominees Pty Ltd*** [2003] WASC 215). I was informed by Mr Shaw, during the course of argument, that some time after that application proceedings were commenced - I do not know by whom, whether, by the Ridouts or by him or by others - against a number of persons including myself seeking an order in the nature of mandamus in the High Court of Australia. As I said to Mr Shaw, I have never heard of those proceedings before. I have had no notice of them, I have not participated in them, and I do not know their detail. However, the submission was that, because of my role in that earlier application, and because it is said that I have been named in some way or another in proceedings in the High Court, I should not sit on this application.

14 I rejected that objection. My reasons for doing so are that I have no knowledge of any kind of those proceedings. I am not conscious of being in jeopardy or of being interested in any way in the outcome. My role in sitting on that earlier application was simply as a judge of this court dealing with the daily chamber list on which there were a number of matters. That is not sufficient reason for me to disqualify myself and I declined to do so.

15 The second reason for the objection advanced by Mr Shaw has already been touched on in these reasons for decision. He pointed out, and it is not disputed, that if his arguments were to be accepted at their highest, it would mean that no judge of this court would have the jurisdiction to deal with any application in this litigation or, it would seem, in any matter before the court because of the radical and unauthorised changes which he asserts have been made to legislation affecting this court. I am in no different position in that regard from any judge of the court. I do not accept that the legislation has had that effect and I am satisfied that that is not a reason to disqualify myself from sitting on the present application.