IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

HC03C03923

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 23th June 2004

Before

MASTER BOWMAN

BETWEEN

DAVID CLAUDE FITZGIBBON
Claimant

and

HM GOVERNMENT OF THE KINGDOM OF GREAT BRITAIN & NORTHERN IRELAND
Defendant

JUDGMENT
(as handed down)

Introduction

This it an application by the Defendant described in the Claim Form as “HM Government of the United Kingdom of Great Britain and Northern Ireland" to Strike out the Claimant's claim brought under Part 8. It accepted that pursuant to s.17(3) of the Crown Proceedings Act 1947 (be only proper Defendant is Her Majesty's Attorney-General and that an appropriate amendment could, if necessary be made. Meanwhile I shall refer to the Defendant as "the Attorney".

The Attorney’s application

The grounds on which the Attorney relies In support of the application to strike out; are set out comprehensively in the application notice by reference to the Particulars of Claim. In this judgment I shall follow the pattern of the application setting; out firm more or less verbatim the relevant portion or portions of the Particulars and then summarising the Attorney’s position (but confined to matters of justiciability and hopelessness and not to matters of procedure and in particular whether the Claim should have been begun or proceed – if it proceeds - as one for judicial review). I shall then address the matters raised by the Claimant in resisting the application.

A. Alleged breach of s.I of the Royal Titles Act 1953

The Claimant says:-

a. On 19 October 1973 Her Majesty Queen Elizabeth the Second of the United Kingdom gave her personal Royal Assent to a bill of the Parliament of the Commonwealth of Australia, the Royal Style and Titles Art 1973, which enables and enacts the use of a form of title in relation to the Commonwealth of Australia and its territories in lieu of Her customary title as Queen of the United Kingdom.
b. The Assent given on this date breached Section 1 of the Royal Titles Act 1953(1&2 Eliz 2 c9) which gives the Assent of the Parliament of the United Kingdom to use by the of alternative titles only where, the foreign relations of the territory are under the control of Her Government in the United Kingdom.”

The Attorney says:-

It is trite law that the Crown is rot indivisible in relation to each part of the Commonwealth. Its legal obligations to the people of an independent country such as Australia are governed by the laws of that country and not by UK domestic law.

Reliance is had on R v. Secretary of State for Foreign & Comonwealth Affairs, ex parte Indian Association of Alberia [1982] 1 QB 892 where Denning LJ said (at 917):-

"Hitherto I have said that in constitutional law the Crown was single and indivisible. But that Law was changed in the first half of this century - not by statute - but by constitutional usage and practice. The Crown became separate and divisible -according to the particular territory in which it was sovereign. This was recognised by the Imperial Conference of 1926 (1926) (Cmd. 2768) ……Thenceforward the Crown was no longer single and indivisible. It was separate and divisible for each self-governing dominion or province or territory. Thus in 1968 it was held in this Court that the Queen was the Queen of Mauritius and the Crown in right of Mauritius could issue passports to its citizens *(see Reg. v. Secretary of State for the Home Department, Exparre Bhurosah* [1968] 1 Q.B. 266); and In 1971 it was held again in this court that the Queen was the Queen of the Province of New Brunswick and that province was entitled to state immunity. see *Mellenger v. New Brunswick Development Corporation* [1971]1 WLR. 604."

Accordingly, the issue raised by the Claimant (namely, whether Her Majesty acted lawfully in giving Royal Assent to an Act of the Australian Parliament) is a question of Australian law for the Australian courts and not a question of English law for the English courts.

The effect of s.4 of the Statute of Westminster 1931 is that the 1953 Act (being an enactment of the UK Parliament) does not extend to Australia. Accordingly, the 1953 Act does not purport to render unlawful (either as a matter of English or of Australian law) an act done by the Crown in right of Australia.

The effect of s.2(2) of the Statute of Westminster 1931 Is that the validity of the 1973 Act (being an enactment of the Parliament of Australia) cannot be impugned on the ground that it is inconsistent with the 1953 Act (being art enactment of the UK Parliament).

Even if the 1953 Act were capable of operating extra-territorially, on its proper interpretation it Is purely permissive, and not restrictive, it does not limit Her Majesty s freedom to adopt such style and titles as may be considered appropriate in relation to such countries of which she is Head of State, whether or not the UK Government is responsible for their foreign relations. Accordingly, Her Majesty could not have been acting inconsistently with the 1953 Act in giving Royal Assent to the 1973 Act.

B. Validity of the title ‘Queen of Australia’

The Claimant says:

“c. The United Kingdom Government has not been responsible for the foreign relations of Australia since the enactment of the Statute of Westminster 1931 and the Statute of Westminster Adoption Act 1942 both being prior to the current Monarch’s accession.

d. As the result the title, "Queen Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth" only exists outside of UK law and cannot be used by Hot Majesty without further express consent of the UK Parliament no matter what status the title is given in any Australian jurisdiction..

e. Such express consent does not exist. Her Majesty Queen Elizabeth the Second remains the Queen of the United Kingdom at all times and in all places and under the terms of both the Coronation Oath and the Accession Declaration remains subject to United Kingdom law at all times. The existence and operation of the Sovereignty of the United Kingdom is never suspended nor set aside at any time to allow her to exercise an independent role or sovereignty in another jurisdiction."

The Attorney says:-

In so far as these allegations are predicated on those made in paragraphs (a) and (b) of the Claim Form, they are not justiciable, alternatively the claim should be struck out on the grounds that It is hopeless;

Moreover the Attorney submits that the allegations regarding the validity of Her Majesty's title as Queen of Australia are unintelligible and/or wholly unconnected with the substance of the claim that follows; as such, they are embarrassing and should be struck out.

C. A]leged loss of the power to appoint Governors-General

The Claimant says:

“f. That after 19 October 1973 various persons both with and without the United Kingdom have used the unlawfully adopted title to conceal that the Parliament of the United Kingdom by Acts of the Parliament dated 1931, 1945, and 1948 had ceded full sovereignty over the territory of the Commonwealth of Australia to the people of Australia and had surrendered the executive power over the Commonwealth of Australia embodied in The Commonwealth of Australia Constitution Act, No 61 of 1900 (63 & 64 Victoria c12) and earlier colonial legislation.

g. From 19 October 1973 Her Majesty, acting upon incorrect, unauthorised and mistaken advice, and by Commissions which have not been considered and approved by the Privy Council not issued in accordance with the Crown Office Act 18117 (40&41 Victoria c41) and the rules and regulations under that Act, nor In accordance with the Great Seal Act 1884, has appointed seven Governors-General under clause 9 Section 2 of the above Act No 6l."

The Attorney says:

The claim in this regard is a matter of Australian law, and is not justiciable here.

In any event the claim should be struck out on the grounds that it is hopeless;

1. The Queen's power to appoint Governor-General derives from s.2 of the Constitution of Australia, made under s.3 of the Commonwealth of Australia Constitution Act 1900 ("the 1900 Act”).
2. Executive authority in Australia remains vested in Her Majesty, and exercisable by her representative there, the Governor-General, by virtue of s.61 of the Constitution.
3. Giving Royal Assent In the 1973 Act (which dealt with Her Majesty's style and title in Australia, not her substantive powers) had no effect on Her Majesty's power in that regard.

Moreover as a matter of detail, paragraph (f) of the Claim Form is embarrassing as a pleading. It alleges that various unspecified persons have "used the unlawfully adopted title” in unspecified ways to "conceal", by means that are unspecified, the fact that the UK Parliament has “ceded full sovereignty over the Commonwealth of Australia to the People of Australia. This pleading should he struck out on the grounds that It Is unintelligible and/or falls to particularise the claim in sufficient detail for it to be properly understood and answered. In particular, the allegation of concealment is meaningless, given that every instrument about which complaint Is made in these proceedings is a public act.

D. Allegedly unlawful appointment of Governors-General:

The Claimant says:

”h. The Bill of Rights 1689 states as follows:

1. That the pretended power of suspending the laws or the execution of laws by regal authority without the consent of Parliament is illegal.
2. That the pretended power of dispensing with laws or the execution of laws by regal authority, as it has been assumed and exercised of late, is illegal

i. The use of the "pretended power" exercised by the regal authority of Her Majesty in the form of Letters Patent dated 21 August 1984 amended on 11 May 2003 to suspend without the consent of the Parliament the requirements and effects a the Crown Offices Act 1877 and the Great Seal Act 1884 to change the method of appointment of Governors-General under Act No 61 of 1900 is therefore Illegal. Further by means of these Letters Patent of 21 August 1984 Her Majesty has illegally directed the said Governors-General to breach or dispense with the execution of the Statute of Westminster 1931 and continue to exercise in the name of the Crown of the United Kingdom the surrendered executive authority over the people and Commonwealth of Australia.

m. That acting by regal authority contrary to the provisions of the B ill of Rights 1689, Part 1, Sections 1&2 and Part X11 without the approval or authority of the UK Parliament on 24 August 1984 Her Majesty by proclamation posted in the Commonwealth of Australia Government Gazette No S334, unlawfully sought to allow the exercise by other persons of a "pretended power" obtained by unilaterally dispensing with legislation or the execution of' UK legislation in the form of the Crown Office Act 1871 and the Great Seal Act 1884 and subordinate rules and regulations in respect of appointments to office as Governor-General made tinder clause 9 Section 2 of Act No 61 of 1900."

The Attorney says:-

It is not understood in what respects either (1) the 1984 Letters Patent are alleged to have infringed either 1877 or the 1884 Acts or (h) Her Majesty is alleged to have directed any Governors-General to act unlawfully. The claim in this regard is embarrassing, and as such should be struck out.

In so far as the Claimant is seeking to impugn either (i) the validity of the appointment of Governor-General; or (ii) the extent or exercise of their powers in Australia, them are matters of Australian law and justiciable here.

In any event the claim should be struck out on the grounds that it is hopeless for the reasons given in C above.

E. Alleged unlawful appointment of State Governors

The Claimant says:-

"j. Part X11 of the Bill of Rights 1689 states as follows:

"And be it further enacted by the authority aforesaid, that from and after this present session of Parliament no dispensation by non obstante of or to any statute or any part thereof shah be allowed, but that the same shall be held void and as of no effect, except a dispensation be allowed of in such statute, and except In such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parliament."

k. The claimant states that on and after 14 February 1986 Her Majesty acting upon incorrect and mistaken advice, contrary to the above Part X11, and outside of any lawful authority conferred by or assented to by any legislation of the Parliament of the United Kingdom and outside her prerogatives as Queen of the United Kingdom, has unlawfully appointed Governors for each of the constituent states of the Commonwealth of Australia after those states were removed as colonies of the United Kingdom by Section 11 of the Statute of Westminster 1931 and in doing so has also unlawfully Issued instructions for the continued use of defunct executive authority wholly reliant upon colonial legislation of the United Kingdom Parliament.

l. Further that the. Privy Council, on 14 February 1986 acted In excess of Its jurisdiction by unlawfully authorising the issue of Letters Patent issuing illegal Instructions for the continued use of colonial executive authority derived from United Kingdom law by State governors and other persons holding false appointments on the basis of the Letters Patent and knowingly breached the reports of the Imperial Conferences of 1926 and 1930 adopted Into law by the Statute of Westminster 1931 specifying that both Australia and its states were no longer colonies subject to UK colonial law and authority and that the Commonwealth of Australia has equal status with the United Kingdom in all respects of Its internal and external affairs."

The Attorney says:

The validity of the appointment of Governors In the various States, and the extent of their powers in those States, are matters of Australian law and are not justiciable here.

Moreover the claim should be struck out on the grounds that it is hopeless. Due provision is made for the appointment of State Governors and for the exercise by them of Her Majesty's powers and functions in respect of the States, by the Australia Act 1986 (being an Act of the Australian Parliament), and by a substantially identical Act of UK Parliament with the same name passed pursuant to ss.4 and 9(3) of the Statute of Westminster in response to the enactment by the

Australian Parliament of the Australia (Request and Consent) Act 1985, passed on the 4th December 1985.

F. Alleged oppression of the Claimant:

The Claimant says:

"n. The Claimant states that the persons purportedly appointed as Governors-General and others for their personal benefit and financial reward, have used the unlawfully issued Letters Patent and Commissions or copies thereof to subvert, distort and misuse legislation of the United Kingdom Parliament and to unlawfully usurp the authority, powers, prerogatives and immunities granted by the Parliament to Her Majesty the Queen of the United Kingdom, thereby oppressing the claimant, depriving him of his lawful income and denying justice under the law to the claimant and to those persons who have sought and acted on his advice in matters relating to the Commonwealth of Australia Constitution Act No 61 of 1900 (63&64 Victoria c12) and in matters related to the various state Constitutions.

This claim was abandoned at the hearing; its abandonment may be relevant to the standing of the Claimant to bring these proceedings.

G. Alleged breach of duty by the Privy Council:

The Claimant says:

"o. The Claimant also states that the Privy Council of the United Kingdom, being the section of the Government of the United Kingdom charged with the duty of considering and authuri5ing the appointment of subjects to vice-regal offices and the issue of Commissions under Royal Warrant, the Sign Manual and the Great Seal of the Realm, has neglected its duty, has failed to advise Her Majesty not to sign, authorise or issue documents which breach United Kingdom law, and has therefore failed to its duty of care to prevent the authority of the United Kingdom Parliament and Government from being used by persons operating on the authority of commissions which qualify as forgeries under Section 1 of the Forgery and Counterfeiting Act 198l."

The Attorney says:-

Paragraph (o) of the Claim Form appears to lead a cause of action that is unknown to English law - namely, a breach by the Privy Council of a "duty of care" in performing its public functions. The claim is meaningless and should be struck out.

Relief:

The prayer to the Particulars is in the following terms:

“The Claimant seeks damages from the Government of the United Kingdom.

Orders Sought:

The Claimant seeks:.

a. A declaration by the Court that the title "Elizabeth the Second by the Grace, of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth is not a title assented to by the Parliament by means of the Royal Titles Act 1953 or by any other legislation and cannot be used by Her Majesty Queen Elizabeth the Second to authorise the issue of any warrant, commission, letters patent or other official documents or for other purposes arising from legislation of the Parliament of the United Kingdom.

b. That the Letters Patent of 21 August 1984 are void and of no effect.

c. Damages In the sum of five million pounds.

d. Any such other Orders as the Court may see fit."

Most of the relief sought by the Claimant is, of course, parasitic on the substantive allegations in the Claim Form which have been dealt with above. Paragraphs (c) of the Prayer seeking damages In the sum of £5 million has (as I have noted) been abandoned.

The Claimant's case

In summary the Claimant's case in response to the application in his skeleton argument in response to the application was as follows:

"1, The Claimant seeks declaratory relief as to whether under the law 9f England and Wales, the effect of various UK statutes is such that Her Majesty the Queen must act in relation to her functions under the Australian constitution as the Queen of the United Kingdom and issue letters patent in respect of those functions under the Great Seal of the United Kingdom.

2. The point has significance because since 1973 many of the Queen's functions have been exercised using the title of "'Queen of Australia" and her acts have been evidenced using the Great Seal of Australia. In particular on 21 August 1984, Letters Patent made by the Queen as Queen of Australia and using the Great Seal of Australia made fundamental changes to the office of Governor General under the Australian constitution."

This is a case which does not appear obviously in the Claim and was accordingly not responsive to the application as such. It was developed as follows.

The Austmlian constitution

The Commonwealth of Australia Act 1900 (a UK statute) sets out the constitution of Australia in section 9. The following provisions are regarded by the. Claimant as pertinent:-

a. The legislative power under the constitution is vested in the Queen, a Senate and a. House of Representatives
b. A Governor-General appointed by the Queen shall be her repesentative in Australia, with such powers as she may assign to him.
c. Every senator and every member of the House of Representatives must take an oath of allegiance to the Queen in the form scheduled to the Act
d. No alteration may be made to the Constitution except by the Australian legislature and not unless it has first been approved in a referendum.

By section 2 of the Act it is expressly provided that references lo the Queen (then H.M. Queen Victoria) shall extend to "'Her Majesty's heirs and successors in the sovereignty of the United Kingdom".

By Proclamation dated 17 November 1900, and as envisaged by the Act, H.M. Queen Victoria declared the Commonwealth of Australia.

The use of the Great Seal of the United Kingdom

The monarch's wishes or commands in executive matters are made known to the nation, or to the individuals particularly concerned, by means of various documents, of which the most formal are Orders in Council; warrants, commissions or orders under the sign manual; or proclamations, writs, letters patent, letters close, charters, grants, and other documents under the Great Seal of the United Kingdom.

Under the Union with Scotland Act 1707 Article 24 the Great Seal of the United Kingdom must be used by the Queen for letters patent made by her as Queen of the United Kingdom.

The use of a different Royal style and titles for Australla

By Proclamation dated 28 May 1953 and in accordance with the Royal Style and Titles Act 1953 (a UK statute.) H.M. the Queen adopted the Style and Titles set forth there.

By the Royal Style and Titles Act 1973 (an Australian statute) the Australian parliament assented to the use by the Queen in relation to Australia, in lieu of the Style and Titles set forth in the 1953

Proclamation, the Royal style and titles.. "Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth".

In argument I was taken to portions of what I understand to the Australian equivalent of' Hansard recording a debate in the House of Representatives on 18 February 1953 when the Royal Styles and Titles Bill was considered. I shall not set out the speeches of Mr Menzies (the Prime Minister) (pages 55 and 56) or of Dr. Evatt (the Leader of the Opposition) (page 57) but they make it clear that the House was considering not questions of function but of succession.

The change in the Royal Style and Title (whether in accordance with the 1953 Act or not) could, the Claimant says, only be titular and could effect no substantive change to the provisions of the constitution (no referendum was held). That is a proposition from which unsurprisingly the Attorney does not dissent.

By Letters Patent dated 29 Octobcr1900 H.M Queen Victoria constituted the office of Governor General of Australia and provided for a Great Seal of Australia which should he kept and used by the Governor General. Nothing in the 1953 Act, or the Australian 1973 Act permit H.M. the Queen to issue letters of patent in right of the sovereignty of Great Britain under the Great Seal of Australia.

Correct jurisdiction

Australia, the Claimant says is not the correct jurisdiction for this claim. The claim relates to the status of royal acts in right of the United Kingdom in fulfilment of powers or obligations arising under a UK statute and the declaration sought is as to the meaning of UK statute law and as to the effect of English common law, custom and convention relating to such royal acts.

The Claimant acknowledges the reliance of the Treasury Solicitor upon the divisibility of the Crown recognised in *R v Secretary of State for Foreign & Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] 1 QB 892. Reference was also made to *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs and another* [2001] QB 1067; the principle of divisibility of the, Crown is expressly recognized In the judgment of Laws J and the Alberta Indians case referred to (paragraph 21).

Consequently self-governing dominions, were able to achieve effective independence while being members of the Commonwealth. The acts of her Majesty's government in the dominion were not the acts of Hot Majesty's government In the UK. Accordingly claims, in relation to such acts are justiciable in the courts of the dominio only. As developed in argument I understood it to be said that that principle bad no application to the functions in s. 2 of the Act but that, of course, depends on a conclusion that there are any functional aspects of the Act.

That principle, the Claimant says has no application to the exercise of functions prescribed under the Commonwealth of Australia Act 1900. Section 2 of the Act 1900 negates any contrary constitutional usage or practice by stipulating that the monarch of the United Kingdom (and not Australia) shall have the functions prescribed in the Act. The functions are reserved to the monarch for the time being of the United Kingdom and are exercised in fight of the United Kingdom. Accordingly the monarch of the United Kingdom has (for example) the power of appointment of a Governor General of Australia and such an appointment Is made by the monarch in right of the United Kingdom.

Conclusions

The terms of the application notice which so far as relevant I have set out above were not addressed in answer to the application. They are overwhelming and accordingly the claim ought (all other thing being equal) to be struck out for want of justiciabilty, for hopelessness and where appropriate as embarrassing.

Nevertheless I have to consider what is an unpleaded case set out for ffia first time in the Claimant's skeleton argument. Essentially it is a matter of procedure and not necessarily of substance - that the wrong seal has been used. The effect of such misuse was not explored at the hearing (which occupied no more than two hours).

The essential consideration is the relevance of s.2 of the 1900 Act and the words therein ".... in the sovereignty of the United Kingdom". I cannot see s.2 as being in any sense functional - it merely provides for succession. That is apparent from the Note to the Schedule.

Both the Alberta Indians and the Bancoult authorities put beyond doubt the principle of divisibility of the Crown. That principle departing from the principle of indivisibility is now one of general application as a consequence of constitutional usage and practice.

Thee can be no basis on which it could be concluded that the 1900 Act could possibly be construed as the Claimant would contend so as to negate any contrary constitutional usage or practice (that is of divisibility).

So far as the Royal Style and Titles Act 1953 and its Australian equivalent are Concerned (and so far as relevant) the Claimant is at one with the Attorney in agreeing that they could effect no substantive change to the provisions of the constitution - they confer no powers and consequently curtail no powers.

It follows that nothing said by the Claimant affects my provisional conclusion that the Claim should be struck out on the basis of hopelessness, lock of justlciability and where appropriate embarrassment. In the circumstances I shall not unless requested by the parties to do go address the Issue of whether this Claim should have been begun as one for judicial review or might (if not struck out) have been transferred to the Administrative Court.