Fiji

Bavadra v. Attorney-General

Supreme Court
Rooney J.
14 August 1987

Constitutional law – Executive power of the Sovereign – Whether competent to amend or alter the Constitution of Fiji without observing the formula for amendment or alteration as prescribed by law – Whether proclamations of Governor-General amounted to legislation.

Constitutional law – Parliamentary privilege – Internal proceedings of House of Representatives – Whether Court may make declaration as to the state of business in the House of Representatives – Constitution of Fiji 1970, section 54(1).

Procedure – Application to strike out statement of claim as disclosing no reasonable cause of action – Principles upon which jurisdiction to strike out should be exercised.

On 14 May 1987 the Royal Fiji Military Forces arrested and detained Dr Bavadra, the Prime Minister of Fiji, members of his Cabinet and members of the House of Representatives who formed his majority in the House. Under section 18(6)(b) of the Constitution of Fiji 1970 the Governor-General declared a state of emergency. By Proclamation of 19 May 1987 he dissolved Parliament and declared the office of Prime Minister and certain other high offices in the Executive and Legislature to be vacant.

The plaintiff, the deposed Prime Minister, sought to challenge these and other measures taken and promulgated by the Governor-General. By way of Originating Summons the plaintiff sought declarations:

(1) that the Crown's power to prorogue or dissolve Parliament was prescribed by the Constitution and there was no residual power to do so;
(2) that the purported dissolution of 19 May 1987 was unconstitutional, unlawful and invalid, having been proclaimed without the advice of the Prime Minister and without statutory conditions therefor having been met;
(3) that the session of the House of Representatives stood adjourned;
(4) that any alteration of the Constitution other than by the House of Representatives as constituted on 14 May 1987 would be unconstitutional, invalid and void;
(5) that further elections for the House of Representatives would be unconstitutional, invalid and void;
(6) that the plaintiff remained a member of the House of Representatives and held the office of Prime Minister;
(7) that the Proclamation of 19 May declaring certain offices vacant was unconstitutional, invalid and void;
(8) that the Governor-General was under a duty to return executive power to the Ministers since the state of emergency had ceased upon their release; and to reconvene the House of Representatives;

(9) that the Crown retained no residual power to amend the Constitution by Order in Council;

(10) that the executive powers of the Crown did not include a power to legislate or to authorize appropriation and expenditure of public funds other than in compliance with the Constitution.

The defendant applied to strike out the plaintiff's statement of claim on the ground that it was frivolous, an abuse of process, and disclosed no reasonable cause of action. At the hearing, only the allegation of no reasonable cause of action was pursued. The defendant argued that the matters at issue were not justiciable.

HELD:

(1) The Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed: it must be shown that no cause of action exists: *l.* 200. *Attorney-General* v. *Shiu Prasad Halka* (1972) 18 Fiji L.R. 210 applied; *Dyson* v. *Attorney-General* [1911] 1 K.B. 410; (1911) 80 L.J.K.B. 531; (1911) 103 L.T. 707; (1910) 27 T.L.R. 143; *Dreyfus* v. *Peruvian Guano Company* (1889) 41 Ch.D. 151; (1889) 58 L.J. Ch. 471; (1889) 60 L.T. 216; (1889) 5 T.L.R. 323 followed.

(2) The Supreme Court has original jurisdiction in constitutional questions by virtue of section 97(1) of the Constitution, including the discretionary power to make declarations. Section 78(3) of the Constitution, which precluded the Court from inquiring into whether the Governor-General acted upon advice, did not preclude the question of whether any advice was tendered. In any event the present claim raised questions beyond those contemplated by the Constitution itself. It concerned an extraordinary situation in which legislative and executive power had been subverted. Accordingly the first two claims ought not to be struck out: *l.* 280.

(3) As to the third claim (that the House of Representatives stood adjourned), this was a matter within the exclusive cognizance of the House and the Court was not empowered to pronounce thereon. Accordingly this claim ought to be struck out: *l.* 310.
Madhavan v. *Falvey & Ors* (1973) 19 Fiji L.R. 14 applied.

(4) As to the seventh claim, whereby a declaration was sought that the dismissal of certain officers was invalid and that they still held office, this did raise a matter which was not obviously non-justicable, but insofar as the speaker, Deputy-Speaker and Leader of the Opposition were concerned, the claim ought to be struck out since the plaintiff had no interest in their positions: *l.* 380.

(5) As to the ninth claim, for a declaration that the Crown had no power to amend the Constitution by Order-in-Council, this ought to be struck out. It was plain that the Queen, who could do no wrong, would not purport to alter the provisions of statute law by other than statutory means. The ninth declaration sought assumed that the Queen would purport to act unlawfully and was clearly unsustainable and ought to be struck out: *l.* 470.

(6) All other claims ought not to be struck out since they involved complicated and difficult questions of law and the power to strike out ought not to be

exercised to deprive the plaintiff of his right to seek the relief *l.* 350, *l.* 400 & *l.* 510.

OBSERVATION: Section 18(6)(b) of the Constitution did not appear to contain provision for the proclamation of a state of emergency by the Governor-General on 14 May 1987, notwithstanding the Proclamation's purported reliance upon it (see *l.* 400).

EDITOR'S OBSERVATIONS: A most useful review of the reserve or residual powers of a Governor-General is the judgment of Nedd C.J. (Granada) in *Mitchell & Ors* v. *Director of Public Prosecutions* [1985] L.R.C. (Const.) 127. The learned judge there referred to, regarding times of emergency, the maxim *salus populi suprema lex*, and the words, attributed to Oliver Cromwell, "If nothing should be done but what is according to law, the throat of the nation might be cut while we sent for someone to make a law."

Other cases mentioned in judgment:

Attorney-General v. *De Keyser's Royal Hotel* [1920] A.C. 508; [1920] All E.R. Rep 80; (1920) 89 L.J.Ch. 417; (1920) 122 L.T. 691; (1920) 36 T.L.R. 600

Attorney-General of the Duchy of Lancaster v. *London & North Western Railway Co.* (1892) 3 Ch. 274; (1892) 62 L.J.Ch. 271; (1892) 67 L.T. 810

In re Bamato [1949] Ch. 258 (C.A.)

Blackburn v. *Attorney-General* [1971] 1 W.L.R. 1037; [1971] 2 All E.R. 1380

Eastern Trust Co. v. *McKenzie, Mann & Co. Ltd.* [1915] A.C. 750; [1914-15] All E.R. Rep. 1267; (1915) 84 L.J.P.C. 152; (1915) 113 L.T. 346; (1915) 31 W.L.R. 248 (P.C.)

Gouriet v. *Union of Post Office Workers* [1978] A.C. 435 [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70 (H.L.(E.))

Hobson v. *Pare* [1899] 1 Q.B. 457; (1899) 68 L.J.Q.B. 309; (1899) 15 T.L.R. 171

Peru, Republic of v. *Peruvian Guano Co. Ltd.* (1887) 36 Ch.D. 489; [1886-1890] All E.R. Rep. 366; (1887) 57 L.T. 337; (1887) 3 T.L.R. 848

Application

The Attorney-General, defendant, applied under Order 18, rule 19 of the Rules of the Supreme Court to strike out the action brought by originating summons by the plaintiff, Dr Timoci Uluivuda Bavadra, seeking declarations.

J. Cameron for the plaintiff

G. Newman Q.C. and *A. Qetaki* for the defendant

ROONEY J.

Judgment:

This is an application by the defendant to strike out and dismiss the plaintiff's action which was commenced by originating summons on 29 May 1987. The defendant claims that the action discloses no reasonable cause of action, is frivolous or vexatious or is otherwise an abuse of the process of the Court.

The originating summons seeks certain declarations. They are all directly concerned with the present constitutional crisis arising from the action taken by the

Royal Fiji Military Forces on 14 May 1987, when the plaintiff, members of his Cabinet and members of the House of Representatives who formed his majority in Parliament were arrested and detained. The plaintiff in these proceedings seeks to challenge the validity of measures taken thereafter by the Governor-General.

These included a Proclamation dated 19 May 1987 dissolving Parliament and declaring vacant the office of Prime Minister then held by the plaintiff and other high offices in the Executive and Legislative branches of Government. Other declarations sought relate to the present state of emergency, the residual powers of the Crown in Fiji and the authority of the Governor-General to legislate.

150 The application is made under Order 18, rule 19, of the Rules of the Supreme Court and the inherent jurisdiction of the Court. It is aimed against the "originating summons and proceedings herein" and the order sought by the defendant is that the action be dismissed with costs. The application is not supported by an affidavit, but this is not a necessary requirement where the grounds upon which it is based are that the summons discloses no reasonable cause of action: *Republic of Peru* v. *Peruvian Guano Co. Ltd.* (1887) 36 Ch.D. 489; [1886-1890] All E.R. Rep 366; (1887) 57 L.T. 337; (1887) 3 T.L.R. 848.

This is probably the most significant and important action ever brought before any court in Fiji. To claim that it is frivolous, vexatious or an abuse of the process of 160 the Court is entirely inappropriate. Mr Newman, who argued the application, made no submission in favour of these propositions and confined his argument to the only pertinent issue, namely, whether the plaintiff has a reasonable cause of action.

It is well settled law that an application of this nature can only succeed where it can be clearly seen that the claim is obviously unsustainable: *Attorney-General of the Duchy of Lancaster* v. *London and North Western Railway Co.* (1892) 3 Ch. 274; (1892) 62 L.J. Ch. 271; (1892) 67 L.T. 810. In *Dyson* v. *Attorney-General* [1911] 1 K.B. 410; (1911) 80 L.J.K.B. 531; (1911) 103 L.T. 707; (1910) 27 T.L.R. 143 it was held by the Court of Appeal that the corresponding rule then extant in England was never intended to apply to any pleading which raises a question of general 170 importance or serious questions of law. Fletcher Moulton L.J., at p. 418 (K.B.); pp. 535-536 (L.J.K.B.); p.710 (L.T.) said:

> Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide 180 region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the

plaintiff has no appeal as of right from the decision of the judge at chambers in
190 the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. To my mind it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

I am bound by the decision of the Court of Appeal in the *Attorney-General* v. *Shiu Prasad Halka* (1972) 18 Fiji L.R. 210, wherein it was held that the power to strike out is one which is to be sparingly used and is not appropriate to cases involving
200 difficult and complicated questions of law.

I am not required to try any issue at this hearing. All I have to decide is whether there is an issue to be tried.

It must be clear beyond doubt that the plaintiff has no reasonable cause of action. If the relief claimed in an action is one which a court has no power to grant it should not be entertained: *Dreyfus* v. *Peruvian Guano Company* (1889) 41 Ch.D. 151; (1889) 58 L.J. Ch. 471; (1889) 60 L.T. 216; (1889) 5 T.L.R. 323. It is not enough for the defendant to show on this application that the plaintiff's case is weak and unlikely to succeed. He must demonstrate by irrefutable argument that no cause of action exists. For instance, a court will strike out an action for libel where the pleadings
210 disclose that the words were used in the course of judicial proceedings and were absolutely privileged: *Hobson* v. *Pare* [1899] 1 Q.B. 457; (1899) 68 L.J.Q.B. 309; (1899) 15 T.L.R. 171.

In this action the plaintiff seeks no relief other than certain declarations and costs. This form of proceedings is specifically permitted by Order 15, rule 16 of the R.S.C. It was the general tenor of Mr Newman's submissions that the declarations sought by the plaintiff are on matters not justiciable by the courts.

The plaintiff seeks:

(1) A declaration that the powers of the Crown to prorogue or dissolve
220 Parliament are fully set out and expressed in the Constitution and there remains no residual power in the Crown to do so.

(2) A Declaration that the purported dissolution of Parliament by the Governor-General by Proclamation dated 19th May 1987 is unconstitutional, unlawful and invalid:

  (a) the plaintiff as Prime Minister not having advised a dissolution, and

  (b) neither of the conditions precedent to a dissolution without the advice of the Prime Minister set out in section 70(1) of the Constitution having been satisfied.

230 The plaintiff, as Prime Minister on 19 May 1987, was affected by the Proclamation of the Governor-General which dissolved Parliament. In affidavits sworn by Temo Sukanaivalu, a Minister in the plaintiff's Government, and by the plaintiff himself, it is alleged that the plaintiff's advice on the question of a dissolution of Parliament had been neither sought nor given prior to the dissolution.

Mr Newman submitted that this raises a question of fact which this Court is asked to decide. He argues that the question raised is one of public as opposed to private rights and beyond the power and jurisdiction of the courts to determine.

Mr Newman cited *Gouriet* v. *Union of Post Office Workers* [1978] A.C. 435; [1977]

3 W.L.R. 300; [1977] 3 All E.R. 70 in which the House of Lords held that in England the superior courts had jurisdiction to declare public rights, but only at the suit of the Attorney-General *ex officio* or *ex relatione*, since he was the only person recognized by public law as entitled to represent the public in a court of justice. The application of that decision to the courts of Fiji depends upon a consideration of the nature of the office of Attorney-General, as established by the Constitution, which would not now be appropriate. In *Blackburn* v. *Attorney-General* [1971] 1 W.L.R. 1037; [1971] 2 All E.R. 1380, also relied upon by Mr Newman, it was held that the courts could not impugn the treaty-making power of the Crown and would only interpret laws when they had been enacted by Parliament. That case does no more than illustrate the limits placed upon judicial power.

The Constitution of Fiji contains express provisions conferring jurisdiction on the Supreme Court. In particular, section 97(1) gives original jurisdiction to the Court in constitutional questions. Any person, who alleges that any provision of the Constitution has been contravened and that his interests are being or are likely to be affected by such contravention, may apply to the Supreme Court for a declaration and for relief. The right conferred by section 97(1) is subject to certain limitations expressed therein, including the provision that it is subject to section 78(3) of the Constitution. I set out the whole of section 78 below:

> 78 (1) In the exercise of his functions under this Constitution or any other law, the Governor-General shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority other than the Cabinet or in his own deliberate judgment.
>
> (2) Where the Governor-General is required by this Constitution to exercise any function after consultation with any person or authority other than the Cabinet, he shall not be obliged to exercise that function in accordance with the advice of that person or authority.
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> (3) Where the Governor-General is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any matter so acted shall not be called in question in any court of law.

Mr Newman submitted that subsection (3) above prohibits the plaintiff from seeking to prove in this case that his advice was neither sought nor given and it prevents this Court from embarking upon such enquiry.

Mr Newman argued that section 78 has its origin in the conventions which, under the unwritten Constitution of the United Kingdom, govern the manner in which prerogative power is exercised. Such conventions are not a source of legal rights and, therefore, are not justiciable. Mr Newman cited the views of learned authors to support his proposition that if the power to dissolve Parliament is vested in the Governor-General, the courts will not enquire into the propriety or impropriety of the exercise of that power, nor go into the question whether or not the action taken was backed by ministerial advice. I do not propose to examine Mr Newman's submission further, not because I consider it to be ill-founded, but, for the reason that it does not appear to be conclusive. Dr Cameron for the plaintiff submitted that

section 78(3), while it precludes a court from considering whether the Governor-General has acted on advice received, does not expressly prohibit a court from determining the question as to whether the Governor-General received advice upon which he could or should have acted.

Furthermore, the Supreme Court may have to determine what powers the Governor-General retained after the abduction of the plaintiff and his Cabinet and in what circumstances and for what purposes he could exercise any such powers. This is not a case in which the Supreme Court is called upon to adjudicate questions arising out of constitutional issues contemplated by the Constitution itself. The present action depends upon an extraordinary situation in which the executive and legislative institutions founded in the Constitution have been effectively subverted. It raises difficult and complicated questions of law and I decline to strike out the plaintiff's claim.

The third claim is of the plaintiff for:

> A declaration that the session of the House of Representatives which was forcibly and unlawfully interrupted on 14th May 1987 stands adjourned.

This declaration could only be made if the previous two issues were decided in favour of the plaintiff. I am not certain how a declaration as to the state of business in the House of Representatives would be of assistance to the plaintiff.

Although Mr Newman contented himself with a general submission that the declaration sought is manifestly outside the Court's power to grant, I do not think there can be any doubt about the matter. In *Madhavan* v. *Falvey & Ors* (1973) 19 Fiji L.R. 140 the Court of Appeal held that the House of Representatives has exclusive control over its own internal proceedings under the Constitution of Fiji (section 54(1)).

The state of business in the House of Representatives is a matter for that House to decide if and when it convenes. It is not a matter upon which the Supreme Court is empowered to pronounce. No useful purpose would be achieved by raising that issue in the present action and I therefore strike out the relief claimed under the third declaration sought in the originating summons.

The fourth and fifth claims made by the plaintiff are for:

(4) A declaration that in the absence of a lawful and valid dissolution of the House of Representatives, any alteration of the Constitution of Fiji by the House of Representatives other than as presently constituted would be unconstitutional, invalid and void.

(5) A declaration that in the absence of a lawful and valid dissolution of the House of Representatives any future elections to the membership of the House would be unconstitutional, invalid and void.

It is objected that these claims are concerned with the future and not the existing situation. If Parliament has not been validly dissolved they do not arise for consideration at all. There is no premise of a present intention either to amend the Constitution or to hold elections for a new House of Representatives. All that is advanced is a copy of the Proclamation dated 23 May 1987 made by the Governor-General, which grants an amnesty to Lt. Col. Sitiveni Rabuka and all other persons who may have been implicated in the unlawful seizure of the power of the State on Thursday 14 May. The Proclamation contains the recital:

> AND WHEREAS it is desirable and imperative that the normal system of government be restored and preserved as soon as possible.

The words used in the Proclamation do not suggest that it is the intention of the Governor-General to exercise whatever authority is vested in him in a manner that could be regarded as unconstitutional, invalid or void.

The power of the Court to make binding declarations of right is discretionary. It has been held that there is no jurisdiction in the Court to make a declaration in respect of a purely hypothetical question that might never arise: *In re Barnato* [1949] Ch. 258.

However, I do not perceive it to be my duty to make a finding that this Court would not in any circumstances make the declarations sought by the plaintiff. As I have said earlier, the power to strike out is to be sparingly used and I do not feel impelled to deprive the plaintiff of his right to seek this particular relief in these proceedings.

The sixth claim is for:

> A declaration that the Plaintiff remains an elected member of Her Majesty's House of Representatives and continues to hold the office of Prime Minister.

Mr Newman submitted that this is a non-justiciable issue and that no basis has been established for the claim. He argues that section 74 of the Constitution, which stipulates the events upon which the Governor-General must or may remove a Prime Minister from office, is not exclusive. He submitted that the Governor-General may exercise the prerogative power of the Crown to dismiss at his pleasure.

Mr Newman further submitted that there is no private right to the office of Prime Minister. In so far as it may be a public right, the question as to who should be Prime Minister and as such in political control of the Government of the nation is not a matter which the courts may decide.

Once again, I consider that it is not appropriate for me to express an opinion on the merits of these submissions. I consider that this grave question should be left to the Court to determine. I decline to strike out the claim.

The seventh claim reads:

> A declaration that the Proclamation dated 19th May 1987 purporting to declare certain offices vacant is unconstitutional invalid and of no effect and that the membership of the House of Representatives, the offices of Speaker of the House, Deputy-Speaker of the House, Prime Minister, Attorney-General and Leader of the Opposition, together with the allocated Ministerial portfolios, remain as they stood as of 14th May 1987.

It would appear that the reference to the membership of the House of Representatives is already covered by the second declaration sought and it is unnecessary to repeat it. The plaintiff as Prime Minister may have an interest in the office of Attorney-General and the members of his Government, but, insofar as the Proclamation dated 19 May 1987 declared the offices of Speaker, Deputy-Speaker and Leader of the Opposition vacant, these are not the concern of the plaintiff. It is for the dispossessed holders of these offices to assert their claims if so inclined.

Again, it is submitted that the content of the Proclamation is non-justiciable, presumably on the same grounds as were advanced in respect of the sixth claim. I am not prepared to hold that this Court is precluded from considering the nature,

purpose and effect of the whole or any part of the Proclamation of 19 May and deciding upon its validity, purport or meaning. I decline to strike out this claim.

The eighth claim is for:

> A declaration that the state of emergency created by the unlawful and forcible abduction and detention of members of Her Majesty's Government having ceased with their release, it is the constitutional duty of the Governor-General to return executive power to Her Majesty's democratically elected Government and to call for the House of Representatives to reconvene.

The Proclamation of the state of emergency was made by the Governor-General on 14 May and it may be assumed that it was issued in consequence of the action taken against the Parliament and elected Government by the military earlier that day. The making of the Proclamation is not challenged in these proceedings. It is stated in the Proclamation that it was made under section 18(6)(b) of the Constitution. I make the observation that the section in question defines the meaning of the phrase "period of public emergency" and does not appear to contain words which enable the Governor-General to make such a Proclamation. That power may be found in some other law. The duration of the period of public emergency is made an issue in this claim.

Mr Newman again submitted that the allegation that the Governor-General was under some duty to return the executive power to the elected Government is not a question for the courts to determine. That may be the case, but, I am not persuaded that the plaintiff should be precluded from making this case in this action. I decline to strike out the plaintiff's claim.

The ninth claims reads:

> A declaration that there remains in the Crown no residual power to amend the Constitution of Fiji by Order in Council and that the Constitution may be validly and lawfully amended only by strict compliance with the provisions of section 67 of the Constitution.

The Crown in this context clearly refers to the Sovereign. The claim appears to be based on some apprehension that Her Majesty retains a right by virtue of her being the Head of State to amend the Constitution of Fiji.

There is a widespread misunderstanding of the powers of the Queen, not only in this Dominion but elsewhere. What is known to constitutional lawyers as the Royal Prerogative has been described by Dicey as "both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." (See *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* [1920] A.C. 508, 526; [1920] All E.R. Rep. 80, 86; (1920) 89 L.J. Ch. 417, 423; (1920) 36 T.L.R. 600, 604, per Lord Dunedin.

The courts have jurisdiction to inquire into the existence or extent of any alleged prerogative. If any prerogative is disputed, the courts must decide the question whether or not it exists, in the same way as they decide any other question of law *(Halsbury's Laws of England,* 4th ed., vol. 8, para. 890).

In Fiji, Her Majesty appoints the Governor-General who shall hold office during Her pleasure (Constitution, section 27). The Parliament of Fiji consists of Her Majesty, a House of Representatives and a Senate (section 30). The Governor-General assents to the laws passed by both Houses of Parliament on behalf of Her

Majesty (section 53(1).

The executive authority of Fiji is vested in Her Majesty, but, save as otherwise provided in the Constitution, it is exercised on her behalf by the Governor-General (section 72). The Governor-General exercises the prerogative of mercy in Her Majesty's name and on her behalf (section 88). The Queen is vested with certain functions in regard to the removal of the Judges of this Court and the Court of Appeal. She acts on the advice of the Judicial Committee of the Privy Council. Happily, Her Majesty has not been called upon to exercise her authority in respect of any of her Judges in Fiji. Whenever Her Majesty is required to act in relation to the powers vested in her by the Constitution she does so on the advice of her Ministers in Fiji or on the advice of the Judicial Committee as the case may be. The Queen does not act in accordance with her personal preferences. The Queen is a constitutional monarch in Fiji as she is in the United Kingdom and in her other Realms and Territories.

Constitutional law clothes the person of the Sovereign with supreme sovereignty and pre-eminence. She is, however, bound by the terms of her coronation oath and the maxims of the common law, to observe and obey the law *(Halsbury,* vol. 8, para. 894). The Queen may not suspend laws or the execution of laws without the consent of Parliament *(Halsbury,* vol. 8, para. 912). That means, in the case of Fiji, the Parliament established by the Constitution. The Queen may not dispense with laws. She cannot, therefore, alter or repeal the Constitution of Fiji, which is the supreme law (section 2) or any part of it.

> It is the duty of the Crown and every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in case of doubt to ascertain the law in order to obey it, not to disregard it. *(Eastern Trust Co.* v. *McKenzie, Mann & Co. Ltd.* [1915] A.C. 750, 759; [1914-15] All E.R. Rep. 1267, 1272; (1915) 113 L.T. 346, 349, per Sir George Farnell.)

Apart from her place as Queen of Fiji under the Constitution, Her Majesty is the fountain of all honour and dignity and she can confer upon any of her subjects any title or dignity at Her pleasure. In general she exercises this power on the advice of her Ministers.

The Queen can do no wrong. It follows that anything done in the Queen's name which is contrary to law will be a nullity and of no effect. This principle applies to any purported exercise of the prerogative by Her Majesty's Governor-General for the Dominion of Fiji, which is subsequently found by the courts to be unlawful or unconstitutional. In the exercise of the prerogative, the Governor-General possesses no greater powers than the Queen herself.

The Queen reigns but does not rule over her subjects. The claim in the ninth paragraph of the summons appears to be based upon a misconception as to the nature and purpose of royal authority. Whatever may have been the power of ancient kings to rule over their subjects and enact measures which had to be obeyed, no vestige of such authority remains in the hands of the Monarch today. It is inconceivable that Her Majesty would in any circumstances attempt to alter the Constitution or the laws of Fiji by means other than those provided by the Constitution itself. The claim made by the plaintiff in these proceedings, which suggests that it could be otherwise, is clearly unsustainable and no useful purpose

could be served by allowing it to proceed to trial and it is therefore struck out.

The final substantive claim of the plaintiff is for:

> A declaration that the executive powers of the Crown under section 72 do not confer a power to legislate and the exercise of that executive power cannot extend to the appropriation and expenditure of public funds other than in with strict compliance with the provisions of Chapter X of the Constitution.

Mr Newman submitted that this is hypothetical, speculative and misconceived.

The main purpose of this action is to challenge the assumption of executive power by the Governor-General. The dissolution of Parliament on 19 May had the effect of rendering inoperative the House of Representatives, one of the constituents of Parliament as provided in section 30 of the Constitution. It is specifically provided that the term of office of a member of the Senate shall not be affected by a dissolution of Parliament (section 47(1)). Whether or not Senators may meet to constitute a Senate is a matter for that body to decide.

The absence of a House of Representatives makes it impossible for Parliament to make laws for the peace, order and good government of Fiji (section 52). More than sixty days have now passed since the date of the dissolution of Parliament and writs for a general election of members of the House of Representatives have not been issued although this is a requirement of section 69(3) of the Constitution. Thus, Fiji is without a legislature and it does not appear to be the present intention to create one in the manner provided in the Constitution. This creates a grave situation which becomes more serious as each day passes and the need arises to obtain supply in order to continue the Government and the services which it provides.

On 18 May the Governor-General promulgated the principal Public Emergency Regulations (L.N. 1186). The Public Emergency (Maintenance of Supplies and Services) Regulation 1987 followed on 12 June. The Public Emergency (Loans to Coconut Oil Makers) Regulations appeared on 19 June. And on 23 June, the Public Emergency (Requisition of Property) Regulations. Further Public Emergency Regulations dealing with price control, petroleum prices and the Fiji National Training Levy were promulgated in June and July. These measures are of a legislative character. It is not for me to say at this time to what extent these Proclamations are within the authority that His Excellency has assumed.

But there can be no doubt that the measures already taken and those which may be in contemplation raise serious and difficult issues which may have to be resolved by this Court either in this or other proceedings. I am not persuaded that the plaintiff should now be prevented from placing them before this Court for consideration and judicial determination and I decline to strike out the claim.

For these reasons I make the following orders:

The relief claimed in paragraphs 3, 7 and 9 is struck out. Leave is granted to the plaintiff to file a new claim to replace paragraph 7 amended so as to bring it into conformity with this ruling. Such amendment must be filed within seven days.

Save as above this application is dismissed.

The costs shall be treated as costs in the cause.

Reported by: P.T.R.