

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT E. 154/94

BETWEEN	RUPERT S. WILMOTT-FRANCIS	APPLICANT
A N D	SIR HOWARD COOKE O.N., G.C.M.G., G.C.V.O.	1ST RESPONDENT
A N D	THE ATTORNEY GENERAL OF JAMAICA	2ND RESPONDENT
A N D	PETER PHILLIPS	3RD RESPONDENT

Emil George, Q.C. & Mrs. J. Mangatal - Munroe instructed by Messrs, Dunn, Cox & Orrett for Applicant.

Dr. Lloyd Barnett & David Muirhead, Q.C. instructed by the Director of State Proceedings for the first respondent.

D. Leys & C. Collman instructed by the Director of State Proceedings for the second respondent.

M. Tenn instructed by Messrs. Playfair, Junor, Pearson & Co. for the third respondent.

Heard: 1st June 1994 and 20th June 1995

Harrison J.

These reasons in writing were promised on the 1st day of June 1994.
This is a preliminary objection on behalf of the first respondent

to an originating summons by the applicant seeking a determination,

1. Whether on a proper construction of the Election Petitions Act as a whole, and in particular section 20 (f) thereof, once an election petition is filed, no action may be taken by Sir Howard Cooke, O.N., G.C.M.G., G.C.V.O., on the advice of the Prime Minister pursuant to section 3 of the Representation of the People Act and section 32 of the Constitution, affecting the seat of the member to whose election the petition relates, until the judge or Court issues a certificate of determination or unless the petition is withdrawn, or a sole petitioner dies and no one is substituted as a petitioner.

AND FOR

2. A declaration that the act of Sir Howard Cooke, O.N. G.C.M.G., G.C.V.O., in purporting to issue his writ of election of a member of the House for Representatives for the Constituency of East Central Saint Andrew to be held.....is illegal and/or void and ought to be set aside."

The first respondent His Excellency, Sir Howard Cooke served a notice of preliminary objection dated the 20th day of May 1994 seeking an order that he be dismissed from the action on the ground that he,

"....has been unlawfully sued and/or cited in his personal capacity and/or has been improperly joined as a party."

The facts relevant are stated hereunder:

One Mr. Arthur Jones was elected as a member of the House of Representatives in respect of the constituency of East Central St. Andrew, at an election held on the 30th day of March 1993. The applicant, who was the unsuccessful candidate for the said seat filed a petition under the Election Petitions Act, on the 23rd day of April 1993, seeking a declaration that because of election irregularities, he the applicant was duly elected and ought to be returned as member, and not the said Mr. Arthur Jones. This petition was left to lie at rest.

On the 25th day of February 1994, Mr. Arthur Jones resigned, on the ground of ill health.

In satisfaction of the requirements, of section 45 of the Constitution of Jamaica, and in accordance with section 3 of the Representation of the People Act and the Second Schedule thereto, His Excellency the Governor General issued a writ of election, as he was directed so to do, by the Honourable Prime Minister of Jamaica. As a consequence, the Returning Officer issued a notice declaring that nomination day would be the 9th day of April 1994, and election day would be the 27th day of April 1994.

Dr. Barnett argued that the Governor-General in an independent state is not liable in his personal capacity in respect of head of state functions performed by him in circumstances in which he has no personal discretion.

A viceroy is unquestionably immune to an action in respect of head of state functions - he has a special immunity-in an **Mostyn v Fabrigas** [1775-1802] All E.R. Rep. 266. The Governor-General in an independent state is in a better position than a viceroy and moreover is superior to a Governor in a colonial state or territory - **Musgrave v Fulido** [1879] 5 App. Cases 102. The Governor-General therefore has immunity from suit. Colonial Governors may be sued for tortious or ultra vires acts or personal contracts - **Hill v Bigge** [1844] 3 Mob. p.c. 454, although they at times enjoy immunity - **Re Benn** [1964] 6 WIR 500.

The Governor-General was held in ~~his personal capacity to be liable~~ to be sued in circumstances of head of state functions performed by him - **Hoychoy vs National Union of Government Employees et al** (1964) 7 WIR 174. Though of persuasive authority, the latter case is in error to treat the Governor-General as if he was a Governor. Where power is conferred on an office and not personally on the holder of the office, it is inconsistent with the constitutional scheme to sue him personally for performance of official functions, which attract an immunity from suit as the representative of the sovereign exercising particular state functions of the highest level. In Canada and Australia, on achieving dominion status, the Governor-General when performing functions of head of state, assumed the status analogous to the monarch in the United Kingdom, **The Government of Canada by Dawson**, 4th Edition and **Australian Constitutional Law by Fajgenbaum & Hanks**.

In pre-Independence Jamaica Constitution 1959, the Governor's authority was of a variable nature. Under the present Constitution section 27, the Governor-General is ".....appointed.....Her Majesty's representative in Jamaica..." He is not now subject to variable instruc-

tions. He performs the functions of Her Majesty in Jamaica; legislative powers are exercisable by the Governor-General in Her Majesty's name. Her Majesty cannot perform such duties nor can she alter the duties performed by the Governor-General. A viceroy acts in the name and on behalf of Her Majesty, but Her Majesty may withdraw certain powers from the viceroy and vest them in others. Powers given to the Governor-General, as head of state, namely, for example, under section 65, calling of general elections, under section 68, the exercise of executive authority by the Governor General on behalf of the sovereign and under section 70 the appointment of minister, could not be altered or varied by Her Majesty.

The Governor-General's true constitutional nature is that he enjoys the immunity - *Wari et al vs Ramoi et al* [1967] LRC (Const) 152.

At common-law the Attorney-General is the proper person to be cited in respect the official acts of the Governor-General who is bound to act on the advice of the Cabinet or the Attorney-General. Under section 45 of the Constitution when a seat is vacant the action of the Governor-General is the exercise of executive authority, as if by Her Majesty in her right - by her Government in Jamaica, under section 32, - the action of the Crown.

In conclusion he said that in a declaratory action, the proper party is the Crown and by section 3 of the Crown Proceedings Act, proceedings by or against the Crown are instituted in the name of the Attorney-General. The Governor-General is not a necessary party to the suit, he is not exercising any personal power nor does he have any legal or personal interest - he acts on official advice.

Mr. George for the applicant conceded and supported Dr. Barnett's arguments concerning the dignity of the office.

Section 34 of the Constitution of Jamaica provides that the Parliament of Jamaica shall consist of:

"...Her Majesty, a Senate and a House of Representatives."

Her Majesty, however, enjoys immunity from suit in all matters; such immunity is personal to the sovereign. Closely associated to this is the further rule that the sovereign can do no wrong. The first rule is a remnant of early English legal history, in that the feudal lord could not be sued in his own Court. Incidentally, the Crown was the largest feudal landlord.

The author, in **Wade & Phillips' Constitutional Law, 5th Edition**, at page 332, said,

"There were two main rules which governed until 1948 the complicated law relating to the liability of the Crown and its servants:

1. The rule of substantive law that the King could do no wrong.
2. The procedural rule that the King could not be sued in his own Court - a rule derived from the feudal days when a lord could not be sued in his own court."

In **Blackstone's Commentaries (12th Edition) Vol. 1**, it was said, of the Sovereign's immunity, at page 242,

"...no action can be brought against the King, even in Civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power....."

Consequently, superior officers of the Crown could not be sued for wrongs committed by them during the course of their employment, prior to 1948. The aggrieved citizen's only recourse was by way of petition of right, to the Sovereign. After 1948, the Crown incurred liability for the wrongful acts of public officials; the person of the Sovereign still enjoyed immunity from suit and liability -Crown Proceedings Act 1947 (England).

The Governor, the Sovereign's representative in a colonial territory, did not enjoy the Sovereign's immunity. He could be sued for wrongs, allegedly committed, and was only freed from liability in circumstances where his action was interpreted as an executive act in the course of

the performance of his public duty.

In **Mostyn vs Fabrigas** [1775 - 1802] All E.R. Rep. 266, the defendant, Governor of Minorca, Spain, then a British possession, was held liable to the plaintiff, in damages for assault and false imprisonment, by his act of banishing him from the island of Minorca.

The defendant pleaded that as Governor, he was entitled to do so, because the plaintiff was guilty of riot, sedition and endeavouring to raise a mutiny. Referring to the status of the governor for his acts, Lord Mansfield, C.J. said at page 270,

"...to lay down in an English Court of justice such a monstrous proposition that a Governor acting by virtue of letters patent under the Great Seal is accountable only to God and his own conscience, that he is absolutely despotic, and can spoil, plunder and affect His Majesty's subject both in their liberty and property with impunity, is a doctrine that cannot be maintained."

He did confirm that if the Governor sought to rely on the sacredness of his person as Governor, he should plead it setting forth his commission as special justification.

In **Musgrave vs Fulido** [1879] Appeal Cases 102, the defendant, Governor of Jamaica was held liable in trespass for seizing and detaining the plaintiff's schooner, which had put into Kingston for repairs. The Governor, argued that the seizure was done by him as Governor in his discretion, and was an act of state.

In response to the dictum of Lord Mansfield, C.J. in **Mostyn v Fabrigas**, supra, where he said, at page 269,

"...it is truly said that a Governor is in the nature of a viceroy, and therefore, locally during his Government no civil or criminal action will be against him..."

Sir Montague E. Smith said, in **Musgrave v Fulido**, supra, at page 111,

"...the Governor of a Colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His

He went on to hold that the Court should determine the "true character of the acts done by a Governor" and if the act is an act of state done under the authority of the Crown, it would be a good defence.

The cases therefore do not seem to bestow on the Governor an immunity from suit. That immunity resides in the sovereign.

Wooding, C.J. in *Hochoy vs N.U.G.E.* (1964) 7 WIR 174, held that the Governor-General of Trinidad and Tobago, in appointing a commission of enquiry under a statute, the Commission of Inquiry Ordinance, when sued in challenge to the validity of such an appointment, could not claim to be immune from suit, because, though he was the Queen's representative, immunity from suit was personal to the sovereign and did not extend to her representative. In his judgment, Wooding, C.J., confirmed that the viceroy did not enjoy an immunity from suit, that in the case of *Sullivan v Earl Spencer* (1872) I.R. & C.L. 173, the Lord Lieutenant, as viceroy, was held, immune from liability when it was proven to the court that his act complained of, was a positive act of state, and that the cases reveal that such latter acts of state, committed by officers of state, are usually held by the courts as immune from liability, but not immune from suit. He however concluded, by suggesting that,

"...In future the practice be followed of naming the Attorney-General as defendant whenever the validity of any act of state done by the Governor-General is being called in question..... the ordinary civilities dictate (that)..."

What therefore is the true status of a Governor-General in an independent state? It seems to be accepted that the courts of that particular state should determine the status, rights and immunities of its Governor-General.

The former colonial territories of the Commonwealth of Australia

and the Dominion of Canada, on achieving independent status re-assessed the status of the Governor-General in the new form of Government, in relation to the powers previously exercisable by the monarch.

The author, in the Government of Canada by A. McGregor Dawson, 4th Edition, said at page 153,

"Executive power in Canada has always borne a strong resemblance to the executive power of Great Britain from which it is in large measure derived. The monarch, as head of the state, is represented in Canada by the Governor General; and the general position of the latter corresponds today, more than ever before, to that of the sovereign.... The historical monarch, in short strengthens not only the modern monarch but her representative as well; the prestige, the dignity, the antiquity, the past record of the monarchy are all transferred in some measure and help substantially to maintain the repute and vitality of the office of Governor General His powers originally autocratic but progressively diminishing with advance in self government, were by turn of this century beginning more and more to resemble those of the monarch, and the time was clearly not far distant when the identification would be virtually complete."

The author confirmed that executive power in Canada vested in the Crown, which power sprung from statute and the prerogative, and that the prerogative powers are delegated by the Queen on the advice of the Canadian Cabinet to her representative, the Governor-General.

He however cautioned, that the Governor-General is not in the same position as the Sovereign, in the exercise of certain prerogative powers.

The Governor-General in the Commonwealth of Australia, appointed by the Queen on the advice of the Australian Ministers, is vested with and exercises the executive power of the Commonwealth, subject to the Constitution, on the advice of the Ministers of Government. He is Her Majesty's representative in the Commonwealth. See the Commonwealth of Australia Constitution Act 1900.

By Letters Patent dated the 29th day of October, 1900, as amended, and Royal Instructions, specific assignments of the powers of the Sovereign are given to the Governor-General. This is an acknowledgement that no general assignment was made by the operation of the Constitution. The exercise of the Sovereign's prerogative powers by the Governor-General is unclear.

The authors in, Australian, Constitutional Law, Cases, Materials and Text, by Fajeengenbaum and Hanks said, of the assignments, at page 34,

"Section 61 of the Constitution throws some doubt on the necessity of such assignments for, in quite general terms, it vests the 'executive power of the Commonwealth' in the Queen and declares that such executive power is exercisable by the Governor-General."

They took the view that much of what appears in the said Letters Patent is "superfluous and that the Governor-General probably has the authority "to exercise any of the powers of the Crown in respect of Australia." The said authors concluded, at page 46,

"...it is enough to observe that in all of these cases, the courts were prepared to accept that the Governor-General, on behalf of the Executive Government of the Commonwealth, could exercise substantial aspects of the royal prerogative, despite the absence of any express transfer or assignment of those powers by the Queen under section 2 of the Constitution."

The cases referred to were, the Australian case of Australian Communist Party vs Commonwealth (1900) 83 C.L.R. 1, and the Canadian case, Bonanza Creek Gold Mining Co. vs Reg. [1916] 1 A.C. 566; the view held was that executive power was conferred automatically on the Governor-General at the date of the Constitution.

Despite their posture on the assumption of the powers of the sovereign, neither state regarded the Governor-General to have assumed the persona of the sovereign, and so enjoy the privilege of the sovereign's age old immunities.

The Constitution of Jamaica provides for the existence and status of the Governor-General; in section 27.

"27 - There shall be a Governor-General of Jamaica appointed by Her Majesty and shall hold office during her Majesty's pleasure and who shall be Her Majesty's representative in Jamaica."

However, section 32 provides that,

"32 - (1) The Governor-General shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet in the exercise of His functions..."

Excepted are functions exercisable by him, "with the recommendation or advise of, or with the concurrence of, or the consultation with, any person or authority other than the Cabinet...or exercisable...in His discretion."

The comprehensive and official nature of the functions of the Governor-General is portrayed by section 32(6),

"32 (6) -- Any reference in this Constitution to the function of the Governor-General shall be construed as a reference to his powers and duties in the exercise of the executive authority of Jamaica and to any other powers and duties imposed on him as Governor-General by or under this Constitution or any other law."

The Governor-General of Jamaica, although appointed by Her Majesty, performs his functions under the Constitution, principally, on the instructions of the Cabinet. In very few matters has he a discretion of his own and where such discretion exists, his powers are circumscribed - vide section 91 - pardon in capital cases. Her Majesty may not vary his functions nor subject him to direct orders. Prior to Independence 1962, the Governor of Jamaica appointed by Her Majesty to ".....hold office during Her Majesty's pleasure..." was subject to the directives and variable control by Her Majesty.

The Jamaica (Constitution) Order in Council, 1959 (Statutory Instrument 1959 no. 862) dated the 18th day of May 1959, provides, in

paragraph 4,

- "4 - (1) There shall be a Captain-General and Governor-in-Chief in and over Jamaicaappointed by Her Majesty... and shall hold office during Her Majesty's pleasure.
- (2) The Governor shall have such powers and duties as are conferred on him by or under this Order or by other law, and such other powers as Her Majesty may from time to time be pleased to assign to him, and subject to the provisions of the Order and of any law by which any such power or duties are conferred or imposed shall do and execute all things that belong to his office (including the exercise of any powers and the performance of any duties with respect to which he is empowered by this Order to act in his discretion according to such instructions, if any, as Her Majesty may from time to time see fit to give him....."

The Governor-General, in independent Jamaica, unlike the Governor prior to 1962, performs the functions and duties and has the powers of Her Majesty, under the Constitution. He does not however thereby enjoy the historic immunity, personal to the sovereign. The Constitution, does not confer it in express terms. The Courts should therefore decide what is the status and functions of the Governor-General in this respect.

The Court of Appeal, in Papua New Guinea, was faced with the latter question in the case of *Wari et al v Ramoi et al* [1987] L.A.C. (Const) 152. The Court dismissed the appeal against the refusal of the trial judge to restrain the Governor-General from terminating the appellants appointment. The Governor-General under the Constitution of Papua New Guinea, acts on the advice of National Executive Council. The Court, treating the Governor-General as head of state, held that in his official capacity he was immune from personal action.

Kidu, C.J. said of the status of the Governor-General in Papua New Guinea, in rather unflattering terms, at page 156,

"..under...the Constitution the Head of State acts solely on the advice of the N.E.C. or other body designated by written law. He or She does not determine anything. He or she merely affixes the or her signature to documents... The Head of State had no personal power. He or she is a mere figure-head - a rubber stamp is not an inappropriate description of the nature of his or her function.

It would therefore be most inappropriate that an office holder or a person who is a "rubber stamp" be personally taken to court for acting on advice or performing acts in respect of which he or she has absolutely no say legally."

The relevant section of the Constitution of Papua New Guinea is in almost similar terms to that of the Jamaican Constitution.

The Governor-General of Jamaica may be sued in his private capacity for personal affairs.

When he is directed to perform official functions, he has no choice in the matter, nor may he substitute his personal preferences. As inglorious as the description sounds, he is a "figurehead" in this regard. It seems incongruous that he should be seen as incurring liability for acting as he is directed in such circumstances. The Constitution of Jamaica, provides, in section 32(4)

"4 - Where the Governor General is directed to exercise any function in accordance with the recommendation of, or after consultation with, or on the representation of, any person or authority, the question whether he has so exercised that function shall not be enquired into in any court." (emphasis added).

This provision bars a Court from enquiring into the actions of the Governor-General in that context - an immunity from liability. Of course the consequences of his officially directed action are not immune to further examination.

Consequently, a party aggrieved by such action of the Governor-General would not be adversely affected in any way by immunity from suit or liability of the Governor-General.

The Crown Proceedings Act provides, in section 13(2)

"(2) Civil Proceedings against the Crown shall be instituted against the Attorney-General."

When the Governor-General issued his writ of election under section 3 of the Representation of the People act, in satisfaction of the requirements of section 45 of the Constitution he was performing an official act, on the directive of the Hon. Prime Minister, an executive function. He had no power or discretion to do otherwise than to comply with the directive. He was performing the functions and duties of her Majesty, as her representative in Jamaica. On a challenge of the issue of such a writ of election, it is unnecessary to sue the Governor-General, in pursuance of one's claim - see section 3 of the Crown Proceedings Act, supra. Furthermore, the status, power and lofty level of the office of Governor-General portrays a constitutional flavour that demands that it be free from suit.

This Court is of the view that the Governor-General is in the circumstances of his office, in the performance of his duties as Her Majesty's representative in Jamaica, under the said Constitution, immune from suit.

Accordingly, the preliminary point succeeded. ~~It was~~ ordered that, the 1st respondent be dismissed from the suit herein - no order as to costs.

I am grateful to Dr. Mervyn Farnett for his submissions in this matter and apologize for the delay, in putting these reasons in writing, due to an indisposition.

⑧ Bonoga Creek Gold Mining Co.
v Reg [1916] 1 A.C. 566

- Conferred to
- ① Masgrove v Fabrigas [1915-1922] All R.P. Rep 266
 - ② Masgrove v Fulda [1879] 5 App. Cas 102
 - ③ Stell v Lidge [1847] 3 Moo & C. 454
 - ④ Re Benn [1967] 6 W.L.R. 500
 - ⑤ Hochy v National Union of Government Employees [1966] 7 W.L.R. 170
 - ⑥ Wari et al v Rampal et al [1987] L.R.C. (Const) 152
 - ⑦ Australian Communist (sic) Party v Commonwealth