

AUSTRALIAN AIRPORT SERVICES PTY. LTD. v. THE COMMONWEALTH AND S.56 OF THE JUDICIARY ACT

The case of *Australian Airport Services v. The Commonwealth*¹ provides a convenient opportunity for further speculation about the scope of s.56 of the Judiciary Act, 1903 (Cth.). A.A.S. had leased part of an airport terminal building from the Commonwealth under a lease which allowed it on termination to "take down remove and carry away all fixtures and improvements and additions . . . which the tenant has . . . erected or constructed upon the demised premises . . ." When A.A.S. attempted to exercise this privilege, the Commonwealth prevented it from doing so; it thereupon sued the Commonwealth in the New South Wales Supreme Court for a declaration that it was entitled to remove its fixtures, etc. The Commonwealth applied to have the plaintiff's summons set aside on the ground that the Commonwealth was not amenable to such a suit.

Now if the lessor had been a private person, there is no doubt that the suit would have succeeded. Likewise, there appears at first blush to be no difficulty at all in A.A.S. maintaining its action against the Commonwealth, because it is undisputed that the Commonwealth can be sued in contract and tort, within one or both of which areas the plaintiff's action undoubtedly fell. However, when we read the report of the case, we are confronted at the outset by the following statement in Yeldham J.'s reasons for judgment:²

"the defendant argued and . . . the plaintiff conceded that s.56 of the Judiciary Act 1903-1973 did not confer jurisdiction upon this court to make a declaration as sought by the plaintiff as there was not here any 'claim against the Commonwealth, whether in contract or in tort'."

How could this argument and concession have been made? Later in his reasons Yeldham J. gives us the answer: s.56 of the Judiciary Act "appears to contemplate a claim *for the recovery of damages* in contract or in tort."³ The argument, which was conceded by the plaintiff and which seems to have found favour with the judge, must have been that, although the Commonwealth had submitted itself to actions for damages by s.56, it had not submitted itself to actions for declarations, because bringing the latter type of action was not "making a claim" within the meaning of s.56.

Having made the concession which it had, the plaintiff now felt obliged to point to some other provision by which the Commonwealth had submitted itself or had been submitted to actions of the type the plaintiff had initiated. Relying on the reasoning in the old case of *Commonwealth v. N.S.W.*,⁴ it therefore seized upon s.75(iii) of the Constitution. It was argued that this provision, by conferring jurisdiction on the High Court in all matters in which the Commonwealth is a party, had impliedly submitted the Commonwealth to, *inter alia*, suits of the type the plaintiff had initiated and that jurisdiction in such suits was shared with State courts by virtue of s.39(2) of the Judiciary Act. The Court accepted this argument and made the declaration sought.

1. (1976) 10 A.L.R. 167.

2. *Id.*, 169.

3. *Id.*, 171 (emphasis added); cf. 172.

4. (1923) 32 C.L.R. 200. That the relevant reasoning was *obiter* was pointed out by Dixon, K.C., (as he then was) in his evidence before the Royal Commission on the Constitution. See its *Report* (1929), 103. He repeated this point in *Werrin's* case (1938) 59 C.L.R. 150, 165-7, referred to by Yeldham J. at 10 A.L.R. 167, 171.

It is submitted that, while the Court was correct in holding that the action could be maintained, the reasoning by which it reached this result was wrong. Not much need be said about the second part of the reasons for judgment. Yeldham J. himself acknowledged that the notion that the words of s.75(iii) of the Constitution were more than merely jurisdictional, but somehow affected the Commonwealth's liability to suit, had been frequently criticized. In fact, he referred to some (but by no means all) of the High Court cases in which such criticisms had been made.⁵ Had the instant case been heard in the High Court, it is in the highest degree improbable that that Court would have interpreted s.75(iii) as Yeldham J. did.

Unlike the second part of the reasons for judgment, the first part was not untenable from the outset in the face of the authorities, although it was just as untenable in principle. This first part, as had already been mentioned, was that part of the reasons in which, without reference to any supporting authorities, Yeldham J. said that s.56 of the Judiciary Act did not authorize actions for declarations against the Commonwealth. Why should the Commonwealth be thought to have been prepared by the enactment of the section to allow itself to be sued for damages, but not for a declaration in situations in which damages would have been obtainable? Surely, its acceptance of the former, more onerous, liability would suggest its concurrent acceptance of the latter, less onerous, liability.⁶ Even if the conclusion has some slight air of plausibility when s.56 is looked at in isolation, that must be completely dissipated when s.56 is read in the light of s.64. That section provides:

In any suit to which the Commonwealth . . . is a party, the rights of the parties shall as nearly as possible be the same, and judgment may be given . . . as in a suit between subject and subject.

Thus it is submitted that the plaintiff's concession regarding s.56 was unwise and that it need not have introduced s.75(iii) of the Constitution into the argument at all. It is also submitted that Yeldham J.'s conclusion that s.56 does not authorize declaration actions does not constitute a precedent for *stare decisis* purposes, based as it was on a party's concession.⁷

One further matter may be mentioned. His Honour expressed the view that s.56 provided for the making of claims against the Commonwealth in contract and tort only.⁸ He cited no authority for this proposition, although some does exist.⁹ This approach to s.56 had previously been criticized by Hogg,¹⁰ on the basis that the words "whether in contract or in tort" should be interpreted as merely illustrative rather than exhaustive, the better to accord with the legislative intention.

5. *Ibid.* For further references see Hogg, *Liability of the Crown* (1971), 216 n.9. In their *Annotated Constitution of the Australian Commonwealth* (1901), 772, Quick and Garran gave the contemporaneous understanding of s.75(iii):

"This sub-section, like the others, confers a *jurisdiction* only, not a right of action. It does not enable actions to be brought . . . against the Commonwealth, but only provides that, where any such action lies, the High Court shall be a competent court of original jurisdiction (emphasis in original).

6. Cf. *Commonwealth v. Woodhill* (1917) 23 C.L.R. 482, 488 *per* Barton J.:

"In that section [*viz.*, Judiciary Act, s.56] 'making any claim' clearly means having any cause of action . . ."

7. *Joscelyne v. Nissen* [1970] 2 Q.B. 86, 98-99 (C.A.).

8. (1976) 10 A.L.R. 167, 169.

9. See Hogg, *op. cit.*, 142-143 referring to *Washington v. The Commonwealth* (1939) 39 S.R. (N.S.W.) 133, 141; *Froelich v. Howard* [1965] A.L.R. 1117 (Vic. C.C.). Reference can also be made to *The Commonwealth v. Woodhill*, (1917) 23 C.L.R. 482, 488, where Barton J. implicitly accepts this view.

10. *Op. cit.*, 143.

“It would be very strange if the Commonwealth Parliament, at the same time as it extended the liability of the Commonwealth to claims in tort for which the Crown at common law was not liable, excluded liability for some claims for which the Crown at common law was liable. It is surely true that one purpose of the Judiciary Act was to permit and facilitate suits against the Commonwealth . . . and its provisions should be read in the light of that purpose. It is submitted, therefore, that the claims which may be brought against the Commonwealth . . . are not confined to claims in contract or in tort.”¹¹

Although Hogg did not refer to the relevant Parliamentary debates in support of his contention, they certainly do support it, as will be seen shortly.

Now s.56 of the Judiciary Act was not the first provision to deal with claims against the Commonwealth. It was preceded by s.2(1) of the Claims against the Commonwealth Act, 1902 (Cth.), which began with the words, “Any person making any claim in contract or in tort against the Commonwealth may . . .” According to Deakin,¹² the Attorney-General of the day, the Claims against the Commonwealth Act was proposed by the government as a direct result of the decision of the New South Wales Supreme Court in *Hannah v. Drake*.¹³ In fact, the bill’s introduction succeeded the judgment by a mere thirteen days.¹⁴ In that case, an action for damages against the Commonwealth alleging vicarious liability for the negligence of some of its servants, the plaintiff had been non-suited because of the absence of such a statute.¹⁵

As he was piloting the bill through the Senate, Senator O’Connor, then Vice-President of the Executive Council and soon to become one of the three original judges of the High Court, made reference on a number of occasions to the effect of the words “in contract or in tort” in cl.2(1). On the first occasion, he said that “[e]very cause of action in which one seeks a remedy in damages, comes under the definitions of contract and tort.”¹⁶ Later he expressed himself somewhat more elegantly, but to similar effect, when he said,

“The clause . . . includes every case in which there is any kind of claim for damages . . . We are willing that, whenever a wrong done is reparable in damage [*sic*], the case shall go into court.”¹⁷

Thus the legislative history of this forerunner of s.56 of the Judiciary Act certainly suggests that it was not intended to be interpreted as authorizing claims in contract and tort only.

What of the legislative history of s.56 itself? That section was included in what became Part IX of the Judiciary Act, which was added to the bill at

11. *Ibid.*

12. 12 *Parl. Debs.* (Cth.), 16449 (25th Sept., 1902).

13. (1902) 8 A.L.R. (C.N.) 69.

14. Judgment in the case was delivered on 12th Sept., 1902.

15. Once the bill became law, Hannah began another action against the Commonwealth, which was successful. See *Hannah v. Dalgarno* (1903) 3 S.R. (N.S.W.) 494 (F.C.); (1903) 1 C.L.R. 1 (H.C.). In neither of these reports is there any indication that the Commonwealth argued the non-retrospectivity of the Claims against the Commonwealth Act. However, the Commonwealth did take that point in *Gyton v. Outtrim* (1904) 29 V.L.R. 646 (S.C.), and the Court accepted it. There is no indication in the report that *Hannah v. Dalgarno* was referred to.

16. 12 *Parl. Debs.* (Cth.), 16716 (10th Oct., 1902).

17. *Id.*, 16718.

the committee stage in the House of Representatives.¹⁸ Presumably, the government had initially forgotten about the need for it, a need magnified by the fact that the Claims against the Commonwealth Act had been expressed in s.8 thereof to expire at the end of 1903. It was accepted in both the House¹⁹ and the Senate²⁰ without comment. The legislative history of s.56 of the Judiciary Act thus provides no reason whatever to assume that the reference to claims in contract and tort was intended to be any more limiting than had been the reference to such claims in s.2(1) of the Claims against the Commonwealth Act.

By way of summary, then, it is submitted that s.56 of the Judiciary Act authorizes damages claims of all types against the Commonwealth and that it also authorizes declaration claims in lieu of such damages claims. To the extent that the *A.A.S.* case comes to contrary conclusions, it is submitted that it was wrongly decided.

*Leslie Katz**

18. 14 *Parl. Debs.* (Cth.), 1537 (30th June, 1903).

19. *Ibid.*

20. See, especially, the committee stage at 15 *Parl. Debs.* (Cth.), 3171 (6th August, 1903).

* Senior Lecturer in Law, the University of Sydney.