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THE SUPREME COURT OF
WESTERN AUSTRALIA

1955 of 2007

BRIAN WILLIAM SHAW

and

ATTORNEY-GENERAL FOR THE
STATE OF WESTERN AUSTRALIA

HEENAN J

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON MONDAY, 22 OCTOBER 2007, AT 10.36 AM

The plaintiff appeared in person.

MR C.P. WAYTE represented the State of Western Australia.

HEENAN J: Yes, Mr Shaw?

SHAW, MR: Your Honour, I represent myself.

HEENAN J: Yes, thank you. Yes, Mr Wayte?

WAYTE, MR: Yes, your Honour. I appear for the attorney-general.

HEENAN J: Yes, very well. Yes, Mr Shaw?

SHAW, MR: Thank you, your Honour. Probably a little bit of business first. I don't wish to make the challenge to a stand or whatever but what I presume to do is - - -

HEENAN J: I'm sorry. I didn't hear what you said.

SHAW, MR: What I presume to do is the challenge will be first and we will set that aside then because these vexatious proceedings essentially emanate from some of the Ridout v Commonwealth Bank matter but a portion of that matter was when I was in front of you as an advocate for them relative to an injunction to that, so I will just state it for the record but leave it laying there. What I propose to do, your Honour, is - - -

HEENAN J: Mr Shaw, I'm not quite sure what it is that you are foreshadowing. Could you excuse me? I have the current influenza and my voice is a bit strange but are you forecasting some kind of challenge to me sitting on this application, because if you are I think you should state it clearly. I realise that you want to deal with it at some other time but it does need to be stated clearly.

SHAW, MR: Thank you. Your Honour, if I could just give you the details of that. So if we go back to the Commonwealth Bank - it was Commonwealth Bank v Ridout. During the course of that the Court of Appeal permitted me to be their advocate. I think it was the year 2002 or 2003, thereabouts. During a period after that there was a time where the bank was beginning to move to take possession and still as their permitted advocate, we lodged an injunction that actually came back in front of you.

HEENAN J: Yes, I have a slight recollection of this, Mr Shaw, not a very good recollection but a very slight recollection.

SHAW, MR: Yes. That injunction was refused which failed to stay the possession et cetera.

HEENAN J: It was something to do about taking off a harvest.

SHAW, MR: All of that.

HEENAN J: Yes.

SHAW, MR: That was all part of that. In actual fact, the other side stole that harvest but a writ of Mandamus did go to the High Court and it's actually still there. It has not been returned because of that particular hearing.

HEENAN J: What has all this got to do with me sitting today?

SHAW, MR: You were that judge, your Honour.

HEENAN J: I was the judge who sat on the application for an injunction.

SHAW, MR: The injunction application.

HEENAN J: Yes.

SHAW, MR: And this is only a flow-on relative to the vexatious but equally the writ of Mandamus still sits at the High Court. They have not dealt with it.

HEENAN J: But a writ of Mandamus against whom?

SHAW, MR: You.

HEENAN J: That's the first I have heard of that.

SHAW, MR: Yes, I know, your Honour. It was to hear the matter correctly but they did send one writ back, which is a writ of prohibition. That was relative to have the Court of Appeal handle it but they never sent the other one back.

HEENAN J: Unless I'm mistaken, Mr Shaw, I have never been served with any such process.

SHAW, MR: Yes. I'm just bringing it up today because it was certainly filed at the High Court but I will put that matter clearly on the record.

HEENAN J: So you don't want me to sit on this application because I sat on an application in the Ridout matter - - -

SHAW, MR: What I'm actually saying - - -

HEENAN J: - - - and because you have got a writ of application - an application for Mandamus against me in the High Court. Is that the position?

SHAW, MR: That's its essence but there's a bigger problem, your Honour. No matter whoever replaces you will walk into the same problem. Not that they have heard the matter direct or been in some form or another involved but in what will unfold in this particular hearing. Essentially the Supreme Court has removed its own

jurisdiction. Now, whoever replaces you will walk into that same issue.

HEENAN J: What I'm trying to do at the moment is to isolate exactly what it is that you say prevents me or should result in me refusing to sit on this application. At the moment it seems to be that I sat on an application by the Ridout family for an injunction which was dismissed and that some time after that, in circumstances which I know nothing about, some kind of process was commenced against me and perhaps others and is still pending in the High Court of Australia. Is that it?

SHAW, MR: It was a writ of Mandamus, your Honour, only naming that particular judgment.

HEENAN J: Yes, but are those the reasons why you submit I should not sit to hear today's application?

SHAW, MR: That would be correct, your Honour, but equally I don't want to throw away the hearing because - - -

HEENAN J: No, I realise that.

SHAW, MR: - - - I have come from Victoria to come to the hearing.

HEENAN J: I just want to be clear that I have identified and understand what are the grounds that you advance to suggest that I'm ineligible to hear this matter.

SHAW, MR: No, there would be one technical point there. If we did not serve you with that writ of Mandamus, effectively it has been filed at the High Court but not served, that would probably be a technical point which would permit the hearing to go ahead.

HEENAN J: Are those the two matters? Only those two matters?

SHAW, MR: Yes, your Honour.

HEENAN J: Yes. I will give a written decision in due course.

SHAW, MR: Thank you, your Honour.

HEENAN J: But I am satisfied that I should continue to sit, notwithstanding the objection that has been made. I will note the objection and, as I say, give reasons later.

SHAW, MR: Thank you. Your Honour, what I wish to do or the order that I wish to do it is I will read from the notice or the grounds relative to the notice of originating motion which - - -

HEENAN J: Mr Shaw, I have the originating motion and I have had that for some days and have read it. This morning for the first time I received a bundle of - I think there are 46 affidavits.

SHAW, MR: Correct, your Honour.

HEENAN J: Strictly speaking, they haven't been filed in sufficient time to be heard or used on this application but I have nonetheless read them. When I say read them, I have read the content of the affidavit and I have satisfied myself of the substance of all the annexures without reading every word of each annexure.

SHAW, MR: Can I go through those?

HEENAN J: What is it that you are seeking to do on this originating motion?

SHAW, MR: I need to be able to file a document which permits me to officially file a document as a vexatious litigant.

HEENAN J: What you are seeking I take it is leave to commence proceedings under the Vexatious Procedures Act. Is that it?

SHAW, MR: Correct. That's right.

HEENAN J: So it's an application under section 6 of the Vexatious Procedures Restriction Act, leave to institute proceedings.

SHAW, MR: Correct.

HEENAN J: Yes, I understand that. And these are the proceedings which you wish to commence.

SHAW, MR: Correct, your Honour.

HEENAN J: They seem to address a distinct number of quite different matters. One is, the first mentioned, the decision of a registrar on the taxation of the bill of costs in two other actions which are presently before the court; secondly, a declaration that any order or judgment made by the registrar, presumably on those taxation costs, is void in law; and, thirdly, a declaration that the removal of the requirement for the oath of allegiance deprives Registrar Powell and other members of his court of jurisdiction, and then there is a list of the amendments and then a declaration that the act of parliament which had the effect of removing the requirement for the oaths or affirmations of allegiance is void; then a declaration that an order for judgment in another matter in which McKechnie J gave a judgment, which is one of the matters before Registrar Powell, is void in law; then a declaration that any order or judgment in yet another matter, a decision of the Court of Appeal, is void in law. That is the second matter before Registrar Powell and I take it that there has been an unsuccessful appeal from the decision of McKechnie J. Am I right about that?

SHAW, MR: It was only leave to file.

HEENAN J: Well, an unsuccessful application to challenge McKechnie J's decision.

SHAW, MR: Correct.

HEENAN J: Then a declaration that on some date in December last year McKechnie J was a named defendant in certain proceedings in Victoria. I am not quite sure what that has got to do with the relief which you are seeking.

SHAW, MR: Can I answer that?

HEENAN J: Yes. I will give you an opportunity in a moment. Then a declaration that after a hearing in Victoria a grand jury application was lodged against McKechnie J in the Full Court of the Supreme Court of Victoria; then in paragraph 11 that in relation to the application in the Court of Appeal and the three judges involved all three were charged and served and heard in the proceedings in the Magistrates Court in Victoria and grand jury applications lodged against them, and you are seeking a declaration that their judgment in the proceedings, which I have already mentioned, is stayed pending the grand jury determination.

SHAW, MR: Correct.

HEENAN J: *Then you seek a declaration that the State Solicitor's Office of Western Australia, because of the amendment to the legislation of 2003 which you are challenging, is unable with lawful authority to seek or receive any moneys without committing a fraud; and then you seek a declaration that the Public Interest Disclosure Act of this state gives immunity against civil or criminal liability for disclosure of public interest information which includes the allegations about the alleged loss of jurisdiction because of the amendment removing the requirement of oaths of allegiance to the crown. Have I understood that correctly?*

SHAW, MR: Correct, your Honour.

HEENAN J: Then you seek a declaration that under the Public Interest Disclosure Act, which I have already mentioned, any type of reprisal is an offence, and you draw attention to certain provisions in that act. Then you refer to the Commonwealth Crimes Act, section 44, dealing with compounding offences, which you simply mention. Then you refer in paragraph 16 to the Commonwealth of Australia Constitution and the provision in the constitution that the act and all laws of the Commonwealth are binding upon all courts, judges and people of every state and territory within the Commonwealth.

Then you refer to the provisions of section 80 of the Commonwealth Constitution that the trial on indictment for any offence against any law of the Commonwealth must be by a jury. Then you make reference to section 106 of the Commonwealth Constitution saying that the constitution of each of the states is subject to the constitution but otherwise shall continue as at the establishment of the federation.

Then you make reference to the Western Australian Constitution Act section 73 with a provision setting up the state parliament. I won't read them all as they are extensive, then you refer to section 128 of the Commonwealth Constitution dealing with the only means permitted of altering the Commonwealth Constitution by a referendum, an act of parliament.

Then you refer to paragraph 21 - I'm sorry, in paragraph 21 you make reference to the oath of allegiance prescribed by the Commonwealth Constitution and then in paragraph 22 you seek a declaration that this matter, presumably this litigation, be administered by the Federal attorney-general's department so that there is an opportunity to take advantage of a scheme for providing costs for public interest litigation.

SHAW, MR: There is a fund there, your Honour.

HEENAN J: Then you make reference to section 6 of the Australia Act and the manner and form provision relating to state law. Then you seek a declaration that the 2003 Western Australian Act dealing with the removal of the need for the oath or affirmation of allegiance is completely void in law but the legal ramifications of such act leave only two courts open to address the legal ramifications, the grand jury in Victoria and the law of the House of Lords in England.

Mr Shaw, the impression I am getting from this, and it's only an impression and I invite you to correct it or amplify it if I am doing your approach any injustice - *what it seems that you are really wanting is an authoritative judicial decision that the passage of the act of parliament in Western Australia, 65 of 2003, the Acts Amendment and Repeal (Courts and Legal Practice) Act is invalid and void and that as a consequence of that no judges, judicial officers or courts who have acted in pursuance of that law retain any jurisdiction or authority. Am I correct about that?*

SHAW, MR: *Correct, your Honour.*

HEENAN J: The problem as I see it is first of all there are decisions of McKechnie J and the Court of Appeal rejecting that argument which have been made against you

and in the ordinary course the only avenue open to you would be to see to appeal from the decision of the Court of Appeal. That's the first point.

The second point, and I think you have already alluded to this when dealing with the objection, *is that if you are right in this argument that you have then neither I nor any other judge of this court has the power to deal with your application.* Is that right?

SHAW, MR: Totally. I didn't do it, your Honour. I mainly uncovered it.

HEENAN J: Nobody is suggesting you did anything, Mr Shaw.

SHAW, MR: Thank you.

HEENAN J: I am limited by the requirements of the Vexatious Proceedings Act and the situation is that I am required to dismiss your application.

SHAW, MR: Your Honour, may I be heard?

HEENAN J: Yes, of course. I'm just drawing your attention to some apparent obstacles but I am required to dismiss your application if the proceedings are vexatious proceedings or there is no prima facie ground for the proceedings and at the moment it seems to me that you have two decisions of this court directly in your way, that is the decision of McKechnie J and the decision of the Court of Appeal and I'm not sitting on appeal from those decisions. Anyway, I have been speaking for long enough and you certainly are entitled to be heard.

SHAW, MR: Your Honour, what I will do is, because of the point that you've raised from where it is now at I intend to read just the essence of some of those affidavits and prior to that I will come back to the Western Australian Constitution.

HEENAN J: Mr Shaw, there is a limit to which you can be heard on an application like this. You need to indicate to me what your answer is to the obstacles which I have identified because if you haven't got an arguable answer to those obstacles I think the door is shut against you.

SHAW, MR: Your Honour, the act we're actually talking about is the Acts Amendment (Repeal Courts and Legal Practice) Act purportedly enacted on January 1 2004. That act also amended the Supreme Court Act. Now, under the Western Australian Constitution, under section 73 - - -

HEENAN J: Mr Shaw, I understand what you say about that legislation. I have read the decisions in McKechnie J's reasons and I have read your papers and so on. I know what

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you say about that but the problem is that your arguments have already been rejected by two considered decisions of this court and you are asking me for leave to start the process going again. Why should you be permitted to do that?

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SHAW, MR

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SHAW, MR: First off, your Honour, it's a maxim in law, two maxims: number 1, a judge cannot be a judge in their own cause; number 2, fraud vitiates everything. They are the two big maxims of law. In essence, when the Supreme Court - - -

HEENAN J: Why do you say that McKechnie J, or for that matter the judges of the Court of Appeal, were judges in their own cause when they were considering the validity of an act of parliament? Judges do that all the time.

SHAW, MR: The problem is, your Honour - I'm well aware of that. Except for when - and in this instance their own Supreme Court Act - threw the Queen out of the act. Now, the moment that that happened - and with respect to this court and to yourself - you actually became the offender because under section 73(6), subsection (6), any elector - and that would include any judge, registrar or master - has the right to take an injunction against that particular thing.

So you could have as an independent person just simply said: if you go ahead with that act you will invalidate my authority as a Supreme Court judge. So just protect your own career and standing, the injunction should have just been filed under that section. Any politician could have lodged it. We are actually the only ones who ever lodged an injunction under that section. It sits sine die out of the Ridout matter by Le Miere J but the section which that acts would have had to confine itself and do was totally breached in your constitution.

The section says - and if I can read the section. Under section 73(2), and I will read (e), (f) and (g):

Expressly or implicitly in any way affects any of the following sections of this act, namely -

and there's six sections named here, your Honour -

sections 2, 3, 4, 50, 51 and 73. Those six sections have binding conditions immediately following here: shall not be presented for Royal Assent by or in the name of the Queen unless -

now, the first condition is in (f) and the High Court has already changed this condition in the Marquet matter from that but it says:

the second and third readings of the bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and Legislative Assembly respectively -

and the big one is the next one, (g):

The bill has also prior to such presentation been approved by the electors in accordance with the section.

The electors never saw it. "And a bill" - and here's where the two big - the big structure happened:

And a bill assented to consequent upon its presentation in contravention of this subsection shall be of no effect as an act.

Your Honour, the State of Western Australia has gone and rewritten the law books on that act.

HEENAN J: Mr Shaw, I do understand your argument about this.

SHAW, MR: It's the law.

HEENAN J: But the decisions of this court are that this legislation was not affected by those requirements and that it is valid. Now, if you want to challenge that further, it would seem to me that the obvious and perhaps only avenue for you to pursue is an application to the High Court of Australia.

SHAW, MR: Are you fully aware of how the High Court conducts itself today?

HEENAN J: I'm not sure what you imply by that remark, Mr Shaw, but I - - -

SHAW, MR: I'm happy to put it on record.

HEENAN J: I have had a very extensive experience of the High Court Australia when I was in practice over some 20, 30 years.

SHAW, MR: But I'm talking about today, your Honour, and I will give you a little bit of - you have to pay 2 and a half thousand odd dollars to file it to High Court. At some point or another you have to tick the 20 minute box in that application and stand on your feet. Usually two days before the due date they fax you or ring you to say your matter will be heard in the High Court on such and such a date, you have no need to be in attendance and you will be informed on the Internet of the judgment.

Now, as you look on each day's - usually there's 10 or 12 on a list, each day has special leave to appeal dismissed on every one. So what the High Court is doing today is in effect working as a closed court and giving judgments on the Internet. Now, any Australian who would permit the High Court to work in that capacity I wouldn't

know what you would call it but that's not how the High Court was set up under the constitution to function.

HEENAN J: Mr Shaw, all I can say to that is that there is a mechanism for applying for special leave to appeal to the High Court of Australia. Some of those applications are dealt with on the papers. Some are dealt with on hearings and a number of special leave applications are granted.

SHAW, MR: Your Honour, are you familiar with how treason must be handled in law?

HEENAN J: Well, it doesn't come before me every day, Mr Shaw, but I - - -

SHAW, MR: No, it's not been in the history books before, your Honour. This is in the history books now.

HEENAN J: What seems to me to be happening, Mr Shaw, is that this dialogue as it's progressing is constantly veering into the merits of your arguments. I can well understand why you want to do that but they have been considered, heard and rejected on a number of occasions by other judges of this court.

I am not here to hear them again even if I wanted to. I am here to decide whether or not you should be permitted to institute proceedings **which have some arguable prospect of success**. For me to discharge that function I really need to be provided with some information or argument as to how you could - - -

SHAW, MR: Your Honour, I just gave you the best argument in Western Australian law. I just gave you your constitution that actually says you must do something which you did not do. Now any court, any court, would have said and must say, "You go back and do it," which means, and it says it right there in your own constitution, that if you contravene the requirements the act is void, so the Acts Amendment (Repeal Courts and Legal Practice) Act, which they've rewritten the law books on, is a void act. They are riding a donkey to nowhere.

That's what it means in essence but why you have got away with it is, and excuse the expression, the electorate is almost to the point of being simpleton. They do not understand their constitution. They don't even know they have this requirement, so when you show it to the elector they just say, "We've never seen it." This is jury trial issue. **You can only handle treason by grand jury**. That's the law in this country. No other bench, no authority, has got authority to touch treason or misprison of treason other than a grand jury. All evidence prior to grand jury is excluded from the hearing benches.

It has to have a format. Number 1, there has to be a formal charge. That was done in the Melbourne Magistrates Court because the Victorian jurisdiction is the only jurisdiction with grand jury. You once had it but you repealed it.

HEENAN J: I didn't repeal anything.

SHAW, MR: No, but your Western Australian politicians did, but when it goes before the Magistrates Court and the Commonwealth DPP, Mr Damian Buggs, who was a named defendant in that application, appears at the bar table to take over and decline, that actually activates the right to activate the grand jury. That's how it is processed.

HEENAN J: Where do you find the treason, the alleged treason, in all of this?

SHAW, MR: Your Honour, Kings Bench, I think in 1918, Rex v Casement from memory, defined treason in that matter as **breach of allegiance**. Now, once you remove our oath of allegiance, which you did, from the legal - - -

HEENAN J: You keep saying that I did.

SHAW, MR: Your Honour, with respect, yes, you did because you permitted the Supreme Court Act to be amended. Now, anyone, even if you're running a law firm, you would be - - -

HEENAN J: Mr Shaw, the amendment repeal or re-enactment of the laws of this state lies with parliament, not with the courts.

SHAW, MR: No, your Honour. When they included your act, the Supreme Court Act, that trespassed into separation of powers and at that point somebody from this court should have said, excuse the expression, I'll say it as a farmer, "Get the hell out of that territory" because it bridges the separation of - it destroys it. Your act, the Supreme Court Act, should never have been allowed into that act, never, and not only has it removed your right to sit - - -

HEENAN J: But parliament can and does amend the Supreme Court Act from time to time and - - -

SHAW, MR: Your Honour, this time they threw the Crown out. That is a breach of allegiance. That in the legal history books is treason. Who introduced the bill? The attorney-general of Western Australia, *an unarticled clerk*. Now, I say that quite specifically because I didn't say it. Sue Walker said it in Hansard in the Western Australian parliament, that Mr Jim McGinty never finished his articles and if he wished to come down to my law firm for a year he can come down there. So in essence what we have is an unarticled clerk who has chucked out the crown and the Queen. Every articled clerk working in Western Australia right now wouldn't know they had that capacity. They would think they have to finish the year out.

HEENAN J: But the Queen has not been removed from the system of government in Western Australia.

SHAW, MR: Your Honour, read that act.

HEENAN J: I have read the provisions to which you have directed my attention.

SHAW, MR: Your Honour, you threw her out, removed.

HEENAN J: Mr Shaw, we still have a governor. The governor is appointed by the Queen.

SHAW, MR: Your Honour, with respect, the Australia Act altered that in 1986.

HEENAN J: The governor, as I understand it, is appointed by the Queen on the advice of - - -

SHAW, MR: Your Honour, it all changed in 1986.

HEENAN J: - - - her Australian representative.

SHAW, MR: It all changed in 1986 because under the Australia Act, and the Australia Act creates an enormous problem for Western Australia because under the Australia Act, and it's in this part of the constitution, it actually says this as the beginning:

They chose to use section 51 subsection (38) to remove the Queen -

but they should have used section 128 and it's quite clear here what section they used but in section 14 of the Australia Act it says Amendment of Constitution Act of Western Australia. That section amends sections 50 and 51. Now, when you pick up the Commonwealth Constitution under section 106 it states this, and I'll read the section so I don't misquote it:

The constitution of each state of the Commonwealth shall, subject to this constitution -

so you are subject to this -

continue as at the establishment of the Commonwealth or has the omission or establishment of the state as the case may be until altered in accordance with the constitution of the state.

Now, altered in accordance with the constitution is section 73(2)(g) and when we come back to the Australia Act it amends sections 50 and 51 at section 14 of the Australia Act. Once it does that it automatically is confined to abide by the two sections in your constitution: number 1, absolute majority; number 2, give it to the electors. None of that happened with the Australia Act, none of that happened at the Acts Amendments (Repeal Courts and Legal Practice) Act and once you interfere with the oath of allegiance, in legal terms, **treason**.

We have never had a treason matter in Australia. Nobody even knows where to look but I would suggest they start to look. You had the best constitution in the country relative to protecting the elector but what has happened here? The oath of allegiance has been completely aborted and substituted with something else.

Now, when they say in the Australia Act they introduce new letters patent et cetera, and it actually says to serve us. The problem is, your Honour, "us" is not defined in any interpretation act. We don't know who it is but did they have to abide by section 73 in 1986? What happens after that? It purportedly gave every state governor a purported right to do Royal assent to bills that would have needed reservation, so they just went ahead and started signing. The problem is they didn't have correct jurisdiction so in this particular act, Acts Amendment (Repeal Courts and Legal Practice) Act, that was signed by both the governor and Mr McGinty on the enactment they had no jurisdiction whatsoever, as in lawful jurisdiction, they broke the law, but is the breach one that we could sort of say "Let it go through to the keeper" or did a civil and criminal issue activate from the breach and is the breach fraud or, at the top line, is the breach treason?

Your Honour, with respect, fraud could probably be-handled by most courts. Treason can't because in all the precedents of law relative to treason in Australia that is grand jury exclusively. Your Honour, if you wish I can have some grand jury authorities that I could tender, if you wish.

HEENAN J: No, at the moment I'm still trying to focus on why you say you should be permitted to commence proceedings which in effect challenge final decisions of this court.

SHAW, MR: *Two maxims*, your Honour. Number 1, a judge in his own cause, the judgment is void automatically. Number 2, fraud vitiates everything. Number 3, treason is involved and what the other side is saying to me is, "Pay the money and shut your mouth and get out of our state," as in, do not uncover what has occurred here because the average electorate, and I will repeat the words, is basically a simpleton in relation to this sort of law. It is beyond them, but it's not beyond the lawyers that made it happen and it's not beyond the lawyers that are continuing to let it happen.

The Australia Act required an electoral consent from the electorate of Western Australia in 1986. It then altered the whole framework of Australia fraudulently. It then went on to purportedly give the governor-general and all governors an authority that they had not got legally and they have gone on to do bills that should have been reserved and done its correct Royal assent and they have breached the confining section at the preamble. Section 5 defines all judges, courts and people relative to the act.

The Commonwealth Constitution is both a UK Act and an act of the Commonwealth parliament. It's a combination thing. We can't just take bits and pieces and throw it out.

HEENAN J: It's an act of Commonwealth parliament and it's an act of the Imperial parliament.

SHAW, MR: Correct, your Honour.

HEENAN J: And it was passed before the Commonwealth parliament was created.

SHAW, MR: Correct. What is actually happening is that there are checks and balances in here so what the government or the state of Western Australia is saying - - -

HEENAN J: Mr Shaw, as I say, you keep verging into this question of your argument about why you say your submissions about the invalidity of this law are correct but I keep coming back to the question of why should you be permitted to advance this argument when it has already been decided against you?

SHAW, MR: Your Honour, can I read the affidavit relative to part 8 of this stat?

HEENAN J: What do you mean?

SHAW, MR: It deals with the section. I think it should be placed on record.

HEENAN J: I'm treating all these affidavits as being on the record. Is that what you want me to do?

SHAW, MR: On the record?

HEENAN J: Yes.

SHAW, MR: Thank you. Is that acceptable?

HEENAN J: If you want - you just tell me whether you want to rely on them or not.

SHAW, MR: I do, your Honour.

HEENAN J: *I will take all the affidavits as being relied on.*

SHAW, MR: Thank you. Could I refer to that particular one?

HEENAN J: Yes. Which is the one you want to refer to?

SHAW, MR: I haven't numbered them so it's going to be difficult but they should be in order and I will try to find it.

HEENAN J: Just tell me what it is.

SHAW, MR: It's affidavit number 40 but it will be seventh from the bottom of the stack and it will be part 8.

HEENAN J: Just a moment. Is that your affidavit annexing - - -

SHAW, MR: It annexed part 8, your Honour.

HEENAN J: - - - part of the - part 8, yes.

SHAW, MR: If I could just take you to section 130 of that act.

HEENAN J: Just for the transcript, I am now attending to an affidavit of Mr Shaw sworn 16 October which annexes what appears to be a computer printout of portion of the Acts Amendment (Repeal Courts and Legal Practice) Act 2003, WA, Part 8.

SHAW, MR: Correct, your Honour. I take you to section 130 of the act, which is on the bottom of the right-hand side page 6.

HEENAN J: Yes.

SHAW, MR: At page 7 of that the sections that are amended. This specifically deals with the Supreme Court Act of Western Australia and coming back to the legal fact that treason is breach of allegiance by Kings Bench 1918. Section 4 is amended, and I won't go every word:

Action by deleting "Crown"; caused by deleting
"Crown"; section 9 - - -

HEENAN J: You have referred me to Sir Roger Casement's trial. That was the man who was convicted for treason for conspiring with the German government during war time and smuggling arms into Ireland with a view to promote a local insurrection against the Crown.

SHAW, MR: Correct. All I'm actually saying out of that matter is **Kings Bench** had to define treason and all they defined there in that matter was **breach of Allegiance**

HEENAN J: Conspiring with the King's enemies was treason.

SHAW, MR: Thank you. Section 9, and I will put subsection (1) only for the point of the record, is amended by deleting "her Majesty" and inserting instead "the Governor". Your Honour, automatically you have a problem with section 50 of your constitution because that's the office of the governor. The moment you touch section 50, under section 73(2) "must go to the elector".

HEENAN J: But the Queen has not been removed from the Constitution of Western Australia. Her name may have been taken out of certain provisions dealing with legal procedure and - - -

SHAW, MR: Not allowed to, your Honour - - -

HEENAN J: - - - and with other courts - - -

SHAW, MR: - - - without breaching your state referendum requirements.

HEENAN J: - - - but her Majesty remains the formal head of government.

SHAW, MR: Even this thing - your Honour, you're not allowed to do this without the electoral consent. That's section 73(2).

HEENAN J: Here we are again, Mr Shaw. You say that and - - -

SHAW, MR: *Your act says that.*

HEENAN J: - - - I understand why you say that but the point that you're making has already been considered and rejected by other judges.

SHAW, MR: No, your Honour. It has to be rejected by - the moment that I state that this is the Supreme Court Act amending and taking our her Majesty every Supreme Court judge in this country states - - -

HEENAN J: Mr Shaw, I think we have arrived at this point: that I am fairly confident that I understand your argument and I have read these materials and I have offered you three or four opportunities now to indicate to me how you propose to overcome these particular obstacles. I will give you one last opportunity to do that and then I will call on Mr Wayte for the respondent because, as I said, I am not permitted on this occasion to examine whether or not your argument is correct or not. That has already been decided. I have got to inquire into whether you have shown sufficient reason to allow this argument to have a third outing.

SHAW, MR: What you actually said during the course of it, you actually said that if I'm right - *if I'm right - no bench has jurisdiction in Western Australia.*

HEENAN J: *Yes, I did say that.*

SHAW, MR: Thank you. I think I'll rest on that.

HEENAN J: Very well. Yes, Mr Wayte?

WAYTE, MR: I have to ask the question "*Why are we here then?*" because if Mr Shaw is right and he is sure he is then there is no jurisdiction and our appearance today is pointless and so is anything we do.

HEENAN J: I think that is Mr Shaw's strongest point.

WAYTE, MR: Sir, I don't think I can say much more than what you said, that these are all points which have been litigated at first instance before Braddock C, before McKechnie J, before the Court of Appeal and, as I understand it, in a failed application for special leave to appeal to the High Court against the Court of Appeal's decision. All those avenues have now been exhausted.

SHAW, MR: I'm sorry, your Honour, can I just interject there for one minute to fix a technicality? Sorry.

HEENAN J: Yes, you may.

SHAW, MR: The High Court's decision wasn't - there was no decision relative to this from the High Court. I will just give you the issue that happened there. Number 1 - - -

HEENAN J: You applied for special leave and - - -

SHAW, MR: No. What actually happened was that the date of out of time, or whatever due time, was January 2. Everything is shut on January 2 inclusive back home. I live back in Melbourne and you don't have a High Court here. It's got to go through the Federal Court here.

HEENAN J: There is a registry at the High Court.

SHAW, MR: No, your Honour. Only the Federal Court will take stuff here for the High Court. We filed it on January 2. It was done on January 2 via my friend here behind me. That was in time but the originating document which had to follow in came two days after in the post and on that two-day delay the High Court said, "It's not coming in. We're not hearing it." Thank you.

HEENAN J: You were unable to challenge the matter in the High Court because you were out of time.

SHAW, MR: No. The document was filed on January 2. They are saying the other document should have been filed on that day too. The documents were filed.

HEENAN J: Yes, Mr Wayte?

WAYTE, MR: By whatever means all avenues of legally challenging or raising these points have been exhausted then in this country.

SHAW, MR: Sorry, your Honour, I'd like to interject on that one.

HEENAN J: Just - - -

SHAW, MR: The grand jury doesn't eliminate that.

HEENAN J: Just a minute, Mr Shaw. It is not necessary for you to interject at every point you have a contrary submission to make or an answer to give. You will be given an opportunity. Please continue, Mr Wayte.

WAYTE, MR: It seems to me, your Honour, that on a literal reading of section 6 of the Vexatious Proceeding Restrictions Act that these proceedings are vexatious in that sense. They are an attempt to relitigate issues which have been relitigated at numerous times before and I have no doubt litigated in other states, in Victoria, as well. If there was any ground whatsoever for the application itself, which is a - and we have simply not even addressed that. We are here today because Mr Shaw challenges the taxation of a registrar of two earlier matters. There is nothing - - -

HEENAN J: *It is a lot more than that*, Mr Wayte. Mr Shaw seems to be to be attempting by these proceedings to raise the issue of substance about the validity of the Acts Amendment and Repeal (Courts and Legal Practice) Act of 2003 and the power and jurisdiction of all judicial officers that have acted in relation to any of these matters since then under the amended legislation and in the process to have declared void, as he puts it, earlier decisions of this court.

WAYTE, MR: That's correct, your Honour, including I suspect or I guess in point - - -

HEENAN J: If looked at in that way it is to circumvent the process of appeal.

WAYTE, MR: Yes, exactly. That's right.

Because to succeed in what he is seeking to establish he needs to have at least two decisions, perhaps three or more decisions of this court, overturned.

WAYTE, MR: That's correct. It would then go to the issue to overturn everything right from the very beginning but of late the certificate of taxation or the two certificates of taxation.

HEENAN J: Yes, but the certificates of taxation, though no doubt important, seem to me to be small feed as far as Mr Shaw is really concerned.

WAYTE, MR: Absolutely and if that's right then we can't go past the position that we're here arguing over issues which have been litigated before and determined against the applicant and I don't think I can say anything more than that. It is improper for him to attempt to raise them again before your Honour and they are in that sense vexatious and there is no reasonable prospects of success for them and this application ought be dismissed.

HEENAN J: Yes, very well. Yes, Mr Shaw? You have your right of reply.

SHAW, MR: Thank you. In relation to the vexatious issue, it is clearly stated in law that no-one can be declared vexatious **if there is no question of law or fact still left at the end of the tunnel undiscovered.** In relation to the High Court application, I have already interjected on that point.

In relation to "Mr Shaw seems to have exhausted all avenues within Australia," **I haven't even started,** your Honour. Number 1, it's a guaranteed constitutional right under section 80 of the Commonwealth Constitution for a trial by jury on indictment. The Commonwealth director of public prosecutions, Mr Damian Bugg, is the co-applicant in this vexatious writ in Western Australia, which automatically implicates the whole of the Commonwealth because when you go back and look at the Acts Amendment (Repeal Courts and Legal Practice) Act when it substitutes, amends various points it says "the state and/or the Commonwealth" so the Commonwealth - and that's why Mr Damian Bugg showed up on the writ - is part of this, and I will use the words, specific treason and treason can only be handled by grand jury. Grand jury just deals with the

indictment, it doesn't deal with the trial, but it grants the right.

It's as simple as this: grand jury would just simply say to me, "Mr Shaw, you're an absolute idiot. Go away and shut the door," or "You are absolutely correct and here is your indictment." Suddenly every person named in Western Australia is indicted. I don't want that. Commonsense says, and someone has got jurisdiction, give it a trial of the issues. I'm quite happy with that but nobody wants it but to say this is not a clear breach of section 73(2) of the Western Australian Constitution, which was placed there as late as 1978, is not correct in law. It is a clear breach.

To say that it is not a breach of section 6 of the Australia Act is incorrect in law. It is a clear breach. To say that the Australia Act permitted a new letter patent and purported Royal assent capacities is void in law because it did not abide with section 109 of the Commonwealth Constitution, section 106 of the Commonwealth Constitution and section 128 of the Commonwealth Constitution and neither did it abide with section 73. Thank you, your Honour.

HEENAN J: Mr Shaw, in your submissions to me a few moments ago you said that Mr Bugg was a party to the vexatious proceedings.

SHAW, MR: Yes, your Honour. He is that "and/or other". He is the second - - -

HEENAN J: Were you intending to submit to me that the Commonwealth DPP was the applicant to have you made a vexatious litigant?

SHAW, MR: Yes, your Honour. He is the applicant on that writ with Mr McGinty.

HEENAN J: So when were you declared a vexatious litigant?

WAYTE, MR: I can help you, your Honour. The order was made against Mr Shaw, if I remember correctly, 23 December 2004. I will just double-check that. 23 December 2004, yes.

HEENAN J: Do you have the number of the proceedings?

WAYTE, MR: CIV 2264 of 2004 and the Commonwealth DPP was the second applicant in that matter. It was a joint application by the attorney-general and the Commonwealth DPP.

HEENAN J: The state attorney-general and Commonwealth DPP.

WAYTE, MR: Yes. I think the state is only named here today because it is only the state that proceeded to have costs taxed against the applicant.

HEENAN J: Yes, very well. Mr Shaw, is there anything which arises out of that that you wish to answer or comment upon? It seems, according to the information which has been given, that on an application made to this court under the Vexatious Proceedings Restriction Act of 2002 by the attorney-general for Western Australia and the Commonwealth director of public prosecutions you were declared a vexatious litigant on 23 December 2004 and that the action number is CIV 2264 of 2004. Do you question any of that?

SHAW, MR: All those facts are correct, your Honour, except for this fact: that's the period of time that they were all invalid, as in outside of the lawful authority, but I will say this about the Commonwealth DPP, Mr Damian Bugg. Treason can only be indicted by a grand jury. Usually when he shows up in the Magistrates Court he is already a named defendant but he shows up at the bar table as the named defendant to make application to take over his own indictment and to strike out.

Effectively what that is saying is that Mr Damian Bugg can come into any restaurant in Australia, rape the receptionist or whatever, be formally charged and come to the court later to have the charge dismissed, taken over and aborted.

If the Australians wish to continue to leave the DPP in that capacity they are absolute fools, but the moment that he makes the application to decline to present, the right under section 354 of the Crimes Act 1958 of Victoria, the right to a grand jury automatically activates. That's what is activated out of here, even though these are what you call matters being - no, it's the state - I will finish with two final points and reiterate it.

Number 1, it is a maxim in law that the judge cannot be a judge in his own cause. That's occurring today. Number 2, fraud vitiates everything. Now, fraud, just to come to one point of fraud, is the decline or refusal of a legal right. That's fraud. That's certainly what has occurred here. The only reason they made me vexatious, your Honour, and that's all under appeal and still going through its process, but it was to put a fetter on what was occurring and the discovery of what had occurred. I don't mind the label, but it certainly creates a contest. But in the contest I have the right to be heard on one side by an impartial bench. Your Honour, in the state of Western Australia that's impossible. Thank you.

HEENAN J: Yes, very well.

(Judgment delivered)

A transcript of these reasons is being taken. I will take the opportunity afterwards to correct it as to matters of grammar and any other minor inconsequential provisions and a written copy of the reasons will be made available to you, Mr Shaw, and to the state solicitor's representative in due course but the order of the court today is that the application is dismissed. Yes, Mr Wayte?

WAYTE, MR: Your Honour, I seek an order also that the applicant pay the defendant's costs of the matter as well. We would invite your Honour, subject to what my friend might say, to fix the costs simply generously to him at \$350 to save any more procedural taxations of costs.

HEENAN J: Mr Shaw, do you wish to make any submissions about this?

SHAW, MR: That was an exceptional offer but is it a bribe? I will (indistinct) down, your Honour.

HEENAN J: Mr Shaw, I don't think there is any reason to treat it as a bribe. It does seem to me to be a generous offer - - -

SHAW, MR: Exceptionally generous.

HEENAN J: - - - and as far as I'm concerned it is available for acceptance without any compromise or prejudice to any rights of appeal or challenge which you may have.

SHAW, MR: On that behalf, your Honour, I accept that. Thank you.

HEENAN J: Yes. Am I correct, Mr Wayte, in interpreting that offer as being entirely without prejudice to any rights of appeal or other review?

WAYTE, MR: That's correct, your Honour.

HEENAN J: Yes. There will be an order that Mr Shaw pay the costs of these proceedings fixed at \$350 by agreement. The court will adjourn.

AT 11.54 AM THE MATTER WAS ADJOURNED ACCORDINGLY