EGAN v CHADWICK

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Introduction

I will assume that you have had a chance to at least glance at the judgment of Egan and Chadwick, and I do not propose to deliver an oral headnote, but I will say one or two things by way of summary.

The central issue in the case was whether the Legislative Council had power to require the production of two sorts of documents. They were documents attracting legal professional privilege and documents which were, in one way or another, properly described as cabinet documents. The decision of the Court of Appeal was a majority decision. Chief Justice Spiegelman delivered the leading judgment, Justice Marr agreed with Chief Justice Spiegelman, and Justice Priestly dissented. The majority drew a distinction between the two types of documents in issue. The majority said that the Legislative Council could require a minister to produce documents attracting legal professional privilege at common law, but the majority went on to say that the Legislative Council had no power to compel a minister to produce cabinet documents. Justice Priestly, in his dissenting judgment, would have upheld the power of the Legislative Council to require production of both types of documents.

As you read the judgment, you doubtless start with the reasons for decision of the Chief Justice. They come first, they extend over very many pages, they are abstract, they are erudite, they are rich in political history. They tell us, for example, that the convention that the monarch does not sit in cabinet, dates from the reigns of George I and George II of England, who did not attend cabinet meetings simply because they did not speak English.

The reasons of the Chief Justice go on to tell us about the evolution of responsible government in the Australasian colonies, and they identify two essential features of responsible government. One is cabinet and government and collective cabinet government, and the second is the collective responsibility of cabinet to parliament, and including, in New South Wales at least, the collective cabinet responsibility to the upper house as well as to the lower house. They say, in substance, that the power of the upper house to require the production of documents does not extend to requiring the production of documents that reveal the deliberations of cabinet, because that would be to allow one feature of responsible government to swallow up the other.

They say, finally, that legal professional privilege has no role to play because it is a doctrine that applies between strangers. It simply has no application to the very peculiar intramural relationship between a government and a legislative chamber.

And you probably next skimmed the dissenting reasons of Justice Priestly. They come next. They were, however, obviously written first, because they go to the trouble of trying to set out the facts. They note that a considerable number of substantial matters were put in issue by the defendants, but that as the course of the trial developed, those matters largely fell away.

You then, no doubt, turned to the pithy concurrence of Justice Marr. The beauty of that concurrence is that it sums up in three paragraphs what it takes the Chief Justice 30 pages

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to expound. Having read those three paragraphs, you can test your comprehension of the Chief Justice's reasons and feel fairly comfortable that you have understood the case.

What is less easy to pick up, and perhaps more interesting, is the way in which the issues came to be litigated and the course of events during the conduct of the case that led many of the issues to fall away, and that is the picture that I want to paint for you tonight.

Let me lay it out as best I can, briefly and chronologically, and in doing so, I will tell the story in the present tense.

The date is 13 October last year. The place is Parliament House, Sydney. The Treasurer, Mr Egan, is a member of the Legislative Council, and Leader of the Government in the Upper House. The Legislative Council passes a resolution calling upon the Treasurer to table documents relating to Sydney's water crisis. The resolution specifically asks for documents for which claims to legal professional privilege and public interest immunity are made. They are to be produced by five o'clock the next day. The Treasurer refuses to produce the documents and the deadline passes. There are threats to suspend him. The effect of suspension for the Government would be significant. The Legislative Council is made up of 42 members, 16 at that time are Government members, 17 are Opposition members, 9 sit on the cross benches. The Government needs the support of 5 of those 9 to pass legislation. With the Treasurer gone, the Government needs the support of 6. It is nearing the end of the parliamentary term, the Government has a very full legislative agenda.

The whole question of the power of the Legislative Council to require the production of documents is still under consideration by the High Court in Egan and Willis. The case has been argued before the High Court in Canberra for 2 days in June and another day in September. Judgment is still reserved, and remember we are only in mid-October. The Treasurer takes the initiative. He takes out a summons in the Administrative Law Division of the Supreme Court of New South Wales. He names as the defendants, the President of the Legislative Council, the Clerk and the Usher of the Black Rod. He seeks a declaration that the resolution of the 13th of October is invalid, and an injunction restraining its enforcement.

Before anything can happen in those proceedings, the Legislative Council strikes back. The date is 20 October last year. The Legislative Council passes another resolution. It finds the Treasurer guilty of contempt for failing to comply with the resolution of 13 October and suspends him for 5 sitting days. The Treasurer gets up and leaves the Chamber. The Treasurer immediately amends his summons to seek a declaration that the resolution of 20 October is also invalid. The Administrative Law Division transfers the matter to the Court of Appeal, to be heard in its original jurisdiction. There the matter is given expedition. Points of claim and points of defence are ordered to be given, and unlike the rather consensual litigation in Egan and Willis, it emerges that every conceivable legal and factual point is put in issue. Nothing is common ground. Amongst other things, the defendants take issue with the jurisdiction of the court, not only to grant the relief sought, but to entertain the proceedings at all.

The hearing is due to commence before the Court of Appeal on Tuesday the 24th of November. On Thursday the 19th of November, the High Court hands down its judgment in Egan and Willis. Relevantly, that judgment does four things. First, it affirms the earlier decision of the Court of Appeal in Egan and Willis that the Legislative Council does have power to require the production of documents by the executive.

Secondly, it expressly leaves open whether that power extends to the production of documents the subject of legal professional privilege and public interest immunity.

Thirdly, it addresses an issue of justiciability, raised for the first time in the High Court, not by the parties, but by an intervener. It finds, in relation to that issue that whatever the general position may be, in that case there was a justiciable legal issue because the plaintiff in that case, Mr Egan, had alleged that he had been the victim of a common law assault, as he had been escorted from the Chamber. It was, of course, a put up job. He had been escorted by a prior arrangement. Nevertheless, that was the pleading.

Finally, the judgment confirms that the traditional test for determining the scope of the powers of the Legislative Council was to apply. That is, one of reasonable necessity. It adds, however, and somewhat surprisingly, that what is reasonably necessary is "to be understood by reference to what, at the time in question, has come to be conventional practices established and maintained by the Legislative Council". So one looks to contemporary practice.

Consideration of the judgment in Egan and Willis over the weekend leads to some reformulation of the Treasurer's case to be presented on the Tuesday. When the case opens at 10.15 on Tuesday, the Treasurer seeks, and is granted, leave to file a further amended summons. In an attempt to deal with the question of justiciability, the further amended summons seeks a declaration that the Treasurer is entitled to refuse to produce two specific types of documents. One is a couple of letters containing legal advice, the other is a cabinet submission. There is a traditional, public interest immunity affidavit from the Director-General of the Cabinet Office saying that the maintenance of cabinet confidentiality is vital to the development of public policy in New South Wales.

There is also another affidavit inspired by the High Court's reference in Egan and Willis to contemporary conventional practices. That affidavit is from an officer in the Premier's Department who has worked at the senior level in that Department for nearly 20 years, and he says, to the best of his recollection, although no Government had commanded a majority in the Legislative Council during that period, it had never been maintained by the Legislative Council that it could press for the production of documents after there had been a refusal by the Government to produce them.

The evidence is complete, and I commence my submissions. Brett Walker SC, who appears for the defendants takes an objection. He says I cannot put the argument, because to do so would be to breach Article 9 of the Bill of Rights. We spend the whole day arguing about justiciability. My argument is simple enough. I say that legal professional privilege and public interest immunity are common law doctrines. I say they apply for the benefit of the Crown, just as they apply for the benefit of the citizen. And I say that the Legislative Council is wrongly purporting to use a coercive power to interfere with the Government's common law rights. We spend the whole day arguing about whether or not I can put my case, and the Court reserves its decision on that preliminary issue.

Meanwhile, back at Parliament House, other developments are taking place. The Court of Appeal began sitting at 10.15. The Legislative Council began sitting at 11.00 am. By early afternoon it has passed another resolution. The resolution notes the decision in Egan and Willis. The resolution also notes the continued failure of the Government to produce the documents in issue in that case, as well as the documents sought in a number of subsequent resolutions. This resolution requires the Treasurer to produce the documents - all of them - by 11 o'clock on Thursday the 26th of November. In answer to that resolution, the Treasurer, on 26th November, produces some documents. He refuses to produce privileged documents. He tables a report from Sir Laurence Street, who certifies that the documents that are being withheld are all cabinet documents or legally professionally privileged.

Needless to say, that is not good enough for the Legislative Council. The Legislative Council decides to give the Treasurer one last chance. On the same day, 26th November 1998, it passes a resolution calling on the Treasurer to produce all documents for which privilege is claimed as listed in Sir Laurence Street's report, and all documents for which privilege is claimed in relation to the water crisis. It wants the documents delivered to the Clerk, it authorises the Clerk, then, to release to members, all of the documents except those claimed to be cabinet documents. But in relation to the documents claimed to be cabinet documents, it says that any member can notify the Clerk that he or she disputes the claim that they are cabinet documents, and if such a notification is given, then the status of the document is determined by none other than Sir Laurence Street, who is now to be appointed, by the President, as an independent arbiter. The deadline for production is 11.00 am on Friday the 27th of November, and in default of production the Treasurer is to be automatically suspended indefinitely. The suspension order is expressed to be self-executing.

Now, let me read at this point, from the affidavit of Kate McKenzie, Deputy Director-General to the Cabinet Office, sworn 27 November 1998.

> This morning I was present in the Legislative Council at 11.00 am by which time the plaintiff had been required to table privileged documents in accordance with the resolution of the Legislative Council on 26 November 1998. Soon after 11.00 am, the first defendant [that is Virginia Chadwick] said words to the following effect:. "I note the presence of the Treasurer in the House. According to resolution of the House of the 26th of November 1998, the Leader of the Government was required to deliver to the Clerk of the House by 11.00 am today, certain privileged documents. I have been advised by the Clerk that he has received no papers according to the resolution of the House. Does the Treasurer intend to comply with the order of the House?". I then saw the plaintiff rise from his seat and heard him say words to the following effect. "Madam President, I have been advised that the question of whether the House has the power to require the tabling of privileged documents has not been determined by the Courts, and indeed, my advice from the Crown Law Offices is that the House has no valid power in that respect. I then saw the plaintiff resume his seat and heard the first defendant say words to the following effect. "As the Treasurer clearly has not complied with the order of the House according to paragraph 5 of the resolution of 26th November 1998, if the Leader of the Government fails to comply with the order of the House, he is suspended from the service of the House for the remainder of the session, or until he fully complies with this order, whichever occurs first. As the Leader of the Government has failed to comply with the order, according to the resolution, he is suspended from the service of the House for the remainder of the session, or until he fully complies with the order. I direct that the Usher of the Black Rod escort Mr Egan from the Chamber". I then saw the plaintiff remain seated whilst the third defendant stood up, picked up his black rod, put it over his shoulder and approached the plaintiff who was still seated. I then saw the third defendant lean over the plaintiff and move his arm in a manner to indicate to the plaintiff he must leave the House. I then saw the plaintiff rise from his seat and be escorted from the House by the third defendant.

The stakes are now raised, the gloves are off, the issue of principle is crisply exposed. What is more, the problem of justiciability has fallen away. A technical assault has been committed - this time a real one.

At 5.00 pm the same day, we are back in the Court of Appeal. The summons is again amended to challenge, now, the two new resolutions to seek a declaration that the Treasurer is entitled to withhold production of the specific documents, certified by Sir Laurence Street, and to claim damages for assault. The hearing is scheduled for the first available date, that date is the 14th of December.

In the time between the 26th of November and the 14th of December, the proceedings of the House are adjourned until the 16th of February. Under section 24A of the Constitution Act (NSW) a general election must be held before the fourth Saturday in March of 1999, and the Parliament must, in proper course, be prorogued at least three weeks before the date of the election. Well, 14 December arrives, we have the argument, we hear no more from Brett

Walker about justiciability, he admits that the assault is subject only to a defence of justification. The main question is whether the Legislative Council acted within power in authorising the Usher of the Black Rod to escort the Treasurer from the Chamber. But that is not the only way in which the case was put. In fact, I put the case that the Treasurer's legal rights are affected in three ways. I say that the Legislative Council had purported to use coercive powers to require the production of documents that the Treasurer has a common law right to withhold. I say secondly, that it has purported to authorise an assault and I say thirdly, that it has purported by the indefinite suspension to prevent the Treasurer from performing his constitutional duties as a member of the House.

At the conclusion of the hearing, the following exchange takes place. Chief Justice Spiegelman:

> If, for whatever reason, you lose the challenge to the resolution suspending your client, do you still persist in seeking the declaration that a specific list of documents cannot be called on?

Me:

> Yes.

Chief Justice Spiegelman:

> Why should we deal with that if it appears that the House demand is spent in the resolution?

Me:

> It won't go away. There is a history that Your Honours have lived through in the course of the hearing. To say that the controversy is moot or somehow spent is to deny reality.

Chief Justice Spiegelman:

> The Court will reserve its decision.

Well, the judges leave the bench. An eerie silence envelops us. Nothing happens. A couple of months later, Parliament is prorogued. The suspension order therefore lapses. A month or so later, there is a general election in New South Wales. The Government gets returned, and we are still waiting for the judgment.

The judgment is then delivered on the 10th of June this year. It says nothing about the assault, and nothing about the specific documents. But it does clear up a point of principle.