CASE NOTE

TO REMIND PEOPLE OF THE *BILL OF RIGHTS* 1688

"The *Bill of Rights* declared: 'that the pretended power of suspending of laws by regal authority without consent of Parliament is illegal'; and 'that the pretended power of dispensing with laws or execution of laws as it hath been assumed and exercised of late is illegal': and a further declaration, against 'levying money for or to the use of the Crown by pretence or prerogative without grant of Parliament'. . . . So that, as the *Act of Settlement* expresses the principle, all officers and ministers ought to serve the Crown according to the laws. It may be desirable that sometimes people be reminded of this and of the fate of James II . . ." per Windeyer J. in *Cam and Sons Pty. Ltd* v. *Ramsay* (1960) 104 C.L.R. 247 at 372.

It was the fate of James II to be forced to flee his kingdom and to be replaced as King of England, Scotland, Ireland and His other Realms and Territories. Mr R. D. Muldoon remains Prime Minister of New Zealand today as he was on 15 December 1975 but he and the people of New Zealand have been reminded by the Supreme Court of the provisions of the *Bill of Rights* 1688[1] which established once and for all that regal authority may not be exercised in an arbitrary manner without regard for the laws laid down by Parliament.

The Supreme Court decision is *Fitzgerald* v. *Muldoon and others*,[2] a judgment of Wild C.J., and the centre of the controversy was a press statement issued by the Prime Minister on 15 December 1975. This statement promised that early in the next parliamentary session legislation would be introduced which would retrospectively remove the compulsory element in the law relating to the New Zealand Superannuation Scheme. All compulsory contributions already made would be refunded and no further contributions were to be made as from the date of the announcement. Mr Muldoon stated that the Board of the Superannuation Corporation would not take action to enforce the payment of further deductions and contributions. The Prime Minister's statement was acted upon immediately by all government departments and by employers throughout the country.

[1] The *Bill of Rights* is sometimes given the date 1689 rather than 1688. At that time, and until the *Calendar (New Style) Act* 1750, the legal commencement of the year was 25 March rather than 1 January. The *Bill of Rights* was first enacted by the Convention Parliament which met after the flight of James II in January and February 1688—i.e. towards the end of the year 1688. The Acts of the Convention Parliament (including the *Bill of Rights*) were subsequently ratified and confirmed by the *Crown and Parliament Recognition Act* 1689. See 8 *Halsbury's Laws of England* (4th ed.), para. 846, n. 3.

[2] [1976] N.Z.L.R. 615.

The background to the press statement was that there had been a fierce political controversy over the merits of the New Zealand Superannuation Scheme introduced by the then Labour Government and passed into law as the New Zealand *Superannuation Act* 1974. The National Party, then in opposition, used all possible parliamentary devices to oppose this legislation and promised to repeal it immediately the Party gained office again. The general election campaign in 1975 had featured an acrimonious debate over the merits of the rival Labour and National superannuation policies. The result of that election was a sweeping victory to the National Party and the timing of the press statement on the Superannuation Scheme indicated the importance of that issue in the mind of the new Prime Minister. Mr Muldoon had been sworn in as Prime Minister on Friday, 12 December and he did not waste much time before his pronouncement on the Monday following to immediately stop the Superannuation Scheme.

Although the new government undoubtedly had a "mandate" to dismantle the Superannuation Scheme and replace it with its own, there was some consternation in certain legal circles as well as among supporters of the defeated Labour Party that the Prime Minister had purported to suspend the operation of a duly enacted law with nothing more than a promise to pass legislation to validate his actions retrospectively. A number of trade unionists decided to test the situation by bringing a private prosecution against their employer for his breach of the provisions of the *Superannuation Act*, but this prosecution was stayed by the Attorney-General acting on the basis of his powers under s. 77A of the *Summary Proceedings Act* 1957.[3] This caused another political storm but effectively stopped that avenue for seeking a court ruling on the Prime Minister's actions. Moreover the Government firmly rejected suggestions that Parliament should be called into session at an early date, if only to repeal the *Superannuation Act*.[4]

Meanwhile an assistant section clerk in the Department of Education, Mr P. C. B. Fitzgerald, had been conducting a one man protest by calling at the Inland Revenue Department each pay day and offering to pay the contribution which the *Superannuation Act* required him to pay. His offer was turned down on each occasion, but he decided to bring a civil action against the Prime Minister, the New Zealand Superannuation Board, the Attorney-General and the Controller and Auditor-General. He sought a declaration that the Prime Minister's actions were illegal, a mandatory injunction requiring the withdrawal of the announcement and instruction and an injunction restraining the Prime Minister from continuing to instruct the Superannuation Board to refrain from enforcing the law on superannuation contributions. He sought similar declarations and injunction as against the other defendants. The plaintiff's problem was to

[3] Section 77A was inserted by the *Summary Proceedings Amendment Act* 1967. For a comment on this action see Black, "Politic or Just" [1976] *N.Z.L.J.* 169.

[4] See the exchange of letters between the President of the Auckland District Law Society and the Attorney-General: "Superannuation: Retrospective Termination" [1976] *N.Z.L.J.* 268.

get a court hearing before his action was stifled by retrospective legislation passed when Parliament came into session in late June 1976. His proceedings were filed in late March and, to the great credit of our judiciary, Beattie J. acceded to a motion for a fixture which came before him towards the end of May in spite of vigorous opposition from counsel for the defendants.[5] The hearing took place from 31 May to 3 June and Wild C.J.'s historic judgment was handed down on 11 June.

Counsel for the plaintiff had put at the centre of his submissions the argument that the Prime Minister's press statement was an exercise of a pretended power of suspending of laws and was accordingly illegal by virtue of s. 1 of the *Bill of Rights* 1688.[6] Wild C.J.'s judgment was not an erudite discussion of the constitutional law of New Zealand but he accepted in full that the Prime Minister had acted illegally. In a memorable passage he said:

> "It is a graphic illustration of the depth of our legal heritage and the strength of our constitutional law that a statute passed by the English Parliament nearly three centuries ago to extirpate the abuses of the Stuart Kings should be available on the other side of the earth to a citizen of this country which was then virtually unknown in Europe and on which no Englishman was to set foot for almost another hundred years. And yet it is not disputed that the Bill of Rights is part of our law."[7]

He had no doubt that Mr Muldoon had purported to suspend a law that Parliament had made and the only doubt as to the applicability of the *Bill of Rights* concerned whether or not the Prime Minister exercised regal authority. On this the Chief Justice said

> "He is the Prime Minister, the leader of the Government elected to office, the chief of the Executive government. He had lately received his commission by royal authority, taken the oaths of office, and entered on his duties. In my opinion his public announcement of 15 December, made as it was in the course of his official duties as Prime Minister, must therefore be regarded as made 'by regall authority' within the meaning of s. 1."[8]

The only authority referred to by the Chief Justice in addition to the Bill of Rights was a passage from Dicey, *Law of the Constitution*

> "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has under the English constitution the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[9]

[5] See Palmer, "The Courts Are Open" [1976] *N.Z.L.J.* 290.

[6] The full text of s. 1 in its original spelling is:
> "That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall."

[7] [1976] N.Z.L.R. 615, 622. The *Bill of Rights* is clearly part of New Zealand Law by virtue of s. 2, *English Laws Act* 1908 which makes applicable in New Zealand the laws of England as existing on 14 January 1840.

[8] [1976] N.Z.L.R. 615, 622.

[9] Dicey, *Law of the Constitution* (10th ed.) p. 39.

It is hardly believable that a Prime Minister should have thought he could suspend the law of the land and get away with it. Yet what a magnificent reaffirmation of the principles of legality for the Supreme Court to declare the actions of the Prime Minister to be illegal by reference to the *Bill of Rights* and to Dicey's statement of the fundamental principle of Parliamentary sovereignty.

Having decided that the plaintiff was entitled to a declaration that the Prime Minister's public announcement of 15 December was illegal, the Chief Justice then approached the question of injunctions with a proper degree of political realism. It would have been an expensive exercise in futility to have issued injunctions which would have attempted to resurrect the complex machinery of the Superannuation Scheme within a couple of weeks of Parliament reassembling. Wild C.J.'s conclusion, therefore, was that the law and the authority of Parliament would be vindicated by the making of the declaration but that the appropriate course was to adjourn all other matters in issue for six months.

It should perhaps be noted that Mr Muldoon was not at all repentant and he made it clear, in publicly commenting on the Chief Justice's decision, that he thought the Chief Justice did not arrive at the correct result! The end of the saga was the *Superannuation Schemes Act* 1976 which was the third Act to become law in the Parliamentary session. Section 10 provided protection against civil or criminal action in any Court for all persons who failed to comply with the *Superannuation Act* on and after 16 December 1975 "[n]otwithstanding the provisions of the New Zealand Superannuation Act 1974 or any other Act or any rule of law, . . ."

It is interesting to note that this decision in New Zealand vindicating the principles of legality in our political system by reference to the *Bill of Rights* follows closely after an equally significant decision in England: *Congreve* v. *Home Office* [1976] 1 Q.B. 629. In that case the Court of Appeal made some caustic criticisms of the Home Office for its attempts to bully colour television set owners into paying a higher licence fee even though they had relicensed their sets before the Regulations requiring the higher fee had come into force. The Court held that the purported revocation of the plaintiff's licence because of the plaintiff's failure to pay the higher fee was unlawful, invalid and of no effect and relied on the provision in the *Bill of Rights* which prohibits levying money for the use of the Crown without grant of Parliament.[10]

On the other hand it is possible that the new found interest in the *Bill of Rights* may be taken a little too far. Thus the Labour M.P., Mr J. Hunt, introduced a Private Member's Bill in the 1976 session to amend the *Electoral Act* which would have required Parliament to meet within 90 days of a general election. The preamble to this Bill states

> "Whereas Article 13 of the Bill of Rights 1688, which is part of the law of New Zealand, states that Parliament shall meet frequently: And

[10] *Bill of Rights* 1688, s. 4. See H.W.R.W.[ade], "Unlawful Revocation of TV Licences" [1976] *L.Q.R.* 331.

> whereas it is desirable that the spirit of this Article should be expressed and applied in New Zealand in statute form, having regard to the ever greater complexity and ambit of contemporary government: And whereas the Executive Council of New Zealand would be assisted by longer sessions of the General Assembly."

Of course Mr Hunt was inspired by the controversy over the failure of Parliament to meet early in 1976 to repeal the *Superannuation Act* and his Private Member's Bill made no progress in the House. Still, it is clear that the concept of frequency the framers of the *Bill of Rights* had in mind related to the failure of Stuart Kings to call Parliament together for some years in a row, rather than meeting with the frequency and length of session envisaged by Mr Hunt.

Finally it is of some interest to discuss the role of the Governor-General in the controversy over the Prime Minister's suspension of the *Superannuation Act*. Nothing is publicly known as to whether or not the Governor-General consulted with the Prime Minister with a view to regularizing the situation created by the 15 December press statement. Different views have been expressed by constitutional lawyers discussing the issue. Most take the line that the Governor-General was obliged to wait until there had been a court decision unfavourable to the Prime Minister before he could even consider demanding either that the Prime Minister should immediately advise him to call Parliament into session or possibly to exercise his power to do so without advice from the Prime Minister. As events turned out the decision unfavourable to the Prime Minister was not handed down until shortly before Parliament was due to assemble anyway on the basis of the advice that the Prime Minister had actually given.

Other lawyers take the view that the Governor-General could and perhaps should have acted at an earlier stage. They point to the decision early in April by the Attorney-General to stay the private prosecutions which would have tested the validity of the Prime Minister's announcement. At that stage the civil action proceedings by Mr Fitzgerald had only very recently been filed and it could hardly have been envisaged that a fixture would have been made at the early date on which in fact it was heard ("early" relative to normal civil actions in our courts). In view of the Attorney-General's decision the Governor-General could quite properly, in their submission, have insisted that Parliament must be convened in order to put an end to the doubtful situation. On the other hand it was the Attorney-General's view that the Government had not suspended the law but had merely chosen not to enforce the particular law.[11] Although not a very convincing argument, it was the opinion of the Crown's Law Officer and therefore must have weighed heavily with the Governor-General if he did in fact make some enquiries on this point. Furthermore there would have been insuperable constitutional problems if the Governor-General would have called Parliament together but the Ministers of the Crown refused to co-operate—for example by refusing to

[11] See "Superannuation: Retrospective Termination" [1976] *N.Z.L.J.* 268, 270.

instruct the Parliamentary Counsel's Office to draft the required legislation.

There is something of an irony in this controversy for Australian lawyers who have been so passionately arguing the rights and wrongs of the action of the Australian Governor-General, Sir John Kerr, in dismissing the Whitlam Government on 11 November 1975. In that argument lawyers with some sympathy for the Labour Party have been particularly incensed by the actions of the Governor-General in exercising his powers without seeking or being given the advice of the then Prime Minister in apparent disregard of constitutional conventions. In the New Zealand situation lawyers with some sympathy for the Labour Party would perhaps have wished that the Governor-General had put Mr Muldoon in his place by insisting that his illegal suspension of the *Superannuation Act* be validated at an earlier date than the Prime Minister desired. As it turned out there was no public controversy over the role of the New Zealand Governor-General and so we must be content with the decision in *Fitzgerald* v. *Muldoon*. We should be thankful that Mr Fitzgerald and his counsel, Mr Barton.[12] have reminded us of the *Bill of Rights* and of the principle that Ministers ought to serve the Crown according to the laws.

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