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UK Government must obtain Parliamentary approval <u>before</u> the Brexit Article 50 notice is sent

The Queen (Gina Miller & Deir Tozetti dos Santos) v. Secretary of State for Exiting the European Union
High Court of Justice, Divisional Court
[2016] EWHC 2768 (Admin)

Article by David Bowden

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Executive speed read summary

The Divisional Court heard over 3 days a challenge by way of judicial review in relation to the EU referendum held in June 2016 in which the UK people voted to leave the European Union. It has granted permission for judicial review and granted the claimants a declaration that it is *'unlawful for the Defendant or the Prime Minister on behalf of Her Majesty's Government to issue a notification under Article 50 of the Treaty on European Union to withdraw the United Kingdom from the European Union without an Act of Parliament authorising such notification'.* It has granted a 'leap frog' certificate so that any appeal can bypass the Court of Appeal. Only the Supreme Court can grant permission for a final appeal. If it does that appeal is likely to be heard by a full court in December 2016.

The High Court has agreed that the 2016 referendum was an advisory pre-legislative referendum only and that only Parliament which is sovereign can vote on and take the decision to leave the EU. Once an Article 50 notice is given it cannot be withdrawn and it cannot it be given on a conditional basis. The High Court ruled that a decision of this nature can only be taken by Parliament which is sovereign and that the Government is not able to take the decision to leave the EU by sending an Article 50 notice by exercising a Royal Prerogative power.

The Queen on the application of Gina Miller and Deir Tozetti dos Santos v. Secretary of State for Exiting the European Union with Grahame Pigney as representative of 'The People's Challenge' and AB, KK, PR & children as interested parties
George Birnie as representative of 'Fair Deal for Expats' as interveners
[2016] EWHC 2768 (Admin) 3 November 2016
High Court of Justice, Queen's Bench Division, Divisional Court [The Lord Chief Justice of England and Wales (Lord John Thomas of Cwmgiedd), the Master of the Rolls (Sir Terence Etherton) and the Right Honourable Lord Justice Philip Sales]

What happened at the hearing?

Please see our earlier note '*Is Parliamentary approval required before the Brexit Article 50 notice is sent?*' dated 20 October which summarises the submissions made at the 3 day hearing on 13, 17 and 18 October 2016. The piece is available here.

What are the facts?

On 23 June 2016, in the EU Referendum the people of the UK voted by a clear majority to leave the EU. Prior to the referendum, the UK Government's policy was unequivocal that the outcome of the referendum would be respected. Parliament passed the EU Referendum Act 2015 ('EURA 2015') on this understanding. The British people expected to vote and voted on this understanding. The current Prime Minister has confirmed that the UK Government will give effect to the outcome of the EU referendum by bringing about the exit of the UK from the EU.

Article 50 of the TFEU sets out the procedure by which a Member State which has decided to withdraw from the EU achieves that result. That decision having been taken the next stage in the process is for the UK to notify the European Council of its intention to withdraw. The UK Government says it intends to give notification and to conduct the subsequent negotiations in exercise of prerogative powers to conclude and withdraw from international treaties, against the backdrop of the referendum result.

What were the grounds for seeking this judicial review? What issue(s) were before the court?

Ms Gina Miller would like the UK to remain in the EU. Supported by the Interested Parties and Interveners, she brought this application for judicial review. Her claim was that the UK Government could not give effect to the will and decision of the people (as expressed in the referendum outcome) to withdraw from the EU without further primary legislation. This means it will then be necessary to subject the issue to a vote by Members of Parliament.

What declaration was the court being ordered to make? How did this change?

Ms Gina Miller in her Claim Form seeks a declaration in these terms:

> 'A *declaration that it would be unlawful for the Defendant or the Prime Minister on behalf of Her Majesty's Government to issue a notification under Article 50 of the Treaty on European Union to withdraw the United Kingdom from the European Union without an Act of Parliament authorising such notification'.*

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Who are the parties in this case?

A wealthy Hedge Fund manager called Mrs Gina Miller has fronted the case. She founded the investment fund SCM Private – www.scmdirect.com. She was nominated the lead claimant to bring the challenge. Señor dos Santos, a hairdresser, was separately represented and was nominated as a representative of litigants who claim that the constitutional background is such that the EU referendum was advisory only and that a decision to take the UK out of the European Union can only be validly taken by Parliament and not by the Government of the UK.

Grahame Pigney is in charge of an unincorporated association called '*The People's Challenge'* ('TPC'). It claims as a matter of international treaty law, customary principles on constitutional law and the powers conferred on Parliament itself by the European Communities Act 1972 ('ECA') that the UK cannot serve an Article 50 notice without prior Parliamentary approval.

George Birnie was separately represented and nominated on behalf of expatriates of the UK who now live elsewhere in the EU. These litigants claim that the UK Government does not have a prerogative power from Her Majesty the Queen to act to take the UK out of the EU. AB, KK, PR and children who were also separately represented and nominated as being representative of those whose immigration status could change when the UK leaves the EU because they have rights to remain in the UK only by reason of the UK being a member state of the EU at the moment.

What did Parliament provide about the EU Referendum?

The European Union Referendum Act 2015 was short and provided:

> **'1. The referendum**
> (1) A referendum is to be held on whether the United Kingdom should remain a member of the European Union.
> (2) The Secretary of State must, by regulations, appoint the day on which the referendum is to be held.
> ….
> (4) The question that is to appear on the ballot papers is—
> *"Should the United Kingdom remain a member of the European Union or leave the European Union?" '*

What do the EU treaties say the process is for leaving the EU?

The Lisbon Treaty was finally ratified on 13 December 2007. For the first time in Article 49A it provided a mechanism for a member state to leave the EU **[2007] OJ C 306/01**. This was renumbered to Article 50 in the Treaty on the Functioning of the European Union 2012 but the text was not changed. It says:

> '**Article 50**
> *1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
> *2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 188 N(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*
> *3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*
> *4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.'*

What was the common law position in the early 17th century in the *Case of Proclamations*?

In the *Case of Proclamations* **[1610] 12 Co Rep 74** Sir Edward Coke, Chief Justice, recorded that he had been summoned to attend on the Lord Chancellor and others to answer these 2 questions:

- If the King by his proclamation may prohibit new buildings in and about London, and
- If the King may prohibit the making of starch or wheat.

The Chief Justice after consulting with the other judges ruled as follows:

> '*The King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm'*

He also ruled that:

'*It was resolved that the King hath no prerogative but that which the law of the land allows* him'.

Are there any other prior authorities of relevance?

These authorities are relevant in this case:

In the matter of Part Cargo ex Steamship Zamora **[1916] UKPC 24** (Privy Council – Lords Parker, Sumner, Parmoor & Wrenbruy and Sir Arthur Channell)
The idea that the King in Council, or indeed any branch of the executive, has power to prescribe or alter the law to be administered by the courts of law in this country, is out of harmony with the principles of our constitution. It is true that under a number of modern statutes, various branches of the executive have power to make rules having the force of statute, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that prerogative involves any power to prescribe or alter the law administered in the courts of common law or equity.

Attorney-General v. De Keyser's Royal Hotel Ltd **[1920] AC 508** (House of Lords – Lords Dunedin, Parmoor, Arnold, Summers)
The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words or by necessary implication. Where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed. As far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced.

Van Gen den Loos **[1963] ECR 1** (European Court of Justice)
The Treaty of Rome 1957 is more than an agreement which merely creates mutual obligations between the contracting states. The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights. European Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

Blackburn v. Attorney-General **[1971] EWCA Civ 7, [1972] CMLR 882** (Court of Appeal – Lord Denning MR, Salmon and Stamp LJJ)
The treaty-making power of this country rests not in the courts, but in the Crown - that is Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treaty (even a treaty of such paramount importance as this proposed one) they act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts.

Laker Airways v. Department of Trade **[1977] QB 643** (Court of Appeal – Lord Denning MR, Roskill and Lawton LJJ)
Laker Airways was designated as an approved airline under the Bermuda Agreement 1946. This meant the US Government was obliged to grant it an operating permit. The Department of Trade withdrew the designation. The Civil Aviation Act 1971 did not refer to designated carriers. Denning MR held the Secretary of State had unlawfully used his royal prerogative powers. The 1971 Act's provisions could not be displaced by invoking a royal prerogative.

In re International Tin Council **[1987] Ch 419** (High Court, Chancery, Millett J)
It is one thing to give effect to plain and unambiguous language in a statute. It is quite another to insist that general words must invariably be given their fullest meaning and applied to every object which falls within their literal scope, regardless of the probable intentions of Parliament.

R v. SS for Foreign & Commonwealth Affairs ex parte *Rees-Mogg* **[1994] QB 552** (QBD Divisional Court – Lloyd LJ, Mann LJ and Auld J)
In passing the ECA 1972, Parliament did not intend to curtail the use of the royal prerogative powers in relation to EU law. The Minister had no RP power to ratify the Social Policy Protocol to the Maastricht Treaty.

R v. Home Office ex parte *Fire Brigades Union* **[1995] 2 AC 513** (House of Lords – Lords Keith, Mustill, Browne-Wilkinson, Lloyds and Nicholls)
It was an abuse of the royal prerogative power for the Home Secretary to introduce a new criminal injuries compensation scheme when a different scheme had been approved by Parliament in a statute (even where that scheme had not yet been brought into force).

What arguments did the lead claimant, Mrs Miller, make?

Lord Pannick QC's 5 submissions were:

- The UK Government has no statutory power to give an Article 50.2 notice of withdrawal from the EU. The referendum was advisory only. An Article 50.2 notice can only lawfully be given if the UK Government is validly exercising the Royal Prerogative ('RP'),
- The RP cannot be exercised where this would frustrate or undermine rights and duties established by prior Acts of the UK Parliament,
- To give an Article 50.2 notice would frustrate or undermine the ECA 1972 because it would extinguish or substantially reduce the rights and duties part of UK law by reason of the ECA 1972. Notification would pre-empt a decision of the UK Parliament as to whether to retain EU law rights or not,
- An Article 50.2 notification may only be validly authorised by a prior Act of the UK Parliament. A debate on leaving the EU in Parliament on a motion will not suffice, and
- This matter is justiciable before the courts which have a power to grant a declaration that an Article 50.2 notification may not lawfully be made without prior authorisation from the UK Parliament.

Lord Pannick said that there were 3 categories of rights given under EU law:

- **Category 1** rights are those rights which Parliament would be able to replace or replicate, if it wished to do so, after the UK's actual withdrawal from the EU such as employment law or equality rights,
- **Category 2** rights are rights which may be replaced or replicated by Parliament, depending on what deal emerges from the Article 50 withdrawal negotiations. These rights are not in Parliament's unilateral gift because they depend upon what the remaining 27 member states will agree to. Freedom of movement or the right to work in another EU state are examples, and
- **Category 3** rights are rights which by their very nature will be lost irreplaceably, when the UK withdraws from the EU such as the rights of UK citizens to stand for election to the European Parliament and to vote in those elections.

What additional arguments did Señor dos Santos add?
Dominic Chambers QC made these 5 submissions:

- Only the UK Parliament can lawfully take the decision that the UK withdraws from the EU. THE ECA 1972 is a constitutional statute which grants rights to UK citizens and only rights that Parliament has granted can Parliament remove or alter,
- The only way the people in a referendum could legally and constitutionally take the decision to withdraw from the EU were if Parliament had empowered this in the EURA 2015. It did not and the EU Referendum was 'advisory' only. Parliament chose not to legislate that the EU Referendum outcome should be binding. Parliament's agreement to hold a referendum was not a 'pre-approval' of a leave result,
- The UK Government is not able by use of the RP powers able to decide to withdraw from the EU and give the Article 50.2 notice without more,
- Once an Article 50.2 notice is given to the EU Council, the UK cannot withdraw it, and
- Parliament must decide whether, when and on what terms the UK leaves the EU. Parliament must decide which existing EU rights are retained or are modified or are repealed.

What additional arguments were advanced by counsel for Grahame Pigney and the People's Challenge?
Helen Mountfield QC's submissions were:

- The RP power is a residual power which has been 'abrogate' by domestic statutory provisions. The UK government does not have RP power to decide that that the UK should withdraw from the EU nor may ministers notify the European Council without prior Parliamentary approval,
- The RP power does not extend to modifying, abrogating or removing fundamental rights such as EU citizenship rights, and
- It would be an abuse of the RP power for the Secretary of State to decide that the UK will leave the EU without prior Parliamentary authorisation.

What were the immigration arguments put forward by their representative litigants?
Mr Manjit Gill QC's submissions were:

- An Article 50 notification cannot be given on a conditional basis,
- An Article 50 notice is irrevocable and once given this will lead the UK to leave the EU,
- A leave decision affects 3 categories of persons he is concerned with:

- British citizens including expatriates,
- EEA or EU nationals other than UK citizens,
- Non-EU national family members who derive their rights of residence under EU law such as partners or extended family members who are in a relationship of dependency.

He was concerned the court took into account *Zambrano* carers **[2012] 2 WLR 886** who are either a British minor citizen or a disabled person who requires the presence of a non-EU national in this country to make that British child's rights to reside in the UK as a European citizen effective. The CJEU has ruled that these non-EU citizens as carers are also be entitled to remain in the EU.

What were the arguments advanced on behalf of George Birnie and the other expatriates?
Patrick Green QC sought to develop these 5 alternative and additional submissions:

- The Northern Ireland Act 1998 in contrast to the Referendum Act 2015 requires steps to be taken by the Government to give effect to a referendum. The omission of such an express statutory power provides no support to the UK Government position that it can give an Article 50 notification without legislation,
- Rights enjoyed by UK citizens beyond British shores are so fundamental that legislation is required to take them away,
- Exercise of RP power is amenable to judicial review because it affects the rights of individuals in domestic law, affects British citizens' rights in other EU countries and it affects fundamental rights,
- The decision to give an Article 50 notification is flawed because the rights and interests of between 1 and 2 million expatriate British citizens have been excluded from consideration because they were excluded from voting in the EU referendum if they had lived outside the UK for 15 years or more, and
- Any Article 50 notification would also be flawed because it would be based on this flawed anterior decision to leave the EU.

What were the written arguments advanced by the UK Government?
In their Skeleton Argument these 5 submissions were made:

- It is constitutionally proper and lawful to rely upon RP powers to give effect to the outcome of the EU referendum,
- Use of the RP power is not precluded by or inconsistent with the purposes of statutes relating to EU law implementation in the UK because:
  - Parliament has not curtailed the use of the RP power,
  - Article 50.2 notification is not inconsistent with the ECA 1972, and
  - Prior case law supports this,
- The judicial review claim is not justiciable in a court,
- The relief sought is constitutionally impermissible, and
- The other points made by the Government's opponents are not good points including those relating to:
  - Section 18 of the European Union Act 2011,
  - Constitutional statutes and the principle of legality,
  - The 3 devolution statutes (schedule 5 of the Scotland Act 1988, scheduled 2 of the Northern Ireland Act 1998 and s108 and schedule 7 of the Government of Wales Act 2006),
  - International obligations especially the UN Convention on the Rights of the Child that Mr Manjit Gill QC relies on for the immigration litigants.

What was the court's decision on the legal question in this judicial review?
In giving the unanimous judgment of the court, Lord Thomas LCJ was unequivocal in allowing the claimants' application for judicial review. His conclusion on this was:

> '*we hold that the Secretary of State does not have power under the Crown's prerogative to give notice pursuant to Article 50 of the TEU for the United Kingdom to withdraw from the European Union*.'

How did the court deal with the political aspects of this case?
Lord Thomas headed this off at the pass very early in the judgement and was clear that their ruling was on the narrow question referred to them. However astute to the wider picture and consequence of their ruling, he said:

> '*Nothing we say has any bearing on the question of the merits or demerits of a withdrawal by the United Kingdom from the European Union; nor does it have any bearing on government policy, because government policy is not law. The policy to be applied by the executive government and the merits or demerits of withdrawal are matters of political judgement to be resolved through the political process. The legal question is whether the executive government can use the Crown's prerogative powers to give notice of withdrawal'*

How did the court structure its decision on the legal question?
The court broke it down into these 10 chunks:

- The nub of the Brexit's Department's contention,
- The ECA 1972 as a constitutional statute,
- The Crown cannot use its prerogative powers to alter domestic law,
- The Crown's royal prerogative power operates only at international level,
- Parliamentary intention,
- The claimants main argument based on the *Case of Proclamations*,
- The prior court decisions on royal prerogative,
- The Act of Union 1707 by which Scotland joined England and Wales as one nation,
- The decision of Mr Justice Maguire in *McCord* **[2016] NIQB 85**, and
- The EURA 2015.

What did the court say about the nub of the Brexit's Department's contentions?
Lord Thomas said the UK Government's position was that section 2 of the ECA 1972 conferred rights under EU Treaties which depended on the UK being a member of the EU, and that the Crown was free to act on the planes of international law. He then summarised the findings in the *Case of Proclamations* and *The Zamora*. However Lord Thomas noted that '*under the approach advocated by the Secretary of State, the resolution of the issue would depend upon whether the claimants could point to an intention on the part of Parliament as expressed in the 1972 Act to remove the Crown's prerogative power to take action to withdraw the United Kingdom from the Community Treaties once they were ratified*.'

As to this, Lord Thomas ruled that:

> '*However, in our judgment the Secretary of State goes too far in his suggestion that the constitutional principle summarised in* The Zamora *drops out of the picture and that the approach to statutory interpretation in relation to abrogation of the Crown's prerogative powers as set out in* De Keyser's Royal Hotel *leads to the conclusion that under the ECA 1972 the Crown retained prerogative power to take steps to withdraw the United Kingdom from the Community Treaties and now, therefore, has power under the Crown's prerogative to give notice under Article 50*.'

What did the court rule on the ECA 1972 as a constitutional statute?
On this Lord Thomas ruled that '*statutory interpretation, particularly of a constitutional statute which the ECA 1972 is … must proceed having regard to background constitutional principles which inform the inferences to be drawn as to what Parliament intended by legislating in the terms it did*.' Further he said that '*where background constitutional principles are strong, there is a presumption that Parliament intended to legislate in conformity with them and not to undermine them*.'

He made good these assertions by reference to 3 prior House of Lords cases (*Anisminic* **[1969] 1 AC 147**, *ex parte Pierson* **[1998] AC 539** and *Simms* **[2000] 1 AC 115**) and said he drew from these binding authorities that '*all these presumptions can be overridden by Parliament if it so chooses, but the stronger the constitutional principle the stronger the presumption that Parliament did not intend to override it*'.

Lord Thomas was highly critical of the UK Government's case which he said '*glossed over an important aspect of this starting point for the interpretation of the ECA 1972 and proceeded to a contention that the onus was on the claimants to point to express language in the statute removing the Crown's prerogative'.* This was incorrect because the '*Secretary of State's submission left out part of the relevant constitutional background*'. Whilst refraining from calling the Minister a hypocrite in terms that is the only inference to be drawn from Lord Thomas saying '*it was omitted, despite the Secretary of State making recourse to this approach to statutory interpretation a keystone of his own submission that the conduct of international relations is a matter for the Crown in the exercise of its prerogative powers*.'

Lord Thomas was brutal saying that the UK Government's submission '*gave no value to the usual constitutional principle that, unless Parliament legislates to the contrary, the Crown should not have power to vary the law of the land by the exercise of its prerogative powers'*. Concluding on the ECA

1972 issue Lord Thomas ruled '*in our view, the Secretary' of State's submission is flawed at this basic level*.'

What did the court rule on whether the Crown can use its prerogative powers to alter domestic law?

Lord Thomas starting by noting that **'***the Crown has no power to alter the law of the land by use of its prerogative powers*' because this was '*the product of an especially strong constitutional tradition in the United Kingdom'*. Laying the historical context on thick, Lord Thomas said

> '*It evolved through the long struggle … to assert parliamentary sovereignty and constrain the Crown's prerogative powers. It would be surprising indeed if, in the light of that tradition, Parliament, as the sovereign body under our constitution, intended to leave the continued existence of all the rights it introduced into domestic law by enacting section 2(1) of the ECA 1972'*.

Making good his judgment by reference on this point to *Fire Brigades Union* **[1995] 2 AC 513,** Lord Thomas returned to his stinging criticism of the UK Government's position saying that '*it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again*'. Returning to the ECA 1972, Lord Thomas concluded that it was '*a statute of major constitutional importance'* and that Parliament had *'indicated that it should be exempt from casual implied repeal by Parliament itself'* and accordingly it was unlikely that '*Parliament nonetheless intended that its legal effects could be removed by the Crown through the use of its prerogative powers'*.

What did the court say about the Crown's royal prerogative power operating only at international level?

Again Lord Thomas was blunt in his criticism of the UK Government's position which he said had '*overstated that constitutional understanding'*. Lord Thomas agreed that the '*the conduct of international relations is a matter for the Crown in the exercise of its prerogative powers*'. However he said this presumption of non-interference was '*substantially undermined'* in this case **'***where the Secretary of State is maintaining that he can through the exercise of the Crown's prerogative bring about major changes in domestic law.*'

Lord Thomas made good his point on this by reference back to *Rees-Mogg* **[1994] QB 552**. From that Divisional Court ruling, Lord Thomas said that the '*Crown has untrammelled prerogative powers to make treaties in the conduct of the United Kingdom's international relations'* but that *'contrary to the Secretary of State's submission, the judgment cannot properly be read as saying, let alone holding, that express words would be required to fetter the Crown's treaty-making power in relation to EU law'.*

As to Brexit itself, Lord Thomas ruled that *'the question is whether the Crown has power under its prerogative to withdraw from the relevant EU Treaties where such withdrawal will, on the Secretary of State's argument, have a major effect on the content of domestic law'.* He said that *Rees-Mogg* which only dealt with ratification of the social chapter under the Maastricht Treaty *'did not touch on that question'.*

What did the court rule on Parliamentary intention?

Lord Thomas was both clear and concise on this ruling:

> '*Interpreting the ECA 1972 in the light of the constitutional background … we consider that it is clear that Parliament intended to legislate by that Act so as to introduce EU law into domestic law … in such a way that this could not be undone by exercise of Crown prerogative power. With the enactment of the ECA 1972, the Crown has no prerogative power to effect a withdrawal from the Community Treaties on whose continued existence the EU law rights introduced into domestic law depend …. .. The Crown therefore has no prerogative power to effect a withdrawal from the relevant Treaties by giving notice under Article 50 of the TEU*.'

He expanded on this by making 8 ancillary points (pages 26-27 of the judgement. On international treaties, Lord Thomas noted:

> '*Moreover, the fact that Parliament's approval is required to give even an ancillary treaty made by exercise of the Crown's prerogative effect in domestic law is strongly indicative of a converse intention that the Crown should not be able, by exercise of its prerogative powers, to make far more profound changes in domestic law by unmaking all the EU rights set out in or arising by virtue of the principal EU Treaties*.'

To hammer his message home on this Lord Thomas emphasised:

> '*In our judgment, the clear and necessary implication from these provisions taken separately and cumulatively is that Parliament intended EU rights to have effect in domestic law and that this effect should not be capable of being undone or overridden by action taken by the Crown in exercise of its prerogative powers.*'

What did the court say about the argument based on the *Case of Proclamations*?
Lord Thomas said this was this was the 'principal contention' made by Mrs Miller. In agreeing that her submission on this were correct he ruled that '*the Crown cannot through the exercise of its prerogative powers alter the domestic law of the United Kingdom and modify rights acquired in domestic law under the ECA 1972 or the other legal effects of that Act. We agree with the claimants that, on this further basis, the Crown cannot give notice under Article 50(2).*'

What did the court say about prior court decisions on the royal prerogative?
Lord Thomas referred in detail to all 5 speeches in the House of Lords in *De Keyser's Royal Hotel* **[1920] AC 508** and said that he took from this that it had held that '*the Crown's prerogative power to take without paying compensation had thereby been impliedly removed by the legislation. But the House of Lords did not decide that this is the only kind of situation in which an implied abrogation may be found*'.

He then went on to analyse the House of Lords judgments in *Fire Brigades Union* **[1995] 2 AC 513** which was also binding on the High Court. From this Lord Thomas said that '*Parliament could not be taken to have legislated in vain*'. He went on to rule that *'sections 2(1), 2(2) and 3(1) of the ECA 1972 set out legal duties already in force which require effect to be given to EU law'* and that '*contrary to the submission of the Secretary of State, the inference that Parliament intended to abrogate the Crown's prerogative powers that would allow those provisions to be stripped of practical effect is even stronger.'*

Were any further support needed, Lord Thomas relied on *Laker Airways* **[1977] QB 643** which being a decision of the Court of Appeal was binding on the High Court. He noted that Lawton LJ had ruled there that '*the Secretary of State cannot use the Crown's powers in this sphere in such a way as to take away the rights of citizens'*.

What did the court say about the Act of Union 1707?
Lord Thomas said that in the end the Divisional Court did not '*find it necessary to address the supplementary submissions made by Miss Mountfield QC on the effect of the Act of Union of 1707'*.

What notice or regard did the court give to the ruling last month in the parallel case in Belfast?
Lord Thomas went on to note the judgment of Maguire J in *McCord [***2016] NIQB 85.** Lord Thomas noted that **'***the parties before us deliberately withdrew from their arguments submissions based on that Act and the "Good Friday Agreement" on the basis that those issues were for the decision of the High Court in Northern Ireland'*. However Lord Thomas pulls out 3 points from Maguire J's judgement:

- '*were it not for the displacement of the prerogative by the Northern Ireland Act 1998, the use of prerogative power to give notice under Article 50 would be unobjectionable'*,
- '*The judgment does not however address the principle that the Crown cannot through its prerogative power change any part of the law of the land'*, and
- '*the judge did not have the benefit of the careful analysis of the effect of Article 50 addressed to us'*

How did the court interpret the EU Referendum Act 2015 in its ruling?
This was very much the icing on the cake, with Lord Thomas observing that the EURA 2015:

> '*was passed against a background including a clear briefing paper to parliamentarians explaining that the referendum would have advisory effect only. Moreover, Parliament must have appreciated that the referendum was intended only to be advisory as the result of a vote in the referendum in favour of leaving the European Union would inevitably leave for future decision many important questions relating to the legal implementation of withdrawal from the European Union.*'

What did the court rule about a leap frog certificate?
Section 12 of the Administration of Justice Act 1969 deals with 'leap frog' appeals from the High Court directly to the Supreme Court. It provides as follows:

> **'12. Grant of certificate by trial judge.**
> *(1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied—*
> *(a) that the relevant conditions are fulfilled in relation to his decision in those proceedings, and*
> *(b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal, and*
> *(c) that all the parties to the proceedings consent to the grant of a certificate under this section, the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.*
> *(2) This section applies to any civil proceedings in the High Court which are either—*
> *…*
> *(c)proceedings before a Divisional Court.*
> *….*
> *(4) Any application for a certificate under this section shall be made to the judge immediately after he gives judgment in the proceedings'*

As the Government lost, it asked for a leap frog certificate to be able to take this case to the Supreme Court directly and bypassing the Court of Appeal being the normal appeal route. The Divisional Court granted a leap frog certificate but it has no power to grant permission to appeal to the Supreme Court. The UK Government must now seek permission from the Supreme Court itself for a final appeal.

When could the Supreme Court hear this case?
The Supreme Court is likely to want to sit *en banc* to hear this. There are 2 gaps in the Supreme Court's diary in its Michaelmas term diary. They are:

- 7 and 8 December 2016, and
- 19 - 22 December 2016.

What about costs?
The claimants, interveners and interested parties through their counsel all applied for an order for costs against the UK government. At a case management hearing before the October 2016 hearing, a cap was ordered to be place on the amount of costs recoverable. The court made adverse costs orders against the UK government subject to these caps. Surprisingly, although it would have been open for any party to do so, no-one applied for a payment on account of costs against the UK government under CPR part 44.2(8).

What were the exact terms of the declaration made by the court?
The declaration sought in the Claim Form was that '*it would be unlawful for the Defendant or the Prime Minister on behalf of Her Majesty's Government to issue a notification under Article 50 of the Treaty on European Union to withdraw the United Kingdom from the European Union without an Act of Parliament authorising such notification'.* This had been subject to fine tuning revisions and Lord Pannick QC had submitted the latest version of this before the handing down hearing. James Eadie QC said that he needed to take instructions from Ministers on this wording. He asked for and was granted time until close of business on 7 November 2016. So at the moment we don't yet have a final or agreed form of declaration that the Divisional Court is making consequent on its ruling.

What happened in the High Court in Belfast?
Mr Justice Maguire in the High Court in Belfast heard a similar challenge brought by Mr Raymond McCord on 6 October 2016. The focus of that 2 day case related to the devolution settlement for Northern Ireland including what could happen in relation to the border with the Republic of Ireland. There was provision for this in the Good Friday agreement. He need not hear argument on the scope of the prerogative power because that issue was argued only in the English High Court. In what was to prove to be a false dawn for the UK Government, Maguire J in his reserved judgment dismissed the challenge in Belfast High Court based on arguments on the Good Friday agreement. His judgement dated 28 October 2016 is reported at **[2016] NIQB 85.**

What could happen in the Supreme Court?
The Supreme Court has to give permission for a final appeal to be brought. At the moment, the High Court has granted a leap frog certificate allowing the Court of Appeal to be bypassed. It is important to stress that this is an appeal and the UK Government will need to persuade the Supreme Court that the High Court erred in some way. The UK Government should not be allowed to introduce new material. The Supreme Court will be tied by the findings of fact made by the High Court. Although the judgement does not refer to any as such there were witness statements filed in the High Court which provide evidence of the real affect of Brexit without prior parliamentary approval. This was particularly the case

for the Expat Interveners and the interested parties affected by immigration issues. Mr Green QC at the hearing on 17 October 2016 specifically referred to his client's evidence.

In the High Court, one of the main arguments deployed by the UK Government was that this case was not justiciable. This means the UK Government says that the courts cannot stray into this territory which is a political one reserved to Government or Parliament. During the course of argument over 3 days, Mr Eadie QC was forced to concede this in the High Court and on 18 October 2016 Lord Thomas said that justiciability was no longer in issue. This is reflected in the 3 November 2016 judgment.

However the UK Government has not abandoned its case based on justiciability. It is bound to return to this in the Supreme Court. It will be tempting for a more politically astute Supreme Court under the presidency of Lord Neuberger to see how far the envelope can be stretched on this to accommodate the UK Government. The High Court has approached this on an 'all or nothing' basis but this may be too stark and the Supreme Court may want to feel its way to a third way on this.

On the opposing side, the Supreme Court will face strong submissions that the Royal Prerogative has had its day and cannot survive either at all or in its present form in a representative democracy. It will be interesting to see how this is developed and what interventions come from the panel.

There were a large number of bundles produced for the hearing and the parties written arguments refer to a large number of authorities including prior court cases. The English High Court decision at paragraph 104 refers to and makes 3 poignant observations based on the Belfast High Court judgment handed down by Mr Justice Maguire on 28 October 2016. In some ways this is the case of 2 giddy children trying to steady themselves on an icy path. The Supreme Court will not be confined in this way and will be able to overrule all or parts of either the London or Belfast decisions.

It is doubtful that the Supreme Court will agree with the Divisional Court that it makes no difference whether you look at Article 50.1 or Article 50.2. The UK Government had tried to put up a smokescreen below by focusing only on Article 50.2 and failing to engage at all with what the UK's 'constitutional requirements' were under Article 50.1. They are distinct parts of the Article and intended to do different things with different requirements. Lord Thomas said at paragraph 16 of the judgment that '*In our view, nothing really turns on this, since it is clear that the two provisions have to be read together*.' This is clearly open to attack in the Supreme Court.

At the hearing some reference was made to Lord Denning MR in *Blackburn v. Attorney-General* **[1971] EWCA Civ 7** in which he doubted whether the UK government would be able to simply repeal the ECA 1972. However as this is a Court of Appeal decision, it is open to the Supreme Court to overrule this and to give its opinion on this which may be the diametrical opposite.

The High Court judgment makes extensive reference to *In the matter of Part Cargo ex Steamship Zamora* **[1916] UKPC 24**. However this is a Privy Council decision. In *Willers v Joyce (No 2)* **[2016] UKSC 44** a full court of 9 Supreme Court justices was at pains to stress that decisions of the Privy Council did not bind it. Lord Neuberger PSC said that the '*position is rather more nuanced when it comes to courts of co-ordinate jurisdiction*' and spelled this out saying:

> *'First, given that the JCPC is not a UK court at all, decisions of the JCPC cannot be binding on any judge of England and Wales, and, in particular, cannot override any decision of a court of England and Wales (let alone a decision of the Supreme Court or the Law Lords) which would otherwise represent a precedent which was binding on that judge'*

This gives the Supreme Court considerable leeway here if it wants to reshape the common law in a way that departs from that stated in the *Zamora* a century ago.

The High Court judgment refers to a 4 other Court of Appeal or High Court decisions such as *Rees-Mogg, Blackburn, Thoburn* and *Laker Airways*. These decisions are not binding on the Supreme Court and again this gives it room to maneuver should it decide to add any glosses or qualifications on what the lower courts have said there.

As to the *Case of Proclamations* itself, it is unlikely that the Supreme Court would want to doubt the overarching proposition in that case. However the case is 400 years old. Although the judgment was given by Lord Coke, it is not exactly clear what judicial status it has. So the Supreme Court is likely to take this only as a starting point and then seek to fashion a result it feels will fit present circumstances from it.

The High Court judgment refers to a New Zealand case (*Fitzgerald v Muldoon* **[1976] 2 NZLR 615**) but no others from common law jurisdictions. It is inevitable that all sides will be looking for authorities that support their position from countries such as Canada, Australia, New Zealand or the other commonwealth countries. Again these will be merely persuasive with the Supreme Court.

The judgement refers to the 1915 edition of Dicey on '*An Introduction to the law of the constitution'.* At the hearing on 13 October 2016, Dominic Chambers QC also referred extensively to Professor Vernon Bognador's writing on the referendum but, surprisingly, this is not referred to in the High Court judgment itself. Academic writings such as these hold great sway with the Supreme Court – especially Lade Hale DPSC – and no doubt other writings will be sought by parties to support their cases.

Finally, the judgement refers to 10 previous House of Lords cases (*Jackson, Burmah Oil, De Keyser's Royal Hotel, International Tin Council, Lyons, Factortame, Buckinghamshire CC, Anisminic, ex parte Pierson* and *Fire Brigades Union*). It would be open to the Supreme Court to decide not to follow those if it so chose. However this has not been the approach of the Supreme Court recently. Instead in cases such as *Cavendish Square v. Makdessi* **[2015] UKSC 67** it has sought to 're-explain' older House of Lords judgments for the modern age. Again this is likely to prove very tempting for Mr Eadie QC to guide the Supreme Court Justices in this direction where he needs to.

What is clear is that the Supreme Court hearing will be the end of it. Although there are a number of CJEU cases referred to in the judgement and more still in the bundles, it will be most unattractive to have to refer any issue (even one exclusively on EU law) to the Luxembourg court.

What will be the significance of this case?
It is fair to say that this is the most significant constitutional law case in the last 2 generations.

At its heart is who takes the decision to leave the EU. The June 2016 referendum saw a high turnout – much larger than in recent general elections. The vote to leave was by a 4% margin but was significant enough to be clear. Those who voted to leave, see this case as at attempt by wealthy litigants to use the courts or legal technicalities to frustrate and undermine the democratic will of the British people.

On the other hand, even some of those who voted to leave are unhappy about the process that is being followed with little democratic involvement in the detail. It is telling that both sides have had to go back over 400 years for a case on the scope of the Royal Prerogative power.

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