

THE DUCHY OF CORNWALL AND THE PRINCIPLE OF CROWN IMMUNITY PART II: IS THE DUCHY FREE TO BREAK THE LAW WITHOUT CRIMINAL SANCTION?

Dr John Kirkhope¹

Introduction

Part two of my analysis of the legal status of the Duchy of Cornwall, following on from my earlier musings in this journal 'Is the Duchy of Cornwall entitled to Crown Immunity?'², questions its status as a 'Private Estate' which benefits from 'Crown Saving Clauses', which arguably no one can explain, which permits the Duchy to break the Law without criminal sanction and includes a digression into the mysterious existence of the so-called 'Crown Roads'.

I have gained a modicum of fame (notoriety) from my researches into the Duchy of Cornwall. One result of this is that I have benefitted (?) from a small number of correspondents who, typically, will write to me along the following lines: 'I don't know if you are aware but...'. Frequently, despite myself, I am sufficiently intrigued to pursue research which distracts from my other interests and has, sometimes, landed me in court, about which more later. Before proceeding further, let me explain, this article explores the principle of 'Crown Immunity' and its application to the Duchy of Cornwall, in general terms it can be summarised as follows:

The Crown is not bound by statute unless the contrary is expressly stated, or there is a necessary implication to be drawn from the provisions of the Act that the Crown was intended to be bound...³

The basis of Crown Immunity is the maxim: 'The King/Queen can do no wrong'. The usual understandings of the adage are: 'Whatever the King/Queen does cannot be wrong'. Next the principle of 'absolute perfection' which provides that, in law, the Sovereign is regarded as being incapable of thinking wrong or meaning to do an improper act. Finally the Sovereign has no legal power to do wrong and as Maitland explained '...against the King the law has no coercive power.'⁴

¹ Visiting Research Fellow, Plymouth University.

² See Kirkhope, J., '[Is the Duchy of Cornwall entitled to Crown Immunity?](#)' *Plymouth Law and Criminal Justice Review* (2014) 41-57 for Part I.

³ Halsbury's Laws of England Volume 8(2) Constitutional Law and Human Rights para.384.

⁴ Tomkins, A., 'Crown Privileges' in Sankin, M., and Payne, S., *The Nature of the Crown* (1999) p.176.

There are many articles written by distinguished academics which explore this issue in detail. My particular interest is the fact that the principle of Crown Immunity and in many cases the privileges of the Crown are extended to the Duchy of Cornwall and, in at least two cases, to the Duke of Cornwall personally.⁵ It is this with which the rest of the article shall be concerned.

The Duchy of Cornwall on its website asserts it is a 'private estate' which has caused contention for a considerable period of time.⁶ In the case of *Michael Bruton v Information Commissioner and The Duchy of Cornwall* (2010)⁷ it was decided by the First Tier Tribunal that the Duchy of Cornwall conducted 'public administrative functions' by virtue of its control of St Mary's Harbour, Isles of Scilly. The Duchy of Cornwall is now seeking to 'privatise' the Harbour because its control is inconsistent with its 'status as a private landed estate'.⁸ The author has considerable doubts whether the Duchy of Cornwall is a 'private estate' in the sense that term is ordinarily understood and about which he has written at length.⁹ However for present purposes he is prepared to accept the Duchy of Cornwall's description of itself.

1 Crown Saving Clauses

Typically a Crown Saving Clause will read along the following lines:

Subject as otherwise expressly provided in this Act, this Act shall apply to land belonging to Her Majesty in right of the Crown of the Duchy of Lancaster, to land belonging to the Duchy of Cornwall.¹⁰;

Subject to subsections (2) to (5), Part 1 and regulations and orders under it bind the Crown¹¹;

The provisions of this Part bind the Crown¹²; and

Subject to paragraphs 2 to 5 these Regulations bind the Crown.¹³

⁵ Health and Safety at Work etc. Act 1974 Part 1 section 48. The Equality Act 2006 does not affect the Duke of Cornwall.

⁶ See for example HC Debate 8 June 1832 vol.13 cc.554-5, HC Debate 25 March 1850 vol.109 cc.1370-89, HC Answers 9 February 2009 column 1533W etc.

⁷ EA/2010/0182.

⁸ Duchy of Cornwall: St Mary's Harbour, Scilly Governance Review Public Consultation Paper 8 January 2015 para.50.

⁹ See for example Kirkhope, J., 'Is the Duchy of Cornwall entitled to Crown Immunity?' *Plymouth Law and Criminal Justice Review* (2014) 41-57.

¹⁰ Land Drainage Act 1991 section 74.

¹¹ Wildlife and Countryside Act 1981 Part IV section 66A.

¹² Marine and Coastal Access Act 2009 Part 4 section 111.

¹³ The Environmental Permitting (England and Wales) Regulations 2010 No. 675 Schedule 4 section 1

Usually the Act or Regulation will then go on to specifically provide the Duchy of Cornwall is included. For example:

'Crown land' is land in which there is a Crown Interest or a Duchy interest.
A Duchy interest is an interest belonging to the Duchy of Cornwall¹⁴;
'Crown land' means land in which there is a Crown interest or a Duchy interest.
'Duchy interest' means an interest ... belonging to the Duchy of Cornwall.¹⁵

At this point I would like to reiterate that I have an interest in the way these various clauses, a few examples of which are provided above, relate to the Duchy of Cornwall, which I would emphasise describes itself as a 'private estate'. The more I delved into the legislation the more I observed the different ways in which the Duchy of Cornwall's interest was defined. For example:

Land belonging to the Duchy of Cornwall¹⁶;
...an estate which belongs to the Duchy of Cornwall¹⁷;
...property, rights or liabilities belonging to the Duchy of Cornwall¹⁸; and
...land or hereditaments or any rights of whatsoever description belonging to the Duchy of Cornwall.¹⁹

Since there is reference, variously, to 'land belonging to the Duchy of Cornwall', 'an estate belonging to the Duchy of Cornwall' and 'liabilities of the Duchy of Cornwall' I decided to see if I could establish what the persons who drafted the legislation thought those terms meant. In that connection I wrote to numerous Departments of State, using the Freedom of Information Act 2000, requesting copies of correspondence between those Departments and the Duchy of Cornwall and any material which explained the meaning of the various clauses contained in the legislation.²⁰ In summary, I did not succeed in getting any information at all. The various Departments asserted they had no papers relating to my questions and could not assist in providing any papers which explained the meaning of the clauses contained in legislation. The most 'enlightening' answer I received came from Cornwall Council who, together with Plymouth City Council, were responsible for drafting the Tamar Bridge Act 1998, and replied as follows:

Section 41 of the Tamar Bridge Act 1998 is the standard clause *required by the Duchy of Cornwall* to be inserted into legislation which impacts on the estate and its rights, powers and privileges.

¹⁴ Planning Act 2008 Part 12 section 227(2) and 227(4).

¹⁵ Planning (Hazardous Substances) Act 1990 section 31(2) or section 31(3).

¹⁶ Land Drainage Act 1991 section 74.

¹⁷ Land Registration Act 2002 Schedule 6 section 13.

¹⁸ Infrastructure Act 2015 Part 3 section 31.

¹⁹ Tamar Bridge Act 1998 section 41.

²⁰ For information I wrote to the Department of Environment Food and Rural Affairs, Department for Transport, Department for Communities and Local Government, Department of Energy and Climate Change, Department for Business Innovation and Skills, Department of Culture Media and Sport.

It is, of course, open to any promoter of a Bill in Parliament not to include provisions equivalent to or the same as Section 41 but the inevitable consequence of so doing is that the Act will be delayed by several months at least and will be required to go through an inquiry process.

In the case of the 1998 Act, the Joint Authorities, Cornwall County Council and Plymouth City Council, accepted that the strengthening and widening of the Tamar Bridge would impact on the estate and rights of the Duchy of Cornwall...To have not included the standard protective provisions, therefore, would not only have delayed a time-critical piece of legislation, it would not have been an appropriate position for the councils to take.

This Council does not possess published materials which set out the information you seek...²¹

I would summarise the reply thus. The clause was included '*as required by the Duchy of Cornwall*', a 'private estate', and the Council does not '*possess published materials*' which explain what the clauses mean. In simple terms the clause was included because it was a requirement to do so but the drafters of the Act actually do not know what the clause means.

The various Departments to whom I wrote, almost invariably referred me to the Office of Parliamentary Counsel, a part of the Cabinet Office, with whom I have had previous dealings. I wrote to them and suggested, rather than waste public money with endless Freedom of Information Requests, would a meeting be more sensible. The reply I received thanked me for my 'pragmatic proposal' and agreed to a meeting for which I am grateful.²²

The hypothetical question I posed was:

Imagine I am a member of the Office of Parliamentary Counsel and I have been asked to draft a Bill which referred to 'an interest', 'property rights or powers'. 'estate', 'land and hereditaments' etc of the Duchy of Cornwall how would I establish what those terms mean? To what would I refer? How do I know which is the appropriate clause to include?"

The answer I received was: 'We would discuss it. There is no written material to which I could be referred.' I came to the conclusion which, maybe, is unfair that the clauses were included as a matter of routine which no one, as far as I could discern, could explain or define.

There is a highly unusual clause included in The St Mary's (Isles of Scilly) Harbour Revision Order 2007²³ which at clause 20 states:

Nothing in this Order affects prejudicially any estate, right, power, privilege, authority or exemption of the Crown including (without prejudice to the *general law concerning*

²¹ Cornwall Council letter to author 17 November 2014 FOI – 101001724497.

²² Letter to author dated 27 November 2014. Meeting at Cabinet Office on 19 January 2015.

²³ The St Mary's (Isles of Scilly) Harbour Revision Order 2007 No.1554.

the applicability of statutes relating to the Duchy of Cornwall) including the Duchy of Cornwall....

I would suggest the drafters of the Order would be hard pressed to summarise the general law concerning the applicability of statutes relating to the Duchy of Cornwall. It is, I would submit, a further example of a form or words included without anyone having a real understanding of what they mean.

The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2000²⁴ provides at Schedule 2 section 1 before work can be carried out 'adjacent to the counties of Devon and Cornwall and the Isles of Scilly' approval of the Duchy of Cornwall must be sought. The coast adjacent to Cornwall and the Isles of Scilly is understandable but why Devon? The Department of Transport²⁵ and the Cabinet Office²⁶ both advised that after a search of their records they did not hold this information. Or expressed another way they appear not to know why. One example of many of the privileges of the Crown being extended to the Duchy of Cornwall is contained within the Land Registration Act 2002 Schedule 6 section 13 which provides that adverse possession of the foreshore will be 10 years except in the case of the Crown, Duchy of Lancaster and Duchy of Cornwall when it is 60 years.

2 'Crown Roads'

Another of my occasional correspondent's wrote to me to point out the provisions of the Road Traffic Regulation Act 1984 section 131(3) which reads:

No order, regulation or scheme in relation to a Crown Road shall be made, varied or revoked under any of the road traffic enactments by virtue of an order under subsection (1) above except by, or with the consent of, the appropriate Crown authority.

Section 131(7)(iii) defines the appropriate 'Crown authority' as the Crown Estate Commissioners, the Chancellor of the Duchy of Lancaster and '...in the case of a road on land belonging to the Duchy of Cornwall, means such person as the Duke of Cornwall or the possessor for the time being of the Duchy of Cornwall appoints.' There have also been detailed regulations passed under the Act.²⁷

²⁴ The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2000 No.2109.

²⁵ Dept. of Transport Reference F0011798.

²⁶ Cabinet Office Reference FOI320240.

²⁷ The Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996 No. 2489; The Crown Roads (Royal Parks)(Application of Road Traffic Enactments) Order 1987 No 363; The National Parks Authorities' Traffic Orders (Procedure) (England) Regulations 2007 No. 2542.

I thought it would be interesting, in the same way train-spotters find spotting trains interesting, to see if I could create a list of Crown Roads and embarked on engaging in correspondence the result of which was uninformative, unenlightening and, maybe, mildly amusing. I wrote to the Department of Transport on 28 June 2014 asking for a list of Crown Roads. I eventually received a reply on 8 October 2014, but only after complaining to the Information Commissioner.²⁸ The Department explained the delay by advising 'We have consulted the Royal Household'²⁹ and on 22 October wrote a letter advising they did not hold the 'specific information' I had requested.³⁰

I then wrote to Dorset County Council on 24 October 2014 asking for a list of Crown Roads in Dorset. It is worth bearing in mind the Duchy of Cornwall's development of Poundsbury is in Dorset. They replied on 12 November 2014 and advised: 'There are currently no traffic regulations within Poundsbury as either not yet highway or adopted highway...' They wrote again on 24 November 2014 advising their Highways Information Unit had 'not heard of the term "crown roads"'.³¹

I also wrote to Devon County Council on 24 October 2014 and the Dartmoor National Park Authority on 31 October 2014 since, it is claimed, a third of Dartmoor is owned by the Duchy of Cornwall and it is within Devon. Devon County Council stated they had no record of having any Crown Roads in Devon.³² Dartmoor National Park Authority simply stated that they did 'not hold this information'.³²

The Duchy of Cornwall has, at least, a freehold interest in the whole of Cornwall thus I wrote to Cornwall Council in addition to the above. The reply I received on 19 November advised:

To the best of our knowledge there are no Crown Roads within Cornwall. The vast majority of the public highways rests on land which has no registered owner..this might be construed as being Duchy land by default, this is not definitive...³³

The Crown Estate advised:

The Crown Estate does not hold a list of Crown Roads, nor does it identify Crown Roads on its record maps. However, it is likely that some roads in the Windsor Great Park and on other rural estates fall into this category.³⁴

²⁸ ICO Reference FS50551061.

²⁹ Email to writer dated 8 October 2014 from FOI Advice Team Dept. for Transport.

³⁰ Letter to writer 22 October 2014 their reference F0011660.

³¹ Letter to writer dated 18 November 2014 Devon County Council Reference IR2004464.

³² Letter to writer dated 14 November 2014.

³³ Cornwall Council Reference IAR-101001759771.

³⁴ Email to writer dated 29 October 2014.

The Duchy of Lancaster advised:

it would seem that the Duchy does not have any Crown Roads and we certainly have no list. The nearest we may come to such a road might be the public highways which runs across the Stray in Harrogate, but it seems to me they would be covered by the Stray Acts rather than the road traffic regulations.³⁵

The email I sent to the Duchy of Cornwall at 9.23 am on 31 October 2014 received a reply at 10.08 am on the same day which advised:

I understand you asked the same question Government.
We will send you a coordinated response when we have research the position.

I have heard nothing further.

In conclusion, despite primary legislation and regulations passed under that legislation, it would appear if Crown Roads exist either the term is unfamiliar to the various Departments within County Councils or no one has a record of them. It seems possible they may exist in Harrogate and Windsor Great Park but no one is entirely certain. Furthermore, Road Traffic regulations do not apply to Poundsbury which, I am sure, is a relief to the residents.

3 Is the Duchy of Cornwall free to break the Law without criminal sanction?

A clause typical of the sort with which I shall next be concerned appears in the Marine and Coastal Access Act 2009 Part 4 Chapter 5 section 111 which reads:

The provisions of this Part bind the Crown (which includes the Duchy of Cornwall)
No contravention by the Crown of any provisions of this Part is to make the Crown criminally liable...

Similarly in the Data Protection Act 1998 section 63 states

the Act binds the Crown (including the Duchy of Cornwall) but any data controller appointed by the Duke of Cornwall will not be liable to prosecution under the Act.

Other examples would be the Water Industry Act 1991 section 221 (substituted by Schedule 1 of the Environment Act 1995) and the Wildlife and Countryside Act 1981 section 66A (as inserted by section 54(1) of the Natural Environment and Rural Communities Act 2006). In fact the following list, which is by means comprehensive, also includes provisions by which a breach of the Act would not give rise to criminal sanction:

Nuclear Explosions (Prohibition and Inspections) Act 1998 section 14
Transport Act 2000 section 196

³⁵ Email to writer dated 28 November 201.

Licensing Act 2003 section 195
Planning and Compulsory Purchase Act 2004 section 84
Planning Act 2008 section 228

It is suggested that most people would find it odd that the Duchy of Cornwall can cause a nuclear explosion without criminal sanction. An estate which asserts that it is 'private' yet is given exemption from criminal sanction under numerous Acts of Parliament should it act in breach is a remarkable state of affairs.

Equality before the Law

One of the jewels of the English legal system was always said to be the principle of 'equality before the law'. Bracton, nearly 800 years ago, in 1235 said 'That the King shall not be under man, but under God and the Law'.³⁶ Lord Bingham in Chapter 5 of his recent book *The Rule of Law* headed 'The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation' said:

Most people today would, I think, rightly regard equality before the law as a cornerstone of our society ... But any departure from the general rule of equal treatment should be scrutinized to ensure that the differential treatment is based on real differences.³⁷

The Right Honourable Lord Judge, Lord Chief Justice of England and Wales, in a speech given at the Commonwealth Law Conference on 18 April 2013 entitled *Equality before the Law* asserted:

The rule of law is a phrase which has spawned many children. We can all make it say many things, and even the greatest jurist among us struggle from time to time to define precisely what we do mean. But as lawyers we rather understand when the rule of law is applied, and recognise it, and understand and recognise it when it is not. *But if we are looking for a critical ingredient in the rule of law it is that we must live in a society in which every citizen is treated equally before the law.* [emphasis added].

But neither money nor wisdom nor strength nor social position nor political or financial power should ever attract special privileges or special treatment from the law.

Jeremy Wright, QC, MP, The Attorney General, in a speech at the London Law Expos on 14 October 2014 quoted Dicey and said:

[Dicey] also said when we speak of the 'rule of law' we mean not only that with us no man is above the law, but that here every man, whatever be his rank or condition, is subject to the ordinary laws of the real and amenable to the jurisdictions of the ordinary tribunals.

Hilaire Barnett in her book *Constitutional and Administrative Law* says:

³⁶ Bracton *Laws and Customs of England* (1235).

³⁷ Bingham, Tom *The Rule of Law* (2010) (London) pp.55 *et seq.*

must be set the extent to which government and public officials are subject to law in the sense of being accountable for their actions before ordinary courts, for this indeed, was Dicey's real argument.³⁸

The Duchy of Cornwall, a private estate, which seeks to unburden itself of obligations which potentially make it subject to the Freedom of Information Act, under various Acts of Parliament can breach the law without fear of criminal sanction. It enjoys a privilege of the Crown not available to any other 'private estate'. This is an extraordinary, some may even suggest, offensive situation.

4 The Duchy of Cornwall and Crown Immunity

As expressed above the author has some doubt about the Duchy of Cornwall's claim it is a 'private estate' and assumption that it is entitled to 'Crown Immunity', and for that reason is entitled to the benefit of 'Crown Saving' clauses including freedom from criminal sanction: something he has written about at some length 'Is the Duchy of Cornwall entitled to Crown Immunity?'³⁹ The author has no wish to reiterate the material contained within the article, however, he would refer readers to the case of *Michael Bruton v Information Commissioner and others* cited above in which that Tribunal observed: 'The Duchy has a historical context which is complicated and possibly unique' [and] 'When there is no Duke then the Duchy is managed by the Crown, but it does not belong to the Crown or to the Monarch.'⁴⁰ This latter point is significant. The Duchy of Cornwall may be managed by the Crown but is never absorbed into the Crown and indeed the Appellant can give examples of disputes between the Duchy of Cornwall and the Crown when there was no Duke. The Crown could hardly be in a position of being in dispute with itself.

In a letter written on 3 February 1961 from Mr J.S. Fiennes of the Office of Parliamentary Counsel to Mr K.R. Mackenzie of the Public Bill Office at the House of Commons it is stated '(Crown Immunity)...applies equally to the Duchy of Cornwall but it only applies because of the Crown's interest in the Duchy when there is no son of the Sovereign.' I would suggest the argument set out in this letter is still reflected in Government when drafting legislation and has become part of the orthodoxy despite the fact the basis upon which the Duchy enjoys that immunity is at the very least questionable.

³⁸ Barnett, Hilaire *Constitutional and Administrative Law* (Routledge Cavendish, 2006) p.85.

³⁹ Kirkhope, 'Is the Duchy of Cornwall entitled to Crown Immunity?'

⁴⁰ (2010) EA/2010/0182 at paras.2 and 33.

The presumption of Crown Immunity extending to the Duchy of Cornwall appears to be based on a Law Officer's Opinion of 1913⁴¹ which was repeated in 1921⁴². If at that time it was accepted the Duchy enjoyed Crown Immunity then the Inland Revenue would not have entered into dispute with the Duchy and found it necessary to seek Counsel's Opinion. The Opinion is based upon a palpable error as the nature of the Monarch and Heir's rights in respect of the Duchy. The Law Officer's opinion was premised on the assumption that the Monarch and Heir have some legal right in respect of the land and other capital assets of the Duchy:

I think the question might be answered by saying that the Prince of Wales qua Prince of Wales is bound by statute, but qua Duke of Cornwall *and in respect of Duchy lands* he is not bound. *The lands of the Duchy* would appear to be in an anomalous position. They are not Crown lands strictly speaking but they are analogous to Crown lands. Are (sic) one time they may be *in the hands of* the sovereign at another time in those of the Prince... [emphasis added].

This fundamentally misunderstands the nature of the Monarch and Heir's interest in the Duchy. They have no right whatsoever to its land or other property. Their sole entitlement, which is dependent on whether there is an eligible Heir from time to time, is payment of the income which the Duchy generates. It follows that the central premise of the Law Officer's opinion is misfounded and that it is, to say the least, questionable the Duchy is entitled to any form of Crown Immunity. The Opinion on its face supplies no cogent reasoning or explanation for the concessions which the Duchy has enjoyed for over 100 years. Despite the fact that the 1913 Law Officer's Opinion is inconsistent with previous Law Officer's Opinions and is highly unsatisfactory Crown Immunity was extended to the Duchy of Cornwall by executive action without the approval of, or even discussion in, Parliament. Furthermore the Opinion has never been scrutinised by the Courts.

If the Duchy of Cornwall is not entitled to Crown Immunity then the extension of the 'Crown Saving' clauses to the Duchy, including freedom from criminal sanction, comes into question and the basic premise upon which these clauses are founded in so far as they relate to the Duchy of Cornwall are thrown into doubt.

Conclusion

The Duchy of Cornwall claims to be a 'private estate' which implies it is like the Duchy of Bedford or Duchy of Somerset but at the same time claims the privileges of the Crown. So that it can 'require' clauses be inserted in legislation, 'adverse possession' claims in respect

⁴¹ TNA LO 3/467 Duchy of Cornwall, Land Tax and Valuation (1913).

⁴² TNA IR 40/16546 Liability of Duchy of Cornwall to tax (1921) and IR 40/16549 Duchy of Cornwall Law Officer's Opinion (1921).

of the foreshore must run for 60 years and not ten, its permission is required in respect of 'Crown Roads' even though no one knows where they are to be located and clauses are included in legislation which have the benefit of being highly ambiguous. Most significantly of all the Duchy of Cornwall is free to break the law without criminal sanction.

All these privileges are based on the assumption that the Duchy of Cornwall is entitled to 'Crown Immunity' based on a flawed Law Officer's Opinion inconsistent with previous Law Officer's Opinions never discussed in Parliament, never tested by the Courts and imposed by executive action.

Postscript: Dr John Kirkhope v The Information Commissioner and Cabinet Office (2015)⁴³

I said at the start that sometimes my enquiries had landed' me in court to which I promised to return. I made Freedom of Information requests to the Cabinet Office in respect of the Wildlife and Countryside Act 1981, the Water Industry Act 1991 and the Data Protection Act 1998 asking for copies of the correspondence in respect of those clauses which related to the Duchy of Cornwall being free from criminal sanction. The Cabinet Office refused to provide the information requested quoting the qualified exemption of Legal Professional Privilege.⁴⁴ I appealed to the Information Commissioner who supported the Cabinet Office.⁴⁵ I then appealed to the First Tier Tribunal and as a result there was a hearing and the outcome is awaited at which time I may submit further articles.

⁴³ EA/2015/0034, EA/2015/0074 and EA/2015/0098).

⁴⁴ Freedom of Information Act 2000 section 42(1).

⁴⁵ FS50550467, FS5055096 and FS50554507 respectively.