# HIGH COURT OF AUSTRALIA

KIRBY J

**Matter No P46/2000**

IN THE MATTER OF AN APPLICATION FOR
A WRIT OF CERTIORARI AGAINST THE
HONOURABLE JUSTICE NEVILLE JOHN OWEN,
A JUDGE OF THE SUPREME COURT OF
WESTERN AUSTRALIA & ORS RESPONDENTS

EX PARTE ROBBY SUMAMPOW & ANOR APPLICANTS

*Re Owen; Ex parte Sumampow*
[2001] HCA 55
*Date of Order: 10 September 2001*
*Date of Publication of Reasons: 4 October 2001*
P46/2000

**ORDER**

1. *The application for a writ of certiorari is dismissed.*

2. *The applicants pay the second and third respondents' costs of the application.*

**Representation:**

No appearance for the first respondent

M J Buss QC with N A Odorisio for the second and third respondents (instructed by Clayton Utz)

K G Robson with T S Su for the applicants (instructed by Su & Co)

# HIGH COURT OF AUSTRALIA

KIRBY J

**Matter No P53/2000**

ROBBY SUMAMPOW & ORS APPLICANTS

AND

MERCATOR PROPERTY CONSULTANTS PTY LTD & ANOR RESPONDENTS

*Sumampow v Mercator Property Consultants Pty Ltd*
*Date of Order : 10 September 2001*
*Date of Publication of Reasons: 4 October 2001*
P53/2000

**ORDER**

*1. That part of the cause in proceedings No FUL 92 of 2000, pending in the Full Court of the Supreme Court of Western Australia which involves the following question:*

> *"Are s 10 and s 7(2) of the* Federal Courts (State Jurisdiction ) Act 1999 (WA) *invalid?"*

*be removed into this Court pursuant to section 40 of the* Judiciary Act 1903 (Cth) *on the ground that such question arises under the Constitution and involves its interpretation.*

*2. The applicants pay the second respondent's costs of the application.*

**Representation:**

K G Robson with T S Su for the applicants (instructed by Su & Co)

No appearance for the first respondent

M J Buss QC with N A Odorisio for the second respondent (instructed by Clayton Utz)

## CATCHWORDS

**Re Owen; Ex parte Sumampow**
**Sumampow v Mercator Property Consultants Pty Ltd**

Constitutional Law (Cth) — Inconsistency — Whether State law inconsistent with Ch III of the Constitution and *Federal Court of Australia Act* 1976 (Cth) providing for an appeal from a judgment of a single judge of the Federal Court to a Full Court of that Court — Whether provisions of *Federal Courts (State Jurisdiction) Act* 1999 (WA) ss 7(2) and 10 arguably invalid — Whether issue of invalidity determined by decisions of the High Court in *Re Macks; Ex parte Saint* (2000) 75 ALJR 203; 176 ALR 545 and *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013; 172 ALR 366 — Whether matter of validity of appeal provisions should be removed from Supreme Court of Western Australia to High Court pursuant to the *Judiciary Act* 1903 (Cth) s 40.

Constitutional Law (Cth) — Inconsistency — Whether State law inconsistent with Ch III of the Constitution — Validity of *Federal Courts (State Jurisdiction) Act* 1999 (WA) ss 6, 7, 8 and 10 — Whether question should be removed to High Court pursuant to *Judiciary Act* 1903 (Cth) s 40 — Whether order nisi for certiorari should be granted to quash order made in State Supreme Court — Whether validity of State law in respect of appeals already decided by Full Court of High Court — Whether certiorari reasonably arguable.

Constitutional Law (Cth) — High Court original jurisdiction — Constitutional, prerogative or other relief — Writ of certiorari sought without other relief — Whether available in High Court to judge of Supreme Court of a State — Whether available against other persons who are not the Commonwealth or officers of the Commonwealth.

High Court — Original jurisdiction — Writ of certiorari — Whether available to Judge of Supreme Court of a State.

Constitution, ss 72, 76(i).
*Federal Court of Australia Act* 1976 (Cth), 24(1), 25(1).
*Judiciary Act* 1903 (Cth), ss 30, 31, 33, 40.
*Federal Courts (State Jurisdiction) Act* 1999 (WA), ss 6, 7, 8, 10.

1 KIRBY J. Two matters are before me in the original jurisdiction of this Court. In the substantive proceedings in the matter of *Sumampow & Ors v Mercator Property Consultants Pty Ltd*[1], Robby Sumampow and others are the applicants. Mercator Property Consultants Pty Ltd and Christmas Island Resort Pty Ltd (Receiver and Manager Appointed) (in Liq) are the respondents. In these reasons I shall describe them by their respective original appellations.

2 The second respondent has brought a summons for an order dismissing the substantive proceedings. The facts appear substantially in the affidavits of Mr Nino Odorisio, solicitor for the second respondent, and the exhibits to those affidavits. His affidavits were filed in support of the summons and read without objection. Other facts appear in documents which are in the Court file and which are not contentious.

The history of the application

3 On 5 July 2000, pursuant to s 40 of the *Judiciary Act* 1903 (Cth), the applicants filed in this Court a motion for removal into the Court of part of a cause in proceedings then pending in the Full Court of the Supreme Court of Western Australia. The propounded questions concerned whether the *Federal Courts (State Jurisdiction) Act* 1999 (WA) ("the 1999 Act") ss 6, 7, 8 and 10 are invalid under the Constitution. Notice of a constitutional matter was filed at the same time and presumably served. None of the law officers of the Commonwealth have intervened at this stage.

4 In support of the applicants' motion, an affidavit of Mr Tien Shang Su was filed on 4 August 2000. Mr Su is the solicitor for the applicants. The applicants were the directors of the second respondent, now in liquidation. The second respondent's original purpose was to build a resort on Christmas Island. That project fell into difficulties. A casino licence was cancelled. Eventually R D Nicholson J, in the Federal Court of Australia in Perth, appointed a receiver and manager to the second respondent. That person was subsequently appointed provisional liquidator of the second respondent. In December 1998 R D Nicholson J ordered that the second respondent be wound up.

5 It was at that point that the decision of this Court in *Re Wakim; Ex parte McNally*[2] intervened. That decision struck down the cross-vesting legislation in certain respects. It was pursuant to that legislation that R D Nicholson J and the Federal Court had secured the jurisdiction which his Honour had purported to exercise in respect of the winding up of the second respondent. Following *Re*

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**1** No P53 of 2000.

**2** (1999) 198 CLR 511.

*Wakim*, so far as would be conformable with the Constitution, legal attempts were made to rescue the situation which was then presented to litigants before Australian courts.

6 The attempts included the several State Jurisdiction Acts of 1999. Pursuant to the Western Australian manifestation of this Act (the 1999 Act), the proceedings in the Federal Court concerning the present parties were transferred to the Supreme Court of Western Australia. By their application to this Court in the substantive proceedings, the applicants sought to contest the constitutional validity of the stated provisions of the 1999 Act under which the Supreme Court of Western Australia had secured, and subsequently exercised, its jurisdiction after the transfer. However, the applicants were extremely dilatory in pursuing their application to this Court.

Gross delays in the prosecution of the application

7 On 16 August 2000, in order to bring the proceedings into proper order, the Deputy Registrar of this Court issued a direction setting out a timetable for the filing and service of the summary of arguments of the parties. The applicants were to file and serve their summary by 1 September 2000. The respondents were to file and serve their summary of arguments by 25 September 2000. The applicants were to file a reply by 2 October 2000.

8 On 3 September 2000, the applicants' summary of argument had not been filed. The solicitor for the second respondent therefore pursued the matter. The applicants' summary of argument was eventually filed on 3 October 2000. The respondents' summary of argument was filed on 10 November 2000. The Deputy Registrar prepared a draft index of the application book on 4 December 2000. He sent it to the parties.

9 It was at this time, on 7 December 2000, that this Court delivered its decision in *Re Macks; Ex parte Saint*[3]. That decision, and the earlier decision of the Court in *Residual Assco Group Ltd v Spalvins*[4], addressed various challenges to the validity of provisions of the 1999 legislation that had been contested before this Court. The provisions of the legislation considered in *Macks* and *Spalvins* correspond with the provisions of the 1999 Act raised in the motion of the applicants now before me.

10 Following the delivery of the decision in *Re Macks* on 7 December 2000, the solicitors for the second respondent demanded of the applicants whether they

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**3** (2000) 75 ALJR 203; 176 ALR 545 ("*Re Macks*").

**4** (2000) 74 ALJR 1013; 172 ALR 366 ("*Spalvins*").

would be continuing with their application. They received no immediate reply. They pressed their request many times. Ultimately, in February 2001, Mr Su informed the second respondents' solicitors that the applicants did indeed intend to proceed with their application and were preparing the application book.

11 The second respondent pointed out that the applicants were already seriously in default of the timetable established by the Deputy Registrar. He said that the second respondent did not consent to further delay. Still the application book was not filed. Reminders were sent in April 2001 and May 2001. On 16 May 2001, a warning was despatched to Mr Su that, unless the application book were filed by 21 May 2001, the second respondent intended to apply for an order that the applicants' process be struck out for want of prosecution.

12 On 21 May 2001 Mr Su promised that the application book would at last be served on or before 25 May 2001. On that last-mentioned date, when this was not done, a further promise was made that the book would be filed "by next week". The unbound, unpaginated application book was apparently filed by the solicitor for the applicants very shortly before the present summons first came before me on 3 September 2001. On that day the second respondent moved for the proceedings to be dismissed. An application was made on behalf of the applicants for the adjournment of those proceedings. Reluctantly, I granted that application until today[5]. This is how the proceedings now come before me for determination.

The significance of the delay and non-prosecution

13 I have set out the history of the proceedings to demonstrate the shocking delays that have attended the prosecution of this application. Such delays immediately make one suspicious that the true reason for the delay might be a lack of conviction on the part of the applicants about the merits of the application or a belief that the application should be abandoned unaccompanied by the resolution necessary to give effect to that belief.

14 However, having regard to the matters of substance that have been argued before me today, I would not be inclined to dismiss the application for want of prosecution. In that regard, I take into account the fact that the second respondent did not itself move to secure dismissal of the proceedings for want of legal substance until the gross delays had become so apparent, in the circumstances that I have described, as to warrant the filing of the summons based principally on the non-prosecution of the motion.

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**5** *Re Owen; Ex parte Sumampow* unreported, High Court of Australia, 3 September 2001 per Kirby J.

15 The delays I have recounted are obviously relevant to the disposal of the costs of the proceedings before me. In my view, it was proper for the second respondent to initiate the summons. The applicants must pay the costs of the proceedings before the Court. I have already ordered that the costs of the adjourned proceedings on 3 September 2001 should be paid by them.

16 The question of substance therefore becomes whether the matters decided by this Court in *Spalvins* and *Re Macks* render redundant the questions of constitutional law which, by their original motion, the applicants have sought to have removed into this Court. On those questions I have heard detailed argument. I have reached a firm conclusion.

Determination of the validity of post *Wakim* legislation

17 So far as the constitutional validity of ss 6, 7 and 8 of the 1999 Act is concerned, standing on their own, an analysis of the Court's reasons in *Re Macks* indicates that a majority of this Court has expressed the view that those sections are, in substance, valid[6]. My own opinion was that the provisions in question were invalid when measured against the requirements of the Constitution[7]. However, in this I was in dissent. Accordingly, my reasons must be disregarded for ascertaining the binding rule established by *Re Macks* and the reasonable arguability of the points which the applicants still wish to remove into a Full Court of this Court.

18 The position of s 10 (and to the extent that it also deals with appeals, s 7(2)) is more complex. Upon that question, so far as the validity of s 10 is concerned, Gleeson CJ expressly reserved the point[8]. Gaudron J indicated a view that the appeal provisions were invalid[9]. It was my view that they were invalid[10]. Hayne and Callinan JJ did not expressly determine the point. Counsel for the second respondent argued that the logic of the reasons of Hayne and Callinan JJ, and indeed of the Chief Justice and Gummow J, was favourable to the proposition that s 10 and the appeal provisions of s 7 in the 1999 Act were

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**6** (2000) 75 ALJR 203 at 211 [26], [28], [30] per Gleeson CJ, 221 [88], 229 [132] per McHugh J, 243 [209], 248 [232] per Gummow J, 271 [351], 272 [353], 274 [367] per Hayne and Callinan JJ; 176 ALR 545 at 553-554, 567, 578, 598, 604, 637-638, 641.

**7** (2000) 75 ALJR 203 at 260-264 [292]-[305]; 176 ALR 545 at 622-627.

**8** (2000) 75 ALJR 203 at 211 [29]; 176 ALR 545 at 553.

**9** (2000) 75 ALJR 203 at 218 [67]; 176 ALR 545 at 563.

**10** (2000) 75 ALJR 203 at 260 [290]; 176 ALR 545 at 621.

constitutionally valid. That may eventually prove to be so. However, my analysis of the reasoning of the Justices in the majority does not bring me to the conclusion that that question has been authoritatively determined by this Court. It did not need to be decided either in *Spalvins* or *Re Macks*. The question whether the appeal provisions of the 1999 Act (and hence of its counterparts throughout Australia) are valid is obviously an important question.

Removal of a residual question about appeals

19 That question is also a live one in these proceedings. The order which the applicants wish to impugn is an order of a judge of the Supreme Court of a State purporting to exercise the jurisdiction granted by the 1999 Act. The order in question was made by Owen J in the Supreme Court of Western Australia.

20 The applicants contend that, before they are forced into a position of prosecuting an appeal against that order they should have the opportunity of securing the determination of this Court on the constitutional validity of the appeal provisions of the legislation. In my opinion, they are entitled to have the opportunity of securing the Court's ruling on the matter. At least this much could be said of *Re Macks*, it does not conclusively determine the question. It is appropriate that it should be determined by this Court because of the effective national application of the legislation and because the point involves, in a sense, the completion of the circle begun in *Spalvins* and *Re Macks*.

Orders (1)

21 Upon this basis, I will order that that part of the cause in proceedings No FUL92 of 2000, pending in the Full Court of the Supreme Court of Western Australia which involves the following question: "Are s 10 and s 7(2) of the *Federal Courts (State Jurisdiction) Act* 1999 (WA) invalid?" be removed into this Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth) on the ground that such question arises under the Constitution and involves its interpretation.

22 The applicants must pay the respondents' costs of these proceedings. I certify for the attendance of counsel in chambers.

23 I now turn to matter *Sumampow & Anor v The Hon Neville Owen & Ors*[11].

24 In the substantive proceedings in this matter Robby Sumampow and Herman Tjahjahdi Gani ("the applicants") seek a writ of certiorari directed by this Court to the Honourable Justice Neville Owen, a judge of the Supreme Court of Western Australia. They also name Christmas Island Resort Pty Ltd and

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**11** No P46 of 2000.

Mr Jeffery Herbert ("the second and third respondents") as respondents in the proceedings. Mr Herbert is the receiver and manager and the provisional liquidator of the second respondent. Justice Owen has submitted to the orders of this Court save as to costs. The other respondents have appeared to contest the issue of the writ of certiorari.

A delayed application for a writ of certiorari

25 The proceedings which I am now considering are connected with those in the matter that I have just determined[12]. The same delays have attended the prosecution of the application for certiorari. A like summons has been filed by the respondents for an order dismissing the application for want of prosecution. The same sorry story of inattention could be recorded. However, I refrain from doing so because, as it seems to me, there are more fundamental difficulties in the way of the provision of the relief sought by the applicants. The form of the order nisi presented to me seeks no relief, save for the issue of the writ of certiorari.

26 The primary ground stated for that relief is that the orders of Justice Owen:

> "treating Federal Court WG 3017 and 3031 of 1998 as proceedings of the Western Australian Supreme Court are invalid in that the Act they were made under, namely the *Federal Courts (State Jurisdiction) Act* 1999 (WA), offends the integrity of the State judicial system that is guaranteed by Chapter III of the *Commonwealth Of Australia Constitution Act* 1901." [Tsp 10/09 at 30 [1150]]

There are other grounds stated, but they are supplementary to the one I have just set out.

Inadmissibility of the application

27 It will be observed that the relief sought is stated in terms of absolute generality. Such relief would not be granted, consistent with the decision of this Court in *Re Macks*[13]. The analysis of the decisions of this Court in that case, set out in my reasons above[14], indicate that, in *Re Macks*, a clear majority of this

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**12** *Sumampow & Ors v Mercator Property Consultants Pty Ltd & Anor* (No P53 of 2000).

**13** (2000) 75 ALJR 203; 176 ALR 545.

**14** *Sumampow & Ors v Mercator Property Consultants Pty Ltd & Anor* (No P53 of 2000).

Court has rejected the proposition that the 1999 legislation was invalid, either generally or on the ground propounded. I am not, therefore, persuaded to return before a Full Court, as reasonably arguable, the draft order nisi as presented to me.

28 There are, in any case, other and substantial difficulties in the way of the arguability of the relief claimed. Justice Owen is not an officer of the Commonwealth. He is a judge of a Supreme Court of a State. That Court is a court of general jurisdiction and a superior court. Ordinarily the writ of certiorari is not available to a judge of a Supreme Court of general jurisdiction, being a superior court, unless, exceptionally, that judge is an officer of the Commonwealth amenable to a constitutional writ under s 75(v) of the Constitution.

29 Under the exceptional constitutional provision in s 75(v), judges of Federal Courts in Australia are amenable to the constitutional and other writs which would otherwise ordinarily be confined, relevantly, to inferior courts and tribunals. Certiorari is sometimes granted by this Court in the exercise of its constitutional jurisdiction in relation to such judges as officers of the Commonwealth. That form of relief is not, however, available to the applicants in the present case against Justice Owen. Nor was it contended by any party that the second or third respondents named in the draft order nisi, or either of them, is or was the Commonwealth or an officer of the Commonwealth.

30 The only possible foundation for the grant by this Court of an order nisi for certiorari directed to the named respondents, or at least to the second and third respondents, would be the invocation of this Court's original jurisdiction under s 76(i) of the Constitution together with the original jurisdiction conferred upon the Court by the *Judiciary Act* 1903 (Cth)[15]. For the reasons that I have already indicated, it is unnecessary to consider the availability of certiorari on these grounds because, in my view, the basis of the grant of certiorari is not reasonably arguable in the terms of the draft propounded by the applicants.

Orders (2)

31 Accordingly, the application for a writ of certiorari in the form of the document filed by the applicants is dismissed on its merits. It is not, therefore, necessary for me to determine the summons for dismissal of the application for want of prosecution. The applicants must pay the contesting respondents' costs of the application and of the summons which the respondents were justified in bringing. I certify for the attendance of counsel in chambers.

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**15** ss 30(a), 31, 33(2).