HIGH COURT OF AUSTRALIA

KIRBY J

LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND (INCORPORATED) APPLICANT

AND

THE STATE OF QUEENSLAND RESPONDENT

EX PARTE THE ATTORNEY-GENERAL OF THE STATE OF QUEENSLAND

Local Government Association of Queensland (Inc) v Queensland; Ex parte Attorney-General (Q) [2001] HCA 75
12 October 2001
B81/2001

ORDER

1. *On the application of the Attorney-General of Queensland, I remove the cause pending in the Supreme Court of Queensland between Local Government Association of Queensland (Incorporated) and State of Queensland, Brisbane Registry No S8801 of 2001 into this Court pursuant to s 40(1) of the Judiciary Act.*

2. *On the application of the Local Government Association of Queensland (Incorporated), I make the usual order for remitter of the cause to the Supreme Court of Queensland pursuant to s 42 of the Judiciary Act.*

3. *The costs of the proceedings before this Court today will be costs in the cause so remitted.*

4. *I certify for the attendance of counsel in chambers.*

Representation:

R I Hanger QC with K N Wilson for the applicant (instructed by King & Company)

P A Keane QC, Solicitor-General of the State of Queensland with G R Cooper for the respondent and for the Attorney-General of the State of Queensland (instructed by Crown Solicitor for Queensland)

Intervener:

D M J Bennett QC, Solicitor-General of the Commonwealth with G A Hill intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Local Government Association of Queensland (Inc) v Queensland; Ex parte Attorney-General (Q)

High Court – Practice – Removal of a cause arising under the Constitution – Removal from Supreme Court of a State to the High Court of an application made on behalf of the Attorney-General of a State – Whether remitter of cause so removed to the Supreme Court is permissible having regard to the right of remitter − Whether in the circumstances such remitter should be ordered – High Court unable to hear and determine cause in time for provision of relevant relief – Relevance of desirability of securing reasoned decision of the Supreme Court.

Constitutional law (Cth) – Elections – General election for Federal Parliament – Qualifications and disqualification of candidates – State law purports to terminate office of local government councillor who is declared a candidate for election to the Federal Parliament – Whether State law is inconsistent with the Constitution and *Commonwealth Electoral Act* 1918 (Cth) – Whether matter involves a cause arising under the Constitution – Whether cause must be removed into the High Court on application by State Attorney-General – Whether such removed cause may and should be remitted to Supreme Court.

Elections – Candidates' eligibility and disqualification – State law disqualifies from office of local government councillor a declared candidate for election to the Federal Parliament – Whether such disqualification invalid under the Constitution s 109 having regard to express provisions for disqualification under federal law – Whether issue renders cause one arising under the Constitution or involving its interpretation – Whether cause once removed may be remitted to State court – Whether such remitter should be ordered in exceptional circumstances involving delay in resolution of cause by High Court.

Words and phrases – "as of course".

Constitution, ss 32, 44, 109.
Commonwealth Electoral Act 1918 (Cth), ss 162, 163, 164, 176, 327.
Judiciary Act 1903 (Cth), ss 40(1), 42(1).
Electoral Act 1992 (Q), s 88(3).
Local Government Act 1993 (Q), ss 221(f), 224A(b).

1 KIRBY J. Pursuant to the *Judiciary Act* 1903 (Cth) the Attorney-General of the State of Queensland has applied for an order removing into this Court a cause pending in a court of a State, namely, the Supreme Court of Queensland. He has done so on the ground that the cause arises under the Constitution and involves its interpretation. By virtue of s 40(1) of the *Judiciary Act*, this Court is obliged, on an application by an Attorney-General of a State, "as of course" to remove the matter so requested.

2 The respondent to the application has applied, in the given circumstances, for the cause so removed to be remitted back to the Supreme Court. Accordingly, this application raises questions concerning the practice of this Court, under the *Judiciary Act*, in relation to removal and remitter of causes, involving constitutional questions.

The background facts

3 The cause is a proceeding commenced in the Supreme Court of Queensland by a statement of claim filed by the Local Government Association of Queensland (Incorporated) ("the respondent") against the State of Queensland ("the State"). The legal issue raised by the cause involves a contention that the *Local Government Act* 1993 (Q), s 224A(b) is invalid under the Constitution by reason of its inconsistency with s 44 of the Constitution and with provisions of the *Commonwealth Electoral Act* 1918 (Cth), ss 162, 163, 164 and 327.

4 The proceedings thus raise an inconsistency question under s 109 of the Constitution. The State does not contest that this is so. Notices have been given by the Attorney-General of the State in accordance with the *Judiciary Act*, s 78B. The Attorney-General of the Commonwealth has intervened on this application. Putting it broadly, he supports the Attorney-General of Queensland on matters of procedure. But on the ultimate matter of substance, he supports the respondent.

5 It follows from the foregoing that I am obliged to order removal of the cause into this Court. I so order. It is unnecessary, and it would be inappropriate, to pronounce on the merits of the constitutional issue. I have merely to be satisfied that s 40 of the *Judiciary Act* is engaged, as it clearly is.

6 The Federal Parliament has been dissolved. Pursuant to s 32 of the Constitution, a federal general election has been appointed to take place on Saturday, 10 November 2001. In such circumstances two questions arise in consequence of the removal order that I have made. The first is the expedition of the hearing of the cause in this Court. The second, which is connected, is whether, in the exceptional circumstances that I will recount, the proceeding should be remitted to the Supreme Court of Queensland to proceed to a decision or should be retained in this Court, as would normally be the case.

7 So far as expedition is concerned, there is no doubt that the issue raised is a somewhat urgent one. Section 224A(b) was inserted in the *Local Government Act* by amendment taking effect on 25 May 2001. The section provides:

> "A councillor ceases to be a councillor if –
>
> (a) under the *Electoral Act* 1992, section 88(3), the councillor becomes a candidate for an election as a member of the Legislative Assembly; or
>
> (b) under the *Commonwealth Electoral Act* 1918 (Cwlth), section 176, the councillor is declared to be a candidate for an election."

8 By s 221(f) of the *Local Government Act*, if the councillor is elected to the Federal Parliament, he or she is immediately disqualified from his or her office as a councillor. The amendment now incorporated in s 224A(b) brings the disqualification forward. It attaches the consequence of disqualification to nomination as a candidate for election, whatever the ultimate outcome of that election.

9 The respondent submits that the provision in s 224A(b) acts as a legal sanction on a councillor of a local government authority in Queensland, discouraging him or her from nominating for election to the Federal Parliament. It says that this is a sanction inconsistent with the provisions of the Constitution and also the *Commonwealth Electoral Act* which set out the disqualifications from eligibility to be a candidate that were approved by the Federal Parliament. It argues that the provision of the *Local Government Act* imposes both a practical and legal burden upon some citizens which will have the consequence of discouraging them from exercising their rights under federal law. It submits that the electors of the Commonwealth should have a relevantly unrestricted pool of candidates from whom to select their members and senators and that this too is governed by federal law and cannot be diminished in this way by State law.

10 The Solicitor-General of Queensland submits that the provision in the *Local Government Act* does not prevent a councillor from nominating. It merely provides for certain consequences of the councillor's doing so.

Impossibility of early hearing of the cause removed

11 The constitutional question raised by the respondent is arguable. Of its nature, it could only finally be decided by this Court. In an ideal world that would be what would happen. It would happen before Thursday, 18 October 2001, which is the day upon which nominations of candidates for the coming federal election will close. If the cause could be finally determined by this Court before that day, it would put to an end the controversy.

12 I have consulted the Chief Justice and other Justices of the Court to see whether it would be possible to convene a special sitting of the Court to resolve the issue within that time. The result of my inquiries is that it is not possible. No hearing dates are available in this Court before the end of the year. Accordingly, it would not be possible for this Court to hear the cause before 18 October 2001. Nor would it be possible for this Court to hear the cause before the dates upon which by-elections, necessitated by any vacation of the office of a councillor, took place, ie, at the latest, 1 December 2001. Even less would it be possible for the Court to have decided the matter within those time constraints.

13 If the proceedings ultimately result in upholding the respondent's constitutional submission, the consequence would be that any purported disqualification from office of a local councillor in Queensland might have no legal effect upon a candidate who is not elected to the Federal Parliament. I appreciate that this is no answer to the inhibition which the present law is said to work on those who might not be willing to take the risk and, therefore, might refrain from nominating as candidates for election to the Parliament, as otherwise they could. Unfortunately, this Court is not in a position to solve that problem immediately. To some extent this outcome is a result of the delay in the commencement of the proceedings. The amendment to the *Local Government Act* commenced on 25 May 2001. It was well known that a federal election had to be held before the end of this year. The proceedings could have been commenced earlier.

14 Nevertheless, the possibility of later uncertainty and resulting disqualification of still further councillors of local authorities who have filled vacancies resulting from the operation of s 224A(b) of the *Local Government Act*, makes it desirable, in my view, that the hearing of the issues in the cause be commenced as quickly as possible. How can that be done in circumstances where this Court cannot commence a hearing before 18 October 2001 nor conclude a hearing before 1 December 2001?

The power and occasion for remitter of the cause

15 Under s 42(1) of the *Judiciary Act*, this Court has the power to remit proceedings to the Supreme Court of Queensland. However, where a cause is removed into this Court, effectively as of right, remitter is not, by any means, automatic. Indeed, in my view, it is subject to the constraint inherent in the provisions of s 40(1) of the *Judiciary Act*. I expressed my opinion on that constraint in *G E Crane & Sons Ltd v Commissioner of Stamp Duties; Ex parte Attorney-General (Q)*[1] where I said:

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[1] (1997) 72 ALJR 75 at 77.

> "Whilst I do not doubt that s 42(1) of the *Judiciary Act* would empower this Court, having removed the matter, to remit it immediately in whole or part to the court from which it was removed, I think that such an order would rarely be made where the matter has been removed upon application by or on behalf of an Attorney-General as provided in s 40(1). The *right* of a State or Territory (or of the Commonwealth itself) to have this Court decide a constitutional question arising in an Australian court, suggests that such a course would rarely, if ever, be taken if the constitutional question remained alive and the Attorney-General in question sought its determination in this Court.
>
> It is not necessary for me to consider in what circumstances, if any, an order of remittal would be made because, in my opinion, it is not appropriate that it should be made in this case. A constitutional question having been raised by the Court of Appeal and having now been embraced by the Crane interests, it seems to me that on the application of the Attorney-General and the matter now being before the Court, this Court should determine the constitutional question and should determine it for itself." (emphasis in original)

16 To somewhat similar effect were earlier remarks by Mason, Wilson, Brennan, Deane and Dawson JJ in *Attorney-General (NSW) v Commonwealth Savings Bank*[2]. There, their Honours said:

> "Although it is a matter of concern to us that removal will result in an abortive hearing in the Court of Appeal with a consequential waste of time and money, we have no discretion to refuse removal on the Attorney-General's application. The absence of a discretion to refuse removal tells against the exercise of a discretion, if any, in the circumstances to remit the appeal, once removed, back to the Court of Appeal for determination. In any event it seems likely that the parties would ultimately seek a determination of the appeal in this Court. For these reasons the matter will not be remitted to the Court of Appeal."

17 It will be noted that in the last cited passage, the joint judgment of the Court reserved a question as to whether any discretion existed to remit a cause once it had been removed into this Court on an Attorney-General's application. Before me, the Solicitor-General of Queensland did not contest that a discretion exists to remit a cause that had been removed into the Court. It appears to exist in the language of s 42(1) of the *Judiciary Act*. Furthermore, that section must be read alongside s 40(1), but not so as to remove altogether the power of remitter which is also provided by the *Judiciary Act*. Because the power of remitter is not

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[2] (1986) 160 CLR 315 at 329.

contested in these proceedings, I will continue to assume, as I did in *Crane*, that a residual discretion exists.

Exceptional circumstances warrant remitter

18 The discretion to remit is not one that could be exercised simply to procure the advantage of a reasoned decision of a court from which the cause was removed. The absence of a reasoned opinion of such a court is inherent in the process of removal. Exceptional circumstances therefore have to be shown to warrant remitter once a matter is removed into this Court on an application by or on behalf of an Attorney-General. Such a requirement is not only observed out of respect for the constitutional scheme which is provided by s 40(1) of the *Judiciary Act*. It is also required out of respect for the constitutional position of a State or Territory of the Commonwealth and of the Commonwealth itself and the role of this Court as the ultimate arbiter of constitutional controversies.

19 Having said this, I have concluded that there are exceptional circumstances in this case to warrant remitter to the Supreme Court. Those circumstances include the fact that this Court cannot, before the relevant dates, play its part in the resolution of the constitutional controversy presented by the proceedings. As well, it is desirable that, if the matter is to come later to this Court, the time will not have been wasted. In the circumstances it is desirable that this Court should have the advantage of a decision of the Supreme Court of Queensland. After all, the legislation which is the subject of the constitutional challenge is legislation of the Parliament of Queensland. There is good reason in the circumstances why the highest court of that State, which itself holds a constitutional position envisaged by s 73, should provide its decision on the points in controversy, so long as that does not thereby impede any ultimate consideration of the matter by this Court. Furthermore, experience over many years teaches that a hearing before a court sometimes quells the controversy. The parties, having been heard, may be satisfied that the correct decision has been reached. Alternatively, they may accept that there are only slight prospects of a different decision in this Court. They may run out of interest or money to litigate the controversy. The question may not then trouble this Court.

20 I make it plain that if it proves impossible for the Supreme Court of Queensland to hear and determine the proceedings in that Court before, in the ordinary course, this Court could hear the matter in early 2002, it would be appropriate (should the controversy still be alive) for the Attorney-General of Queensland to apply once again to this Court for revocation of the remitter or removal of the cause. Whether in the circumstances such an order would be available as of right or would require some exercise of discretion by this Court, following the remitter, is a question that can be determined should such events occur.

Orders

21 I therefore make the following orders:

1. On the application of the Attorney-General of Queensland, I remove the cause pending in the Supreme Court of Queensland between *Local Government Association of Queensland (Incorporated) and State of Queensland*, Brisbane Registry No S8801 of 2001 into this Court pursuant to s 40(1) of the *Judiciary Act*;

2. On the application of the Local Government Association of Queensland (Incorporated), I make the usual order for remitter of the cause to the Supreme Court of Queensland pursuant to s 42 of the *Judiciary Act*;

3. The costs of the proceedings before this Court today will be costs in the cause so remitted; and

4. I certify for the attendance of counsel in chambers.