

HIGH COURT OF AUSTRALIA

FRENCH CJ

DANIEL THOMAS LEE & ANOR

PLAINTIFFS

AND

COMMONWEALTH OF AUSTRALIA & ANOR

DEFENDANTS

Lee v Commonwealth of Australia

[2012] HCA 62

29 November 2012

C5/2012

ORDER

1. *The proceeding be remitted to the Federal Court at the Melbourne Registry.*
2. *The proceeding continue in that Court as if the steps already taken in the proceeding in this Court have been taken in that Court.*
3. *The Registrar of this Court forward to the proper officer of that Court photocopies of all documents filed in this Court.*
4. *The costs of the summons be costs in the proceeding.*
5. *The costs of the proceeding to the date of remission, including the costs of this order, are to be according to the scale applicable to proceedings in this Court and thereafter according to the scale applicable to that Court and in the discretion of that Court.*

Representation

P E King for the plaintiffs (instructed by Maloney Anderson Legal)

2.

C L Lenehan with D M Forrester for the defendants (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Lee v Commonwealth of Australia

Practice – High Court – Case stated – Questions reserved – *Judiciary Act* 1903 (Cth), s 18.

Practice – High Court – Remitter – *Judiciary Act* 1903 (Cth), s 44.

Constitution, ss 92, 99, 100.

Judiciary Act 1903 (Cth), ss 18, 44.

Water Act 2007 (Cth).

1 FRENCH CJ. By proceedings commenced by writ of summons on
13 September 2012, the plaintiffs, as representatives of a group of water users
said to have the same interests, seek declarations that particular parts of the
Water Act 2007 (Cth) are invalid by operation of ss 100 and/or 99 and/or 92 of
the Constitution, and on other bases.

2 The plaintiffs filed a summons for directions, returnable today, and were
seeking referral of certain questions for determination by a Full Court of this
Court. The defendants have made submissions opposing referral and seeking
remitter of the proceedings to the Federal Court pursuant to s 44 of the *Judiciary
Act* 1903 (Cth) on the basis, inter alia, that there are questions of fact raised on
the statement of claim which are unlikely to be able to be resolved by agreement
and which would make a proceeding by way of demurrer inappropriate.

3 The plaintiffs today have sought an adjournment of this directions hearing
for a period of a few weeks in order to enable discussions to take place between
their representatives and those of the defendants, with a view to agreeing facts
which would support a case stated and referral of questions of law to a Full
Court. The defendants were prepared to consent to an adjournment, but only on
the basis that the very recent publication of the Basin Plan, made under the *Water
Act* 2007 (Cth), is a matter which requires consideration by the plaintiffs and may
affect their pleading. However, that consent was not offered on the basis that it is
likely that there will be an agreement about the facts suitable to support a case
stated and referral of questions to the Full Court.

4 Section 44(1) of the *Judiciary Act* 1903 (Cth) provides that:

"Any matter other than a matter to which subsection (2) applies that is at
any time pending in the High Court, whether originally commenced in the
High Court or not, or any part of such a matter, may, upon the application
of a party or of the High Court's own motion, be remitted by the High
Court to any federal court, court of a State or court of a Territory that has
jurisdiction with respect to the subject-matter and the parties, and, subject
to any directions of the High Court, further proceedings in the matter or in
that part of the matter, as the case may be, shall be as directed by the court
to which it is remitted."

5 The question of remitter and whether the proceeding should be permitted
to continue in this Court is therefore a matter, not just for the parties, but for the
Court. In that connection, Brennan CJ in *Ravenor Overseas Inc v Readhead*¹
said:

1 (1998) 72 ALJR 671 at 672 [5]; 152 ALR 416 at 417; [1998] HCA 17.

"The power of remitter contained in s 44 of the *Judiciary Act* 1903 (Cth) is designed to ensure that this Court is not diverted from its principal functions by the need to hear and determine matters in the original jurisdiction which could properly be brought in an Australian trial court."

6 Nor, I would add, should this Court be diverted from its principal functions by the need to engage in intensive case management in order to ensure that a proceeding brought in this Court, and in respect of which it is sought to refer a case stated to the Full Court, is in an appropriate form and brought on an appropriate basis to support such a referral. Having read the statement of claim and the submissions and affidavits of the parties and having regard to what has been said orally this morning, I am not satisfied that there is or is likely to be, without intensive case management, a proper basis in agreed or uncontested facts to refer questions of law to the Full Court. Nor is there likely to be a proper basis upon which a demurrer could be filed and entertained.

7 The possibility arises that there may be a number of directions hearings in this Court imposing costs on the parties which will not yield any useful result within a reasonable time in terms of a case stated or a demurrer. It is in the interests of the parties therefore that the application be remitted to a court which is in a position to case manage it to ensure pleadings are adequately refined and issues formulated and which is in a position to try questions of fact which may be in contest, as well as to determine the legal issues which arise on the basis of those matters of fact.

8 If the matter proceeds on appeal to this Court, this Court will have the benefit of findings of fact, to the extent that they have been in contest, and also the analysis of legal questions by the courts below. I propose therefore to make a remittal order. The order will be:

1. The proceeding be remitted to the Federal Court at the Melbourne Registry.
2. The proceeding continue in that Court as if the steps already taken in the proceeding in this Court have been taken in that Court.
3. The Registrar of this Court forward to the proper officer of that Court photocopies of all documents filed in this Court.
4. The costs of the summons be costs in the proceeding.
5. The costs of the proceeding to the date of remission, including the costs of this order, are to be according to the scale applicable to proceedings in this Court and thereafter according to the scale applicable to that Court and in the discretion of that Court.

