HIGH COURT OF AUSTRALIA

KIEFEL CJ

IN THE MATTER OF QUESTIONS REFERRED TO THE COURT OF DISPUTED RETURNS PURSUANT TO SECTION 376 OF THE *COMMONWEALTH ELECTORAL ACT* 1918 (CTH) CONCERNING SENATOR RODNEY NORMAN CULLETON

Re Culleton
[2018] HCA 33
10 August 2018
C15/2016

ORDER

1. *The summons filed on 4 July 2018 is dismissed.*

2. *Mr Culleton pay the Attorney-General of the Commonwealth's costs of and incidental to the summons.*

3. *The costs of the summons be excluded from the order made by the Court on 3 February 2017 that Mr Culleton's costs of the proceeding be paid by the Commonwealth.*

Representation

D M J Bennett QC with P W Lithgow appearing on behalf of Mr Rodney Norman Culleton (instructed by Maitland Lawyers)

B K Lim appearing on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Re Culleton

Parliamentary elections (Cth) – Senate – Court of Disputed Returns – Application to reopen perfected orders of Court declaring applicant was incapable of being chosen as a Senator – Where applicant alleges Senate was inquorate when Senate resolved to refer applicant to Court of Disputed Returns – Where arguments were available on original reference – Whether preconditions for reopening have been met.

Words and phrases – "reopen".

Parliamentary Privileges Act 1987 (Cth), s 16(3).

1 KIEFEL CJ. On 7 December 2016 a Full Court of this Court, sitting as the Court of Disputed Returns, heard a reference from the Senate concerning Senator Rodney Culleton. The Court was advised by the President of the Senate that the reference had been made following a resolution of the Senate made on 7 November 2016. On 3 February 2017 the Court gave judgment and answered the referred questions to the effect that, by reason of s 44(ii) of the *Constitution*, there was a vacancy in the Senate for the place for which Mr Culleton was returned and that the vacancy should be filled by a special count of the ballot papers[1]. On 10 March 2017, following the conduct of the special count in accordance with the directions made by the Court, the Court declared, pursuant to s 360(1)(vi) of the *Commonwealth Electoral Act 1918* (Cth) ("the CEA"), that Mr Panagiotis Georgiou was duly elected as a Senator for Western Australia for the place for which Mr Culleton had been returned.

2 On 4 July 2018 Mr Culleton filed a summons in this Court in which he seeks declarations and orders including that the reference was invalid and that the orders of the Court be set aside. Mr Culleton's contentions are that the Senate was not quorate on 7 November 2016 when the resolution was put and as a result this Court had no jurisdiction with respect to his matter. He seeks in effect to reopen the matter which has been determined by the Court and which is the subject of perfected orders. If he is able to do so he will seek to put on evidence of the fact that there was no quorum as required by s 22 of the *Constitution*[2].

3 The Commonwealth Attorney-General submits that Mr Culleton's summons is liable to be dismissed on the basis of established principle. It is the Attorney-General's contention that any exceptional power to reopen his case is not invoked because (i) the argument sought to be raised could and should have been raised at the outset of the hearing of the reference and (ii) the principle of finality weighs heavily against him in the circumstances of the case.

4 The general principles applicable to reopening a matter are not in dispute. It is not doubted that this Court has power to do so before its final orders are entered. There is no decision of the Court about the position which pertains after entry of its final orders[3]. The practice of the Court thus far has been to assume, without deciding, that it has power to reopen perfected orders. No different approach is suggested as necessary in this case.

5 The circumstances in which perfected orders would be reopened can be no wider than those relating to unperfected orders. The latter therefore mark the

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1 *Re Culleton [No 2]* (2017) 91 ALJR 311; 341 ALR 1; [2017] HCA 4.

2 See also *Senate (Quorum) Act 1991* (Cth).

3 *DJL v Central Authority* (2000) 201 CLR 226 at 247-248 [44]; [2000] HCA 17.

conceivable outer limits of any power of the Court to reopen its perfected order, as the Attorney-General submits.

6 It has been said repeatedly that a heavy burden is cast upon an applicant for reopening to show that such an exceptional course is required[4]. That heavy burden is reflected in the principle stated in *University of Wollongong v Metwally [No 2]*[5]:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had [an] opportunity to do so."

7 Gageler J observed in his Honour's reasons for dismissing a previous application to reopen the hearing of this matter, brought by Mr Culleton in January 2017[6], that this principle is not avoided in the case of jurisdictional or constitutional arguments. Mr Culleton does not contend to the contrary.

8 It is submitted for Mr Culleton that *Metwally [No 2]* should be understood as an application of the doctrine of election. Whether that be so, the reference in the passage quoted above to a party's "inadvertence" would not appear to so limit the operation of the general principle there stated. It is the doctrine of finality, together with concerns of injustice, which underpin the principles relating to reopening a matter. The need for finality is reinforced in cases of this kind by the statutory finality conferred by s 368 of the CEA and the imperative in s 363A in relation to the timely determination of these matters by the Court, and in this case by the fact that the orders of the Court have been acted upon.

9 A conclusion that there is no injustice to a party in refusing reopening may be available where there has been some default on his or her part in failing to raise the arguments earlier[7]. Mr Culleton accepts that it is necessary for him to show that neglect or default is not to be attributed to him.

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4 *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 215; [1997] HCA 14.

5 (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; [1985] HCA 28.

6 *Re Culleton* (2017) 91 ALJR 302 at 306-307 [23]; 340 ALR 550 at 555; [2017] HCA 3.

7 *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 215.

10 On 7 December 2016, at the commencement of the hearing of the reference, counsel for Mr Culleton sought an adjournment of the hearing. The affidavit of Mr Culleton filed in support of that application based the application on the need for the Senate to investigate his circumstances with a view to the possible recall of the reference to the Court. The Court ruled that evidence sought to be tendered in that regard could not be received, given the provisions of s 16(3) of the *Parliamentary Privileges Act 1987* (Cth). The Court was being asked, contrary to that provision, to draw inferences of fact about what the Senate may have been told and to draw a conclusion about what the Senate might do[8]. The Court later refused the adjournment and the hearing continued.

11 It was conceded on the hearing of this summons that Mr Culleton and his legal advisors were at all relevant times aware of the fact they now allege, namely that the Senate was inquorate. In these circumstances it is not obvious why the jurisidictional argument now sought to be put was not put to the Court on the hearing of the reference.

12 The explanation provided in argument was that once the Court ruled on the admissibility of the evidence in connection with the possible Senate investigation it was not open to Mr Culleton to seek to prove the fact that the Senate was inquorate. It is difficult to accept this explanation. There is no evidence that that was the view of Mr Culleton's lawyers at that time, as seems to have been suggested in argument. The inference that it was then considered to be an available argument which would have been pursued but for the terms of the ruling on the application for adjournment cannot be drawn. Counsel for Mr Culleton conceded that no evidence had been placed before the Court at that time on the question whether the Senate was quorate. There was therefore no evidentiary basis for such an argument.

13 Further, the jurisdictional argument now sought to be raised differs from that on which the Court ruled. This argument is said not to be subject to the prohibition in s 16(3) of the *Parliamentary Privileges Act* for reasons which did

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8 *Parliamentary Privileges Act 1987* (Cth), s 16(3)(c):

> "(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
>
> …
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament."

not apply to the question ruled upon. In relation to the argument now in question it is said that all that is relied upon is the mere fact that the Senate was not quorate, as the *Constitution* requires it to be. There is no questioning of the proceedings of the Senate involved and no inference sought to be drawn on conclusions reached. No question of privilege can be said to arise. Regardless of the correctness of the argument, it is not obvious why Mr Culleton's lawyers would have thought it could not have been put on the hearing of the reference.

14 Reliance is then placed upon the recent discovery of a resolution of the Senate of 25 February 1988 which is said to bear upon the argument and which was not and could not have been within the knowledge of Mr Culleton and his lawyers at the time of the hearing of the reference.

15 The relevant part of that Senate resolution is in these terms:

> "**10. Reference to the Senate proceedings in court proceedings**
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> (1) That, without derogating from the law relating to the use which may be made of proceedings in Parliament under section 49 of the Constitution, and subject to any law and any order of the Senate relating to the disclosure of proceedings of the Senate or a committee, the Senate declares that leave of the Senate is not required for the admission into evidence, or reference to, records or reports of proceedings in the Senate or in a committee of the Senate, or the admission of evidence relating to such proceedings, in proceedings before any court or tribunal.
>
> (2) That the practice whereby leave of the Senate is sought in relation to matters referred to in paragraph (1) to be discontinued.
>
> (3) That the Senate should be notified of any admission of evidence or reference to proceedings of the kind referred to in paragraph (1), and the Attorneys-General of the Commonwealth and the States be requested to develop procedures whereby such notification may be given."

16 It is submitted for Mr Culleton that neither he nor his lawyers could reasonably have discovered this resolution, although it is accepted that it appears in *Odgers' Australian Senate Practice*. It is said that it would nevertheless not have been common knowledge even amongst constitutional lawyers.

17 The background, purpose and extent of the operation of the resolution was not gone into in argument. The relevance of it is said to be to define the extent of the privilege to which the *Parliamentary Privileges Act* refers, which is to say that it effects a waiver of it. The existence of the resolution does not explain why

the jurisdictional argument was not raised earlier. It merely provides an alternative argument as to the non-application of the *Parliamentary Privileges Act*.

18 The argument has no firm foundation. The resolution clearly concerns proceedings in the Parliament to which s 16(3) of the *Parliamentary Privileges Act* refers. The resolution is expressed not to derogate from any law made under s 49 of the Constitution concerning the use which may be made of parliamentary proceedings. The *Parliamentary Privileges Act* is such a law. In these circumstances the resolution raises no real question for determination[9].

19 In any event, the Attorney-General's submissions concerning finality should be accepted. The steps which have been taken on the basis of the perfected orders of this Court weigh heavily against reopening the matter.

20 The summons should be dismissed with orders for costs in the terms sought by the Commonwealth Attorney-General.

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9 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130; [1964] HCA 69.