

HIGH COURT OF AUSTRALIA

McHUGH J

LETTY MARIE SCOTT & ANOR

PLAINTIFFS

AND

WILLIAM HENRY BOWDEN & ORS

DEFENDANTS

Scott v Bowden [2002] HCA 60
17 December 2002
S346/2002

ORDER

1. *Liberty be granted to the plaintiffs to file and serve any amended statement of claim on or before 31 January 2003.*
2. *The matter be remitted to the Supreme Court of the Northern Territory as if the steps already taken and to be taken under order 1 were taken in the Supreme Court of that Territory.*
3. *The Registrar of this Court provide to the proper officer of the Supreme Court of the Northern Territory photocopies of all pleadings and summonses filed in this Court and the originals of the other materials in the Court file.*
4. *The costs of the proceedings in this Court to date are to be costs in the Supreme Court of the Northern Territory.*
5. *The costs referred to in this Court, including the costs of this order, be according to the scale applicable to proceedings in this Court and thereafter according to the scale applicable in the Supreme Court of the Northern Territory and in the discretion of that Court.*

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

1 McHUGH J. Of my own motion, I asked the parties to these proceedings why I
should not remit this matter to the Federal Court of Australia under the power
conferred by s 44 of the *Judiciary Act* 1903 (Cth).

2 The plaintiffs have filed a Statement of Claim in this Court claiming
various forms of relief against the defendants. The plaintiffs are residents of
New South Wales, at least one of the defendants is a resident of Queensland, and
the other defendants are residents or appear to be residents of the Northern
Territory. The Writ of Summons and Statement of Claim are far from clear.
They do not specify the true nature of the plaintiffs' claims and will need
amendment, if the present action is to proceed. But, read generously, they claim
damages for loss suffered as the result of the death of Douglas Bruce Scott who
was the first plaintiff's husband and the second plaintiff's father while he was in
custody in the Northern Territory. The plaintiffs also appear to make a claim for
an order that the defendants be charged with unlawful imprisonment, torture,
murder and conspiracy to pervert the course of justice. All the conduct that is the
subject of the claims is alleged to have taken place in the Northern Territory. At
the material times, the defendants are alleged to have been employees of the
Territory.

3 The material filed in support of the Statement of Claim demonstrates that
the issues involve many questions of fact that are not suitable to be tried in this
Court given its constitutional and appellate functions. All parties agree that the
matter should be remitted to another court under the power conferred by s 44 of
the *Judiciary Act*. But they disagree as to the court to which the matter should be
remitted. The plaintiffs submit that the matter should be remitted to the Federal
Court while the defendants submit that the matter should be remitted to the
Supreme Court of the Northern Territory. But a serious question arises as to
whether this Court has any power to remit the matter to the Federal Court.

4 This Court has jurisdiction in the present matter by virtue of s 75(iv) of the
Constitution which provides that the High Court shall have jurisdiction in all
matters:

"between States, or *between residents of different States*, or between a
State and a resident of another State". (emphasis added)

The Court's power of remitter comes from s 44 of the *Judiciary Act* which
relevantly provides:

"(1) 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 ...

- (2) Where a matter referred to in paragraph 38(a), (b), (c) or (d) is at any time pending in the High Court, the High Court may, upon the application of a party or of the High Court's own motion, remit the matter, or any part of the matter, to the Federal Court of Australia or any court of a State or Territory."

5 Paragraphs (a), (b), (c) and (d) of s 38 of the *Judiciary Act* do not refer to an action between residents of different States. Accordingly, s 44(2) of the *Judiciary Act* confers no power on this Court to remit the present case. If the matter is to be remitted to the Federal Court, it must be done under s 44(1).

6 The plaintiffs dispute that the Federal Court has no jurisdiction under s 38 of the *Judiciary Act*. They assert that s 38(a) "is invoked by the fact that the offence committed was one of torture as defined under the Convention against Torture, for which the Commonwealth bears a responsibility to bring the perpetrators to justice and a responsibility to compensate the family of a deceased victim of an Act of torture - murder by Government Officials". Section 38(a) refers to "matters arising directly under any treaty".

7 However, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is not part of the municipal law of Australia. It creates no legally enforceable rights. A dispute concerning the application of a treaty that has not been enacted as part of the law of Australia gives rise to no justiciable controversy and is incapable of being the subject of a matter for the purpose of s 75 of the Constitution or s 38(a) of the *Judiciary Act*. Whatever the meaning of s 75(i) of the Constitution, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment gives no "immediate right, duty or liability to be established by the determination of the Court"¹. Accordingly, the Federal Court had no jurisdiction under s 38 of the *Judiciary Act*, and this Court has no power under s 44(2) of that Act to remit the matter to the Federal Court.

8 Nor, within the meaning of s 44(1), has the Federal Court jurisdiction with respect to the subject matter of the proceedings – which are claims under, or that are governed by, the common law or the statute law of the Northern Territory. That being so, this Court has no power under s 44(1) of the *Judiciary Act* to remit

1 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ. See also *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 362 [19] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

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the matter to the Federal Court. The Federal Court has no general jurisdiction over claims in tort or the law of the Northern Territory.

9 The plaintiffs claim that the Federal Court has jurisdiction because the present matter involves a matter arising under the Constitution or involving its interpretation. They claim that the Federal Court has jurisdiction over such matters under s 39B of the *Judiciary Act*. They contend that the defendants are "officers administering a law of the Commonwealth, being the Northern Territory (Self Government) Act, and s 111 of the Constitution, and are within the original jurisdiction of the Federal Court". There is no substance in this submission. These defendants no more administered the *Northern Territory (Self-Government) Act* 1978 (Cth) than a warden at Long Bay jail in New South Wales administers the Constitution of that State. Nor does the Statement of Claim contain any facts from which an inference could be drawn that the defendants were officers of the Commonwealth at any material time.

10 The plaintiffs also claim that the present "matter involves a matter also arising under the Royal Commissions Act 1902". But the rights, duties or liabilities that the plaintiffs assert are not immediate rights, duties or liabilities² that arise under the *Royal Commissions Act* 1902 (Cth). That Act gives rise to no "matter" within the meaning of s 44 of the *Judiciary Act*. The plaintiffs also allege that "the Federal Court of Australia would have jurisdiction over the matter under Cross Vesting legislation it being a matter related to proceedings already in the Federal Court of Australia". Those proceedings are identified as other matters concerning the plaintiffs or the first plaintiff. However, the fact that those proceedings are pending in the Federal Court gives this Court no power to remit the matter under s 44(1) of the *Judiciary Act*. Those proceedings do not confer "jurisdiction with respect to the subject-matter and the parties" in these proceedings.

11 In my opinion, and contrary to my initial impression, this Court has no power to remit the present matter to the Federal Court because that Court has no relevant jurisdiction under s 38 of the *Judiciary Act* within the meaning of s 44(2) and no "jurisdiction with respect to the subject-matter and the parties" within the meaning of s 44(1).

12 The power to remit conferred by s 44 is "intended to facilitate the course of litigation", as Brennan J pointed out in *Robinson v Shirley*³. Where parties

2 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ. See also *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 362 [19] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

3 (1982) 149 CLR 132 at 136.

disagree on the appropriate jurisdiction to which the matter should be referred and the law to be applied in the competing jurisdictions is not materially different, this Court ordinarily looks to the balance of convenience in determining to which jurisdiction or court the matter should be referred⁴. In this context, relevant convenience involves more than the convenience of the parties. The Court must consider where the cause of action allegedly arose, the speed with which the competing courts are likely to determine the matter, the location of the witnesses and the availability of and cost of making witnesses available to give evidence. As Toohey J pointed out in *Crouch v Commissioner for Railways (Qld)*⁵, "[t]he aim is, I think, to select the court which, in all the circumstances, will facilitate the course of the litigation".

13 As I have said, the nature of the plaintiffs' claim is not pleaded with the precision that it should be. However, they claim damages in tort in respect of matters that occurred in the Northern Territory. Such a claim would appear to be governed by the common law as amended by the statute law of the Northern Territory. The plaintiffs also seek an order that proceedings be brought against the defendants for unlawful imprisonment, torture, murder and conspiracy to pervert the course of justice. I have not heard argument concerning the basis for this particular claim. But if it has any basis in law, it must relate to offences against the *Criminal Code* (NT) and perhaps the common law.

14 In my view, this Court obtains jurisdiction in this matter only by reason of the plaintiffs being residents of New South Wales and the first defendant, Bowden, being a resident of Queensland. There is no substance in the contention of the plaintiffs that the other defendants are also within the diversity jurisdiction of this Court because they are residents of the Northern Territory which, the plaintiffs allege, is a constitutional State for the purposes of s 75(iv) of the Constitution. The Constitution draws a clear distinction between States and Territories, and Territories are not mentioned in s 75(iv). Until the grant of self-government, the Territories were subject to federal law or federal control and ultimately still are. And, as a matter of history, when the Constitution was enacted, the settled doctrine of the United States courts was that the federal courts had no jurisdiction in cases concerning a resident of a State and a resident of a Territory⁶. Nor, for the reasons that I have given, has this Court any

4 *Weber v Aidone* (1981) 55 ALJR 657 at 659; 36 ALR 345 at 347 per Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ agreeing; *Pozniak v Smith* (1982) 151 CLR 38 at 47-48 per Mason J.

5 (1989) 63 ALJR 416 at 419; 85 ALR 347 at 351.

6 *New Orleans v Winter* 14 US 89 (1816); *Barney v Baltimore City* 73 US 280 (1867).

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jurisdiction under s 75(i) of the Constitution which gives the Court jurisdiction in all matters arising under any treaty.

15 Undoubtedly, the courts of New South Wales, the courts of Queensland and the courts of the Northern Territory would have jurisdiction with respect to the subject matter of, and the parties to, the plaintiffs' claim. Under s 44(1), the Court has power to remit the matter to any of those courts. But it is the Supreme Court of the Northern Territory that on the balance of convenience is the appropriate forum to determine the present matter. At least two of the defendants reside in the Northern Territory and the conduct that gives rise to the plaintiffs' claim occurred in the Northern Territory. Moreover, the relevant law of the Northern Territory differs in a number of respects from the law of New South Wales and the law of Queensland, and it is the law of the Northern Territory that must ultimately determine the matter. Indeed, the second aspect of the plaintiffs' claim in which they seek the arrest of the defendants must be governed by the law of the Territory. *Pozniak v Smith*⁷ makes clear that, where the relevant law in competing jurisdictions is materially different, the matter should be remitted to the State whose law gave rise to the cause of action. That principle should be applied here. Because the death of the first plaintiff's husband and the second plaintiff's father occurred in the Northern Territory, it is also not an unreasonable assumption that the majority of the lay witnesses will come from the Territory. In contrast, the only connection that New South Wales has with the matter is that the plaintiffs now reside in that State. Similarly, the only connection that Queensland has with the matter is that one of the defendants now resides in that State. The case for remitting the matter to the Supreme Court of the Northern Territory is overwhelming. That is so, even though one of the defendants has apparently not been served. It is the "matter" that is remitted, and the Supreme Court of the Northern Territory will have jurisdiction over the "matter".

16 I have not the slightest doubt that the Supreme Court of the Northern Territory is an impartial tribunal. Nor do I have the slightest doubt that the plaintiffs would receive a fair trial in an action heard in the Supreme Court of that Territory. In so far as the plaintiffs assert the contrary, I reject their submission which depends on nothing but an unsubstantiated assertion and the fact that certain judges of the Supreme Court of that Territory have made rulings or decisions in other proceedings that are adverse to the plaintiffs or the deceased. In any event, an application for special leave to appeal to this Court can always be brought against any adverse finding by the Supreme Court of the Northern Territory.

7 (1982) 151 CLR 38 at 47 per Gibbs CJ, Wilson and Brennan JJ.

Accordingly, I would order:

1. Liberty be granted to the plaintiffs to file and serve any amended statement of claim on or before 31 January 2003.
2. The matter be remitted to the Supreme Court of the Northern Territory as if the steps already taken and to be taken under order 1 were taken in the Supreme Court of that Territory.
3. The Registrar of this Court provide to the proper officer of the Supreme Court of the Northern Territory photocopies of all pleadings and summonses filed in this Court and the originals of the other materials in the Court file.
4. The costs of the proceedings in this Court to date are to be costs in the Supreme Court of the Northern Territory.
5. The costs referred to in this Court, including the costs of this order, be according to the scale applicable to proceedings in this Court and thereafter according to the scale applicable in the Supreme Court of the Northern Territory and in the discretion of that Court.