

SUPREME COURT OF QUEENSLAND

CITATION: *Re Mowen* [2012] QSC 434

PARTIES: **BEVAN ALAN MOWEN**
(Applicant)

FILE NO/S: S110/12

DIVISION: Trial Division

PROCEEDING: *Ex parte* application

ORIGINATING COURT: Supreme Court Rockhampton

DELIVERED EX TEMPORE ON: 22 March 2012

DELIVERED AT: Mackay

HEARING DATE: 22 March 2012

JUDGE: McMeekin J

ORDER: **Application dismissed**

CATCHWORDS: CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – ELECTIONS AND RELATED MATTERS – OTHER MATTERS – where the applicant has applied to the High Court of Australia seeking its determination of a constitutional issue that he believes arises by reason of a conflict of laws between the *Commonwealth Constitution* and the Queensland electoral laws – where the laws that govern the State elections are different to the laws that govern the Commonwealth elections – whether the *Commonwealth Constitution* applies to the issue in question – whether a true constitutional issue arises

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INJUNCTIONS FOR PARTICULAR PURPOSES – OTHER CASES – where the applicant applies *ex parte* to the Court for an injunction to prevent the holding of the Queensland State Election – where the applicant endeavours to delay the State election until he has had a chance to apply to the High Court and have his application there determined – where the applicant bears the onus of demonstrating that he has sufficient prospects of success to justify consideration of the granting of the injunction – whether injunctive relief should be granted

Acts Interpretation Act 1954 (Qld), s 36

Commonwealth Constitution, s 34
Commonwealth Electoral Act 1918 (Cth)
High Court Rules 2004 (Cth), r 6.07
Judiciary Act 1903 (Cth), s 78A, s 78B
Parliament of Queensland Act 2001 (Qld), s 64(1)(a)
Uniform Civil Procedure Rules 1999 (Qld), r 15

Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57, cited
Beecham Group Ltd v Bristol Laboratories (1968) 118 CLR 618, cited
Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436, cited
McLindon & Anor v Electoral Commission of Queensland [2012] QSC 44, cited
McLindon & Anor v The Electoral Commission of Queensland [2012] QCA 48, cited

COUNSEL: Applicant in person

SOLICITORS: Applicant in person

- [1] **McMeekin J**¹: Mr Mowen applies to the Court for an injunction to prevent the holding of the Queensland State election, which is due to be held in two days' time. He applies *ex parte*. At my request, upon the Registrar referring the papers to me, pursuant to r 15 of the *Uniform Civil Procedure Rules 1999* (Qld), I directed that the application be heard today, notice having been received by me, I think late on Tuesday evening, and I requested that the papers be referred to the Attorney-General and the Crown Solicitor, to determine whether they were in a position to assist the Court.
- [2] Mr Keyes has been instructed to appear on behalf of the Attorney-General and has provided a detailed submission, which is of great assistance, and he has done so on very short notice.
- [3] The background to this application is that Mr Mowen has applied to the High Court of Australia seeking its determination of a constitutional issue that he believes arises by reason of a conflict of laws between the *Commonwealth Constitution* and the Queensland electoral laws.
- [4] His point is that, under s 34 of the *Commonwealth Constitution*, in order to be qualified to be a member of the House of Representatives, one is required to be, "of the full age of twenty-one years." In this State the relevant qualification is set out in s 64(1)(a) of the *Parliament of Queensland Act 2001* (Qld), and that is that one be "an adult Australian citizen living in Queensland". For the purpose of the Act, the word "adult" is defined in the *Acts Interpretation Act 1954* (Qld) s 36 as "an individual who is 18 or more".

¹ These reasons were delivered *ex tempore*. Some changes have been made to adapt the reasons for publication.

- [5] Mr Mowen's application before the High Court deals with the federal laws, and the federal laws have a similar age qualification under the *Commonwealth Electoral Act 1918* (Cth), hence he has made his application to the High Court.
- [6] His attempt to file that application, however, met with a referral under 6.07 of *High Court Rules 2004* (Cth) to a High Court Justice, and Heydon J has determined that the application will not be accepted by the Registry until Mr Mowen shows cause, and he must do so with the leave of a Justice of that Court.
- [7] Mr Mowen's concern is to delay the State election until he has had a chance to apply to the High Court and have his application there determined. So that is the background.
- [8] So far as the issue of an injunction is concerned, the relevant principles were usefully explained recently by Atkinson J in *McLindon & Anor v Electoral Commission of Queensland*.²
- [9] That was an application in which one of the parties, which has been described by the Electoral Commissioner as “Katter's Australian Party”, applied to have certain electoral papers amended. The effect of their application would have been to disrupt the election.
- [10] Atkinson J, in the course of her reasons, examined the principles that apply where an interlocutory injunction is sought. Her Honour referred to the decisions of the High Court in *Australian Broadcasting Corporation v O'Neill*³, which in turn referred to the principles explained in *Beecham Group Ltd v Bristol Laboratories*.⁴ The Court is required to ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff's entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown that the balance of convenience favours the granting of the injunction.
- [11] These were described in *Australian Broadcasting Corporation v O'Neill*⁵ as the organising principles, and they were to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed.
- [12] In the earlier case of *Beecham Group Ltd*, the Court said that on such applications there were two main inquiries. The first is whether the plaintiff has made out a *prima facie* case in the sense that if the evidence remains as it is, there is a probability that at the trial of the action, the plaintiff will be held entitled to relief. And the second inquiry was whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.
- [13] The phrase “*prima facie* case” is not to be interpreted as a requirement that the plaintiff show that it is more probable than not that at trial the plaintiff would succeed. But the plaintiff must show a sufficient likelihood of success to justify, in the circumstances, the preservation of the status quo pending the trial. The strength of the probability that

² [2012] QSC 44.

³ (2006) 227 CLR 57.

⁴ (1968) 118 CLR 618.

⁵ (2006) 227 CLR 57.

then had to be entertained, it was said, needed to depend upon the nature of the rights the plaintiff asserts and the practical consequences likely to flow from the order he seeks.

- [14] In *Castlemaine Tooheys Ltd v South Australia*⁶, Mason ACJ, as his Honour then was, explained that the principles applicable to the issuing or refusal of interlocutory injunctions in private law have been applied in public law cases, including constitutional cases, although obviously different considerations must arise.
- [15] So with those principles in mind, I turn to the matters litigated. The first is that if this is a constitutional issue before me, then I'm required by law to give the appropriate notices to the various Attorney-Generals of the Commonwealth and States and self-governing Territories under section 78B of the *Judiciary Act* 1903 (Cth), and I need to give the Attorney-General the opportunity to consider whether to intervene in the proceedings under section 78A of that Act.
- [16] As Mr Keyes points out in his submission, no true constitutional issue arises. The laws that govern the State elections are different to the laws that govern the Commonwealth elections. The Court of Appeal in *McLindon & Anor v The Electoral Commission of Queensland*⁷ made that point at [45], where their Honours, who were the President, Muir JA and Applegarth J, said that, "[i]n simple terms, the provisions of the State Act operate in respect of State elections, and the provisions of the Commonwealth Act operate in respect of federal elections," hence I see no obligation to proceed under the section 78A and 78B of the *Judiciary Act* 1903 (Cth).
- [17] Thirdly, then I turn to the considerations relevant here.
- [18] Mr Mowen bears the onus of demonstrating that he has sufficient prospects of success to justify consideration of the granting of the injunction. Fundamentally, in my view, Mr Mowen's application is misconceived. If the *Commonwealth Constitution* applied to the issue, and it does not, it would not prevent parliament passing a law altering the age at which one could be an elector.
- [19] That follows from the words of s 34 of the *Commonwealth Constitution* itself. It says, "[u]ntil the parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows." That clearly reserves to parliament the power to otherwise provide.
- [20] Section 51 *placitum* 36 of the *Commonwealth Constitution*, clearly reserves to the parliament the power to make laws where the *Commonwealth Constitution* leaves it to parliament to otherwise provide. But that has nothing to do with the Queensland Parliament. It too has power to make laws in respect of this State for its peace, order and good government, and it has passed a law which provides that an elector, and a candidate for election, can be 18 years of age.
- [21] There is no prospect that that law will be held invalid. I know of no constitutional or other concern that can possibly be engaged that would have that effect.

⁶ (1990) 169 CLR 436.

⁷ [2012] QCA 48.

- [22] I have overlooked mentioning that reference has also been made to s 21 of the *Constitution of Queensland* (2001) (Qld) where it provides that a person is eligible to be a candidate and to be elected as a member of the legislative assembly if the person is an adult Australian citizen living in Queensland. Again, "adult" stands to be defined by the terms of the *Acts Interpretation Act* 1954 (Qld).
- [23] So it would seem to me that Mr Mowen's application before the High Court (which already has the difficulty that a Justice of the Court has indicated, that *prima facie* at least, it would appear to him to have no prospect of success hence the requirement that Mr Mowen show cause that leave should be granted to let him issue his proceedings) will have no bearing at all on this election and on the requirements that are in place to lawfully qualify someone to be a candidate or to be an elector there.
- [24] Turning to the balance of convenience, plainly if the election was to be stopped by way of injunction now, there would be a massive wasting of moneys which have gone into preparing papers and the like.
- [25] As Mr Keyes has pointed out, there would be substantial cost and inconvenience to the Electoral Commissioner, candidates, parties and the general public.
- [26] Against that, there would need to be in my view, a very formidable case that the prospects of success would need virtually to be overwhelming before this Court would entertain intervening. So in my view, the application must be dismissed.