[2017] QSC 340

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

A. LYONS SJA

No 9899 of 2017

ROBERT ANTHONY BOWYER	**Plaintiff**
and	
HIS EXCELLENCY THE HONOURABLE PAUL DE JERSEY and ANOTHER	**Defendants**

BRISBANE

4.15 PM, WEDNESDAY, 15 NOVEMBER 2017

JUDGMENT

Any Rulings that may be included in this transcript may be extracted and subject to revision by the Presiding Judge.

HER HONOUR: Pursuant to an application filed on the 25th of September 2017, the applicant, Mr Bowyer, has filed an application under the *Judicial Review Act* 1991 (Qld) for a statutory order of review, pursuant to section 20(g) on the grounds that a fraud will take place upon the people of Queensland when the Queensland Government makes the application to the Governor to have the writs for the election approved and signed. This application was made prior to the actual calling of the election.

Mr Bowyer's application contended that the basis of his application was that the Legislative Council was abolished unlawfully because the 1921 State Parliament did not have the powers to bypass triple-entrenched provisions to amend the *Constitution Act* 1867 (Qld) that made changes to the composition of the legislature. The argument is that, should it be found that the entrenched provisions have not been followed, then the application for the writs for an election that only make provision for the legislative assembly as sole composition of the legislature would be fraudulent. The statutory order for review therefore sought orders that the Governor of Queensland cannot sign writs to hold an election until the State Government provides for the lawful composition of the legislature as described in section 1 of the *Constitution Act* 1867 (Qld).

In his application, the applicant sought that the following questions be forwarded for review: (1) did the State Parliament have the power to amend the entrenched provisions enacted by the British Parliament without first following their directions and in accordance with the UK Privy Council findings; (2) was the *Constitution Act Amendment Act* 1922 (Qld) unlawfully presented to the Governor when neither the entrenched provisions for two-thirds' majority or the majority of the members was achieved in the chamber's division; and (3) did the 28 Labor-appointed Legislative Council members, while holding pledges to destroy the Legislative Council, in taking their oath of office, act in treason to the democratic will of Queenslanders as demonstrated by the 1917 referendum results.

In his oral submissions today and in his earlier written submissions, the applicant indicates that the application to seek a judicial review has highlighted the unlawfulness of the decisions not to have the writs include the provisions to elect members of the Legislative Council. It highlights the fact that the two-thirds' majority provision was always to be used when amendments to the Legislative Council were undertaken; the two-thirds provisions have not been undertaken; and the 1917 referendum bill was not placed on the statute books. The applicant argues that it is the duty of the executive, to ascertain the law; but it is especially the duty of the Attorney-General as chief law officer to do so. The applicant argues it is appropriate that a judicial review be undertaken as the Supreme Court holds jurisdiction over the statutes and there is no other process that can remedy the mischief.

Essentially, it is submitted that a judicial declaration of opinion is sought, on whether the Legislative Council was lawfully abolished and following, by logic, the conformity of the executive to the fundamental laws of the Constitution.

I have read Mr Bowyer's outline of submissions and note his arguments, particularly in relation to the factual basis of some of the decisions that have been relied upon by counsel for the respondents, in particular his arguments as to the factual bases of *Taylor v Attorney-General (Qld)* [1917] 23 CLR 457, *Taylor v Attorney-General (Qld)* [1918] St R Qd 194 (Privy Council) and also *McCawley v The King* [1920] AC 691; 28 CLR 106 (Privy Council). I make it clear, however, that those decisions speak for themselves and I am bound by those decisions.

Pursuant to an application filed by the respondents on the 31st of October 2017, the respondents seek the summary dismissal of the application for judicial review. Basically, the respondents submit that, pursuant to section 48(1)(b) of the *Judicial Review Act* 1991 (Qld), the application should be dismissed because it has no reasonable basis. Whilst the application seeks to review the Governor's issuing of the writs in the forthcoming election, I agree that, in substance, it challenges the validity of the abolition of the Legislative Council in 1922. That is the essence of this application for judicial review. The basis of that challenge is that the former section 9 of the *Constitution Act* 1867 (Qld) contained a manner and form provision that the Legislative Council's constitution could be amended only by a special majority. The argument is that the 1908 repeal of the proviso by a simple majority was invalid and, therefore, the passage of the 1922 bill by simple majority did not comply and was therefore invalid. When the application was originally filed, it was only a potential issue, but on 29 October 2017, after this application was filed, the Governor issued the writs for the election.

Section 48 of the *Judicial Review Act* 1991 (Qld) provides that the Court may stay or dismiss an application under section 20, 21, 22 or 43 or a claim for relief in such an application if the Court considers (a) that it would be inappropriate for the proceedings in relation to the application or claim to be continued or (b) that no reasonable basis for the application is disclosed. Pursuant to section 48(2) the power of the Court must be exercised by order and may be exercised at any time in the relevant proceeding, but in relation to the power to dismiss an application, the Court must try to ensure that any exercise of the power happens at the earliest appropriate time. It is on that basis that I have proceeded to determine the application.

Under the Court's power in section 48, the Court can dismiss an application if it is satisfied of one of the matters in the paragraphs. Clearly, the respondents rely primarily on the basis that there is no reasonable basis for the application for judicial review. I accept that the test in section 48(1)(b), that is no reasonable basis for the application is disclosed, is similar to the test under *Uniform Civil Procedure Rules* 1999 (Qld) rule 293(2)(a), which is a test that the plaintiff has no real prospect of succeeding on the claim. Having read the decision of *Waratah Coal Pty Ltd v Nicholls* by Applegarth J, [2013] QSC 68, I am satisfied that the test in relation to section 48(1)(b) is, in fact, a test which is similar in effect to rule 293(2)(a).

In terms then of whether it is inappropriate, the respondents argue that this originating application discloses no reasonable basis and therefore should be dismissed. It is also argued in the alternative that the Governor's actions are not

justiciable and therefore it would be inappropriate for the proceeding to be continued or to grant the application. It is also argued that, given that the writs have now issued, it would be inappropriate either for the proceedings to continue or the application to be granted.

Turning then to the issue of justiciability and standing, the object of the *Constitution of Queensland* 2001 (Qld) is to declare, consolidate and modernise the Constitution. It is an Act of the Queensland Parliament. It can be amended and repealed by the Queensland Parliament subject only to the Commonwealth Constitution. Section 29 provides there must be a Governor appointed by the sovereign, with power to do all things that belong to the Governor's office under law. One of those roles is to dissolve the Legislative Assembly and to provide for the election of a new one. Since the 1981 High Court of Australia decision in *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170, the mere fact that an action is taken by a representative of the Crown will not itself immunise the action from judicial review, but that the non-justiciability will depend on the nature of the decision rather than simply the identity of the decision-maker. The Governor's powers to dissolve the Legislative Assembly and issue the writs are not prerogative. They are statutory.

In the decision of *The King v Governor of the State of South Australia* [1907] 4 CLR 1497, the question was whether mandamus may lie against a State Governor to perform an asserted duty under section 12. There, the High Court unanimously held that mandamus will not lie against an officer of the Crown to compel him to do an act which he ought to do as agent of the Crown unless he owes a separate duty to the individual seeking the remedy. It was held by the Court that they did not consider that the Governor of a State, in issuing a writ for the election of senators, is acting as an agent for the sovereign in this sense, since the duty imposed by the Constitution is imposed by statute law and not by delegation from the sovereign himself. It was held it is a duty cast upon him as Head of State.

That case remains good law in Australia, and whilst there are some authorities which have referred to the possibility that remedies other than mandamus or prerogative writs rely against a Governor, none of those cases concern the dissolution of legislatures or the issuing of electoral writs. Accordingly, the authority of *The King v Governor of the State of South Australia* prevails. I accept that in the United Kingdom, matters are different in that the powers of the Crown in relation to the dissolution of Parliament are prerogative and not statutory, and therefore they are in a different category. I agree with the submission of counsel for the respondents that the power of the Governor under section 15(2) of the *Constitution Act* 1867 (Qld) is to prorogue or dissolve the Legislative Assembly by proclamation or otherwise, and I accept the submission that it is difficult to see what legal constraint there could be upon the exercise of the power or by what legal standard a decision by the Governor to dissolve the Legislative Assembly could be reviewed, particularly given the convention is its exercise on the advice of the Ministers.

Pursuant to section 82(1)(a) of the *Electoral Act* 1992 (Qld), the Governor is to issue a writ for a general election, and he must issue a writ no later than four days after the

day on which the legislature is dissolved or expires. It is a necessary adjunct to the power to dissolve parliament, and it does not involve any discretion; it merely ensures the short period of time between the dissolution of parliament and the issue of the writs. I accept the force of the submission based on the decision of *Re Ditfort; ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 that if there is no matter which can be the subject of judicial review, it follows that the applicant does not have standing to bring the application. The dissolution of the Legislative Assembly and the issuing of the writs are not justiciable decisions.

In any event, the substance of the present application would also seem to be futile. In substance, it is not an application challenging a decision of the Governor, but it is a challenge to the passing of legislation in 1908 and 1922 which amended the *Constitution Act* 1867 (Qld) and abolished the Legislative Council. If that is the nature of the application, then it is out of time. Section 46 of the *Judicial Review Act* 1991 (Qld) provides that an application for review under part 5 must be made within three months of the day on which the grounds for the application arose. It is more than three months since 1908 and since 1922. Whilst the Court has power to extend time, there is no basis for the Court to do so here. Particularly when one considers the merits of the application; on the basis of the decisions which I have been taken to and after analysis of the constitutional provisions which I have been referred to by counsel for the respondents, the *Constitution Act* 1867 (Qld) was an enactment of the Queensland Parliament and, like all provisions, it is susceptible to amendment or repeal by ordinary majority unless subject to manner and form requirements.

The general principle of parliamentary supremacy is that parliament can make, amend or repeal any law within its powers and, generally, an earlier parliament cannot bind a later one. An important exception in the Constitution of the Australian States arises under the *Colonial Laws Validity Act* 1865 (Imp) and the *Australia Act* 1986 (Cth). The 'exception' is that a colonial or state law respecting the constitution powers and procedures of the colonial or state parliament is of no force or effect unless it is made in the manner and form required by law of that parliament. However, importantly, such a manner and form requirement may be amended or appealed in the ordinary way and it not binding on a later parliament. However, if that requirement itself is subject to a manner and form requirement then later parliaments will be bound by both requirements. As Professor Carney states:

> *For a manner and form provision to be effectively binding on a legislature it must be doubly entrenched.*

When enacted, the *Constitution Act* 1867 (Qld) contained provisions requiring special majorities for amendments of the composition of the Legislative Assembly and the Legislative Council. Section 9 originally provided a power to alter the composition of the Legislative Council subject to two provisions. First, it was unlawful to present a bill for such change to the governor unless it had been passed with the concurrence of two-thirds of the members of both the Legislative Assembly and the Legislative Council. Second, such a bill was to be reserved for signing by her Majesty and it was required to be laid before the Imperial Parliament before such signing. However, it is significant that those provisos were not doubly entrenched.

Section 10 of the Constitution placed similar special majority requirements and provisos on the passing of a measure to alter the system of representation for the Legislative Assembly. Similarly, those restrictive provisions were not doubly entrenched.

Clearly, then, it was the intention of the Imperial Parliament that the colonial legislature should have the capacity to remove the restrictions placed upon the power to alter the composition of the two houses of parliament. In 1920 Lord Birkenhead in the Privy Council in his speech set out that in very clear terms. He stated:

> *It would, indeed, be difficult to concede how the legislature could more plainly have indicated an intention to assert on behalf of the colonial legislatures the right for the future to establish courts of judicature and to abolish and reconstitute them than in the language under consideration, nor were the framers of this Act content with making provision for the future. Adhering to their fundamental purpose which was to remove doubts as to the validity of colonial laws, they affirmed in terms that every colonial legislature should be deemed, at all times, to have had full powers in the matters in question.*

Now, I note Mr Bowyer's arguments in this regard with respect to the decision of Chief Justice Griffiths in the decision of *Cooper*, and I note that in the speech of Lord Birkenhead this was, in particular, specifically referred to. In this respect, Lord Birkenhead held that:

> *The contention of the respondents is that the Constitution Act of 1867 enacted certain fundamental organic provisions of such a nature as thereafter to render the Constitution stereotyped or controlled.*

That submission was rejected by Lord Birkenhead where he held it would be almost impossible to use wider or less restrictive language. He considered that the terms made it clear that the colony may make laws for the peace, welfare and good government of the colony in all cases whatsoever. It was clear, therefore, that he firmly rejected the submission that the Constitution was controlled and held it was a flexible Constitution. There was also a reference to the historical context in the decision of *Western Australia v Wilsmore* (1982) 149 CLR 79, where Chief Justice Gibbs referred to the *Constitution Act* 1889 (WA) which was based on the earlier New South Wales and Victorian Constitutions which contained a provision requiring a special majority to effect changes to the Legislative Council and the Legislative Assembly. The Chief Justice said at page 85:

> *The history of these provisions shows that section 73 of the Constitution Act of 1889 could not have been intended to be a great constitutional safeguard. By that time, the Colonial Laws Validity Act 1865 had been passed but it remained true to say that although, while the first proviso of section 73 remained in force, it was not competent to repeal or alter the provisions of the Constitution Act of 1889 in a way that would affect any change in the constitution of the Legislative Council or of the Legislative Assembly except by the majority to which the proviso referred, it was, nevertheless, possible to repeal the proviso*

by a simple majority since no manner or form was required for a law affecting such a repeal.

By the *Constitution Act Amendment Act* 1871 (Qld), the proviso to section 10 of the *Constitution Act* 1867 (Qld) was removed. Consequently, the composition of the Legislative Assembly could therefore by amended by ordinary Act passed by simple majority. Far from being unlawful or repugnant to imperial law, the repeal was consistent with the provisions of the *Constitution Act* 1867 (Qld), and its ultimate source which was the *New South Wales Constitution Act* 1855 (Imp). Now, I accept the submission that there is no evidence of any legal challenge to the repeal at the time or since. The purpose of the repeal was to remove the restriction so as to enable that the Legislative Assembly to keep pace with demographic changes.

By the *Constitution Act Amendment Act* 1908 (Qld), the first and second provisos to section 9 were repealed. Consequently, the composition of the Legislative Council could thereafter be amended by ordinary Act passed by simple majority. It is significant that the question of the validity of that Act and the *Parliamentary Bills Referendum Act* 1908 (Qld) were considered by the High Court in *Taylor v Attorney-General (Qld)* [1917] 23 CLR 457. The first question in the case stated for the opinion of the High Court was: is the *Constitution Act Amendment Act* 1908 (Qld) a valid and effective Act of the Parliament? That was answered by five High Court judges in the affirmative, and, indeed, Justice Isaacs stated:

The argument never seriously put the validity of this Act in contest. The plaintiffs, rather, threw the burden on the defendants of proving (1) that it had been passed by two-thirds majority, and (2) that the royal assent has been validly given.

He concluded that both provisions appear, in fact, to have been observed. With respect to Mr Bowyer's argument that Justice Isaacs was wrong in his conclusions, it does not matter whether Justice Isaacs was correct. In any event a special majority was not required, a simple majority was sufficient. I am bound by the decision of *Taylor v Attorney-General (Qld)*, and an Act which amends a manner and form provision which is not itself subject to a manner and form requirement may be amended by an ordinary Act passed by a simple majority.

In relation to the abolition of the Legislative Council on 23 March 1922 royal assent was given to the *Constitution Act Amendment Act* 1922 (Qld). The Act was able to be passed by simple majority of the Legislative Assembly because the requirement for a special majority had been removed by the *Constitution Act Amendment Act* 1908 (Qld). Mr Bowyer's argument that a majority of the Legislative Council could only have been achieved by a vigorous process of appointing members who supported the abolition of the council is irrelevant in this regard.

In relation to the arguments by the respondents in relation to the political and legal reality, having made my conclusions clear in relation to the other aspects of the application, I do not consider it necessary to turn to this aspect of the argument.

In my view, the respondents have established that the originating application should be dismissed. They have established that pursuant to section 48 of the *Judicial Review Act* 1991 (Qld), the application should be dismissed because it would be inappropriate for the proceedings to be continued because there is no reasonable basis for the application. I am satisfied, therefore, that there should be orders that the originating application is dismissed.

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HER HONOUR: It was quite clear on the basis of the submissions and the affidavit that were provided to Mr Bowyer that he was aware of the arguments by counsel for the respondents, and that his application not be further pursued, but he did pursue his application, and in the circumstances, given the success of the respondents, the applicant should pay the respondents' costs as sought on the indemnity basis. Thank you. We will adjourn.

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