SUPREME COURT OF QUEENSLAND

CITATION:	*McMahon v State of Qld* [2000] QCA 483
PARTIES:	**GREGORY MICHAEL McMAHON** (plaintiff/respondent) **v** **STATE OF QUEENSLAND** (defendant/appellant)
FILE NO/S:	Appeal No 588 of 2000 SC No 255 of 1995
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 November 2000
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2000
JUDGES:	Pincus and Thomas JJA, Atkinson J Separate reasons for judgment of each member of the Court; Pincus JA and Atkinson J concurring as to the order made, Thomas JA dissenting
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – TRANSFERS AND CONSOLIDATIONS - claim for damages pursuant to s 16 of the *Defence (Re-establishment) Act* 1965 (Cth) – where proceeding commenced in Supreme Court and Act provided claim could only be made by application to a court of summary jurisdiction – power of Supreme Court under s 75 of the *Supreme Court of Queensland Act* 1991 (Qld) to transfer the matter to the Magistrates Court not limited to actions properly commenced in the Supreme Court – whether exercise of such power in present case inconsistent with s 16 of the *Defence (Re-establishment) Act* 1965 (Cth) *Defence (Re-establishment) Act* 1965 (Cth), s 16, s 58 *Supreme Court of Queensland Act* 1991 (Qld), s 8(2)(b), s 75 *Abebe v The Commonwealth; re Minister for Immigration and Multicultural Affairs* [1999] HCA 14, 14 April 1999, cited

Adams v Chas S Watson Pty Ltd (1938) 60 CLR 545, cited
Brown v The Queen (1986) 1650 CLR 171, cited
Collins v Charles Marshall Pty Ltd (1955) 92 CLR 529, cited
Commonwealth v Hospital Contribution Fund of Australia (1992) 150 CLR 49, referred to
Ex parte Walsh and Johnson; in re Yates (1925) 37 CLR 36, cited
Federated Sawmill, Timber Yard and General Wood-workers' Employees' Association (Adelaide Branch) v Alexander (1912) 15 CLR 308, referred to
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 31, referred to
Kotsis v Kotsis (1970) 122 CLR 69, cited
Laurance v Katter [2000] 1 Qd R 147, cited
Le Mesurier v Connor (1929) 42 CLR 481, referred to
Peacock v Newton Marrickville & General Co-operative Building Society No 4 Ltd (1943) 67 CLR 25, cited
R v Federal Court of Bankruptcy; ex parte Lowenstein (1938) 59 CLR 556, cited
Re Wakim [1999] HCA 27, 17 June 1999, cited
Russell v Russell (1976) 134 CLR 495, cited

COUNSEL: J A Griffin QC with T W Quinn for the appellant
A N S Skoien for the respondent

SOLICITORS: Crown Law Office for the appellant
Gilshenan & Luton for the respondent

[1] **PINCUS JA:** I have had the advantage of reading the reasons of Thomas JA in which the nature of the problem is explained. The question is whether, if the Commonwealth Parliament vests jurisdiction to deal with a kind of case in State court A, a State law permitting State court B to transfer cases to State court A applies. Here the case was instituted in the Supreme Court, which has no jurisdiction to determine it; it should have been begun in the Magistrates Court, which has such jurisdiction. There is a State law which allows the Supreme Court to transfer cases in which the Magistrates Court has jurisdiction, but the Supreme Court has not, to the Magistrates Court. In my opinion it applies to allow the Supreme Court to transfer the present matter.

[2] Thomas JA has given reasons for concluding that the State law, s 75 of the *Supreme Court of Queensland Act* 1991, gives the Supreme Court power to transfer whether or not it has, in any other respect, jurisdiction in relation to the matter transferred; I respectfully agree.

[3] There does not appear to be any real doubt about the principles involved, nor is any suggestion of invalidity of s 75 raised; the question is in essence what effect should be attributed, as a matter of interpretation, to s 75, having regard to those principles. If there is any ambiguity, one should lean in favour of a broad construction; there are numbers of courts and tribunals in this State, and it seems fairly common that people are puzzled as to where to start their case. The transfer provision, s 75 of the

Act, alleviates injustices which might otherwise arise, particularly as to litigants acting for themselves.

[4] It was early established that when federal jurisdiction is conferred on an existing State court the court is taken as the Federal Parliament finds it: *Federated Sawmill, Timberyard and General Wood-workers' Employes' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308 at 313. And in *Le Mesurier v Connor* (1929) 42 CLR 481 at 495, the High Court explained that State law, "primarily at least, determines the constitution of the [State] Court itself, and the organization through which its powers and jurisdiction are exercised" (495, 496). So that where a law, such as the present one, confers federal jurisdiction on a State Magistrates Court –

> "in all respects other than subject matter the provisions of the State law as to Courts of summary jurisdiction shall prevail". *Alexander's* case at 312

These doctrines were reaffirmed in *Commonwealth v Hospital Contribution Fund of Australia* (1992) 150 CLR 49:

> "... when the Parliament invests a State court with federal jurisdiction it has no power to alter or affect the constitution of the court or the organization through which its jurisdiction and powers are exercised ...". (56)
>
> "... the State law must determine the organization through which the powers and jurisdiction of the State courts are exercised". (58)
>
> "It is plain enough that that Act took the State courts as it found them. The Constitution itself rests upon the assumption of an existing system of State courts in existence in 1901 but capable of being changed in structure and jurisdiction by the legislatures of the States". (67)

[5] In that same case Mason J (as his Honour then was) referred to the inconvenience which would follow from not applying these doctrines, including "a coercive and restraining influence on the States' competence to organize their courts as they choose" (62). The only unusual feature here is that the State law is not one dealing with the organisation of a single State court, but rather one having to do with statutory arrangements within the State court system as a whole. I see no reason to read the section permitting transfer as inapplicable where the lack of jurisdiction of the Supreme Court is a consequence of a limitation imposed by a federal rather than a State statute.

[6] I agree with Atkinson J that the appeal should be dismissed with costs.

[7] **THOMAS JA:** This is an appeal against an order made in the Supreme Court for transfer of certain proceedings from the Supreme Court to the Magistrates Court. The appellant's contention is that the relevant proceedings should have been struck out because they were commenced in the wrong court.

[8] On 20 February 1995 an action was commenced by Mr McMahon (the respondent) in the Supreme Court against his employer, the State Water Resources Commission. The State of Queensland (the appellant) was named as defendant under the *Crown*

Proceedings Act 1980 as liable in respect of allegedly wrongful acts of the Commission and the Department of Primary Industries.

[9] The respondent's claim against his employer was based upon two separate causes of action. One of these was for damages for breach of the contract of employment, in respect of which various particulars of unfair treatment amounting to breaches of that contract were alleged. The second cause of action was that the defendant through officers of the Commission and the Department of Primary Industries acted contrary to the provisions of Part II of the *Defence (Re-establishment) Act* 1965 (Cth) thereby causing the plaintiff loss. The claim was based on the respondent having been at material times also a member of the citizen forces of the military forces of the Commonwealth who from time to time had sought leave from his employer in order to participate in exercises and periods of training. The allegations in the statement of claim included that he had been penalised and prejudiced by reason of his continuing liability to render service in the reserve forces, contrary to the provisions of the above Act. The statement of claim sought $120,000 damages for breach of contract and $208,000 compensation pursuant to s 16 of the *Defence (Re-establishment) Act* 1965.

[10] After the action had been pending for a considerable time the appellant applied to strike out the claim for compensation of $208,000 made in par 25(a) of the statement of claim, on the ground that it was not maintainable in law. The submission was that such a claim can only be brought in a court of summary jurisdiction. That submission is based on s 16 of the *Defence (Re-establishment) Act* 1965 which states:

> "(1) Where a member considers that the Crown (whether in right of the Commonwealth or of a State) has failed to comply with a provision of this Part requiring the member to be permitted to resume work, or to be reinstated in employment, under the conditions prescribed by this Part or prohibiting the termination or variation of the member's employment, the member may apply to a court of summary jurisdiction, constituted by a Police, Stipendiary or Special Magistrate, for compensation.
>
> (2) The court shall hear the application and, if it finds that there has been a failure to comply with any provision referred to in the last preceding subsection, the court may order that the Crown shall pay to the member such amount by way of compensation as the court thinks reasonable."

[11] There is reason to think that any fresh claim now commenced in the Magistrates Court would be met with a limitation defence. In the event, the learned chamber judge ordered,

> "That so much of the proceedings pending in [the Supreme Court action] as relate[d] to a claim for compensation pursuant to s 16 of the *Defence Re-establishment Act* save for the statement of claim (sic), be transferred to the Magistrates Court at Brisbane. Further, that part relating to interest be transferred also."

[12] Section 58 of the above Act provides:

> "Where this Act provides for the determination of a matter by a court:
>
> (a) if the court is a court of a State – the court is invested with federal jurisdiction to hear and determine the matter …"

[13] The right conferred by s 16(1) is a right to apply to a court of summary jurisdiction. It is not a right of any other kind. I do not accept the submission of Mr Skoien, counsel for the respondent, that the section first confers a right to compensation and secondly, deals with the question of jurisdiction. I do not consider that the Supreme Court of Queensland, or for that matter any other court than one described in s16 can grant compensation under that section. I respectfully agree with the finding of the learned chamber judge that "a claim under that section cannot be *maintained* in this court". The question remains however whether such a claim could be brought in the Supreme Court, transferred to the Magistrates Court and be there maintained and determined. The legality of such a procedure will now be considered, having regard at this stage to the provisions of the law of this state, and leaving the effect of federal law for later consideration.

[14] Section 75 of the *Supreme Court of Queensland Act* 1991 states:

> "(1) The Supreme Court may transfer to a Magistrates Court a proceeding pending in the Supreme Court that is within the jurisdiction of a Magistrates Court.
>
> (2) If a proceeding is transferred to a Magistrates Court, that court may hear and decide the matter as if the proceeding had been started in a Magistrates Court."

[15] Is this power limited to cases which have in the first place been properly commenced in the Supreme Court? The present claim does not fall within the general civil jurisdiction of the Supreme Court as it is purely statutory and the only court to which the claimant may apply for such compensation is the Magistrates Court. Notwithstanding this, the learned chamber judge was of the view that the relevant claim in this court was "not a nothing" or "a nullity". I do not think that notions of "nullity", or the rule that orders or judgments of Supreme Court cannot be treated as a nullity even when made in excess of jurisdiction unless and until set aside, are of assistance in the resolution of the present question. There is a distinction between the validity of orders made after irregular procedure and the validity of a statutory claim that is made contrary to the basic requirement of a statute.

[16] Mr Skoien for the respondent submitted that s 75 is wide enough to confer jurisdiction upon the Supreme Court to order a transfer in a matter which that court lacks jurisdiction to determine for itself, and that the court is at least given the power to transfer such proceedings to another court which does have jurisdiction to deal with the matter. The present matter is within the jurisdiction of the Magistrates Court, and the Supreme Court is expressly given power by s 75(1) to transfer such a proceeding to the Magistrates Court. Section 75(2) is at least consistent with

recognition of the validity of a transfer of proceedings like the present where a Magistrates Court has jurisdiction and the proceedings are incorrectly commenced in the Supreme Court. The appellant responds that it is implicit in s 75(1) that a proceeding referred to is one within the jurisdiction of the Supreme Court.

[17] But there is no particularly persuasive reason for making such an implication. There is nothing odd in the notion of a transfer by a court that lacks jurisdiction to one that has. Although it is a mere example, the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) reveals a scheme intended to facilitate the transfer or cross-vesting of matters which might or might not be within the original jurisdiction of the transferring court. Further, if one considers examples of state legislation giving a statutory cause of action which is required to be heard only in the Magistrates Court, such as for example the *Dividing Fences Act* 1953 s 18(2) there is no immediately apparent reason why a claim erroneously brought in the Supreme Court, perhaps along with damages claims against the same party, ought not to be transferred to the Magistrates Court under s 75 of the *Supreme Court of Queensland Act* 1991.

[18] The arguments on this question are fairly evenly balanced, but I favour a broad construction of s 75 which gives the Supreme Court the power to direct litigants to the correct or most convenient court irrespective of error in the initiating proceeding. Counsel for the appellant drew attention to s 85(1) of the *District Court Act* 1967 which expressly extends the scope of proceedings capable of transfer from that court to include proceedings "in which a District Court has no jurisdiction". That of course puts the matter beyond doubt for transfer orders from that court, but I do not think that an example of clearer drafting in another statutory instrument necessarily bespeaks an opposite intention in the *Supreme Court of Queensland Act* 1991.

[19] I would therefore hold that the power of transfer conferred by s 75 of the *Supreme Court of Queensland Act* 1991 is not limited to actions that have been commenced within the jurisdiction of the Supreme Court.

Exercise of Federal jurisdiction

[20] Counsel for the appellant then submitted that the order for transfer was an order of a state court purporting to exercise a power conferred by the state parliament so as to invest another state court with federal jurisdiction. The investiture of federal jurisdiction is, of course, a matter for the parliament of the Commonwealth.[1]

[21] It is implicit from s 8(2)(b) and 75(1) of the *Supreme Court of Queensland Act* 1991, as well as the Constitution itself, that the power to transfer proceedings cannot be exercised so as to permit the maintenance of a claim involving federal jurisdiction which exceeds the jurisdiction actually conferred by the Commonwealth parliament.

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1 Sections 71 and 77(iii) of the Constitution.

[22] It is true that in conferring federal jurisdiction on a state court the Commonwealth parliament vests the jurisdiction in the state court as it finds it.[2] It was stated in the *Federated Sawmill* case that:

> "[W]hen the Federal Parliament confers a new jurisdiction upon an existing State court it takes the court as it finds it, with all its limitations as to jurisdiction; unless otherwise expressly declared."[3]

In the same context it has been held that:

> "Unless a contrary intention appears, it [the Commonwealth Parliament] also takes the State law as it finds it, so far as that law relates to the procedure to be adopted in the court, the practice of the court, and the rules of evidence."[4]

[23] In the context of investing the Queensland Magistrates Court with jurisdiction to grant compensation under the *Defence (Re-establishment) Act* the investiture may be taken to accept the general provisions governing practice in the Magistrates Court, including the usual commencement of such proceedings by way of plaint and summons, and also that such proceedings may come to the Magistrates Court via a transfer order from the Supreme Court under s 75.

[24] Thus far, the maintenance of the present proceedings in the Magistrates Court would not seem to infringe federal law or to be inconsistent with it. However, in my opinion there is a fatal difficulty arising from the words by which s 16(1) of the *Defence (Re-establishment) Act* confers the relevant right. The only right conferred is that the member "may *apply* to a court of summary jurisdiction". The right is conferred by reference not to the maintenance or determination of such a proceeding but to its initiation. Subsection 2 deals with determination of such proceedings, but the conferral of the relevant right is to my mind inconsistent with the notion that an applicant may apply to some other court in the first instance. It is in my view inconsistent with the notion that the Magistrates Court has a right to hear the application and determine it when the initial application has not been made to the Magistrates Court.

[25] Quite simply, the initiation of such a proceeding in the Supreme Court is inconsistent with the intent of the federal legislation, and the transfer ordered by the learned chamber judge was ineffectual to confer or pass on the power to grant compensation that is given by s 16 of the *Defence (Re-establishment) Act*.

[26] The appeal must therefore be allowed. The order made in par [1] of the order of Fryberg J dated 23 December 1999 should be set aside, and it should be further ordered that the claim made in par 25(a) of the statement of claim be struck out.

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2 *Le Mesurier v Connor* (1929) 42 CLR 481, 496, 498; *Russell v Russell* (1976) 134 CLR 495, 516, 535; *Brown v The Queen* (1986) 160 CLR 171, 198; "…the power given by s 77(iii) contemplates the selection by Parliament of an existing judicial organ which depends alike for its structure and its being upon State law and the grant to that Court of powers of adjudication upon specified subjects of Federal jurisdiction."

3 *The Federated Sawmill Timber Yard and General Woodworkers Employees Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308, 313.

4 *R v Riley* (1940) 40 SR(NSW) 111.

The suggestion that the matter might be transferred to the Magistrates Court and that such a procedure might be a means of overcoming a limitation defence was raised, not by the parties, but by the learned chamber judge. The respondent should be ordered to pay the appellant's costs of the appeal to be assessed but in the circumstances I would direct that the respondent be granted an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973.

[27] **ATKINSON J:** I have had the advantage of reading the reasons of Thomas JA. I agree with his Honour's reasons for concluding that s 75 of the *Supreme Court of Queensland Act* 1991 allows the Supreme Court to transfer a proceeding which is not within the jurisdiction of the Supreme Court to the Magistrates Court if it is within the jurisdiction of that court.

[28] As his Honour observes, the Magistrates Court has federal jurisdiction over this proceeding. Federal jurisdiction is conferred on the Magistrates Court by the exercise, in s 16 and s 58 of the *Defence (Re-establishment) Act* 1965, of the legislative power given to the Commonwealth Parliament by s 71, s 76(ii) and s 77(iii)[5] of the *Constitution* and s 39(2)(d) of the *Judiciary Act* 1903 to invest any court of a State with federal jurisdiction.

[29] This legislative power was an innovation[6] in the Australian Constitution. Under the Constitution of the United States of America, the Congress cannot vest federal jurisdiction in State Courts[7] and so had been obliged to set up a parallel federal court system to deal with all federal matters.[8]

[30] When the Commonwealth invests the judicial power of the Commonwealth in a State court, the Commonwealth takes that court as it finds it.[9] As Brennan CJ held in *Kable v Director of Public Prosecutions (NSW):*[10]

> "It has been accepted constitutional doctrine that, when the Commonwealth invests the judicial power of the Commonwealth in a State court, it must take that court constituted and organised as it is from time to time". [11]

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5 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 556; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 586; *Russell v Russell* (1976) 134 CLR 495 at 516; *Re Wakim; Ex parte McNally* [1999] HCA 27; No 74 of 1998, 17 June 1999 at [2], [56], [189].

6 It was called the "autochthonous expedient" in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268.

7 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*. Sydney: Legal Books, 1901, para 337.

8 *Le Mesurier v Connor* (1929) 42 CLR 481 at 496; *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 139-140 per Gummow J; *Re Wakim; Ex parte McNally* (supra) at [200], [245].

9 *The Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308 at 313; *Brown v The Queen* (1986) 160 CLR 171 at 218-219; *Laurance v Katter* [2000] 1 Qd R 147 at 164.

10 (supra) at 67.

11 *Le Mesurier v Connor* (supra) at 496, 498; *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 554-555; *Peacock v Newtown Marrickville & General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 37; *Kotsis v Kotsis* (1970) 122 CLR 69 at 109; *Russell v Russell* (supra) at 516-517, 530, 535, 554; *The Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49 at 61.

Although the Commonwealth has the power to confer additional judicial authority on such a court as constituted from time to time[12] and in doing so can "define the limits or conditions of the investiture",[13] it cannot legislate to affect the constitution, organisation or structure of State courts.

[31] The Commonwealth cannot therefore alter the structural relationship between the Supreme Court and the Magistrates Court in Queensland, nor does the *Defence (Re-establishment) Act* purport to do so. While s 16 provides that a member of the citizen forces of the military forces of the Commonwealth may apply to a court of summary jurisdiction for compensation, it does not specify how such an application may be made. The application may be made in any way provided for by the statutes and rules of Queensland governing the constitution, organisation and structure of State courts. One of these methods is by commencing a matter in the Supreme Court which is then transferred to the Magistrates Court under s 75 of the *Supreme Court of Queensland Act* 1991.

[32] In my view Fryberg J had power to transfer the claim for compensation made under s 16 of the *Defence (Re-establishment) Act* 1965 to the Magistrates Court and the appeal should be dismissed with costs.

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12 Subject to the Chapter III requirement that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial powers of the Commonwealth: *Kable v Director of Public Prosecutions* (NSW) (supra) at 103, 116, 128.

13 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 125; *Abebe v The Commonwealth; Re Minister for Immigration and Multicultural Affairs* [1999] HCA 14; No 53 of 1998, 14 April 1999 at [38], [123].