

COURT OF APPEAL

DAVIES JA
HELMAN J
JONES J

Appeal No 9413 of 2000

EDWARD KELLY
(FORMERLY TERRY PATRICK SHARPLES)

Appellant

and

ATTORNEY-GENERAL OF QUEENSLAND

Respondent

and

MATTHEW FRANKLIN

Non-Party Respondent

BRISBANE

..DATE 30/09/2002

JUDGMENT

DAVIES JA: This is an application by the respondent Mathew Franklin that this appeal be struck out or that it be stayed. The appeal is by Mr Kelly against a judgment of the Supreme Court on the 2nd of October 2000 setting aside a subpoena served on Mr Kelly on 31 July 2000, returnable on 2 August 2000. The subpoena was purportedly issued in a purported proceeding described as an "application for review" in which Mr Kelly claimed:

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1. a declaration of invalidity of the office of the Attorney-General, Matt Foley MLA for Yeronga;
2. a declaration of invalidity of the office of the Premier Peter Beattie MLA for Brisbane Central; and
3. a declaration of invalidity of the 49th Legislative Assembly of Queensland.

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In the alternative he claimed a number of other orders and declarations which I do not find it necessary to set out. It is unclear what the proceeding purports to be but it is unnecessary for the purpose of this appeal and application to consider that question.

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Mr Franklin is a journalist on The Courier-Mail newspaper who wrote an article in that newspaper on 3 April 1999. That subpoena purportedly issued and served on him sought production of documents, described very generally and, it seems, oral disclosure relating to the sources of the article which he wrote.

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By the time the application on Mr Franklin's behalf to set aside the subpoena came on for hearing before the learned primary judge Mr Kelly had accepted that there were no documents in Mr Franklin's possession coming within the description of the subpoena. However he submitted that the subpoena validly required Mr Franklin to give evidence. The learned primary judge held, however, that the subpoena was an abuse of process and he set it aside. He ordered Mr Kelly to pay the costs of the application. The appeal is against both of those orders.

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Even before the learned primary judge there were a number of serious obstacles in the way of Mr Kelly's success. In the first place the issue of a valid subpoena assumes the existence of a validly constituted proceeding in which the subpoena is issued and I doubt very much whether the proceeding purportedly issued by Mr Kelly was a valid proceeding. On the contrary I think it capable of being struck out.

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Secondly it seems that his claim against the Attorney-General, based on the article, is that the election in which the present government came to power was invalid. If that is the question which Mr Kelly sought to litigate, what advice the government got about that is, in my opinion, irrelevant. Moreover it would, in any event, have been privileged. So nothing which Mr Franklin could have said would have been relevant or admissible to anything which Mr Kelly wished to litigate. Finally, as the learned primary judge held, the

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subpoena appears more in the nature of a fishing expedition, seeking discovery of what Mr Franklin knows, rather than seeking to give evidence about an identified relevant topic.

Be that as it may, all of this has been overtaken by Mr Kelly's bankruptcy. He became bankrupt on 19 November 2001 and his trustee has not made an election to prosecute this appeal. He is therefore deemed to have abandoned it. This is not as Mr Kelly has submitted to us this morning an action for a personal injury or a wrong done to the bankrupt, his spouse or a member of his family or in respect of the death of a spouse or member of his family within the meaning of the Bankruptcy Act 1966 (Cth).

Accordingly he has no personal right to continue it and the appeal should therefore be stayed. I would therefore order that the appeal be stayed.

HELMAN J: I agree.

JONES J: I agree.

DAVIES JA: The appeal is stayed.

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DAVIES JA: The appeal is struck out with costs.
