SUPREME COURT OF QUEENSLAND OS No 5 of 1995

CIVIL JURISDICTION

DERRINGTON J

IN THE MATTER OF THE MUTUAL RECOGNITION ACT 1992 (COMMONWEALTH) AND THE MUTUAL RECOGNITION (QUEENSLAND) ACT 1992

IN THE MATTER OF AN APPLICATION BY QUEENSLAND LAW SOCIETY INCORPORATED

BRISBANE

..DATE 29/05/95

JUDGMENT

HIS HONOUR: In this case I decline to make a declaratory order and the application is dismissed with costs. I publish my reasons.

If I might elaborate on that. Because the matter is being heard in another jurisdiction that is competent and as to which there is a right of appeal to the Federal Court, which incidentally I might add also has a power of making it a declaratory judgment, I do not think that it is fitting on the authorities that I have looked at that I make a declaration in this Court, Mr Applegarth. I paid a great deal of attention to the merits as well, but I investigated the cases on that particular issue and I would feel that it probably would have been not improper but highly undesirable for me to make that declaration; that is without making any reflection at all upon the merits

because I think the merits were very arguable in both directions. So I certainly have not come down in any direction.

I have made an order for costs in your favour, Mr Sande. To make it clear, the costs are against the applicant Law Society.

IN THE SUPREME COURT OF QUEENSLAND O.S. No. 5 of 1995

IN THE MATTER of *The Mutual Recognition Act* 1992 (Commonwealth) and *The Mutual Recognition (Queensland) Act* 1992

- and -

IN THE MATTER of an application by QUEENSLAND LAW SOCIETY INCORPORATED

JUDGMENT - DERRINGTON J.

Delivered: 29 May 1995

CATCHWORDS:

Practice - Declaratory judgment - Matter imminently pending in Administrative Appeals Tribunal - Appealable to Federal Court-Discretion exercised to decline to exercise jurisdiction.

Counsel:	D.J.S. Jackson QC for the applicant In Person, first respondent G.J. Gibson QC with him P.D.T. Applegarth for the second respondent
Solicitors:	McCullough Robertson for the applicant K.M. O'Shea, Crown Solicitor, for the second respondent
Hearing Date:	18 May 1995

IN THE SUPREME COURT OF QUEENSLAND O.S. No. 5 of 1995

IN THE MATTER of *The Mutual Recognition Act 1992 (Commonwealth)* and *The Mutual Recognition (Queensland) Act 1992*

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JUDGMENT - DERRINGTON J.

Delivered the 29th day of May 1995

Mr Sande is a qualified and registered land-broker in South Australia. That is another name for a conveyancer. He wants to practise as such in Queensland, but there is no equivalent occupation here, for the registration of conveyancers has long since ceased. The result is that it is forbidden by statute for any person other than a solicitor to do the work of conveyancing. That applies also to the other legal work beyond conveyancing which is also reserved to solicitors.

Because Mr Sande is not qualified to be admitted as a solicitor and therefore cannot practise as such, and because he cannot be registered as a conveyancer in the absence of any such occupation, he seeks some form of registration that would permit him to exercise his occupation legitimately; and for that purpose, he invokes the provision of the *Mutual Recognition Act* 1992 (Commonwealth) and the *Mutual Recognition (Queensland) Act* 1992. These amount to complementary legislations and it is sufficient to refer to the former, which will be referred to as “the Act”.

Its principal purpose, according to s.3 of the Act, is “... to enact legislation ... for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia.” It is not in controversy that Mr Sande is a service provider within the meaning of this. Such a person's entitlement to be

registered to carry on an occupation is provided for in s.17.

The machinery for effecting the registration referred to in that section is set out in Division 2. Section 19 provides for the giving of notice by the person seeking registration-to the local registration authority for "the equivalent occupation" in accordance with the mutual recognition principle; and s.23(1), where relevant, makes the following provision for refusal of registration:

> "**Refusal of registration**
>
> 23(1) A local registration authority may refuse the grant of registration if:
>
> ...
>
> (c) the authority decides that the occupation in which registration is sought is not an equivalent occupation and equivalence cannot be achieved by the imposition of conditions."

The concept of equivalent occupation referred to in that section is dealt with in Division 4 in which s.28 says that "the equivalence of occupations carried on in different States is to be determined in accordance with this part." Then, by s.29(1) it is provided as follows:

> "**General Principles**
>
> 29(1) An occupation for which persons may be registered in the first State is taken to be equivalent to an occupation for which persons may be registered in the second State if the activities authorised to be carried out under each registration are substantially the same (whether or not this result is achieved by means of the imposition of conditions).
>
> (2) Conditions may be imposed on registration under this Part so as to achieve equivalence between occupations in different States.
>
> ..."

In s. 39(1) the following appears:

> **"General responsibilities of local registration authorities**
>
> 39(1) It is the duty of each local registration authority to facilitate the operation of this Part in relation to the occupations for which the authority is responsible, and in particular to make use of the power to impose conditions in such a way as to promote the mutual recognition principle."

The Act provides for a review of a refusal of registration by the Administrative Appeals Tribunal, and there is no provision for any appeal to or review by this Court to or from the decision of the registration authority. By s.44 of the Act the decision of the Tribunal is subject to appeal on matters of law to the Federal Court which, incidentally has the jurisdiction to make declaratory orders: B.M.I. & Federated Clerks Union of Aust (1983) 76 F.L.R. 141; Tobacco Institute of Aust Ltd v. Aust Federation of Consumers Organisations Ltd (1993) 41 F.C.R. 89.

Having had it determined through litigation that the occupation of conveyancer is no longer available in Queensland, Mr Sande sought registration as a solicitor subject to the imposition upon him of suitable conditions that would limit his right of practice to the work which he would do as a conveyancer. The Registrar of the Court to whom the relevant duty has been entrusted in cases coming within the Act has refused such registration on the ground provided for in s.23(1)(c), that is, that he has decided that the occupation of solicitor in which registration is sought is not, even subject to the conditions proposed by Mr Sande, an "equivalent occupation" and that equivalence cannot be achieved by the imposition of such conditions. It is common ground between the parties that Mr Sande has appealed from this decision to the Administrative Appeals Tribunal, but the Law Society has applied for a declaratory judgment to the effect that the law on this point is as the

registrar has found; and the registrar supports the application.

The applicant's point may be simply stated though its justification is more complex. It is simply that if the occupation of solicitor were stripped down by conditions to the activities of a conveyancer, as Mr Sande proposes for his registration, it would no longer sufficiently represent the occupation of solicitor, and so could not be regarded as an “equivalent occupation”, as the Act requires.

Whether this reasoning misses the point and fails to recognise that for the purpose of the Act equivalence is made to depend upon the substantial equivalence of permitted acts after the imposition of conditions, need not be determined; but it is patent that there is no total clarity of the result that would provide any special utility in making a declaratory order now. In other words, there is nothing special about the issue that would provide a special reason for preferring this procedure over that provided for by the Act.

Because this Court has no appellate or review jurisdiction over decisions of a local registration authority and because there is an appeal pending in the Tribunal and shortly to be heard, it seems to be very undesirable to entertain such an application, which would have a direct bearing upon the only really contentious issue before the Tribunal. This application was originally in response to Mr Sande's application for a declaration as to the continuance of the occupation of conveyancer in Queensland. This application was adjourned indefinitely while Mr Sande pursued his. At that time he intimated that he would not be pursuing registration as a solicitor, but when the declaratory order as to conveyancers went against him, he did apply for restricted registration as a solicitor. This application was then re-enlivened.

Mr Sande appeared on his own behalf at the present hearing and opposed the determination of the matter in this Court because of the pendency in the Administrative Appeals

Tribunal of the proceedings for the determination of exactly the same issue. It of course is the specific tribunal appointed by the Act for the determination of such matters and the construction of the Act on which the whole issue depends is a matter of law, which is amenable to appeal to the Federal Court. Consequently those authorities where the Court considered it appropriate to make a declaratory order because the jurisdiction to determine the relevant point of law resided in some tribunal which may have had difficulty with its complexity and no suitable review machinery was provided, have no application here.

There is no doubt that the court has jurisdiction to make an order, limited only by its own discretion: Forster v. Jododex Australia Pty Ltd (1972) 127 C.L.R. 421; but the real issue here is whether in its discretion it should exercise it: The Totalisator Administration Board of Queensland v. Commissioner of Taxation (1987) 88 F.L.R. 217. While the Court should not be jealously protective in the exercise of its jurisdiction, “the power ... should be exercised with a proper sense of responsibility”: Ibeneweka v. Egbuna (1964) 1 W.L.R. at 225.

There is a powerful reason why a declaratory judgment should not be made by this Court when the jurisdiction is vested expressly in a system that has another superior court's supervision: cf. Sutherland Shire Council v. Leyendekker (1970) 91 W.N. (N.S.W.) 250; Young v. Public Service Board (1982) 3 I.R. (N.S.W.) 50; Attorney-General v. Ripon Cathedral (Dean or Chapter) (1945) Ch. 239; North Eastern Marine Engineering Co v. Leeds Forge Co (1906) 2 Ch. 498; F. Pratt & Co v. Minister of Munitions (1922) 127 L.T. 814; Slough Estates Ltd v. Slough B.C. (1968) Ch. 299; Blank v. Berova Pty Ltd (1967) 92 W.N. (N.S.W.) 24; and Land v. Clyne (1968) 92 W.N. (N.S.W.) 134.

In Forster v. Jododex Australia Pty Ltd (1972) 127 C.L.R. 421 at 427, Walsh J said:

> “In my opinion when a special tribunal is appointed by a statute to deal with matters arising under its provisions

> and to determine disputes concerning the granting of rights or privileges which are dependant entirely upon the statute, then as a general rule and in the absence of some special reason for intervention, the special procedures laid down by the statute should not be displaced by the making of declaratory orders concerning the respective rights of the parties under the statute."

Gibbs J (as he then was) noted at 438 that "there were some obvious reasons why a judge should hesitate before intervening when the matter was about to come before the (mining) warden." He found countervailing factors in the complexity of the matter, and in the limitation of the issue before the warden to an interpretation of a statute. Although these factors are present to a greater or less extent in this case also, in the matter before the High Court, the only method of reviewing the warden's decision was by a writ of prohibition in the court which made the declaratory judgment. That would have been slower and less efficient than the making of a declaratory order. In those circumstances, it is not surprising that he approved of the exercise of the discretion adopted there; but here the power of review by the Federal Court rather than this court of the Tribunal's decision on this issue is a major mark of distinction which if anything would reinforce the hesitation which a judge would experience in the present position.

In O'Riley v. Mackman (1983) 2 A.C. 237 and Cocks v. Thanert D.C. (1983) 2 A.C. 286 it was held by the House of Lords that it is an abuse of process to bypass or examine administrative decisions by seeking a declaration, and that all proceedings for judicial review should be made pursuant to the appropriate special procedure. This is analogous in principle to the position here.

This is a case where the legislation has invested special jurisdiction in a special competent tribunal with review by another superior court. Unless there is an exceptional reason it would sit very uncomfortably with this Court to exercise its jurisdiction pre-empting the

hearing of the matter by the Tribunal specially appointed to determine it and, on any appeal, by the Federal Court. This position is exacerbated by the proximity of the hearing of the matter by the Tribunal and by the identity of the issue in the declaration sought and the only issue likely to arise there. A declaration in those circumstances would amount to a clear pre-emption of specified process. Because this is a federal matter, it would have been more appropriate to pursue any application such as this in the Federal Court.

The position may be different where, as in the case of Mr Sande's earlier application, the declaration of the Court was sought by both sides. Conversely, it makes no difference in principle that that determination was made by this Court. However the history of this application provides no reason for departing from the very strong reasoning as to the appropriate exercise of this Court's discretion revealed in the above authorities. It should therefore decline to exercise its jurisdiction to make an order.

Accordingly the application is refused with costs.