SUPREME COURT OF QUEENSLAND

CITATION:	*Childs v Crompton & Anor* [2001] QSC 118
PARTIES:	**DAVID THOMAS FRANCIS CHILDS** (applicant) **v** **THOMAS PATRICK CROMPTON** (first respondent) **ALAN JAMES RICKARD** (second respondent)
FILE NO/S:	S 3038/00
DIVISION:	Trial Division
DELIVERED ON:	24 April 2001
DELIVERED AT:	Brisbane
HEARING DATE:	26 March 2001
JUDGE:	Douglas J
ORDER:	**The application for judicial review be dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – POWERS AND DISCRETION OF COURT – DISCRETION OF COURT GENERALLY ADMINISTRATIVE LAW – JUDICIAL REVIEW AT COMMON LAW – EXCESS OF POWER AND DEFECTIVE USE OF POWERS – IN GENERAL – whether the Court can consider the disputed ballots afresh and make a determination of whether marks on a number of ballots sufficiently indicated the voter's intent and were thus valid LOCAL GOVERNMENT – REGULATION AND ADMINISTRATION – ALDERMEN AND COUNCILLORS – ELECTIONS – VOTERS AND ROLES – CONDUCT OF ELECTIONS LOCAL GOVERNMENT – REGULATION AND ADMINISTRATION – DISPUTED ELECTIONS AND OUSTER – OTHER MATTERS – EFFECT OF IRREGULARITY ON ELECTION RESULT *Ballot Act* (35 and 36 Vict. c 33) 1875, s 2 *Judicial Review Act* 1991, s 10, s 20, s 21, s 30, s 42, s 42(2), s 42(2)(a), s 42(2)(b), s 452, Part 3, Part 5

Local Government Act 1993, s 223, s 275-s 281, s 282, s 334(1), s 354(3), s 354 [357(2)(a)(i)], s 357(2), s 357(2)(a), s 360, s 365(2), s 366(3)(b)(ii)

Bridge v Bowen [1916] 21 CLR 583,
Halsburys Laws of England (4th Ed) Vol 1 paras 169 to 181
Mackie v Liu (1994) 85 LGERA 353 at 359;
Robertson v Knuth [1997] 1 QdR 95 at 96/20
Wasaga v Tahal (1991) 33 FCR 438 at 445-446
Woodward v Sarsons (1875) LR 10 CP 733, 223, 357, 743, 748-749

COUNSEL: H Fraser QC and with him B Porter for applicant
R Mullholland QC for first respondent
R Bain QC for second respondent

SOLICITORS: Morwood Payne Solicitors for applicant
Gilshenan & Luton for first respondent
Johnsons Solicitors for second respondent

[1] **DOUGLAS J:** This action concerns the outcome of the Local Government elections for the Gold Coast City Council held on 25 March 2000. The particular result is that with respect to Division 3, where the applicant and the second respondent were the only candidates. The second respondent was declared the winner of Division 3 with a majority of only twenty--one votes.

[2] Initially, the main thrust of the action was an allegation of fraudulent behaviour with respect to the ballots counted in mobile booth No 1 at the Runaway Bay Retirement Village. This relies solely upon the evidence of one Mervyn Gordon King who was the mobile booth officer for that booth. However, at the conclusion of the evidence in this matter any reliance upon his testimony was abandoned by the applicant. That, therefore, left only two grounds of challenge to the result. They are compendiously described as:

(a) "Scrutiny" on ballots; and
(b) Double voting or personation.

[3] The application is brought pursuant to the *Judicial Review Act* 1991 ("the JRA").

[4] Section 223 of the *Local Government Act* 1993 ("the LGA") relevantly provides:

> (1) This section applies to an application for review under the *Judicial Review Act* 1991 of –
>
> (a) the lawfulness of the election or appointment of a councillor;
> or
> (b) the continued eligibility of a person to act as a councillor;

> (2) For the purposes of the *Judicial Review Act* 1991 any elector of the local government is a person who may make the application;
>
> (3) However, subsection (2) does not limit the persons who may make the application.

[5] Although that section does not specifically create a right of review of the election of a councillor under the JRA, it clearly contemplates the availability of review of the lawfulness of the election of a councillor under that Act.

[6] There are two separate sources of jurisdiction under the JRA by which the court may review the election of a councillor under the LGA and they are:

> (a) by statutory order to review under Part 3 of the JRA; and
> (b) by application for a declaration under Part 5 of the JRA.

[7] As to the former, the jurisdiction to grant a statutory order to review under s 30 JRA arises where the statutory preconditions set out in the JRA are met, i.e. that there be a decision or conduct to which the JRA applies, and that a ground of review set out in s 20 and or s 21 can be established.

[8] Sections 10 and 42 of the JRA expressly preserve the second source of jurisdiction. Section 452 relevantly provides:

> (1) Information in the nature of *quo warranto* are abolished;
>
> (2) If –
>
> > (a) a person acts in an office in which the person is not entitled to act;
> > (b) an information in the nature *quo warranto* would, but for subsection 1, lie against the person;
> >
> > The court may:
> >
> > (c) grant an injunction restraining the person from acting in the office; and
> > (d) declare the office to be vacant.

[9] In my view the pre conditions to the exercise of the Court's jurisdiction set out in s 42(2)(b) JRA are fulfilled in this case. The circumstances in which *quo warranto* will lie are set out in *Halsburys Laws of England (4th Ed)* Vol 1 paras 169 to 181. Therefore adopting the elements set out there the following seems to be the position:

> (a) the office of councillor is a public office created by statute;
> (b) the second respondent is acting in that office; and
> (c) the applicant, as an unsuccessful candidate for that office, has a direct interest in the impeachment of the second respondent's occupation of the office.

[10] Accordingly, it is necessary to decide whether the court's jurisdiction under s 42(2) JRA will be enlivened if it is shown that the second respondent is "not entitled" to act in the office of councillor. The applicant seeks to invoke the common law rather than the specific grounds for statutory review in s 20/21 of the JRA: *Mackie v Liu* (1994) 85 LGERA 353 at 359; *Robertson v Knuth* [1997] 1 QdR 95 at 96/20; and *Woodward v Sarsons* (1875) LR 10 CP 733.

[11] The submission goes on to say that, accordingly, the question for the purpose of s 42(2) JRA is on what grounds would *quo warranto* have been available at common law?

[12] The second respondent correctly points out that *Woodward v Sarsons* (supra) was a case which concerned the common law in so far as the common law could consider whether or not there had been, in substance, an election. The second respondent points out that the validity or invalidity of different classes of votes, in that case, arose only in the context of whether alleged mistakes had affected the result of the election, an element of the overall claim which had to be demonstrated on the common law approach. See *Woodward v Sarsons* at 743.

[13] Further, the second respondent submits that, unlike this case, *Woodward v Sarsons* (supra) arose out of the issue of what had to be demonstrated to show that there had been such departure from the requirements for a valid public ballot as to invalidate the election.

[14] Relying upon the fact that there is no "election tribunal" such as was constituted for the purposes of the *Ballot Act* (35 and 36 Vict. c 33) in 1875 and considered in that case, there is only a limited ground of judicial review available to the applicant here which is only on a point of law. It is said that the "scrutiny" which the applicant wants undertaken is on a "point of fact" and that the JRA (Part 3) does not afford the sort of relief sought by the applicant.

[15] On the other hand the applicant submits that in considering whether the second respondent is not entitled to act as a councillor under s 42(2)(a) JRA, the court ought itself to assess the disputed ballots in light of the relevant provision. It is submitted that this is plain because the source of the second respondent's entitlement to hold the office is the declaration of the poll for the office in his favour by the first respondent. The submission goes on further to say that the declaration of the poll is based on the number of formal votes cast for the second respondent as against the applicant. It is said that, accordingly, if on consideration of the disputed ballots the court comes to the conclusion that in fact the second respondent did not have a majority of formal ballots then it cannot be said that the second respondent was entitled to the office.

[16] Relying upon *Woodward v Sarsons* (supra) at 748-749, and pointing to the similarity between s 2 of the *Ballot Act* (supra) there considered, and s 357 of the LGA, it was submitted that the court was entitled itself to decide whether marks on a number of ballots sufficiently indicated the voter's intent and were thus valid, and whether certain marks identified the voters (and therefore invalidated the votes under the *Ballot Act*).

[17] In my view the adoption of the approach in *Woodward v Sarsons* (supra) advances the objects of the JRA. The purpose of retaining the common law prerogative remedies was to maintain the flexibility and capacity for development of the common law. It is undesirable for election matters involving disputes as to formality of ballots to be resolved on narrow grounds (if that is in fact the effect of Part 3) and that the flexibility of the prerogative injunction can, and in my view, should be used to avoid such an undesirable outcome.

[18] I therefore conclude that I am entitled to consider the disputed ballots in exhibit 16 and 17, afresh, for myself.

[19] It is necessary to look at the statutory framework in the LGA concerning voting.

[20] No provision of the LGA makes a vote formal or informal if in the opinion of the returning officer it is formal or informal. The vote is, as a matter of law, either formal or informal. (Contrast, for example s 365(2) "if the returning officer is satisfied", which would require a challenge to that opinion.) The relevant provisions are s 354(3), s 357(2)(a), s 360 and s 366(3)(b)(ii):

(a) s 366(3)(b)(ii) provides for the returning officer to count all formal ballot papers;
(b) s 360 provides that a formal ballot paper is one that has effect to record a vote;
(c) s 357(2)(a) provides that a ballot paper has effect to record to a vote if:
    (i) it complies with s 354 [357(2)(a)(i)]; or
    (ii) it contains writing or marking "other than marks mentioned in the s [354]" indicating the elector's intended preference or intended order of preferences [357(2)(a)(ii)];
(d) s 354 provides that an elector may validly cast a vote if:
    (i) the elector marks on the ballot paper the numeral 1, or a tick or a cross in the square opposite the name of the candidate whom the elector prefers [354(2)]; or
    (ii) instead of voting as set out in the previous sub subparagraph, the elector marks on a ballot paper the numeral 1, or a tick or a cross in the square opposite the name of the candidate to record the elector's first preference for the candidate and mark in the numeral 2 in another square [354(3)].

[21] It can be seen therefore, in short, that for a vote to be valid the ballot paper must be marked with the numeral 1, or a tick or a cross, in the square opposite the name of the candidate to record the elector's first preference for the candidate or "must contain writing or marking, other than marks mentioned in the section, indicating the elector's intended preference, or intended order of preferences". See s 354 and s 357(2) LGA.

[22] Exhibit 16 is a bundle of votes tendered by the second respondent in respect of which the returning officer's determination is disputed. In my view the returning officer, with four exceptions, has correctly determined the intention of each respective voter. Those four are the ballot papers identified as Nos 99, 221, 222 and 223 of that exhibit:

- Ballot No 99 (which was counted informal) clearly shows a cross in the second respondent's square and should be credited to him;

- Ballot No 221 (which was counted informal) clearly has a mark indicating a preference for the second respondent;

- Ballot No 222 (which was counted informal) clearly has a mark indicating a preference for the second respondent;

- as, similarly, does Ballot No 223.

[23] Exhibit 17 is a corresponding selection of ballot papers disputed by the applicant. In my view the returning officer correctly determined the voting intention of each respective voter with five exceptions. They are ballots numbered A9, A25, A27, A54 and A62.

- Ballot No A9 (which was counted informal) should be allocated to the applicant. The elector has marked the applicant's square with a tick and by an oblique mark has sought to obliterate the second respondent's square;

- Ballot No A25 (which was counted informal) should be allowed as a formal vote for the applicant. The elector has made an extravagant cross in the applicant's square.

- Ballot No A27 (which was counted informal) should be allocated to the applicant. The mark in the applicant's square resembles an asterisk and there is no other mark on the ballot paper. The voter, in my view, has complied with the requirements of s 357(2) LGA.

- Ballot No A54 (which was counted informal) should be allocated to the applicant. There is a clearly formed numeral 1 in the applicant's square. Although there is a slight mark in the second respondent's square it is consistent only with a slip of the elector's pencil.

- Ballot No A62, which was allowed for the second respondent, should be counted as informal. It contains a numeral 1 in the second respondent's square and an X in the applicant's square. The voter's intention cannot be discerned.

[24] The outcome of the above is that the applicant should have been allocated four additional votes, and that one vote should have been deducted from the second respondent's tally, and four votes should have been added to the second respondent's tally. Therefore, to this point, the first respondent succeeded in the election with a majority of 20 votes rather than 21.

[25] There remains another issue. It appears from the evidence that there were in Division 3 eight cases of irregular voting, i.e. eight invalid votes. It seems that:

(a) two electors voted twice;
(b) five votes were cast by persons impersonating electors; and

(c) one person voted who was not entitled to vote.

[26] The following is clear:

1. That an elector may only vote once in a ballot taken in a poll, see s 282 and s 334(1) of the LGA;

2. That if a person personates an elector, the vote cast by that person will not be a vote of the elector and the decision to count any such ballot as a formal ballot therefore involves an error of law, see s 334(1) and s 275-s 281 LGA; and

3. Any vote cast by a person pretending to be an elector is a vote which is lodged by fraud.

[27] However, what can be done? As early as the decision in *Bridge v Bowen* [1916] 21 CLR 583, Griffith CJ in considering this question said at 635:

> "But I think it my duty to invite public attention to the state of the law as now laid down. It is this: In elections conducted by ballot when there *is* no means of identifying the votes given by individual voters, a vote given by a successful personator is, at common law, unless otherwise expressly declared by Statute, as effective as a vote given by a genuine elector. It follows that when it is shown that personators sufficient in number to turn the scale have succeeded in voting the election is, nevertheless, valid, and cannot be set aside."

[28] See also the discussion of *Bridge v Bowen* in *Wasaga v Tahal* (1991) 33 FCR 438 at 445-446 per Spender J.

[29] Clearly enough I do not have jurisdiction to set aside the election on the basis that there were eight such votes. Indeed, even if each of those votes were cast for the second respondent, they being invalid, the result would be that he would still have succeeded in the election, but by a mere twelve votes.

[30] Accordingly I dismiss the application for review.