SUPREME COURT OF QUEENSLAND

CITATION:	*Skyring v Crown Solicitor* [2001] QSC 350
PARTIES:	**ALAN GEORGE SKYRING** (applicant) **v** **CONRAD WILHELM LOHE, CROWN SOLICITOR** (defendant/first respondent)
FILE NO/S:	OS 178 of 1995
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	27 September 2001
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2001
JUDGE:	Philippides J
ORDER:	**1. That the application be dismissed;** **2. That the applicant pay the respondent's costs fixed pursuant to s 10(4) of the *Vexatious Litigants Act* 1981 at $800.**

PROCEDURE – Whether vexatious litigant should be granted leave to institute proceedings

CONSTITUTIONAL LAW – Generally – whether the *Constitution (Office of Governor) Act* 1987 is invalid on the basis that it breached s 53 of the *Constitution Act* 1867 (Qld) as amended – whether *Australia Act* 1986 (Cth) enacted in breach of s53 of the *Constitution Act* 1867 (Qld)

Australia Acts (Request) Act 1985 (Qld)
Australia Act 1986 (Cth)
Australia Act 1986 (UK)
Constitution Act 1867, s 53
Constitution (Office of Governor) Act 1987
Judicial Review Act 1991
Supreme Court Act 1991
Vexatious Litigants Act 1981, s 2, s 3(1), s 4, s 8(1), s 8(1A), s 8(3), s 9A, s 9A(1), s 9A(2), s 9A(4), s 9A(6), s 9A(7),

s 9(1), s 9(2), s 10(1), s 11(1)(a), s 13

Hunter v Chief Constable of the West Midlands Police [1982] AC 529 at 542
O'Shea v Skyring, No OS 178 of 1995, unreported, 6 April 2000
Sharples v Arnison [2001] QCA 274
Re Skyring (1994) ALJR 618
Re Skyring No 178 of 1995; unreported, 23 October 1997
Skyring v Australia & New Zealand Banking Group [1995] QCA 376, Appeal No 26 of 1995, unreported 7 August 1995
Skyring v O'Shea; No 4 of 1996, 8 January 1996.
Skyring v Lohe [2000] QCA 451
Skyring v Electoral Commission of Qld [2001] QSC 080

COUNSEL: M O Plunkett for the respondent

SOLICITORS: The applicant appeared on his own behalf
C W Lohe Crown Solicitor for the respondent

1. PHILIPPIDES J: On 20 July 2001, the applicant, Alan George Skyring, filed an application seeking leave to bring proceedings to revoke an order declaring the applicant to be a vexatious litigant pursuant to the provisions of the Vexatious Litigants Act 1981 ("the Act"). That order was made by White J on 5 April 1995. The applicant unsuccessfully appealed from that order[1] and has, by various applications,[2] attempted unsuccessfully to have his declaration as a vexatious litigant revoked.

   [1] Skyring v Australia & New Zealand Banking Group [1995] QCA 376, Appeal No 26 of 1995, Court of Appeal, unreported 7 August 1995.
   [2] Skyring v O'Shea; No 4 of 1996, 8 January 1996 (Fryberg J); Re Skyring No 178 of 1995; unreported, 23 October 1997, (Muir J); Skyring v Electoral Commission of Qld [2001] QSC 080 (Muir J); O'Shea v Skyring, No OS 178 of 1995, unreported, 6 April 2000 (Douglas J). An application for leave to appeal against this decision was refused: Skyring v Lohe [2000] QCA 451.

2. The Court may in certain circumstances revoke an order by which a person is declared a vexatious litigant upon an application by such person inter alia where the Court is satisfied that the person declared to be a vexatious litigant does not intend to pursue, or procure another to pursue, the course of conduct that occasioned the person being declared a vexatious litigant.[3]

   [3] See s 4 (1) (a) of the Act; see also s 4 (1) (b) of the Act.

3. A person declared a vexatious litigant must seek the leave of the Court before instituting or taking any legal proceedings.[4] "Legal proceedings" is defined to encompass "any

… proceeding of any kind within the jurisdiction of any court".[5] A proceeding instituted or taken without leave of the court is invalid and of no force or effect in law.[6]

[4] Section 8(1) of the Act.
[5] Section 2 of the Act.
[6]Section 8(1A) of the Act. A person declared a vexatious litigant cannot procure the issue of any subpoena, summons to a witness, warrant or process for the purposes of any legal proceedings instituted or taken without leave: s 9(1) of the Act.

4. The process by which a vexatious litigant may obtain leave is set out in s 9A of the Act. Such a person must file and serve an originating application, an affidavit of relevant evidence, and submissions which it is intended to be relied upon,[7] and is required to give notice to the respondent, which states that the respondent may within 45 days after the notice is given file a written response to the application.[8]

[7] Sections 9A(1) and 9A(2) of the Act.
[8] Section 9A(4) of the Act.

5. Section 11(1) of the Act specifies the criteria which must be considered in determining whether to grant leave. It provides that leave shall not be granted unless the judge of whom leave is sought is satisfied that instituting or taking the proceeding is not an abuse of process, and that there is prima facie ground therefor. By 9A(6) of the Act, the court must decide the application in the absence of the parties.[9]

[9] If leave is refused, the registrar of the court must refuse to accept a further originating application dealing with the same, or substantially the same, issue: s 9A(7) of the Act.

6. It appears that the applicant has failed to provide the respondent with any notice under s 9A(2) of the Act.[10] It is submitted by the respondent that the application is therefore invalid and of no effect pursuant to s 8(1) and s 9(2) of the Act. In that regard, counsel for the respondent referred to the decision of Douglas J in O'Shea v Skyring,[11] where a similar application by the present applicant was dismissed on that basis.

[10] See affidavit of Freeleagus [12].
[11] No OS 178 of 1995, unreported, 6 April 2000.

7. Furthermore, it is submitted that even if such a notice had been given, it is apparent from the application, the supporting affidavit and the submissions, that the applicant is seeking to re-litigate the same arguments as were raised by him on the previous occasions, which were found to be unmeritorious and without substance.[12]

[12] See Douglas J in O'Shea v Skyring, supra: "wholly illogical and nonsensical".

8. The applicant submits that the application raises a new matter not raised in any of the previous applications to revoke the declaration of White J, namely the question of the validity of the Constitution (Office of Governor) Act 1987 ("the 1987 Act"). The

application seeks to have the order of White J revoked on the following specified basis:

"1. That leave, ostensibly required in this instance, be granted to allow proceedings to begin for the revocation of the declaration made at first instance in this matter by White J on 5th April 1995, matters having come to light only very recently which, had they been known at the time and been brought forward in argument then, the declaration that was made at that time could never properly have been made;

2. That the provisions of the Vexatious Litigants Act 1981 generally, but those of s 9A thereof in particular, be suspended in their entirety insofar as the conduct of further proceedings in this matter is concerned – the latter on account of being unenforceable for want of constitutionality, having been enacted in 1997 pursuant to an unconstitutional enactment of major importance – viz the Constitution (Office of Governor) Act 1987 – and the remainder being otherwise in contravention of the 'fundamental' statutes cited in Schedule 1 to the Imperial Acts Application Act 1981 which govern such matters – and the principal proceedings sought to be instituted be brought on for determination forthwith."

9. As developed in his written submissions, the crux of the applicant's argument is that the 1987 Act is invalid as being unconstitutional, because the effect of s 13 of that Act, which suspends the operation of the Letters Patent issued on 14 February 1986 and proclaimed in this State on 8 March 1986, is to abolish the Office of Governor, and that pursuant to s 53 of the Constitution Act 1867 (Qld) ("the Constitution Act") the Bill for the 1987 Act could not lawfully be presented for assent by or in the name of the Queen, except with the prior assent of the electorate at a referendum.

10. In addition, the applicant contends in his submissions[13] that the Australia Acts (Request) Act 1985 (Qld) ("the 1985 Act"), by which the Parliament and Government of the State of Queensland requested and consented to the enactment by the Parliament of the United Kingdom and of the Commonwealth of an Act in substantially the terms set out in the Second Schedule to that Act, and as a result of which the Australia Act 1986 (Cth) and the Australia Act 1986 (UK) were passed, are all invalid. It is contended that the 1985 Act's invalidity follows from its effecting an alteration to the Office of Governor in contravention of the Constitution Act.

[13] See paragraphs 8 (f) to (m) of the applicant's written submissions.

11. The applicant thus contends that[14] "the net effect is that the Australia Act 1986 … and the 1986 Letters Patent never came into effect in Queensland and accordingly the basis for the operation at State level since 1 December 1987 has in fact been, and still is, the Letters Patent of 1925…".

[14] See paragraph 8 (l) of the applicant's written submissions.

12. According to the applicant:[15]

"The necessary consequence of this state of affairs in the present context has to be that, insofar as action taken since that time which contravenes the intent of the Letters Patent

and 'fundamental' laws associated with them and in force at that time is concerned – and of immediate relevance in the present context are the 17 Statutes … [listed in schedule 1 to the Imperial Acts Application Act (Qld) 1984] which establish the 'fundamental' law of this State – such enactments and actions based thereon are constitutionally invalid.

As applied in the present instance that means that all official action which has been taken against me in all proceedings since 1 December 1987 which has violated my civil liberties secured under Cap 29 of Magna Carta – and that necessarily covers all actions associated with this purported 'declaration' of me as a 'vexatious litigant' since that action itself commenced in March 1995 and the matters which gave rise to it dated back to 1987 and earlier – is null and void at law and accordingly there is no proper basis in law for refusing this application."

[15] See paragraphs 5, 8 (m) and 9 of the applicant's written submissions.

13. The applicant thus argues that all legislation subsequent to 1987, including the Supreme Court Act 1991, is invalid because of the unconstitutionality of the 1987 Act. It should be noted, however, that the Act pursuant to which the applicant was declared a vexatious litigant does not fall into this category.

14. The applicant has submitted a draft order in which he seeks inter alia a declaration that the order made by White J is "null and void and of no effect at law having been given by a judge appointed under an unconstitutional statute", presumably the Supreme Court Act 1991. He argues that it follows that no leave is required under the Act. Nor is notice required to be given under s 9A of the Act.

15. The constitutional points upon which the applicant wishes to rely in respect of the question of the invalidity of the 1987 Act were considered and rejected in Sharples v Arnison[16] by Ambrose J whose judgment was upheld on appeal.[17] In Skyring v Electoral Commission of Qld,[18] Muir J, who also had cause to consider these constitutional issues, referred to and agreed with Ambrose J's conclusions.

[16] [2001] QSC 056.
[17] [2001] QCA 274.
[18] [2001] QSC 080.

16. In Sharples v Arnison,[19] de Jersey CJ who gave the judgment of the Court stated :

"This contention or aspects of it have been considered in this Court on three occasions: before Mr Justice Ambrose on an interlocutory basis but following a hearing which lasted just short of three hours, before the same Judge subsequently on a final basis following a day's hearing, and before Justice Muir in separate proceedings. None of those judgments has given the appellant's contention any substantial support.

Having read the full transcript of proceedings and judgments in the proceedings before Mr Justice Ambrose, and bringing to bear my own consideration of his reasons for judgment, and those of Justice Muir, I see no reason to depart from their Honours' assessment."

[19] [2001] QCA 274.

17. In considering the applicant's submissions, I have had regard to the judgment of Ambrose J and to his careful comparison of the provisions of the 1987 Act which bear on the Office of Governor with those provisions of the precedent Letters Patent of 8 March 1986 constituting the Office of Governor. Ambrose J found that :

    (a) the Bill for the 1987 Act did not come within the scope of section 53(1) of the Constitution Act as it did not propose an alteration to the "Office of Governor", concluding that insofar as there were differences between the provisions of the 1987 Act and the previously existing law, those differences were de minimus;

    (b) even if the 1987 Act was invalid, as contended, the invalidity was of no relevant effect as the 1986 Letters Patent would necessarily remain in full force and effect.

18. I agree with Ambrose J's conclusions. I have had regard to the submissions made by the applicant concerning the 1987 Act. In my opinion they have no substance and I reject them.

19. Further, the applicant's submissions concerning the 1985 Act have been rejected in previous proceedings in this Court, when the applicant sought a declaration that the 1985 Act was invalid, as contravening s 53 of the Constitution Act. As Muir J noted in Skyring v Electoral Commission of Qld[20] when the issue was raised by Mr Skyring before him:

    "In proceedings in the Supreme Court in 1986 ... Connolly J rejected the argument finding that: the Australia Acts (Request) Act made no alteration to the Constitution Act; Section 53 of the Queensland Constitution could not restrict the legislative powers of the Parliament at Westminster; there was no limit to that Parliament's legislative power and that any relevant alteration to the Constitution Act was effected by an enactment of the Parliament at Westminster (and/or by the Commonwealth Parliament). The decision, with respect, is plainly correct."

    [20] [2001] QSC 080 at [15].

20. In this regard the applicant raises matters previously litigated and decided adversely to him on a final basis and in so far as this is sought to be done it is an abuse of process.[21]

    [21] Re Skyring (1994) ALJR 618; Hunter v Chief Constable of the West Midlands Police [1982] AC 529 at 542.

21. It follows that there is no prima facie basis for any argument that the declaration of White J is invalid.

22. In addition, in my opinion none of the arguments raised by the applicant obviated the necessity to comply with s 9A of the Act, which was not complied with.

23. Accordingly, I order:

1. That the application be dismissed;
2. That the applicant pay the respondent's costs fixed pursuant to s 10(4) of the Act at $800.