SUPREME COURT OF QUEENSLAND

CITATION:	*Clampett v Wensley and Ors* [2009] QSC 164
PARTIES:	**LEONARD WILLIAM CLAMPETT** **(applicant)** **AND** **HER EXCELLENCY PENELOPE WENSLEY, GOVERNOR OF QUEENSLAND** **(first respondent)** **AND** **ANNA BLIGH, PREMIER OF QUEENSLAND** **(second respondent)** **AND** **DAVID KERSLAKE, ELECTORAL COMMISSIONER OF QUEENSLAND** **(third respondent)**
FILE NO/S:	BS4123 of 2009
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Court of Disputed Returns at Brisbane
DELIVERED ON:	17 June 2009
DELIVERED AT:	Brisbane
HEARING DATE:	19 May 2009
JUDGE:	Atkinson J
ORDER:	**1. The first and second respondents are removed from the proceeding;** **2. The originating application is dismissed;** **3. The applicant must pay the costs of the first, second and third respondents of and incidental to the originating application.**
CATCHWORDS:	CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – ELECTIONS AND RELATED MATTERS – DISPUTED ELECTIONS – GENERALLY – Where applicant filed an originating application disputing the election of the legislative assembly – where respondents made an application to dismiss the originating application – whether

originating application could be summarily dismissed – whether the originating application complied with the *Electoral Act* 1992 (Qld) – whether the first and second respondents were joined properly to the proceeding

Electoral Act 1992 (Qld) ss 123, 127, 128, 129, 130, 133, 136
Currency Act 1965 (Cth)
Commonwealth Electoral Act (Cth) 1918
Judiciary Act 1903 (Cth), s 40

Caltabiano v Electoral Commission of Queensland (No. 2) [2009] QSC 138, followed
Clampett v Hill [2007] QCA 394, cited
Clampett v Kerslake (Electoral Commissioner of QLD) [2009] QCA 104, followed
Featherston v Tully [2002] SASC 243, cited
Hansen v Australian Electoral Commission [2000] FCA 606, cited
Muldowney v Australian Electoral Commission (1993) 178 CLR 34, followed
Re Skyring's Application (No. 2) (1985) 50 ALJR 561, cited
Re Surfers Paradise Election Petition [1975] Qd R 114, cited
Rudolphy v Lightfoot [1999] HCA 61, cited
Sharples v Arnison [2001] QCA 518, cited
Skyring v Electoral Commission of Qld [2001] QSC 080, cited
Smith v Australian Electoral Commission [2008] FCA 953, cited
The Queen v The Minister for Justice and Attorney-General of Queensland, ex parte Alan George Skyring Supreme Court of Queensland, 17 February 1986, unreported, cited

COUNSEL: A A J Horneman-Wren for the first and second respondents
M Hinson SC for the third respondent

SOLICITORS: Applicant self represented in person
Crown Solicitor for the first and second respondents
Crown Solicitor for the third respondent

[1] On 20 April 2009 the applicant, Leonard William Clampett, filed what was referred to as an "election petition" in the Supreme Court of Queensland sitting as the Court of Disputed Returns. It is not in fact a petition but an originating application. The first respondent was described as "Her Excellency Penelope Wensley, Governor of Queensland", the second respondent as "Anna Bligh, Premier of Queensland" and the third respondent as "David Kerslake, Electoral Commissioner of Queensland".

[2] On 29 April the first and second respondents applied to the court for the following orders:

> "That the first respondent and second respondent be removed from the proceeding on the grounds that:
>
> i pursuant to s 133 of the *Electoral Act* 1992 the first and second respondents have been improperly included as respondents to the petition.

ii in the alternative, the proceedings be dismissed on the grounds that:
(i) the petitioner has failed to comply with s 130 of the *Electoral Act* 1992
(ii) the petition discloses no reasonable cause of action."

[3] The third respondent applied for orders pursuant to s 136(2)(d) of the *Electoral Act* 1992 (Qld) ("the Act") that the originating application be dismissed on the grounds that:

"(i) The applicant has not complied with the requirement of s 130(3)(b) of the Act that the applicant deposit with the court $400 when filing the originating application;
(ii) The applicant has not complied with the requirement of s 130(3)(a) of the Act that he file his application within 7 days after the day on which the write for the election is returned; and
(iii) The applicant is not entitled to dispute the election of all of the members of the Legislative Assembly held on 21 March 2009."

[4] Subsequently, on 19 May 2009, the applicant Mr Clampett filed an application seeking orders that the proceedings be adjourned to a date to be fixed pending the outcome of his application to the High Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth). This judgment will deal with the interlocutory applications in the order in which they were filed; that is I shall deal in the first instance with the applications made by the respondents.

The Court of Disputed Returns

[5] Part 8 of the Act provides for a Court of Disputed Returns. The jurisdiction of deciding disputed elections is conferred upon the Supreme Court by s 127 in Division 1 of Part 8 of the Act. Section 127(1) provides that the Supreme Court is the Court of Disputed Returns for the purposes of the Act.

[6] Division 2 of Part 8 of the Act deals with the process for disputing elections. Section 128 provides that the election of a person may be disputed by an application to the Court of Disputed Returns under that division (or an appeal under Division 4 to the Court of Appeal) but that the election may not be disputed in any other way.

The parties to an application to dispute an election

[7] Section 133 provides that the parties to an application to dispute an election are the person who filed it and any respondents under that section. Section 133(2) of the Act provides that the Electoral Commission is a respondent to any application; and so while in this case the respondent is said to be the Electoral Commissioner in fact the third respondent should be the Electoral Commission. Section 133(3) provides that the person who was elected is in certain circumstances a party to the application. There is no provision for any other parties.

[8] The first respondent, the Governor, is not a person who was elected at the State election which the applicant wishes to dispute and so cannot be a party to the application. The first respondent should be removed from the proceeding on the

ground that she has been improperly included as a respondent to the originating application pursuant to s 133 of the Act.

[9] Under s 133(3) a person who was elected is a party to the application if the person, within seven days after receiving a copy of the application under s 131, files a notice with the Supreme Court Registry in Brisbane stating that the person wishes to be a respondent. No such notice has been filed by the second respondent and accordingly she is not properly joined as a party. Accordingly even if she could have been joined as a respondent, she is no longer a proper party to the application and she should be removed as a respondent. It is not necessary at this stage to consider the alternative claim of the first and second respondents who are improperly joined as parties to this action.

Grounds for dismissal of the application

[10] The third respondent has submitted that the originating application should be dismissed because:

(a) It was not filed within the time required by s 130(3)(a) of the Act;

(b) The applicant did not deposit with the court $400 when the application was filed as required by s 130(3)(b) of the Act; and

(c) The applicant is not entitled under s 129 to dispute any election other than that for the electoral district of Stafford.

[11] Any one of these grounds, if it were successful, would be sufficient to have the application dismissed summarily.

[12] The first question is whether or not the originating application was filed within the time required by s 130(3)(a) of the Act. Section 130 seeks out the requirements for an application to be effective. It provides:

> "**130 Requirements for an application to be effective**
>
> (1) For an application to have effect for the purposes of this division, the requirements of this section must be complied with.
>
> (2) The application must –
>
> (a) set out the facts relied on to dispute the election; and
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> (b) set out the order sought from the Court of Disputed Returns; and
>
> (c) be signed by –
>
> (i) in the case of an application by the commission - the electoral commissioner; and
>
> (ii) in any other case—the applicant before a witness; and
>
> (d) if paragraph (c)(ii) applies—contain the signature, occupation and address of the witness.
>
> (3) The person disputing the election must—
>
> (a) file the application with the Supreme Court registry in Brisbane within 7 days after the day on which the writ for the election is returned as mentioned in section 123(2)(b); and

(b) when filing the application, deposit with the court—
(i) $400; or
(ii) if a greater amount is prescribed – that amount.

(4) Subsections (1) and (2) do not, by implication, prevent the amendment of the application."

[13] Section 123(2) provides that in a case such as the present one, where the writ for the election was issued by the Governor, the Electoral Commission must return the writ to the Governor and publish in the gazette the name of each candidate elected. After the recent general election for the State parliament on 21 March 2009, the Commission published in the Queensland Government Gazette of 15 April 2009 notification of the candidates who had been elected as members of the Legislative Assembly at the Queensland general election. The notification included the notation that the writ was returned to the Governor on 7 April 2009. As s 130(3)(a) of the Act provides that the application must be filed with the Supreme Court Registry within seven days after the day on which the writ for the election is returned, an originating application must be filed by 14 April 2009. The application by Mr Clampett was filed on 20 April 2009. It was therefore well after the time within which it was required to be filed under s 130(3)(a) of the Act.

[14] The court cannot relieve the applicant from complying with that section as it is a jurisdictional requirement for the application filed to be effective: see *Rudolphy v Lightfoot* [1999] HCA 61 at [9] to [13]; *Hansen v Australian Electoral Commission* [2000] FCA 606 at [11]; *Featherston v Tully* [2002] SASC 243 at [54]; and *Smith v Australian Electoral Commission* [2008] FCA 953. Failure to file the application within the time required under s 130(3)(a) makes the originating application incurably defective. That was the case here and so for that reason alone the originating application should be dismissed.

[15] The next ground for dismissing the application was that s 130(3)(b) was not complied with in that the applicant did not deposit $400 with the court when the application was filed. For the reasons which are expressed at length in *Caltabiano v Electoral Commission of Queensland (No. 2)* [2009] QSC 138, failure to comply with that requirement also makes the application incurably defective. Mr Clampett did not deposit $400 with the court when the application was filed and for that reason also his application should be dismissed. Mr Clampett argues that the requirement to pay a deposit is invalid pursuant to s 115 of the Constitution. This argument, as it applies to the deposit required under s 85(1) of the Act, was rejected by the Court of Appeal in *Clampett v Kerslake* [2009] QCA 104 and need not be further considered. The originating application should also for this reason be dismissed.

[16] The third and final reason that the application should be dismissed is that the applicant has purported to challenge the election of "the entire complement of 89 candidates, ostensibly returned as members of the Legislative Assembly of Queensland". With regard to a similar provision in the *Commonwealth Electoral Act* 1918, Brennan ACJ (as His Honour then was), acting as the Court of Disputed Returns in the High Court, held in *Muldowney v Australian Electoral Commission* (1993) 178 CLR 34 at 42:

> "The framework of the Act as well as the language of s 355(c) indicates that the jurisdiction of the Court of Disputed Returns does

> not extend to the making of a declaration that the entirety of a general election is void. The jurisdiction to declare an election void on the petition of a person 'who was qualified to vote thereat' is limited to those elections in which the petitioner was an elector entitled to vote. If a challenge on justiciable grounds can be mounted to the validity of a general election – a question that I need not consider – such a challenge cannot be entertained by the Court of Disputed Returns."

[17] His Honour referred to a similar decision in Queensland in *Re Surfers Paradise Election Petition* [1975] Qd R 114 where Dunn J held that an election petition must be a petition with respect to one election of one candidate; it must not call into question the validity of the elections in all electorates.

[18] The structure and provisions of Part 8 of the Act show that the Court of Disputed Returns in Queensland is confined to hearing an application with regard to an electoral district rather than the general election as a whole. The applicant is an enrolled elector for the electoral district of Stafford. As such he would be entitled to dispute the election of a person for that electoral district pursuant to s 129(b) of the Act; but he is not entitled to dispute the election of a person for any other electoral district.

Application for adjournment

[19] Mr Clampett sought an adjournment of the application so that he could have the matter removed to the High Court under s 40 of the Constitution. In the circumstances where his application ought to be struck out there is no utility in adjourning the application pending the outcome of Mr Clampett's application to the High Court pursuant to s 40 of the *Judiciary Act*.

[20] Mr Clampett raised three additional but related arguments. The first was that "unless and until it can be shown 'beyond reasonable doubt' that the entire *Electoral Act* 1992 itself is legally valid constitutionally, then, as contended by the petitioner generally, the election overall is legally invalid and ought be declared such forthwith by the Court." The *Electoral Act* is an Act of the Queensland Parliament which is apparently within the plenary powers of that parliament. It does not have to be shown that the Act of a parliament exercising plenary power is constitutionally valid and certainly not beyond reasonable doubt.[1] It is for the party impugning its constitutional validity to show that it is not valid. The applicant has not presented any coherent argument suggesting that the Act is not constitutionally valid.

[21] The second, related, argument made by Mr Clampett is that the Act is not validly passed by the Queensland parliament because it is contrary to the *Currency Act* 1965 (Cth), and presumably therefore invalid under s 109 of the Constitution. This question has been decided contrary to the arguments of the applicant in the Court of Appeal in *Clampett v Kerslake (Electoral Commissioner of Qld)* [2009] QCA 104 and with regard to the Commonwealth's constitutional power to issue paper money as legal tender in *Re Skyring's Application (No. 2)* (1985) 50 ALJR 561.

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[1] cf *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 154.

[22] The third, related, argument raised by him with regard to the Australia Acts have already been rejected in this court in *Skyring v Electoral Commission of Qld* [2001] QSC 080; *The Queen v The Minister for Justice and Attorney-General of Queensland, ex parte Alan George Skyring* Supreme Court of Queensland, 17 February 1986, unreported; *Sharples v Arnison* [2001] QCA 518 at [24]-[25]; and *Clampett v Hill* [2007] QCA 394. The arguments are entirely without merit and there is no utility in re litigating them

Conclusion

[23] The first and second respondents should be removed as respondents to the originating application filed on 20 April 2009.

[24] The originating application must for the many reasons set out herein be dismissed. The applicant should pay the costs of the respondents and incidental to the originating application to be assessed.