SUPREME COURT OF QUEENSLAND

CITATION:	*Clampett v Wensley & Ors* [2009] QCA 277
PARTIES:	**CLAMPETT, Leonard William** (applicant/appellant) **v** **WENSLEY, Penelope** (first respondent/first respondent) **BLIGH, Anna** (second respondent/second respondent) **KERSLAKE, David** (third respondent/third respondent)
FILE NO/S:	Appeal No 6608 of 2009 SC No 4123 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Court of Disputed Returns at Brisbane
DELIVERED ON:	15 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	8 September 2009
JUDGES:	McMurdo P, Holmes JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. The appellant pay the costs of the respondents of and incidental to the appeal to be assessed.**
CATCHWORDS:	CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – ELECTION AND RELATED MATTERS – DISPUTED ELECTIONS – DISPUTED ELECTION COURTS OR TRIBUNALS – APPEALS FROM – where the appellant filed an application seeking an order that the election of all 89 members of the Legislative Assembly returned at the 2009 election be declared null and void – where the appellant failed to file the application within seven days after the writ for the election was returned – where the appellant failed to deposit the required $400 fee with the court when filing the application – where Court of Disputed Returns dismissed application – where appellant raises arguments concerning validity of state legislation and the "currency argument" that had previously been rejected by the Court of Appeal – whether appeal raised a question of law of merit

Commonwealth Constitution (Cth), s 115
Electoral Act 1992 (Qld), s 130(3), s 141, s 148A

Caltabiano v Electoral Commission of Qld & Anor [2009] QCA 182, cited
Clampett v Kerslake (Electoral Commissioner of Queensland) [2009] QCA 104, cited
Clampett v Wensley & Ors [2009] QSC 164, approved
Lohe v Gunter [2003] QSC 150, cited
Muldowney v Australian Electoral Commission (1993) 178 CLR 34; [1993] HCA 32, applied
Re Skyring's Application (No 2) (1985) 58 ALR 629, cited
Rudolphy v Lightfoot (1999) 197 CLR 500; [1999] HCA 61, cited
Sharples v Arnison [2002] 2 Qd R 444; [2001] QCA 518, cited
Skyring v Electoral Commission of Queensland [2001] QSC 080, cited

COUNSEL: The appellant appeared on his own behalf
A Horneman-Wren for the first and second respondents
M D Hinson SC for the third respondent

SOLICITORS: The appellant appeared on his own behalf
Crown Law for the first, second and third respondents

[1] **McMURDO P**: The appeal should be dismissed with costs for the reasons given by Applegarth J.

[2] **HOLMES JA:** I agree with the reasons of Applegarth J and with the orders his Honour proposes.

[3] **APPLEGARTH J**: On 20 April 2009 the appellant purported to file an "election petition" in the Supreme Court of Queensland sitting as the Court of Disputed Returns concerning "the election of the entire complement of Members of the Queensland Legislative Assembly, purportedly returned from the State General Election held on 21 March 2009". He sought an order that:

> "The election for the entire complement of 89 candidates, ostensibly returned as the Members of the Legislative Assembly of Queensland from that election, be declared null and void".

[4] The petition was not filed within seven days after the day on which the writ for the election was returned, as required by s 130(3)(a) of the *Electoral Act* 1992 (Qld) ("the Act"). When filing the petition, the applicant did not deposit with the Court $400, as required by s 130(3)(b) of the Act. The Governor of Queensland and the Premier of Queensland were included as parties as the first and second respondents respectively. The third respondent was the Electoral Commissioner.

[5] On 17 June 2009 a judge of the trial division sitting as the Court of Disputed Returns:

(a) ordered that the first and second respondents be removed as respondents to the proceeding filed on 20 April 2009;[1]

(b) declined the appellant's request for an adjournment of the application so that he could have the matter removed to the High Court under s 40 of the *Judiciary Act* 1903 (Cth);

(c) dismissed the application;

(d) ordered the appellant to pay the costs of the first, second and third respondents of and incidental to the application.[2]

The grounds for dismissal of the application

[6] The application was dismissed because:

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

(b) the appellant did not deposit with the Court $400 when the application was filed, as required by s 130(3)(b) of the Act;

(c) the appellant was found to be not entitled under s 129 of the Act to dispute any election other than that for the electoral district in which he was an enrolled elector, namely the electoral district of Stafford.

[7] As to the first ground, the writ for the election was returned on 7 April 2009. Section 130(3)(a) of the Act required the application to be filed within seven days after that date. It was not filed until 20 April 2009. The learned primary judge ruled that the Court could not relieve the appellant from complying with that section as it is a jurisdictional requirement. This conclusion was supported by authority.[3] The failure to file the application within time made it "incurably defective", and for that reason alone the application had to be dismissed.[4]

[8] As to the second ground, the appellant made no attempt to deposit $400 with the Court when the application was filed, apparently because he took the view that he could not be required to pay in the expected form of legal tender, namely the familiar paper money and coins in circulation in Australia as authorised by the *Currency Act* 1965 (Cth). The appellant takes the view that certain provisions of the *Currency Act* are invalid by reason of s 115 of the *Constitution*. The learned primary judge noted that a similar argument that relied upon s 115 of the *Constitution* was rejected by the Court of Appeal in *Clampett v Kerslake*[5] and that the application should be dismissed for the same reason. The requirement to pay a deposit was not invalidated pursuant to s 115 of the *Constitution*. The failure to pay the required $400 made the application "incurably defective".[6]

[9] As to the third ground, the purported challenge to the entirety of the general election was found to be not authorised by the Act. Her Honour followed what was said by

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1 The document described in the order as the Originating Application filed on 20 April 2009, and which appears at pages 226-232 of the Appeal Record Book was styled "Election Petition". It is convenient to refer to it as "the application".

2 *Clampett v Wensley & Ors* [2009] QSC 164.

3 *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 507-509.

4 *Clampett v Wensley & Ors* [2009] QSC 164 at [14].

5 [2009] QCA 104.

6 Ibid at [15]. See also *Caltabiano v Electoral Commission of Queensland & Anor* [2009] QCA 182 at [7]-[8], [92] and [122].

Brennan ACJ (as his Honour then was) acting as the Court of Disputed Returns in *Muldowney v Australian Electoral Commission*[7] with regard to a similar provision in the *Commonwealth Electoral Act* 1918 (Cth). The framework of the Act and its language indicated 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 learned primary judge also referred to a similar conclusion in *Re Surfers Paradise Election Petition*.[8] Her Honour ruled that 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. As an enrolled elector for the electoral district of Stafford, the appellant would be entitled to dispute the election of a person for that electoral district pursuant to s 129(b) of the Act, but was not entitled to dispute the election of a person for any other electoral district.[9]

[10] The learned primary judge addressed an argument by the appellant concerning the alleged invalidity of the Act, and found that the appellant had not presented any coherent argument suggesting that the Act was not constitutionally valid. Her Honour also addressed an argument concerning the *Currency Act* 1965 (Cth), and found that the question had been decided contrary to the arguments of the appellant in the Court of Appeal in *Clampett v Kerslake*[10] and with regard to the Commonwealth's constitutional power to issue paper money as legal tender in *Re Skyring's Application (No 2)*.[11] Another argument raised by the appellant with regard to the *Australia Acts* was found to have been rejected in earlier decisions of the Supreme Court. The arguments were said to be "entirely without merit" and her Honour found there was no utility in re-litigating them.[12]

[11] The application of the first and second respondents to be removed from the proceeding on the grounds that they had been improperly included as respondents was granted, since neither the first nor the second respondent were properly included as respondents pursuant to s 133 of the Act.

[12] The request to adjourn the application so the appellant could have the matter removed to the High Court under s 40 of the *Judiciary Act* was not granted in circumstances in which the application was to be struck out and there was no utility in adjourning it pending the outcome of the application to the High Court.

The appeal

[13] Subject to the provisions of Division 4 of Part 8 of the Act concerning appeals, a decision of, or an order made by, the Court of Disputed Returns is final and conclusive and cannot be appealed against or otherwise called into question on any ground.[13] An appeal lies to this Court from such a decision or order on a question of law.[14]

[14] The appeal does not raise any question of law of merit. The learned primary judge correctly interpreted and applied the provisions of the Act. The appellant's failure to comply with the provisions of s 130(3)(a) and (b) necessitated the dismissal of

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7 (1993) 178 CLR 34 at [42].
8 [1975] Qd R 114.
9 *Clampett v Wensley & Ors* (supra) at [16]-[18].
10 [2009] QCA 104.
11 (1985) 58 ALR 629.
12 *Clampett v Wensley & Ors* (supra) at [22].
13 Section 141 of the Act.
14 Section 148A of the Act.

the application. Her Honour was also correct in concluding that the jurisdiction of the Court of Disputed Returns under the Act was confined to hearing an application with regard to an electoral district, rather than the general election in its entirety.

[15] The appellant in his written and oral submissions did not advance any reasonable argument as to why the learned primary judge was in error in her interpretation of the provisions of the Act. Instead, his submission was to the effect that the Act was "unconstitutional" and therefore "null and void and of no effect whatsoever from the time of its enactment". The result was said to be that "the law governing the subject matter which was the subject of the unconstitutional statute reverts to that which was in force before the enactment of the unconstitutional statute". Accordingly, the appellant contended that the operative statute was the *Elections Act* 1983 (Qld). However, no argument of any merit was advanced to support the contention that the 1992 Act is unconstitutional. The appellant's argument seems to depend on the contention that the State of Queensland had not held referendums to effect the passage of the *Australia Acts (Request) Act* 1985 (Qld), an Act which preceded the *Australia Act* 1986 (UK). Similar arguments have been rejected in *Clampett v Hill*,[15] in earlier decisions cited by it,[16] and, more recently, in *Clampett v Kerslake*.[17] On the hearing of the appeal the appellant did not advance any good reason as to why this Court should not follow its earlier decision in *Clampett v Kerslake*.

[16] The appellant's challenge to the requirement in s 130(3)(b) to deposit $400 with the Court when filing an application rests on the so-called "currency argument". This argument with respect to the constitutional validity of Commonwealth statutes has been consistently rejected. As long ago as 1995 Davies JA stated in *Skyring v O'Shea*[18] that:

> "Time has long passed when it is necessary to set out and reject, once again, the arguments of the appellant."

The appellant in this case previously has sought, without success, to advance the same argument in this Court.[19] On the hearing of the appeal he acknowledged that the currency argument had been rejected in earlier decisions, and advanced no satisfactory reason as to why those earlier decisions should not be followed.

[17] As a result, the appellant has failed to make out his argument that the Act is unconstitutional or that its requirement to deposit $400 with the Court when filing an application is invalid.

Conclusion

[18] The appeal is without merit and should be dismissed with costs. I would order:

1. Appeal dismissed.

2. The appellant pay the costs of the respondents of and incidental to the appeal to be assessed.

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15 [2007] QCA 394 at [13]-[14].

16 *Skyring v Electoral Commission of Queensland* [2001] QSC 80; *Sharples v Arnison* [2002] 2 Qd R 444; *Lohe v Gunter* [2003] QSC 150 at [5]-[7].

17 [2009] QCA 104.

18 [1995] QCA 376.

19 *Clampett v Kerslake* [2009] QCA 104.