Terblanche, Chamonix (Sen R. Culleton)

From: Menzel, Margaret (Sen R. Culleton)
Sent: Monday, 7 November 2016 11:25 AM
To: Terblanche, Chamonix (Sen R. Culleton)
Subject: FW: High Court Precedent paragraphs 13 and 14

Nile v Wood [1987] HCA 62; (1987) 76 ALR 91; (1987) 62 ALJR 52 (16 December 1987)

HIGH COURT OF AUSTRALIA

ELAINE NILE v. ROBERT WOOD AND ANOTHER
F.C. 87/063

High Court of Australia
Brennan(1), Deane(1) and Toohey(1) JJ.

CATCHWORDS

HEARING

Canberra
16:12:1987
Solicitors for the Petitioner: E.L. Dearn, O'Kane & Associates
Solicitors for the First Respondent: R.L. Whyburn & Associates
Solicitor for the Second Respondent: Australian Government Solicitor

DECISION

BRENNAN, DEANE AND TOOHEY JJ. This is a motion to dismiss, alternatively to strike out, a petition addressed to this Court as the Court of Disputed Returns under s.353 of the Commonwealth Electoral Act 1918 (Cth) ("the Act").

2. On 25 August 1987, following the last federal election, the first respondent was declared to have been elected as a senator for the State of New South Wales.

3. The petitioner was a candidate for a position of senator for New South Wales. Her petition alleges various matters which, it says, entitles the petitioner "to object to the declaration of the poll".

4. The matter came before a justice of this Court sitting as the Court of Disputed Returns on a summons for directions. At that time counsel for the petitioner applied to amend the petition which was acknowledged to be defective in at least one respect, namely in failing to contain a prayer for relief. Counsel for the first respondent objected to the amendments sought, contending that the defects were not curable. He also foreshadowed a motion to strike out the petition in its entirety. The directions hearing was then adjourned to enable the motion to be filed. As the question of amendment of the petition was closely bound up with the general attack to be made on the petition, no decision was made on the application to amend.

5. The first respondent's motion was subsequently filed and made returnable before a Full Court.

6. The first respondent abandoned two of the grounds in his motion. He did not press another ground which was that the petition was incompetent in seeking to have the Court exercise jurisdiction and powers exercisable only by the Senate under Div.2 of Pt XXII of the Act. The other grounds go to the failure of the petition to meet the requirements of the Act. Having heard argument, the Court reserved its decision. On reflection, and although the point had not been raised by counsel in regard to the grounds of the motion being pressed, it seemed to us that the petition, coupled with the application for amendment, gave rise to a matter between the petitioner and the respondents arising under the Constitution. Moreover a necessary consideration of s.44 of the Constitution involved or might involve its interpretation. In those circumstances the matter was relisted and the Court directed that notices be given pursuant to s.78B of the Judiciary Act 1903 (Cth). The matter was relisted for hearing and the Court heard submissions by the Solicitor-General for the Commonwealth and further submissions by counsel for the parties. We now turn to the attack made on the petition.

7. Section 355 of the Act sets out the requisites of a petition. Section 358 provides that no proceedings shall be had on a petition unless the requirements of certain sections, including s.355, are complied with. Section 355 provides, for present purposes, as follows:

" 355. ... every petition disputing an election
or return ... shall -

the election or return:
(b) contain a prayer asking for the relief
the petitioner claims to be entitled to:
...
(e) be filed in the Registry of the High
Court within 40 days after the return of
the writ ...".
The requirements of the section which, it is said, the petitioner has not complied with, are those in pars (a) and (b).

8. If a petition does not comply with s.355, s.358 ensures that no proceedings may be had on it. Nor are such defects capable of being cured by amendment, at any rate after the period of forty days fixed by par.(e) for the filing of a petition has expired. That much is clear from several decisions of this Court, in particular Cameron v. Fysh [1904] HCA 49; (1904) 1 CLR 314; In re Berrill (1978) 52 ALJR 359; 19 ALR 254 and Evans v. Crichton-Browne [1981] HCA 14; (1981) 147 CLR 169. The rationale of the refusal to allow an amendment in those circumstances may be found in the judgment of Gibbs ACJ. in In re Berrill, at p 360 (p 255 of ALR):

" ... for to do so would in effect be to permit an
evasion of the requirements of s.185(e)."
Section 185(e) of the Act, as it then stood, was in terms comparable to s.355(e) of the present Act.

9. In the present case the last date for the return of the writ was 3 September 1987; the writ was in fact returned on 25 August. The period of forty days fixed by s.355(e) had already expired when the summons for directions came on for hearing.

10. Undoubtedly the petition as formulated contains no prayer for relief. This is no mere oversight of an unimportant matter. Section 355(b) is clear as to what it demands. When the matter was before the Full Court counsel for the petitioner sought leave to amend the petition by adding a paragraph, to read:

" 4. The Petitioner Elaine Nile was a candidate at
the election for the Senate 1987 and would be
entitled to election if the election of Robert
Wood is declared void."
Counsel also applied to include a prayer for relief in these terms:

" (1) That this Court declare the said Robert Wood
to have been disqualified for election; and
(2) Your Petitioner Elaine Nile to be elected to
the Senate; and
(3) Costs be awarded against the Commonwealth."

It is only by reference to the proposed amendments that it is possible to divine which of the powers of the Court the petitioner seeks to invoke. From the proposed amendments, it appears that the case which she would wish to make is that the first respondent was disqualified at the time of his election. When a petition comes before the Court of Disputed Returns under Pt XXII of the Act, the Court is empowered by s.360 to do various things including declaring that a person who was returned as elected was not duly elected (s.360(1)(v)), declaring a candidate duly elected who was not returned as elected (s.360(1)(vi)) and declaring an election absolutely void (s.360(1)(vii)). To comply with the mandatory requirements of s.355, it is encumbent on a petitioner to specify the relief sought. As the above-mentioned cases establish, the petitioner's failure to do so cannot now be remedied by amendment. That being so, the application to amend the petition must be refused. The defect in the petition arising from the absence of a prayer for relief precludes the taking of further proceedings on it.

11. The absence of a prayer for relief is not the only defect in the petition. The petition is notable for a failure to "set out the facts relied on to invalidate the election ...". The petition must set out facts which would justify relief under the Act: see Cole v. Lacey [1965] HCA 11; (1965) 112 CLR 45, at p 51. This it fails to do.

12. The petition makes the following assertions in par.2:

" (a) Robert Wood has been convicted of the offence
of obstructing shipping, being an offence
which carries a term of imprisonment.
(b) He was convicted in 1972 of offences in
relation to National Service, and served a
term of imprisonment.
(c) These offences disqualify him from sitting as
a Senator.
(d) Robert Wood is insolvent.
(e) His actions against the vessels of a friendly
nation indicate allegiance, obedience or
adherence to a foreign power."

These assertions are derived from s.44 of the Constitution. That section renders incapable of being chosen or of sitting as a senator any person who:

" (i.) Is under any acknowledgment of
allegiance, obedience, or adherence to a
foreign power, or is a subject or a
citizen or entitled to the rights or
privileges of a subject or a citizen of a
foreign power: or
(ii.) Is attainted of treason, or has been
convicted and is under sentence, or
subject to be sentenced, for any offence
punishable under the law of the
Commonwealth or of a State by
imprisonment for one year or longer: or
(iii.) Is an undischarged bankrupt or insolvent:
...".

Assuming that s.360 of the Act empowers the Court of Disputed Returns to declare void the election of a person who is incapable of being chosen as a senator by reason of s.44 of the Constitution, does the petition set out the facts relied on to invalidate the election?

13. Paragraph 2(a) of the petition does not set out facts which bring the first respondent within par.(ii) of s.44 of the Constitution. It is not conviction of an offence per se of which s.44(ii) of the Constitution speaks. The disqualification operates on a person who has been convicted of an offence punishable by imprisonment for one year or more and is under sentence or subject to be sentenced for that offence. The references to conviction and sentence are clearly conjunctive, although counsel for the petitioner argued otherwise. This is so as a matter of construction of the language used in s.44(ii). And it is apparent that it was the intention of the framers of the Constitution that the disqualification under this paragraph should operate only while the person was under sentence: see Quick and Garran, The Annotated Constitution of the Australian Commonwealth (1901), pp.490, 492; Official Report of the National Australasian Convention Debates, Sydney (1891), pp.655-659. The petition does not identify the precise offence to which the words "obstructing shipping" are intended to refer and nothing at all is said in the petition regarding sentence.

14. Paragraph 2(b) of the petition is open to much the same objection. But more than that, it positively asserts that the first respondent had already served a sentence for the offences vaguely described, thereby in terms taking the objection out of s.44(ii).

15. Paragraph 2(c) of the petition is simply a conclusion the petitioner invites the Court to reach. It sets out no facts.

16. Paragraph 2(d) merely reproduces one of the words in s.44(iii) of the Constitution. The Solicitor-General for the Commonwealth, supported by counsel for the first respondent, submitted that the adjective "undischarged" in par.(iii) attaches both to "bankrupt" and to "insolvent". In other words, insolvent is not adjectival and merely describing a person who cannot pay his debts as they fall due. It is, the Solicitor-General submitted, part of a composite reference to the status of a person who has been declared bankrupt or insolvent and who has not been discharged from that condition. That view of s.44(iii) is, we think, correct.

17. At the turn of the century some States had bankruptcy laws (Bankruptcy Act 1898 (N.S.W.), Bankruptcy Act 1892 (W.A.), Bankruptcy Act 1870 (Tas.)); some had insolvency laws (Insolvency Act 1890 (Vic.), Insolvency Act 1874 (Q.), Insolvent Act 1886 (S.A.)). In each case the statute provided for the adjudication of a person by a court as either a bankrupt or an insolvent. In each case the statute provided machinery for the discharge of the person so adjudicated. It is true that the word "insolvent", standing on its own, is not a term of art and may mean no more than unable to pay debts that are due: Re Muggeridge's Trusts (1860) Johns 625, at p 627 (70 ER 569, at p 570). But against a statutory background such as the Insolvent Act 1886 (S.A.), the term has been held to mean adjudicated insolvent: In re Salom. Salom v. Salom [1924] SAStRp 22; (1924) SASR 93. Again, this view of s.44(iii) is borne out by records of the time. See Official Record of the Debates of the Australasian Federal Convention, Sydney (1897), pp 1015- 1019, Melbourne (1898), pp.1932-1940.

18. The petition fails to allege that the first respondent was an undischarged bankrupt or an undischarged insolvent; clearly par.2(d) is formulated on the basis that it is enough to allege that the first respondent is unable to pay his debts, a mistaken view of the paragraph.

19. Paragraph 2(e) of the petition falls well short of setting out facts which bring the first respondent within s.44(i) of the Constitution. It does not, in terms, assert allegiance, obedience or adherence to a foreign power. And the facts it sets out in order to establish the conclusion that the first respondent was under any acknowledgment of allegiance, obedience or adherence to a foreign power are clearly insufficient for the purpose. It does not even identify a foreign power. Furthermore it would seem that s.44(i) relates only to a person who has formally or informally acknowledged allegiance, obedience or adherence to a foreign power and who has not withdrawn or revoked that acknowledgment: see Crittenden v. Anderson (unreported decision of Fullagar J. dated 23 August 1950 noted in Australian Law Journal, (1977), vol.51, at p 171), also Quick and Garran, pp 490, 491; Official Report of the National Australasian Convention Debates, Adelaide (1897), p 736. That however is a matter we do not have to decide.

20. It follows that the petition fails completely to comply with the requirements of s.355(b) of the Act. We also conclude that each of the sub-paragraphs of par.2 of the petition fails to comply with s.355(a). The consequence is that the petition is incurably defective and that no proceedings may be had on it.

21. Accordingly, the petition is dismissed with costs.

ORDER

Petition dismissed with costs.

Kind Regards,

Peter Gargan

Advisor to Senator Rodney Culleton

Legal affairs

Electorate Office
Unit 5, 162 Colin Street
West Perth WA 6005
Phone (08) 9226 1750 / 1300 512 510
Peter.Gargan@aph.gov.au