Privy Council Appeal No. 36 of 1976

James Barton Gilbertson – – – – – – *Appellant*

v.

The State of South Australia and Another – – – *Respondents*

FROM

THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH APRIL 1977

Present at the Hearing:

LORD DIPLOCK
LORD SIMON OF GLAISDALE
LORD SALMON
LORD EDMUND-DAVIES
LORD RUSSELL OF KILLOWEN

[*Delivered by* LORD DIPLOCK]

Prior to the passing of the Constitution Act Amendment Act (No. 5), 1975 (" the Act of 1975 "), the boundaries of the electoral districts for the House of Assembly of the Parliament of South Australia were fixed from time to time by Act of Parliament after consideration of the recommendations of an ad hoc commission. The Act of 1975 altered this. It added to the Constitution Act 1934 as previously amended a new Part V comprising new sections 76 to 88 under which there was created a permanent Electoral Districts Boundaries Commission (" the Commission ") composed of a senior puisne judge of the Supreme Court (as Chairman), the Electoral Commissioner and the Surveyor-General. Their function is to divide the State into electoral districts for the purpose of elections to the House of Assembly. They were to embark upon this task within three months after the commencement of the Act and to undertake revisions of electoral boundaries at intervals of between five and eight years depending upon the incidence of polling days for general elections.

By the new section 86 the Commission's order delineating and describing the boundaries of the electoral districts is made subject to an appeal by any elector to the Full Court of the Supreme Court " on the ground that the order has not been duly made in accordance with this Act ".

On 5th August 1976 the Commission made and published in the Government Gazette a re-distribution order delineating and describing the boundaries of the forty-seven electoral districts into which by section 27 of the Constitution Act, 1934–1975, the State has to be

divided. Before the Act of 1975 the average number of electors in metropolitan districts had been about 50 per cent more than in non-metropolitan districts. The Act of 1975 was intended to remove this inequality. By the new section 77, it laid down that the numbers of electors in all districts were to be the same within a tolerance of plus or minus ten per cent. So it was inevitable that the Commission's order should involve substantial alterations in the boundaries of many electoral districts and equally inevitable that it would displease politically-minded voters of all parties who feared that the transfer of voters from one electoral district to another would alter the balance of political power in one or both of them.

A number of appeals against the Commission's order have been instituted in the Full Court under the provisions of the new section 86. With these appeals their Lordships are not directly concerned. What this Board is concerned with is a more fundamental but collateral attack upon the Commission's order, in an action brought in the Supreme Court by the appellant against the State and Attorney General of South Australia claiming declarations that the provisions of the Act of 1975 which provide for an appeal against the order to the Full Court of the Supreme Court and all the other provisions of that Act are void and inoperative by reason of the Colonial Laws Validity Act 1865, and that the Commission's order is accordingly of no effect.

The action was heard by the Full Court (Bray C.J., Walters, Zelling, Wells and Jacobs JJ.). They dismissed it by a majority (Zelling J. dissenting) on 3rd November 1976; and on 10th December 1976 granted the plaintiff final leave to appeal to Her Majesty in Council.

In his collateral attack upon the Act of 1975 and the Commission's order the plaintiff has aimed at the topmost storey of the statutory edifice—the provisions of the new section 86 which provide for an appeal to the Full Court of the Supreme Court of South Australia against an order of the Commission. If this provision can be shown to be void, he relies upon the doctrine of inseverability to bring the rest of the statutory edifice tumbling down and to bury in its ruins the Commission's order of 5th August 1976.

The argument for the plaintiff both in the Supreme Court and before this Board has displayed considerable historical erudition, which is reflected and, it may be, supplemented in the judgments of the Supreme Court. To these their Lordships would express their indebtedness. They are thereby relieved of the necessity of entering upon an independent investigation of the historical background to the imperial and colonial legislation upon which the plaintiff's argument depends. Stripped down to its essentials that argument can, in their Lordships' view, be analysed into six propositions of law:

(1) The Supreme Court of South Australia as constituted under the Supreme Court Act, 1935–1975, is a continuation of the Court of Judicature established under Act or Ordinance No. 5 of 1837 (" the 1837 Ordinance ") and called the Supreme Court of the Province of South Australia.

(2) For the purposes of section 2 of the Colonial Laws Validity Act 1865, the 1837 Ordinance has the constitutional status of an Imperial Act of Parliament extending to the colony as an order or regulation made under authority of the Act of the Imperial Parliament 4 and 5 Wm. IV cap. 95 (" the Act of 1834 ") authorising the creation of the colony of South Australia.

(3) The Court of Judicature established under the 1837 Ordinance owed its preservation after 1842 directly to section 2 of the Imperial Act of Parliament 5 and 6 Vict. cap. 61 ("the Act of 1842") which repealed the 1834 Act and made fresh provisions for the government of the colony.

(4) By authorising the establishment of the Supreme Court of the Province of South Australia as a "court of judicature" the 1837 Ordinance restricted its jurisdiction to the exercise of judicial power. To confer upon it any more extended jurisdiction would be repugnant to the Act of 1834 and/or the Act of 1842.

(5) The determination of appeals against an order of the Electoral Districts Boundaries Commission may involve an exercise by the Full Court of the Supreme Court of legislative or executive as distinguished from judicial power. The provisions of the new section 86 (2) to (9) of the Constitution Act, 1934–1975, which provide for such an appeal are therefore repugnant to the Act of 1834 and/or the Act of 1842 and are void and inoperative under section 2 of the Colonial Laws Validity Act 1865.

(6) The provisions of the new section 86 (2) to (9) are inseverable from the other provisions of the Act of 1975 relating to the determination of the boundaries of electoral districts. These other provisions and the Commission's order of 5th August 1976 which purported to be made under them are therefore also void and inoperative.

Proposition (1) is not disputed by the Solicitor General: all the others are. To get the argument on its feet even as respects the invalidity of the provisions of the Act of 1975 relating to appeals to the Full Court, the plaintiff must establish not only that *either* proposition (2) *or* proposition (3) is correct, *but* also that propositions (4) and (5) are correct. To invalidate in addition the Commission's order he must also show that proposition (6) is right.

Not all these propositions were dealt with by each of the judges of the Supreme Court. The Chief Justice, Walters J. and Jacobs J. all held that neither proposition (2) nor proposition (3) had been established. In their opinion the 1837 Ordinance had not acquired the status of an Act of the Imperial Parliament or an order or regulation made under the authority of such an Act, within the meaning of section 2 of the Colonial Laws Validity Act 1865. The Chief Justice and Jacobs J. also dealt with proposition (5). They rejected it on the ground that the determination of appeals under the new section 86 (2) to (7) did not involve the exercise by the Full Court of any non-judicial powers. In so holding they were joined by Wells J. This was the ground on which he dismissed the plaintiff's action, for he and Zelling J. were of the minority opinion that proposition (2) had been made out. Zelling J., however, also thought that propositions (5) and (6) were both correct and would have given judgment for the plaintiff. Their Lordships propose to deal with those two issues of law on which there was a divergence of opinion in the Supreme Court: the legislative status of the 1837 Ordinance and the nature of the jurisdiction of the Full Court under the Act of 1975.

The Legislative Status of the 1837 Ordinance.

With great respect to the two judges who dissented on this point, their Lordships are of opinion that propositions (2) and (3) are clearly incorrect.

The interpretation section, section 1, of the Colonial Laws Validity Act 1865, has the effect of defining a "colonial law" as a law made for any colony by Her Majesty in Council or any authority competent to make laws for that colony other than the Imperial Parliament.

Sections 2 and 3 of the Colonial Laws Validity Act 1865 provide as follows: —

> "2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.
>
> 3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid."

The Act of 1834 was an Act of the Imperial Parliament extending to the colony of South Australia. By section 2 it authorised His Majesty by Order in Council to empower any one or more persons resident and being in the colony "to make, ordain, and establish all such Laws, Institutions, or Ordinances, and to constitute such Courts, and appoint such Officers . . . as may be necessary for the Peace, Order, and good Government of His Majesty's Subjects and others within the said [colony]".

Pursuant to this section the Order in Council of 23rd February 1836 was made. It empowered the Governor, the Judge and the three other named officials to exercise the powers which had been recited in section 2 of the Act of 1834, but subject, in the case of laws, institutions and ordinances made by them, to disallowance by His Majesty. These persons who, apart from the Governor, assumed, and acted under, the collective title of "Legislative Council" made the 1837 Ordinance. In view of the importance attached to it in the plaintiff's argument, section 1 needs to be set out in full.

> "An Act for the Establishment of a Court to be called the Supreme Court of the Province of South Australia.
>
> Be it Enacted by His Excellency John Hindmarsh Knight of the Royal Hanoverian Guelphic Order Captain in the Royal Navy Governor and Commander-in-Chief of His Majesty's Province of South Australia and its Dependencies by and with the advice and consent of the Legislative Council thereof that there shall be and His Excellency the Governor by and with the like advice doth erect create constitute and establish a Court of Judicature to be called the Supreme Court of the Province of South Australia."

The Ordinance goes on to confer upon the Supreme Court of the Province of South Australia jurisdiction of the kinds exercised by the courts of common law, of equity and of ecclesiastical jurisdiction in England at that time. Section 7 conferred upon the court the same jurisdiction as was exercisable by the courts of King's Bench, Common Pleas and Exchequer, Oyer and Terminer and Gaol Delivery. Section 8 conferred upon it the equitable jurisdiction of the Lord Chancellor. Sections 9 to 13 conferred upon it the jurisdiction of an Ecclesiastical Court and powers in relation to the grant of probate and letters of administration, while section 14 empowered the court to appoint guardians of infants and persons of unsound mind.

Their Lordships entertain no doubt that the 1837 Ordinance is a "colonial law" within the meaning of the Colonial Laws Validity Act 1865. It is not an Act of the Imperial Parliament nor an order or regulation made under the authority of such an Act. Those persons who made the 1837 Ordinance derived their competence to make laws for the colony of South Australia not from the Act of 1834 itself, but from the Order in Council of 23rd February 1836.

This was itself a colonial law within the definition of section 1 of the Colonial Laws Validity Act 1865. The Act of 1834 operated only to confer upon His Majesty the power to make such an Order in Council; or, perhaps more accurately in constitutional law, to confirm, extend and regulate powers in relation to the government of the new colony which the crown would otherwise have possessed under the royal prerogative.

Their Lordships can deal more briefly with the effect of the Act of 1842. In section 1 it repealed the Act of 1834 but subject to a proviso in section 2 of which the relevant portion reads:

> "II. Provided always, and be it enacted, That all Laws and Ordinances heretofore passed under the Authority and in pursuance of the said recited Acts or either of them, and that all Things heretofore lawfully done in virtue of the said Acts or of either of them, shall hereafter be of the same Validity as if the said Acts had not been repealed. . . ."

In their Lordships' view these words are incapable of altering the status as a colonial law of the 1837 Ordinance or any other Act or Ordinance of the Legislative Council made between 1836 and 1842 by giving it the status of an Act of the Imperial Parliament. The section says in terms that the validity of all such laws and ordinances is to be the same as if the Act of 1834 had not been repealed.

Since, in their Lordships' view, as in the view of the majority of the Supreme Court, the 1837 Ordinance is only a colonial law within the meaning of the Colonial Laws Validity Act 1865, it follows that the Parliament of South Australia would have plenary power to confer upon the Supreme Court first established under the Ordinance and continued in existence by subsequent enactments, whatever jurisdiction Parliament thought fit, notwithstanding that such jurisdiction might involve the exercise of powers which do not fall within the concept of judicial power as it has been applied to constitutions based upon the separation of powers—which the State constitution of South Australia is not.

So with his failure to establish either proposition (2) or proposition (3) the plaintiff's appeal would fail upon this ground alone.

The Nature of the Jurisdiction of the Full Court under the Act of 1975.

Their Lordships, however, are also in agreement with those members of the Supreme Court (the Chief Justice, Wells J. and Jacobs J.) who were of opinion that the plaintiff had failed to establish that upon the true construction of the new sections to the Constitution Act, 1934–1975, added by the Act of 1975, the determination by the Full Court of the appeals against orders of the Electoral Districts Boundaries Commission would involve the exercise of powers that did not fall within the concept of judicial powers. Accordingly his proposition (5) which is essential to his success in his appeal to Her Majesty in Council is also incorrect.

Their Lordships have already described in summary form the scheme for Electoral Redistribution introduced by the new sections; but to deal with proposition (5), a somewhat more detailed reference to some of these sections is needed.

The constitution of the Commission laid down in new section 78 has already been referred to. It is incorporated by section 79 and the procedure at its meetings is regulated by section 80. Its sole function is that conferred upon it by section 82. It is to make an electoral redistribution (*i.e.* to divide the State into electoral districts) and to commence proceedings for that purpose within three months after the commencement of the Act of 1975 and thereafter at successive intervals of some five to eight years as previously mentioned. An electoral redistribution is to be made by an order of the Commission which by section 86 (1) is to be published in the Gazette. By the new section 32 the order becomes operative three months after its publication if no appeal against it is made: otherwise not until three months after all appeals have been finally determined.

Section 85 requires the Commission before commencing proceedings for an electoral redistribution to advertise that fact in the press and to invite representations in writing from the public. It is required to consider all such representations and may, at its discretion, hear and consider any evidence or argument submitted in support of them.

Section 77 makes it mandatory upon the Commission so to divide the State into electoral districts that there are an equal number of electors in each district, subject to a tolerance of plus or minus ten per cent; while section 82 (5) makes it also mandatory that except where islands are included in an electoral district, the boundaries of each district are to form an unbroken line.

Apart from these two mandatory requirements section 83 lays down matters which the Commission are to take into account in making an electoral redistribution. In view of the importance attached to it by the plaintiff this section should be set out in full:

> " 83. For the purpose of making an electoral redistribution, the Commission shall as far as practicable have regard to—
>
> (*a*) the desirability of making the electoral redistribution in such a manner that there will exist, as far as reasonably possible, amongst the population of each electoral district, a community of interest (of an economic, social, regional or other kind);
>
> (*b*) the population of each proposed electoral district;
>
> (*c*) the desirability of leaving undisturbed as far as practicable and consistent with the principles on which the redistribution is to be made, the boundaries of existing electoral districts;
>
> (*d*) the topography of areas within which new electoral boundaries will be drawn;
>
> (*e*) the feasibility of communication between electors affected by the redistribution and their parliamentary representatives in the House of Assembly; and
>
> (*f*) the nature of substantial demographic changes that the Commission considers likely to take place in proposed electoral districts between the conclusion of its present proceedings and the time when proceedings are likely to be next taken for the purpose of making an electoral redistribution,
>
> and may have regard to any other matters that it thinks relevant."

In their Lordships' view the Commission in making an electoral redistribution is not determining justiciable issues or exercising what is primarily a judicial power. While its Chairman is to be a Supreme

Court Judge he does not act in his judicial capacity but as *persona designata*, and the other members are experts in the kinds of matters to which, so far as practical, the Commission is required to have regard. Even upon the broadest test of what is a justiciable issue suggested by Lord Simonds in *Labour Relations Board of Saskatchewan v. John East Iron Works* [1949] A.C. 134 (at p. 151) those matters upon which the members of the Commission have to form their judgment are not such as " makes it desirable that the judges " (of those matters) " should have the same qualifications as those which distinguish the judges of superior or other courts."

Their Lordships do not find it necessary to classify the functions of the Commission as legislative, executive or mixed; for it is clear that even in the absence of any statutory remedy for obtaining the annulment of an order of the Commission the legality of the manner in which it had exercised those functions would have raised what is essentially and exclusively a justiciable issue and would, at common law, have been open to review by the Supreme Court by means of the prerogative writs.

A statutory remedy, however, is provided by section 86 (2) to (9). The most important of these subsections are subsections (2) and (7), but it is best to reproduce all of them in full.

> " 86. . . . .
>
> (2) Within one month of the publication of an order, any elector may, in the manner prescribed by Rules of Court, appeal to the Full Court of the Supreme Court against that order, on the ground that the order has not been duly made in accordance with this Act.
>
> (3) The Commission shall be the respondent to any appeal under this section.
>
> (4) Where an appeal has been instituted under this section, the order shall not take effect until the appeal has been disposed of.
>
> (5) Where more than one appeal is instituted against the same order, every such appeal may be dealt with in the same proceedings.
>
> (6) In any appeal under this section, any person having an interest in the proceedings may, upon application to the Court, be joined as a party to the proceedings.
>
> (7) On the hearing of an appeal under this section the Full Court may—
>
> (*a*) quash the order and direct the Commission to make a fresh electoral redistribution;
>
> (*b*) vary the order;
>
> or
>
> (*c*) dismiss the appeal,
>
> and may make any ancillary order as to costs or any other matter that it thinks expedient.
>
> (8) The validity of an order of the Commission shall not be called in question except in an appeal under this section.
>
> (9) An appeal against an order of the Commission shall be set down for hearing by the Full Court as soon as practicable after the expiration of one month from the date of the order, and the appeal shall be heard and determined by the Full Court as a matter of urgency."

Their Lordships must first dispose of the contention advanced by the respondents that the jurisdiction created by subsection (2) is not conferred

upon the Supreme Court of South Australia as such and exercisable by the Full Court under section 48, proviso (1) (*f*), of the Supreme Court Act, 1934–1975, but is conferred upon any three, or if three are not available, any two judges of the Supreme Court as *personae designatae*. In their Lordships' view the new section 86 is quite incapable of bearing that construction. The references to " Rules of Court " and to " the Full Court of the Supreme Court " instead of to its judges are far too strong. Their meaning is clear and unequivocal and, as their Lordships will show, the character of the jurisdiction conferred by subsection (2) provides no justification for giving to the latter expression anything but its ordinary meaning.

The right of appeal conferred upon electors by subsection (2) is not an appeal *from* the order of the Commission but *against* the order and the only ground on which it can be brought is " that the order has not been duly made in accordance with this Act ". These words are apt to confine the right of appeal by an elector to an appeal upon the same grounds as those upon which, in the absence of subsection (8), the validity of the order of the Commission could have been challenged on certiorari.

The only issue that can be raised under subsection (2) is therefore one of law. An appeal upon the stated ground does not entitle the Full Court of the Supreme Court to enter into the merits of the electoral redistribution for which the order provides, still less does it empower the court to substitute its own opinion for that of the Commission as to the most appropriate way of drawing the boundaries between any of the electoral districts into which the State is to be divided by the order. Its only concern is whether the order is *ultra vires* the Commission by reason of some illegality in the form or contents of the order, the procedure adopted by the Commission in the making of it or by reason of their failure to give consideration to matters to which section 83 requires them to have regard or their having had regard to matters that no reasonable body of persons could regard as relevant.

The plaintiff's argument to the contrary is based and, as his Counsel candidly concedes, is based exclusively upon the grant by subsection (7) to the Full Court of a power on the hearing of an appeal under the section to vary the order as an alternative to quashing it and directing the Commission to make a fresh electoral redistribution. An electoral redistribution, so runs the plaintiff's argument, calls for the balancing of conflicting considerations and is of its very nature one in which the alteration of the boundary between any two electoral districts so as to transfer electors from one of them to another, may have repercussions which alter the balance in other electoral districts and call for consequential changes in them. It is not a matter that can properly be dealt with in isolation. So from the grant to the Full Court of a power to vary the order of the Commission on appeal there is to be inferred a parliamentary intention that the Full Court should, if it thought fit to do so, substitute its own opinion for that of the Commission as to the best way of carrying out the redistribution. In doing this, it is contended, the Full Court would be exercising a non-judicial power incompatible with its character as a court of judicature.

This argument, in their Lordships' view, involves giving an impermissible construction to section 86. The only subsection which confers upon an elector a right of appeal against the Commission's order is subsection (2). It confines that right to an appeal on the ground that the order has not been duly made in accordance with the Act, *i.e.* an

appeal on questions of law only. Subsection (7) on the other hand is conferring powers upon the Full Court. The suggestion is that the grant to the Full Court by this subsection of a power to vary the Commission's order as an alternative to quashing it, also confers upon an elector by necessary implication a right of appeal on the merits of the electoral redistribution made by the order. This, it is to be observed, being an appeal on questions of fact and opinion, would be of an entirely different character from the only appeal for which subsection (2) provides.

Even if there were necessarily an inconsistency between the grant of a power to the Full Court to vary an order of the Commission under subsection (7) (*b*) and the restriction of the grounds of appeal to the Full Court against an order of the Commission to appeals upon questions of law under subsection (2), their Lordships have no doubt that subsection (2) ought to prevail. But the highest that any inconsistency can be put is that if the appeal is confined to the question whether the order has been duly made in accordance with the provisions of the Act and precludes the court from considering the order on the merits, there can be no occasion for the court to exercise a power to vary the order. Even if this were so, their Lordships would not regard the inclusion in subsection (7) of a power to vary the order as enlarging the grounds upon which alone a right of appeal is granted to an elector by subsection (2). A power to vary a decision of an administrative tribunal on review by a court of justice is not uncommon, and the draftsman of the Act of 1975 may well have thought it prudent to include such a power in case circumstances might arise in which it would be useful even though he had not attempted to foresee what those circumstances might be. A particular reason for not neglecting such a precaution is the problem of delay. If the order of the Commission is quashed the whole procedure has to start again from the advertisement in the press inviting fresh representations. Many months may pass before any fresh order can come into effect, during which polling day may have come and gone.

However, all inconsistency vanishes if it be possible to point to even one situation in which the Full Court would have jurisdiction to vary an order of the Commission on appeal under subsection (2). Their Lordships have already indicated their view that upon the true construction of the Act the Full Court has no jurisdiction to substitute its own opinion for that of the Commission as to where the electoral boundaries between any electoral districts should be. Section 83 and particularly paragraph (*f*) and the reference to " any other matters that it (sc. the Commission) thinks relevant ", make it clear that there are matters which the Commission alone is competent to decide. So any power of variation must be a narrow one.

An example suggested in the course of the argument is where the award contains a patent error. Instances might be where the order omits from the verbal description of the boundaries of one district, a part of the boundary, thus offending against section 82 (5), although that part of the boundary between them is included in the description of the boundaries of the adjacent district; or where there is a discrepancy between a boundary as delineated on the map and that boundary as verbally described. A variation to correct errors of these kinds would not involve the Full Court in giving effect to a redistribution different from that which the Commission itself had intended to make.

One instance is enough to destroy any argument based on a supposed inconsistency between subsection (2) and subsection (7). Their Lordships do not think it would be helpful to canvass other hypothetical situations

in which the Full Court might think it appropriate to exercise a power to vary the order of the Commission. The discretion whether and in what circumstances to exercise the power is theirs, so long as the variation does not involve a redistribution different from that which the Commission had intended to make by its order.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed and that the order of the Supreme Court of South Australia of 3rd November 1976 should be affirmed. The appellant must pay to the respondents their costs of this appeal.

3176575—6 Dd 119907 80 5/77

In the Privy Council

JAMES BARTON GILBERTSON

v.

THE STATE OF SOUTH AUSTRALIA AND ANOTHER

DELIVERED BY
LORD DIPLOCK

Printed by HER MAJESTY'S STATIONERY OFFICE
1977