

REGINA v. LAMPE; EX PARTE MADDALOZZO¹

Constitutional Law—Ultra Vires—Application of the maxim ‘delegatus non potest delegare’—Legislative and administrative power—Sources of legislative power in the Territories—Mandamus—Executive power.

Maddalozzo sought an order for mandamus to require members of a Building Board appointed under the Building Ordinance 1955 (N.T.) to hear and determine a building application.

The applicant had applied to the Board for a building permit under the Ordinance. The Board specified certain conditions in regard to the building which the applicant contended were outside the material which the Board was legally entitled to consider.

The Building Ordinance was made by the Legislative Council of the Northern Territory under section 4U of the Northern Territory (Administration) Act 1910-1962 (Cth). The Ordinance gave power to the

¹ Judgment 29 March 1963, not yet reported; Supreme Court of the Northern Territory; Bridge J.

Administrator to make regulations prescribing, amongst other things, the conditions subject to which buildings might be erected, the conditions under which licences for the erection of buildings might be issued and the standards required in the presentation of plans and drawings for the consideration of the Board.

The Regulations made under the Ordinance provided for the Board making determinations on a variety of matters and for their publication in a building manual. Regulation 33 (3) provided that:

The Building Manual as amended from time to time shall operate according to its tenor and may be applied by the Board in the discharge of its functions under the Ordinance or these Regulations or by any officer thereof in granting any permit which it or he is authorised to grant or in rejecting any application.

Regulation 25 provided for the submission of applications and plans to the Board and for their examination by an officer of the Board. The Board was required to issue a permit where the plans and specifications complied with the Regulations and any determinations of the Board that had been published in the Building Manual.

The applicant had submitted plans for his proposed building and invited suggestions from the Board. In a letter, the Board informed the applicant that the submitted plans did not conform to various requirements laid down in the Building Manual relating to mechanical ventilation.

The writ of mandamus was sought against the Board on the following grounds:

(1) that the Legislative Council had no authority to delegate its legislative power. Therefore, the regulation making power in the Ordinance was invalid;

(2) that even if the Legislative Council had authority to delegate legislative power to the Administrator, the power conferred by the Ordinance was exercisable solely by the Administrator as the sole delegatee, without any power of subdelegation by him. Consequently, any of the building regulations purporting to effect a subdelegation to the Building Board were invalid;

(3) that even if the Administrator had validly exercised authority under the Ordinance to empower the Board to make determinations for inclusion in the Building Manual the relevant determinations made by the Board exceeded the power conferred upon it by the Regulations.

Bridge J. held:

(a) that the Legislative Council had power to delegate legislative functions to the Administrator and had validly done so;

(b) that the Administrator was not authorised by the Ordinance to delegate legislative power to the Board;

(c) that the Administrator could, however, confer administrative power on the Board and that the relevant determinations of the Board were in this case 'administrative' and not 'legislative';

(d) that the Board had not made a determination relating to mechanical ventilation. Therefore, in refusing the permit to the applicant, the Board had taken into consideration a matter not dealt with in the determinations. It followed, then, that the noncompliance with the demands made by the Board relating to mechanical ventilation was irrelevant to the proper consideration of the application.

This led his Honour to the conclusion that he had power to issue the writ of mandamus.²

It was pointed out, however, that mandamus was a discretionary remedy and should only be granted where it would be effective.³ In this case, the Board need only have reviewed the applicant's request again, made and published a determination relating to mechanical ventilation and, accordingly, rejected his request once more. Against this rejection, the applicant would have had no valid objection. Mandamus was therefore refused.

The power of the Legislative Council to delegate

It was argued for the applicant that the law-making power of the Legislative Council was not plenary, but merely subordinate. That is, that the Legislative Council is a delegate of the Commonwealth Parliament and, therefore, exercises its powers subject to the maxim *delegatus non potest delegare*.

Section 4U of the Northern Territory (Administration) Act 1910-1962 provides that 'subject to this Act the Legislative Council may make Ordinances for the peace order and good government of the Territory'. Other sections of the Act make provision for the assent of the Administrator, the reservation of Ordinances for the Governor-General's pleasure and the disallowance of Ordinances. Provision is also made for Ordinances to be sent by the Governor-General or the Administrator to be laid before Parliament.

In *R. v. Burah*⁴ the Privy Council dealt with an Act conferring power on the Indian Governor-General in Council to legislate in respect to Indian territories. Of this power the Judicial Committee said:

The Indian Legislature has powers especially limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature as those of Parliament itself.⁵

Similar views were expressed in relation to the Ontario Parliament in *Hodge v. The Queen*⁶; the New South Wales Parliament in *Powell*

² *Brownells Limited v. The Ironmongers' Wages Board* (1950) 81 C.L.R. 108.

³ *The King v. Archbishop of Canterbury* (1812) 15 East 117, 136.

⁴ (1878) 3 App.Cas. 889.

⁵ *Ibid.* 904.

⁶ (1883) 9 App.Cas. 117.

v. *The Apollo Candle Company Ltd*⁷ and the Canadian Parliament in *Riel v. The Queen*.⁸

It was submitted, however, that the powers granted to the Legislative Council of the Northern Territory differed from those conferred on the above legislatures because of the provisions relating to assent, reservation and disallowance. The fact that the legislative power was granted to the Council 'subject to this Act' was also relied on.

Bridge J. rejected these submissions. In doing so he followed a previous decision of Kriewaldt J. in *Namatjira v. Raabe*,⁹ holding that the phrase 'peace order and good government' was 'a traditional formula for the grant of legislative power by a fully (or semi) self-governing community'. He also held that the other provisions of the Act did not destroy or qualify the plenitude of the law making authority but merely prescribed conditions to which the exercise of the legislative power was made subject. The Commonwealth Constitution (sections 58-60) also contains provisions for assent, reservation and disallowance, but it has never been suggested that those provisions affected the plenary nature of the legislative powers of the Commonwealth Parliament.

It was held, therefore, that the Legislative Council was not a mere delegate in respect of its legislative power. It was, therefore, not affected by the operation of the maxim *delegatus non potest delegare*.

Power of the Administrator to delegate legislative and executive authority

Whether the maxim *delegatus non potest delegare* was applicable to delegated law-making authority was dealt with in relation to the regulation-making power of the Administrator under the Ordinance. This was clearly delegated and not plenary power.

The Court referred to a number of cases in which the application of the maxim to delegated legislation had been judicially approved in both England and New Zealand, but regarded the question as an open one in Australia. His Honour accepted the general principle that a delegate of specified legislative powers must discharge the legislative functions himself and cannot transfer them to other authorities. This principle he thought was based, not on the maxim, but on

... the proposition that a delegation of specified legislative powers does not extend beyond the powers so specified, and except in so far as they include the powers as so specified, and except in so far as they include the powers to sub-delegate, any purported delegation of them is ultra vires the terms of the delegation.

It is difficult to see how there is any conflict between the approach adopted by Bridge J. in this case and those who claim that the maxim is applicable to grants of specified legislative powers. The maxim itself is not a rule of law, but merely a label by which a rule is known. The rule of law that this particular maxim describes is that unless a

⁷ (1885) 10 App.Cas. 282.

⁸ (1885) 10 App.Cas. 675.

⁹ (1958) unreported.

delegate of legislative power is granted, either expressly or by necessary implication, a power to sub-delegate, then the delegate has no such power.¹⁰ The maxim, therefore, merely describes the rule that Bridge J. upholds and is clearly not an alternative.

His Honour found that there was nothing in the Ordinance to indicate that the Administrator had authority to delegate his regulation making power. However, he regarded the relevant determinations of the Building Board as an exercise of executive power and held that executive power was delegable even if the legislative power was not.

This distinction was supported by the dictum of Scott L.J. in *Blackpool Corporation v. Locker*.¹¹

It is, however, of little assistance to pursue the subtle and sometimes arbitrary distinction between legislative and administrative functions. In fact most functions that come under consideration in this way are both legislative and administrative in some respects and the distinction usually depends on the status of the body as judged from its overall purpose and not solely from its individual powers. The only relevance of this distinction is that the more administrative in character a function is that the body has to perform, the more ready the courts will be to imply a power of sub-delegation.

Power of the Commonwealth Parliament to delegate legislative power to the Northern Territory Legislative Council

One problem not dealt with in the present case might be mentioned here. Although the power granted to the Legislative Council is not regarded as delegated power for the purposes of the maxim *delegatus non potest delegare* it is, in a constitutional sense, the delegation by the Commonwealth Parliament of its plenary power under section 122 of the Constitution to another body. In *Namatjira v. Raabe* Kriewaldt J. had affirmed the proposition that the powers granted by the Constitution under section 122 were plenary and this was affirmed by the High Court.¹²

In this case Bridge J. pointed out that the words 'peace order and good government' in section 4U of the Northern Territory (Administration) Act 1910-1962 conferred plenary power on the Legislative Council.

This clearly amounts to a transfer of power and in *Victorian Stevedoring Company and Meakes v. Dignan*¹³ Dixon and Evatt JJ. both expressed the view that the transfer by the Commonwealth of one of its enumerated powers to another body was not an exercise of that power.

There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a

¹⁰ *Jackson Stansfield and Sons v. Butterworth* [1948] 2 All E.R. 558, 565.

¹¹ [1948] 1 K.B. 349, 368.

¹² (1959) 100 C.L.R. 664.

¹³ (1931) 46 C.L.R. 73.

law with respect to any particular head or heads of legislative power. (Dixon J.)¹⁴

On final analysis therefore, the Parliament of the Commonwealth is not competent to 'abdicate' its powers of legislation . . . because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the Constitution. (Evatt J.)¹⁵

Is the legislative power under section 122 a power with respect to a subject matter? The following dictum of Dixon C.J. in *Lamshed v. Lake* seems to suggest that it is.

To my mind s. 122 is a power given to the national Parliament of Australia as such to make laws 'for', that is to say, 'with respect to' the government of the Territory. The words 'the government of any Territory' of course describe the subject matter of the power.¹⁶

Thus it may be argued that section 4U of the Northern Territory (Administration) Act 1910-1926 is invalid, being not a law with respect to legislative power but a law transferring legislative power.

In *Wishart v. Fraser*¹⁷ it was held that a delegation of wide legislative authority under the defence power was permissible even though very broad and uncertain. It was pointed out, however, that the defence power was a power with respect to a purpose and not a power with respect to a subject matter. A wide delegation was in the circumstances referable to the purpose of defence, quick, flexible and detailed legislation being necessary to the defence of the nation.

However, the present Chief Justice may consider his reasoning in *Dignan's* case to be inapplicable to section 122. A distinction may be drawn between the powers granted in section 51 and section 122 in that the latter is not defined with reference to a description of conduct, activity or head of law. It is a power to make laws for the government of a Territory.

In *Lamshed v. Lake* Dixon C.J. pointed out that this 'itself contemplates the establishment of governmental institutions'.¹⁸ It may be that this contemplates more than the setting up of a local government administration and extends to a body exercising the plenary power under section 4U.

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¹⁴ *Ibid.* 101.

¹⁵ *Ibid.* 121.

¹⁶ (1958) 99 C.L.R. 132, 141.

¹⁷ (1940) 64 C.L.R. 470.

¹⁸ (1958) 99 C.L.R. 132, 148.