



Court of Appeal of the Cook Islands

17 November 2014

MINISTER OF COOK ISLANDS NATIONAL SUPERANNUATION FUND v	
ARORANGI TIMBERLAND LIMITED	First Respondent
and ANDY OLAH	Second Respondent
and MANEA FOODS	Third Respondent
and BECO LIMITED	Fourth Respondent
and JAMES BEER	Fifth Respondent
and SUPER BROWN LIMITED	Sixth Respondent
and RAINA TRADING LIMITED	Seventh Respondent

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment.

This case concerns the constitutionality of the Cook Islands National Superannuation Act 2000 (“the Act”). That Act established a compulsory Superannuation Fund (“the Fund” or “the Scheme”) in the Cook Islands.

On 31 January 2014, the Chief Justice of the Cook Islands delivered a judgment declaring that the Act was invalid, being in breach of Article 64(1)(c) of the Cook Islands Constitution (“the Constitution”) in that it involved an unconstitutional deprivation of the property of employers and employees who were compelled by law to make contributions to the Fund which could not be justified by reference to Article 65(2) of the Constitution.

The Minister of the Cook Islands National Superannuation Fund appealed this decision and sought an order that the Act was not unconstitutional.

The first issue before the Court of Appeal (“the Court”) was whether the Act constituted a compulsory taking or acquisition of property, contrary to Article

40(1) of the Constitution. In agreement with the Chief Justice the Court has decided that the requirement for compulsory contributions falls within the principle of general regulation and public interest, and therefore does not amount to a taking of possession or acquiring of property.

Given the above finding, there was no need for the Court to consider the Minister's alternative argument that the requirement for compulsory contributions constituted "tax" under Article 40(2)(a) and was therefore not unconstitutional. However, for completeness, the Court noted that had it been necessary to make a determination, the Court's view would have been that the contributions did not fall within the exemption for tax.

The second issue was whether the Act infringed the general right to "security of the person", contrary to Article 64(1)(a) of the Constitution. The Court has agreed with the Chief Justice that "security of the person" means physical security and does not encompass economic security. The Act therefore does not contravene Article 64(1)(a).

The third issue was whether the Act infringed the general right not to be deprived of property, contrary to Article 64(1)(c) of the Constitution. The Court has agreed with the Chief Justice that there was a deprivation of property under the Scheme. The Court has considered the genesis, structure and implementation of the Scheme and has undertaken a thorough review of the Constitution and the applicable principles of constitutional interpretation. It also made reference to the political and economic history of the Cook Islands and the obvious influence of these events on the structure of the Act and the Scheme. After considering all these matters, the Court determined that, on balance, the limitations imposed by the Act, namely the deprivation of property resulting from the compulsory nature of the Scheme, were outweighed by the significant benefits of the Act in promoting the general welfare of the Cook Islands people and were justified under Article 65(2) of the Constitution. The Court of Appeal also found that, at the time of its enactment, it would not have been feasible to include in the Act the added features which the Respondents claimed should have been incorporated in the Act and the Scheme. In any event, it was not established that those features were necessary or desirable.

The Court was unanimous in its decision. The appeal was accordingly allowed, the judgment of the High Court set aside, and the Court has formally declared that the Act is a valid enactment of the Parliament of the Cook Islands.

The question of costs was reserved for later consideration, but the Court has expressed the following provisional view as to costs: "However, the provisional view of the Court is that it is not appropriate to make any cost order. While the Respondents have ultimately failed to establish the unconstitutionality of the Act, their arguments were not without merit and

raised questions of general public importance. Indeed, the Court ventures to hope that the public ventilation of these issues might well lead the Government to conduct, with the assistance of outside experts, a formal general review of the Act to ascertain whether there are presently any areas where amendments might be warranted.”

Unanimous judgment of the Court of Appeal delivered by David Williams (President), Sir Ian Barker (Justice of Appeal) and B.J. Paterson (Justice of Appeal).

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