

Fotofili v Free Wesleyan Church of Tonga & Kingdom of Tonga

10 Supreme Court, Nuku'alofa
Ward CJ
Civil Case No. 510/94

2 September - October 1994

Administrative Law - judicial review

Judicial review - abuse of process - striking out

20 *Practice and procedure - judicial review - writ - striking out*

A writ had been issued in the Supreme Court covering not only matters struck out of a still pending Land Court action between the same parties but including also the matters still left alive and proceeding in the Land Court.

On a motion to strike out the writ,

Held:

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1. It was an abuse of the process of the Court to attempt to have the Land Court matters within that Court's jurisdiction as agreed by the Plaintiff, considered in the Supreme Court also.
 2. As to the balance of the claim that was a challenge to the way in which the Minister of Lands had exercised his powers (under the Aerodromes Act).
 3. That challenge should have been the subject of an application for judicial review which is a procedure available to challenge the nature of the decision making process and not the merits of the decision itself.
 4. Such a procedure provides certain safeguards against abuse of the Court's process and so to proceed by writ and in that way circumvent the safeguards, it itself an abuse of the Court's processes.
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 5. The proper procedure being to apply for leave to apply for judicial review to then proceed by way of writ well after the time for applying for leave has expired, is also an abuse of the process.
 6. The writ should be struck out.

Cases referred to : O'Reilly v Mackman [1982] 3 All ER 680 (CA) and
[1982] 3 All ER 1124 (HL)
50 Cocks v Thanet D.C. [1982] 3 All ER 1135

Rules referred to : Supreme Court Rules O.27

Counsel for plaintiff : Mr Edwards
 Counsel for first Defendant : Mr Fa
 Counsel for second Defendant : Mr Taumoepeau

Judgment

60 On 19 August 1993, the plaintiff filed a claim in the Land Court against these two defendants.

On a motion brought by the first defendant, a substantial portion of the claim was struck out as being outside the jurisdiction of the Land Court. The part that remained awaits a hearing in that Court.

70 Following the decision on the Land Court motion, the plaintiff filed a claim in this Court which includes the matters excluded from the Land Court case. The first defendant now moves to strike them out in this Court also. I would add that the present claim includes the matters still proceeding in the Land Court. I have already considered they are within the jurisdiction of the Land Court and I shall not consider them in this case. It was the basis of the plaintiff's submission in the Land Court that they were within its jurisdiction and I accepted that. It is an abuse of the process of this Court to attempt to have the matter considered here also.

80 The first defendant holds a lease over 661 acres forming part of the hereditary estate of the plaintiff. When, at the close of the last decade, the Government extended the airway at Fua'amotu Airport, the Minister ordered, under section 5 of the (since repealed) Aerodromes Act, the removal of trees crops and fences over 159 acres of the first defendant's leasehold land. The Minister also, under the same section, ordered compensation to be paid.

As a result, in 1990, a total of \$215,092.00 was paid by the Government to the first defendant. The plaintiff claims that the proportion of the compensation paid for coconut and other trees and timber amounting to \$178,255.34 should have been paid to him.

Although the first defendant moves on a number of grounds, they all amount, in essence, to a single issue; that this case should have been brought as an application for judicial review and not by writ.

90 The same point was raised by Mr. Fa, for the first defendant, in the Land Court as the reason it was outside the jurisdiction of that Court and Mr. Edwards makes the preliminary objection that I have already ruled on this part of the claim. That is incorrect.

In the Land Court, it was necessary to consider this aspect sufficiently only to decide whether or not it fell within that Court's jurisdiction. However, in reaching that decision I formed a preliminary view of the issue.

In my ruling, I said:

100 *Mr. Fa points out that paragraphs 1 - 15 amount to no more than a challenge of the Minister's decision to pay compensation to the first defendant and should have been the subject of an application for judicial review Judicial review allows the Court to exercise a supervisory role over, inter alia, public bodies and tribunals. A ministerial act may be challenged by such an

action and the special procedure laid down in O.27 is intended to define the limits of the right to obtain such an order. Recent decisions in England in relation to the equivalent O.53 have tended to limit the right to proceed by way of writ where the claim is properly one for judicial review (see, for example, O'Reilly v. Mackman [1982] 3 All ER 1124 and Cocks v. Thanet District Council [1982] 3 All ER 1135). In this case the prayer does not seek any of the orders encompassed by O.27 but that is the nature of the claim in paras 1 - 15 and the Land Court should not have been involved.*

110 That was a preliminary view and obiter the Land Court decision but having now heard full argument in this Court, I see no reason to change my mind.

Judicial review is a procedure to challenge the nature of the decision making process not of the merits of the decision itself. It is such a case it should have been brought under Order 27 and not by writ and I need go no further.

The portion of the claim that deals with this issue (paragraphs 9 - 14) makes complaint only about the second defendant. No challenge is made of the right of the Minister to order the removal of the trees and crops for the airport extension nor of the nature and amount of the compensation ordered and paid.

120 His complaint is that it was wrongfully paid to the first defendant and, in paragraph 13 he sets out particulars of that wrongfulness. He suggests the Minister misapplied the law in relation to the meaning of Landholder and, as a result and despite having notice of his claim, did not consider the plaintiff's claim. He then wrongly concluded the Government's duty ceased on payment to the person in possession of the land.

Those challenge the way in which the Minister exercised his powers under the Aerodrome Act and should have been the subject of application for judicial review under Order 27.

130 That procedure provides certain safeguards against abuse of the Court's process and so, to proceed by writ and in that way circumvent the safeguards, is in itself an abuse of the Court's process.

In O'Reilly v Mackman [1982] 3 All ER 680 at 695 Denning M.R. said in the Court of Appeal:

140 "... wherever there is available a remedy by judicial review that remedy should be the normal remedy to be taken by an applicant. If a plaintiff should bring an action, instead of judicial review, and the defendant feels that leave would never have been granted under Ord 53, then he can apply to the court to strike it out as being an abuse of the process of the court. It is an abuse to go back to the old machinery instead of using the new streamlined machinery. It is an abuse to go by action when he would never have been granted leave to go for judicial review.*

And at 696 concluded:

"My conclusion is that the only appropriate remedy in this case was by judicial review under Ord 53. If leave had been sought, it would certainly have been refused. No judge would have granted it. It is far too late. I would, therefore, allow this appeal and strike out this action as being an abuse of the process of the court.*

The House of Lords subsequently affirmed this approach [1982] 3 All ER. 1124.

150 I consider the proper procedure in this case should have been to apply for leave to

apply for judicial review and proceeding by writ well after the time for applying for leave has expired, amounts to an abuse of process.

The writ is struck out with costs to the defendants.