Touliki Trading & anor v Fakafanua & Kingdom of Tonga (No.2)

Court of Appeal
Burchett, Tompkins & Neaves JJ
App.3/95

20, 21, 22, 23, & 31 May 1996

Constitution - property rights - interpretation - jurisdiction
Administrative law - judicial review - basis of
Statutory interpretation - Constitution - principles

This was the appeal by the unsuccessful plaintiffs, exporters of squash pumpkin, against the judgment of the Supreme Court (reported in 1995 Tonga L.R.) dismissing their constitutional and administrative law challenges to the governments imposition of a quota system, the fixing of a total quota figure and the allocation of quota.

Held:

1. The claim that the appellants had signed agreements as to quota only under duress (i.e. that they would not get licences unless quota limits were agreed) did not amount to economic duress within the authorities.
2. The claim that natural juustice was denied the appellants in relation to the amount of the total quota for 1994 was rejected on the facts.
3. The appellants claimed that an amendment act in 1993 to the Licences Act (allowing the maximum quantity of any produce or commodity which may be exported) and an Order in Council of 1994, made pursuant to it (limiting the amount of squash to be exported in 1994) were invalid under the Constitution.
4. Jurisdiction of the Court, founded in Cl.90 off the Constitution to examine legislation was clear - if on a true construction of the Constitution some event or circumstance is made a condition of the authentic expression of the will of the legislature, or otherwise of the validity of a supposed law, it follows that the question whether the event or circumstance has been met is examinable in the Court, notwithstanding that the question may involve internal proceedings of the Assembly. A statutory provision can be examined and struck down if it is contrary to an express provision of the Constitution although its passage through the House was not attended by any irregularity.
5. Reliance having been placed on various Clauses of the Constitution (Clauses 14, 14, 17) by the appellants, they should be examined in the light of an understanding of their place in the Constitution, it being read broadly with an eye to its continuing effectiveness both as the people's guarantee of fundamental rights and as a practical instrument of government.
6. Cl.1 contains a profound philosophical concept linking the inhabitants of the

Kingdom with the whole of human kind as inalienably free and equal. This is the fundamental basis of all that follows but is also a constitutional guarantee against both slavery and serfdom, and the arbitrary or despotic exercise of power. The second sentence of Cl.1 is not an independent guarantee with respect to property rights - cls.14 & 18 provide that - but a statement of a corollary of the opening affirmation of human liberty and equality. The Constitution does not place first the possessions of Tongans but their liberties.

7. The Constitution proceeds to deal with property, taxation, resumption and other significant matters affecting the organisation and activities of the State, but, before doing so, gives concrete application to the basic opening statement, in a series of clause which are concerned with the implications of the constitutional entrenchment of human liberty. Only indirectly are any of them concerned with questions relating to property.

8. Cl.14 in context, is not a provision about the resumption of citizens' property or about planning or other regulatory measures or restrictions affecting the use of property but is a guarantee against arbitrary criminal procedures leading to capital punishment, a fine or confiscation of property, or imprisonment. The clause is not directed against legislative action.

9. The first clause directly concerned with questions of property is cl.18, providing for taxation according to law and for resumptions of land upon payment of the fair value.

10. Cl.1 in saying that "all men may use their lives and persons and time" to do certain things and "to use their own property as they will" does not provide an independent guarantee designed to forbid legislation restricting the use of private property. That would mean any kind of legislation regulating the use of property, whether for an economic, environmental, social, aesethetic, health or any other reason, would collide with the Constitution. Such a meaning over looks the grammar and syntax, and the history, and would be unworkable.

11. The appellants' argument for that meaning accepted that there must be some unexpressed limitation i.e. that all legislation affecting private property was prima facie constitutional so that, if it was challenged, the government had to prove a justification for it to the satisfaction of the court, was rejected. There was nothing in the language or the historical context to suggest the draftsman had anything of the sort in mind and the suggested limitation should not be imposed by an ipce dixit of the court. No such limitation is necessary because cl.1 (is a guarantee of personal freedom, including freedom to use freely the property a person does own, which he necessarily owns by law.

12. Cl.1 says nothing to restrict the ability of the State to enact laws regulating the use by a citizen of his property in the interests of society or of other citizens. Where property was intended to have some measure of immunity cls.18 & 48 show the draftsman knew how to counter it.

13. Cl.4, it was argued, forbade a law affecting a particular group in the community and exporters of squash are such a group. But growers or exporters are not a "class" and the laws about export of squash apply equally to every person who wishes to grow or export squash. So cl.4 was of no assistance to the appellants.

14. Accordingly the constitutional attack on the amending Act and the Order-in-

Council failed.

15. As to the adminstrative law challenges and the claims of denial of natural justice, the taking into account of irrelevant considerations, and of bias, the judge below was entitled to dismiss them quite tersely, as he did. There was no failure shown.

16. Unusually for an administrative law case the facts were very fully explored in evidence, because administrative law does not provide an appeal on the merits but a review of the procedure followed, including the lawfulness of the taking into account of matters considered.

17. The law requiring the principles of natural justice to be observed is a law of primary importance. If a matter is to be taken into account against someone in the making of a decision there must be an opportunity to make answer. And there will be no real opportunity unless the matter on which the answer is required is made known to him who must answer. There was no such breach by the Minister demonstrated where. These challenges failed.

Cases considered : News Ltd v Aust. R.F.L. (1996) 58 FCR 447; 135 ALR 33
Dimskal Shipping v Int. Transport Workers Fed. [1992] AC 152
Fuko v Vaikona [1990] Tonga LR 148
Min. of Lands v Pangia (Scott J, 1952)
Fotofili v Siale (3/8/97, Privy Council) [1996] Tonga LR 227
Allied Structural Steel v Spannaus (1978) 438 US 234
Home Bldg & Loan Assn v Blaisdell (1934) 290 US 398
U.S. Trust Co. v State of New Jersey (1977) 431 US 1
James v Clwealth of Australia [1936] AC 578
Cole v Whitfield (1988) 165 CLR 360
Nationwide News v Wills (1992) 177 CLR 1
Australian Capital T.V. v C/wealth (1992) 177 CLR 106
Equal Opportunities Cmmsn v Sec. State for Employment [1994] 1 All ER 910
Hudson Water Co. v McCarter (1908) 209 US 349
Ram v Min. for Immigration (1995) 130 ALR 314
Poananga v State Services Cmmmsn [1985] 2 NZLR 385
Min. of Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Statutes considered : Licences Act (s.5 and Order-in-Council, 1994)
Constitution

Counsel for appellants : Mr Harrison QC and Mr Macdonald
Counsel for first respondent : Mr C Edwards
Counsel for second respondent : Mrs Taumoepeau

Judgment

The export of squash pumpkins to Japan is of great economic importance to Tonga. As a consequence of governmental concern to ensure the continuing success of this trade, after a few years of attempts at voluntary regulation, the Tongan legislature passed an Act amending the Licences Act specifically for the purpose of authorizing an Order-in-Council to regulate it by the imposition of a quota system. In respect of the 1994 season for exports to Japan, the system was introduced. The appellants, who are exporters involved in that trade, brought an action in the Supreme Court challenging the constitutional validity of the amending Act and of the Order-in-Council, and also challenging, on administrative law grounds, the fixing of the total quota figure by the Privy Council and the allocation of quota as made by the responsible Minister, the First Respondent. Their action having failed in the Supreme Court, they have appealed to this Court.

A difficulty should be noted at the outset. Since the 1994 season has long passed, the success of one or more of the administrative law arguments could not lead to an increase in the quota for the appellants for the year in question. Even had the matter been decided before the season ended, there would have been no assurance that a reconsideration of the quota would have assisted the appellants. The same decision might have been reached on unassailable grounds. Indeed, it is difficult to envisage success of the administrative law challenge to the allocation of the appellants' quota alone as ever having had a prospect of achieving a useful result for the appellants. Provided the Order-in-Council validly fixed the total quantity of squash allowed to be exported for the season, the allocation of the appellants' quota could not be varied in their favour without a reduction of the quota fixed for other exporters. That is because the whole quantity available for allocation was allocated. In this situation, a Court could hardly have ordered a reconsideration of the appellants' quota in an action in which the other exporters had not been joined. On the other hand, the issue of the validity of the Act and Order-in-Council can lead, in proceedings to which the Kingdom is a party, to a declaration of invalidity in the event of the appellants' success.

The background should be stated in a little more detail. The squash market available to Tonga in Japan has been called a "niche market". It is limited to a season of a few months from October to December, as Japanese consumers obtain their squash during the larger part of each year from domestic production or imports from other countries, such as Mexico or New Zealand. In 1991, concerns that the volume of exports into this niche market required to be limited, and that the export of large quantities of squash, including poor quality squash, endangered Tonga's export trade, led to the sending to Japan of what was called the "Government's Squash Investigating Team", which reported in January, 1992. It concluded that a large increase in the volume of squash exported in 1991 "had a major effect on the wholesale price" in Japan, causing Japanese importers "a loss of at least T$2.7 million". The industry had grown enormously in a few years, and it was "important to maintain cordial business and working commercial relationship with Japanese importers". Trust was "paramount". The report specifically referred to a need to limit the volume of squash exported, on grounds both of "the absorptive capacity of the Japanese market" and of the need to "ensure high quality and high prices for the season". There was reference to "the export licensing system" as "probably the only system" available within the existing legislative framework, and there was a formal recommendation that "Tonga must control the export tonnage".

Following this very comprehensive report to the Government, the squash exporters of Tonga, including the appellants, all signed a letter referring to an undertaking given to the Minister of Labour, Commerce and Industries (the First Respondent) on 3rd March 1992 setting "agreed allocations" for each of them for the 1992 season, on the basis that total exports would be limited to 10,000 metric tonnes. The letter stated that "consensus" had been reached, though with difficulty, and that "each and every one of us made concessions in the national interest, and to reciprocate the trust that you (i.e. the Minister] have placed on [sic] us".

In 1993, the squash exporting companies (which were seven in number) again met with the Minister, and a document entitled a "Memorandum of Agreement", dated 27 April 1993, was signed on behalf of each. It set out what it called agreed conditions "previously endorsed in meetings of the Squash Exporters and Officials of the Ministry ... in March and April, 1993". The first was that "the total tonnage of squash to be exported to Japan in 1993 shall be 13,000 MT" (i.e. metric tonnes).

The second was:

> "That the allocated tonnage stated hereunder shall be the export quota for each of the Seven Companies and that each Company shall not exceed it 's export quota unless approved by the Hon. Minister for Labour, Commerce and Industries."

A table of allocations immediately followed this clause, totalling 13,000 metric tonnes, of which the appellants' shares were 1250 MT and 2250 MT respectively. Then the next clause, clause III, contained two sub-clauses:

> "1. That any export of squash in excess of 13,000 MT shall not exceed 10% of the 13,000 MT and only with the approval of the Hon. Minister for Labour, Commerce and Industries. [Emphases added].
>
> 2. That as determined by the market environment and shipping arrangements a review will be held on the 2nd week of September 1993, and that any changes be subject to the approval of Hon. Minister for Labour, Commerce and Industries."

There was also a cl.X, directly forbidding "poaching" of growers registered with one exporting company by another.

In each of 1992 and 1993, licences where issued by the Minister, following these agreements, to each of the exporting companies, pursuant to the provisions of the Licences Act. Notwithstanding the documents, the appellants argued that the expressions of agreement they had signed in 1992 and 1993 were signed only under duress. The duress alleged was that no licence would be issued unless quota limits were agreed. It is difficult to see how this could amount to economic duress within the authorities, which were recently reviewed in the Australian case News Limited v. Australian Rugby Football League Limited (1996) 58 FCR 447; 135 ALR 33. See also Dimskal Shipping Co. SA v International Transport Workers Federation [1992] 2 AC 152. But in any event, there is in evidence a letter, dated 13 February 1992, on the letterhead of the second appellant, signed by the moving force in both appellants, Dr. Sevele, which expressly endorses the recommendations of the Government's Squash Investigating Team, and expressly stated that the "volume of squash exports for 1992 season must be restricted to 10000 MT to 12000 MT for the niche market".

When agreement was reached on 10,000 metric tonnes, with provision for allowance

of a tolerance of 10%, i.e. another 1,000 tons, for 1992, it seems very unlikely that any duress (even of the most attenuated kind) was involved.

Notwithstanding the agreements, the appellants exported substantially above their quota in both 1992 and 1993. Other companies also exceeded quota, but not to the extent that the appellants did in 1992, and to nothing like the extent that the first appellant did in 1993, or that the two appellants did in 1993, if they are taken together, as their own application to exceed their quota, made on 2 November 1993, sought that they be. The evidence is that the importance of a quota system was repeatedly stressed to the Minister on a visit to Japan in 1992, and that in 1993 he stressed at a meeting with the appellants and others that he "took a serious view of their conduct" (i.e. in breaching quota). Also in 1993, legislation was introduced into Parliament to enable quota to be imposed by law. The appellants contested the point, but there seems no reason to doubt that the major purpose of the legislation was to implement the report of the investigating team already referred to and to impose more effective control over exporters who did not honour agreements setting quota. The Licences (Amendment) Act 1993 was passed on 2 November 1993, and the royal assent was given on 3 January 1994. By this Act, a new subs. (4) was added to s.5 of the Licences Act, as follows:

"(4) (a) The Privy Council may by Order-in-Council from time to time fix the maximum quantity of any produce or commodity that may be exported in such period as the Council shall deem fit.

(b) If a maximum quantity is fixed under paragraph (a) of this subsection the Minister of Labour Commerce and Industries shall exercise discretion in alloting such quantity to licencees."

An Order-in-Council, as contemplated by this provision, was made by the Privy Council on 8 April 1994, limiting the "maximum quantity of squash to be exported to Japan under the Licences Act for the last quarter (October - December) in 1994 [to] 17,000 metric tonnes". In due course, as required, the Order-in-Council was laid before the Legislative Assembly, and the Government Gazette of 1 November 1994 records that it was "passed by the Legislative Assembly of Tonga on 15 June, 1994."

While the Act was awaiting assent, and before the Order-in-Council was made, a further report was issued assessing the impact of the 1993 squash export season and assessing the prospects for 1994. It is dated 8 December 1993. Although a report to the Tonga Development Bank, it was publicly available, and must obviously have been of great interest to squash exporters. Under the heading "Executive Summary", the report makes nine points. The first is:

> "The Japanese Importers were very disappointed with Tonga for not adhering to the quota set earlier in the year. This results in a loss of confidence in dealing with Tonga.
>
> However, the passing of the new law with regards to power to control export volume has opened up a door for further involvement under the existing arrangments.
>
> The proposed volume for 1994 is 13,000 MT".

(It will be observed the Bank had no doubt about the role of the new Act.). The ninth point returned to the major issue, asserting that Tonga "must ... instigate an effective quota system". The body of the report contained much material supporting the primacy given to the issue of quota. It stated that the "excessive import in 1993 has very serious

implications", referring to disruption of the markets in Japan, the creation of "mistrust in the Japanese importers and wholesalers", and the danger of the importers "losing all confidence in dealing with Tonga" It states: "The Importers are expected to lose a lot of money this year." That, of course, would be on top of losses in 1992 of several millions of dollars. But the report suggests that the new Act, which it says "should be used effectively to control the export quota for 1994", has prospects of improving market expectation in Japan.

It was in this situation, with the Bank report indicating it was proposed that total exports would be fixed under the amended Act at as low a ceiling as the 13000 metric tonnes fixed for, but exceeded in, the previous year, that the Ministry held meeting with the representatives of the exporters, growers, and applicants for new licences. The minutes of a meeting attended by representatives of the appellants on 12 January 1994 show that they initially supported a total of 20,000 metric tonnes, but that after discussion a representative of the second appellant proposed basing quota for 1994 on the actual shipments for 1993, a proposal which would have led to the imposition of a total of 17,643 metric tonnes, or almost exactly what was ultimately fixed. The minutes reveal no disagreement at that stage by the representative of the other appellant.

In the light of the Bank report, and of the practicalities of preparing for the growing season, the matter required to be dealt with without undue delay. Growers had to know the quantities to plant, and fertilisers and seed had to be imported. Senior counsel for the appellants himself said that preparation of the land had to begin in February to March for planting to be done by the middle of July. There was every reason to make the decision on quota early in the year. Following the exporters' meeting in January, it must have been apparent to everyone that, unless after securing passage of the new Act, the government was not going to implement it at all, quota would be fixed at between 13,000 mt (as the Bank proposed) and about 17,000 (or at most 20,000) as had been discussed with the exporters' representatives. The opportunity to make any further representations was obviously open, but time was limited. Once an Order-in-Council was made, it would be placed before the Legislative Assembly for confirmation, and there would be a final opportunity to raise objections. In this situation, the appellants chose, not to put any argument forward in respect of the total quota to be fixed if the Privy Council went ahead under the new Act, but to seek to persuade it not to impose any quota at all. By a letter of 17 March 1994, addressed to the Minister, they asked "that the quota system be eliminated". Although the letter must have been meant to be placed before the Privy Council, when it came to consider the fixing of the total quota, since the Minister's power under the Act would only be enlivened upon the making of an Order-in-Council, they did not refer to the issue discussed in January.

The Minister placed the letter of 17 March 1994 before the Privy Council as an attachment to a careful Minute in which the issues are discussed. The discussion again confirms that the whole purpose of the legislation was seen as related to the exigencies of the market for the export of squash to Japan. The minute recommends the fixing of quota at 17,000 metric tonnes. It refers to the lower figure supported by the Bank, but not to the discussion at the meeting in January. There is no clear evidence to show that that discussion was mentioned, or on the other hand that it was not mentioned, in the course of the deliberations of the Privy Council.

One of the issues raised in the appeal is whether natural justice was denied to the

appellants in relation to the issue of the amount of the total quota. Considering the circumstances outlined above, there is no ground for this complaint. The Minister recommended, and his recommendation was accepted, almost the very figure which had ultimately been pressed at the meeting in January. The later letter chose to concentrate on a more fundamental question. The appellants were not entitled to require the Privy Council to divide up its consideration of the matter to suit their submissions. A decision was required. After the Bank report was made, the issues were quite apparent, and the appellants chose their stand. In any case, the letter of 17 March 1994 was not the appellants' very last word on the matter. A further letter signed by Dr. Sevele and one Siale on their behalf, dated 22 March 1994, suggested, with reference to "total quota for 1994", that "a planned total tonnage of 17,000 is a reasonable and realistic figure to work on".

But the appellants' principal grounds of appeal attack the quota decision at a deeper level. They contend that both the Act and the Order-in-Council are invalid under the Constitution of Tonga.

Subject to special provisions concerning the Land Court, cl.90 of the Constitution confers jurisdiction on the Supreme Court "in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom". Clause 91 confers, subject to any Act, a right of appeal to the Court of Appeal. It is accordingly not in doubt that an Act of the legislature (or an Order-in-Council) may be declared invalid by the Supreme Court, or by this Court on appeal, if it be found to infringe the Constitution: Fuko v Vaikona [1990] Tonga L.R. 148 at 150 - 151, citing Minister of Lands v Pangia (Scott J., unreported, 1932); Fotofili v Siale (Privy Council, unreported, 3 August 1987). In the last case, the Privy Council stated the law:

> "It follows that in England the validity of an Act of Parliament is not open to challenge on the ground that its passage through the House was attended by any irregularity. The same is not true in Tonga where there is a written Constitution. If, on a true construction of the Constitution some event or circumstance is made a condition of the authentic expression of thewill of the legislature, or otherwise of the validity of a supposed law, it follows that the question whether the event or circumstance has been met is examinable in the Court, notwithstanding that the question may involve internal proceedings of the Assembly.
>
> Again, a statutory provision can be examined and struck down if it is contrary to an express provision of the Constitution although its passage through the house was not attended by any irregularity."

In the present appeal, the appellants place reliance on the following clauses of the Constitution:

> "1. Since it appears to be the will of God that man should be free as He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in this Kingdom be free for ever. And all men may use their lives and persons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they will.
>
> . . .
>
> 4. There shall be but one law in Tonga for chiefs and commoners for non-

> Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land.
>
> . . .
>
> 14. No one shall be intimidated into giving evidence against himself nor shall the life or property or liberty of anyone be taken away except according to law.
>
> . . .
>
> 17. The King shall govern on behalf of all his people and not so as to enrich or benefit any one man or any one family or any one class but without partiality for the good of all the people of his Kingdom."

It is therefore necessary to examine these provisions, doing so in the light of an understanding of their place in the document, read, as a Constitution should be, broadly, with an eye to its continuing effectiveness both as the people's guarante of fundamental rights and as a practical instrument of government.

The Constitution of Tonga opens (in the first sentence of cl.1) with a profound philosophical concept linking the inhabitants of the Kingdom with the whole of human kind as inalienably free and equal. This concept may be seen, not only as the fundamental basis of all that follows, but also as a constitutional guarantee against both slavery or serfdom and the arbitrary or despotic exercise of power. So far as slavery is concerned, cl.2 goes on to provide a more specific guarantee. But cl.1 itself contains a second sentence referring to the right of all to "use their lives and persons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they will." Historically, as emerges clearly from S. Latukefu on The Tongan Constitution at pp 20-34, this sentence seems to have been added in order to put it beyond question that customary rights of chiefs over the property and labour of other Tongans, rights analogous to those of the lords over their serfs in feudal Europe, were forever abolished. It is significant, as an indication of the role of the second sentence in cl.1, that it is introduced by the word "And". It is not an independent guarantee with respect to property rights - cls.14 and 18 provide that - but a statement of a corollary of the opening affirmation of human liberty and equality.

To see cl.1 of the Constitution as concerned with establishing the foundation of the Tongan State in such an affirmation is not to see it as less, but as more, important. The Constitution itself does not place first the possessions of Tongans, but their liberties. In subsequent clauses, the Constitution proceeds to deal with property, taxation, resumption and other significant matters affecting the organisation and activities of the State. But before doing so, it gives concrete application, in a series of clauses, to the basic statement with which it opens.

Clause 2 directly forbids the institution of slavery, and makes a proclamation of freedom for all who live under the flag of Tonga. In the original form of the Constitution of 1875, an additional clause, cl.3 (since repealed), took the same theme one step further by making provision to deal with the then prevalent practice of indentured or forced labour procured from other Pacific islands.

Clause 4 reflects the equality implicit in cl.1 (we are all "of one blood") by requiring that the general law of Tonga apply equally to all, while cl.5 establishes freedom of religious worship and practices, subject to the law and peace of the land. Succeeding clauses protect freedom of opinion and speech, freedom to hold peaceable political meetings, freedom from arbitrary arrest (secured by the constitutionally guaranteed

availability of Habeas Corupu), freedom from arbitrary punishment and freedom from double jeopardy. Each of these early clauses of the Constitution is primarily concerned with the implications of the constitutional entrenchment of human liberty. Only indirectly is any of them concerned with questions relating to property.

It is in this context, after no less than five clauses securingthe protection of Tongans against abuses of the State's power to institute criminal proceedings, that cl.14 is found in the Constitution. There follow cl.15, concerned with the fairness of trials, and cl.16, ensuring that search warrants shall only be issued "according to law". In this context, it is plain that cl.14 is not a provision about the resumption of citizens' property, or about planning restrictions or any other regulatory measurers affecting the use of property. It is a constitutional guarantee against arbitrary criminal procedures leading to capital punishment, a fine or confiscation of property, or imprisonment. But the clause is not directed against legislative action, for its prohibition is "except according to law".

In cl.17, the Constitution turns to the topic of Government, while continuing to be concerned also with the liberties of Tongans. Clause 17 requires the King to govern impartially and for the good of all. The first provision of the Constitution directly concerned with questions of property then follows, cl.18. It provides for taxation "according to law", and for resumptions of land upon payment of "the fair value".

After this brief survey of the first eighteen clauses of the Constitution, it is appropriate to go back to examine further the second part of cl.1. What it guarantees, in terms, is that "all men may use their lives and persons and time" to do certain things. The infinitives, of course, literally express the purposes for which life, person and time may be used. But the appellants, overlooking the grammar and syntax (and the history, which shows that the original form of the clause, differently expressed, was to precisely the same effect), treat the last of these purposes, "to use their own property as they will", as an independent guarantee, designed to forbid legislation restricting the use of private property. So understood, the prohibition is sweeping, for the entitlement it protects is "to use their own property as they will". Any kind of legislation regulating the use of property, whether for an economic, environmental, social, aesthetic, health or any other reason, would collide with the Constitution. Plainly, that would be unworkable, so the argument accepted there must be some unexpressed limitation. What was contended was that all legislation affecting private property was only prima facie unconstitutional, so that, if it was challenged, the government had to prove a justification for it to the satisfaction of the court. Logically, the same must apply to each of the other purposes expressed in cl.1 of the Constitution; the result would be to submit all legislation affecting the acquisition of any proprietary right, and all labour laws, to the same ordeal by litigation.

Since it is admitted that the concluding words of cl.1 cannot be applied literally, and must be subjected to some limitation, a reasonably question is why that limitation should not be the one arising out of the textual and historical setting. The meaning so suggested has already been indicated. The limitation proposed by the appellants had no such connection with the language of the clause. It would be imposed by the court on the analogy of cases in other jurisdictions concerned with other problems. In particular, reliance was placed on United State "contracts clause" cases. But these have been regarded as conflicting and unsatisfactory, even in the country of their birth. The contracts clause, on the face of it, presents none of the problems of construction, arising out of the structure of the language, to which attention has been directed in the case of cl.1 of the

Constitution of Tonga. As was said in Allied Structural Steel Company v Spannaus (1978) 438 US 234 at 240, the "language of the Contract Clause appears unambiguously absolute: 'No State shall ... pass any ... Law impairing the Obligation of Contracts'." Yet the Supreme Court of the United States has felt compelled to reject a literal view of the words: Home Building & Loan Association v Blaisdell (1934) 290 U.S. 398 at 428. In United States Trust Company of New York v State of New Jersey (1977) 431 U.S. 1 at 22, the Court held: "The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." The Court also held (at 23): "As is customary in reviewing economic and social regulation ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." Its decision, nevertheless, to invalidate a State's legislation affecting its own existing contractual obligations, was reached by a bare majority, provoking a strong dissent from Brennan, White and Marshall JJ, who thought it flew in the face of a century of authority, and said (at 33) that "by creating a constitutional safe haven for property rights embodied in a contract, the decision substantially distorts modern constitutional jurisprudence governing regulation of private economic interests"

Then reference was made to Australia's notoriously difficult and inconsistent case law on s.92 of its Constitution (see James v Commonwealth of Australia [1936] A.C. 578; [1936] 2 All E.R. 1449 at 1473, where Lord Wright referred to "free speech" as meaning "freedom governed by law", but accepted a different view of the freedom guaranteed by s.92; Cole v Whitfield (1988)165 CLR 360, where the High Court over-ruled the whole complex series of previous decisions), and to the recent cases (Nationwide News Pty Limited v Wills (1992) 177 CLR 1; Australian Capital Television Pty Limited v. The Commonwealth (1992) 177 CLR 106) dealing with implied guarantees. A decision on the reach of European anti-discrimination law was also cited (Equal Opportunities Commission v. Secretary of State for Employment [1994] 1 All ER 190). None of these concerns the interpretation of a provision at all comparable with cl.1 of the Constitution of Tonga. There being nothing in the language or the historical context to suggest the draftsman had anything of the sort in mind, the suggested limitation should not be imposed by an ipse dixit of the court. No such limitation is necessary because cl.1 is a guarantee of personal freedom, including freedom to use freely the properly a person does own, which he necessarily owns by law and not otherwise, and therefore subject to the provisions of the law. Cf. the famous dictum of Holmes J. in Hudson Water Co. v. McCarter (1908)209 U.S. 349 at 357, uttered with respect to the contracts clause of the United States Constitution: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." Clause 1 says nothing to restrict the ability of the Tongan State to enact laws, of the kind enacted in every civilized country, regulating the use by a citizen of his property in the interests of society or of other citizens. Where property was intended to have some measure of immunity, cls.18 and 48 show that the draftsman knew how to confer it.

It was suggested, during the argument, that cl.1 of the Constitution could be regarded as concluding with a wide guarantee against any legislation affecting either labour or private property, but subject to a limitation, to be implied from cl.17, in favour of legislation "for the good of all the people of [the] Kingdom". The Court would have to decide whether legislation (for example, in pursuance of a policy to promote tourism

on economic grounds or alternatively, to restrict it on environmental grounds) would be "for the good of all the people". Questions of onus, parties, representation of interests, and proof may be left to one side. There are great difficulties with this proposition. Clause 17 is removed from the context of s.1; it makes no reference to a guarantee of freedom in respect of the use of property; and it is not a provision about legislation, but about the exercise of executive power. Throughout the Constitution, a careful distinction is preserved between executive, legislative and judicial functions. As cl.31 declares, "the form of Government for this Kingdom is a Constitutional Government". Under that form of government, as in, for instance, the Commonwealth of Australia, the Crown exercises executive power through appointed Ministers and, in Tonga, a Privy Council. In accordance with cl.34, the King, on succeeding to the throne, swore an oath "to govern in conformity with the laws [of Tonga]". By cl.41, his Majesty "governs the country but his ministers are responsible". Clauses 54 and 55, dealing with the appointment by the King with the consent of Cabinet of Governors of Ha'apai and Vava'u, also show a keen appreciation of the distinction between governing and legislating. It is impossible to find in the Constitution, which takes in all essentials the same form today as it did in 1875, any suggestion that cl.17 is concerned with other than executive powers.

It remains, of the clauses on which the appellants rely, to consider the terms of cl.4. This is a provision relating to legislation. The appellants argue that it forbids a law affecting a particular group in the community, and exporters of squash (generally, or to Japan) are groups entitled to the constitutional protection. But it would not be a normal use of language to describe growers as a "class", or exporters as a "class": Ram v. Minister for Immigration and Ethnic Affairs (1995) 130 ALR 314.

The law about the export of squash, in the present matter, applies equally to every person who wishes to grow or export squash. The law is "the same"; only the activities to which it attaches are different. It follows that cl.4 is of no assistance to the appellants.

Accordingly, the constitutional grounds argued by the appellants fail. Neither section 5 of the amended Act, nor the Order-in-Council made pursuant to it, is inconsistent with the Constitution within the meaning of cl.82 of the Constitution or otherwise.

It remains to consider the administrative law grounds argued in respect of the allocation of individual quota to each of the appellants. They claim that they were denied natural justice, that irrelevant considerations were taken into account, and that the Minister was biased against them. Plainly, the credit of the Minister, who gave evidence, is very important. He is entitled to have full weight given to the fact that the trial judge, who saw and heard him cross-examined, accepted him as honest and truthful.

An important issue was whether the Minister took as irrelevant consideration into account by giving weight to what he perceived to be the appellant's breaches of the agreements fixing quotas in 1992 and 1993. Having regard to both the reports which have been cited (that to the Government and that to the Tonga Development Bank), the Minister would have been entitled to regard any breaches of this kind seriously. As has been said, he gave a warning about the matter in 1993. That was when he found out about what had happened in 1992. Of course, the giving of such a warning put the appellants on notice that breaches of the agreements in respect of quota were matters that would(or, at least, might) be taken into account, and should be dealt with in any submissions they might make. Indeed, the matter was raised in formal correspondence with their solicitors in early 1993.

Unusually, for an administrative law case, the facts were very fully explored in evidence. That is unusual, because administrative law in common law countries does not provide an appeal on the merits, but a review of the lawfulness of the procedure followed, including the lawfulness of the taking into account of matters considered. But since the appellants did choose to deal with the facts exhaustively in evidence, and were permitted to do so, the Court is in a position both to decide whether any legal error occurred in relation to them, and also whether, if they had been fully examined according to law, the decision might reasonably have been affected. See Poananga v State Services Commission [1985] 2 NZLR 385 at 410; cf Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24 at 39 -42.

The evidence shows, as has been said, that the appellants, both in 1992 and 1993, exceeded their agreed quota. Although on 20 January 1992 Dr. Sevele, as Chairman of the second appellant, had written to the Minister about "the mistaken belief that the Japanese market could absorb as much as we could produce" and that "we must ... limit the tonnage to be grown and exported to 10,000 mt", on 11 August 1993 he wrote on behalf of both appellants a letter addressed to "All Our Japanese Buyers" which stated: "Our two companies have never had any problem with marketing excess tonnages over so-called quotas over the past three years - to the satisfaction of both you buyers and ourselves". The same letter referred to the appellants' combined quota of 3500 mt, commenting: "But according to our solicitor, this restriction is not legally binding". It also stated: "So the 6000 mt has always remained as our export target", and "if we examine our performance of the past three years ... we have always exported tonnages well in excess of our so-called licenced [sic] quotas". Figures were actually set out to show an excess of 757 mt in 1992, or more than 25% above quota. Further letters in September 1993 confirmed the appellants' intention to ignore the agreed quota and the high - sounding professions on the basis of which they had obtained export licence.

It could not be disputed that the appellants' conduct was dishonourable. Having claimed to have "made concessions in the national interest" in the 1992 agreement, and pledged themselves in the 1993 agreement to "a sincere endeavour on our part to enhance this important industry by working together [with the other exporters] and in joint cooperation with the Ministry", they had blatantly stolen a march on their competitors by deliberately and dishonestly setting out to exceed greatly their agreed share of the quota. They had also, according to the views of two official reports, seriously endangered a major national economic interest. It is impossible to justify the contention that these circumstances which were amply proved - indeed largely by admissions - were not properly to be taken into account when allocations of quota came to be made pursuant to the Order-in-Council.

But the appellants, seizing on a statement by the Minister that the quota agreements had been breached, claimed he took an irrelevant consideration into account. They asserted this on the basis that they had avoided actual breach of the 1993 agreement by obtaining increased quota under the second clause of that agreement. Having regard to the 10% limit on any increase stated in cl.III, this is at best dubious. But the point is not worthy of extended examination. The letter to Japanese buyers of 11 August 1993 makes it clear there was breach by repudiation long before the enlargement of quota was sought. Of course, the Minister was left with no alternative when a joint application from the appellants was received by him in early November 1993. The appellants told him they had "confirmed Orders in Japan for an additional 2,550 thousand metric tons of squash".

If he had not expressed consent, both Japanese buyers (whose goodwill had already been gravely damaged) and Tongan growers would have been at risk of suffering heavy losses.

In any case, the appellants received quota allocations which indicate that excessive account could not have been taken of their grave conduct. In evidence were the minutes of a meeting of Ministry officials with squash exporters held on 31 March 1994. The meeting was told of the Privy Council's decision to fix total quota at 17,000 mt. The minutes indicate that the Ministry had already worked out figures allocating allbut 1,000 mt, which the Minister proposed to confirm. The details were read out. At this meeting, at which both the appellants were represented, the minutes do not suggest any dispute was raised about these details. What the meeting then discussed, and failed to resolve, was the allocation of the remaining 1,000 mt. The minutes note: "The Ministry was asked by the exporters to decide the 1,000 MT." The conclusion is inescapable that the dispute was limited, at the time, to the relatively small quantity of 1,000 mt which could possibly have been allocated between the appellants and the other exporters.

Once it is appreciated how seriously the appellants had contravened the agreed basis on which they had received their export licences for two years (in the second year, after a formal warning), and in respect of how small a quantity they failed to receive what they regarded as an acceptable allocation, it becomes apparent that they must have been very unlikely, on any evaluation of the circumstances, to have received any higher allocation. The Minister, who was believed said he did not "punish" them, but he did take the circumstances into account. If this decision reflected those circumstances to any degree, and it could properly have done so significantly, the result that did eventuate would have followed. The Minister said in evidence that "in comparison with all the other exporters [the appellants' excess over their agreed quota] was very outrageous", and "to me it was the degree of the excess which weighed in my mind". At the same time, he made it clear that the most important consideration, in his opinion, favouring the allocations he made was the price received for their squash by the growers from the exporters who obtained those allocations.

But in the argument upon the appeal, counsel for the appellants urged that the Minister's deliberations concerning this matter involved a contravention of the rules of natural justice. Counsel appeared to be suggesting that his clients were denied an opportunity, by reason of lack of notice, to defend themselves against the accusation of breach of quota agreements. However, in an affidavit 242 paragraphs long, Dr. Sevele nowhere makes such an allegation. On the contrary, the whole thrust of his complaints is to assert there was open conflict about whether quota agreements had to be adhered to, and he openly boasts of his success in evading them. Far from asserting he was not warned of the Minister's attitude to the appellants' "excess tonnage", he complains that a Ministry official raised it with him in 1993 as a subject upon which the Minister "has it in" from him. In the circumstances, the trial judge was entitled to dismiss this aspect of the appellants' case quite tersely, as he did. "Since the plaintiffs carry the burden of proving matters", he said, "which would show a failure on the part of the Minister to act reasonably and in accordance with the principles of natural justice, ... [and] since that has not been shown in any respect, the plaintiffs must fail".

One additional matter, on the issue of natural justice, was argued. It was suggested the appellants should have been notified, so as to give them an opportunity to rebut it, of a complaint of "poaching" of growers alleged against them. But again, Dr. Sevele does

not allege that he was not made aware of this issue, and counsel for the appellants, upon whom the onus lay, was unable to point to any evidence that his clients were not in fact notified.

In order to avoid any risk of misunderstanding, it should be emphasized that the law requiring the principles of natural justice to be observed is a law of primary importance. If a matter is to be taken into account against someone in the making of a decision of the kind here in question, there must be an opportunity to make answer. And there will be no real opportunity unless the matter on which answer is required is made known to him who must answer. But the circumstances proved here do not demonstrate a breach of the Minister's obligation.

Then it was repeated on appeal, as it had been asserted to the trial judge, that the Minister was biased, acted out of malice or self-interest, or might reasonably be supposed to have done so. Each of these allegations was rejected, as a matter of fact, by the trial judge who saw and heard the witnesses. He held of the Minister: "I accept him as an honest witness in every respect". No reason whatever emerged in the argument to reject or qualify this or to conclude, in the face of such a finding, that the Minister's denials of the serious charges levelled against him should not be given full weight. Nor do the facts suggest any reasonable basis for an apprehension of bias.

All the grounds of appeal having failed, the appeal should be dismissed with costs.