

Taumoepeau v Tonga Water Board

Supreme Court, Nuku'alofa

Lewis J

C.409/96

23, 29 April & 9 May 1997

Administrative law - judicial review - affidavits - procedure

Practice and procedure - judicial review - affidavits - cross-examinations

Judicial review - procedure - cross-examination

The plaintiff applied for judicial review of a claimed denial to him of a water supply by the defendant. The case is reported on procedural aspects only.

Held:

1. Evidence was taken by affidavits from either side. Cross examination was not allowed as there was nothing exceptional in the circumstances of the case.
2. To fully explore facts is unusual since administrative law in common law countries does not provide an appeal on the merits but a review of the lawfulness of the procedures followed. Cross examination may unduly prolong the proceedings and deprive them of the expedition that was in most cases such a strength of prerogative order proceedings.
3. There was not here a denial of natural justice by the court precluding the right to cross examine.

Cases considered : Tonga Water Bd v Hamilton C 376/93 Dalgety J
Hamilton v Tonga Water Bd C226/94 Lewis J
Touliki Trading v Fakafanua [1996] Tonga L.R.

Statutes considered : The Water Board Act (& The Water Supply Regulations)

Counsel for applicant : Mr Fifita

Counsel for Defendant : Mrs Taumoepeau

Judgment

The plaintiff seeks judicial review of a decision of the defendant Board denying him a water supply and other consequential ancillary orders including damages. The plaintiff carries the burden of proof throughout these proceedings on the balance of probabilities.

The defendant Board is charged by the Water Board Act and Regulations (Cap 92) with the administration of The Water Board Act. The Board is a public utility under the Crown. The obligations of the Board are statutory. It exists for the production distribution control and management of water supply throughout the Kingdom.

As the law presently stands the Board its officers and employees may not require a new applicant consumer to pay the arrears of a prior consumer as a condition precedent of the Board connecting a supply. Provided that the new applicant presents an application in proper form and pays the requisite connection fee, then the Board must connect a supply. Tonga Water Board v Fale Hamilton and Vito Langifisi (1993) S.C. no. C376/93 Dalgety J and Fale Hamilton v The Water Board (1994) S.C. no. C226/94 Lewis J.

Regulation 17 of The Water Supply Regulations provides:-

60 "The owner or the occupier of the premises, or both of them, is or are liable jointly and severally for the due payment of all charges for water or for other services provided to those premises by the Board under these regulations."

Evidence in this Review has been taken by affidavits from either side. Counsel for the Defendant Board sought the right to cross examine some deponents. Cross examination has been allowed in the past but only in the most exceptional circumstances. I saw nothing exceptional in the circumstances of this case and refused both Counsel the opportunity to cross examine on any issue.

70 In Touliki Trading Enterprises Limited and Squash Export Company Limited v Kinikini'lau Tutoatasi Fakafanua and the Kingdom of Tonga [1996] Tonga LR [CA] Appeal No.3/1995, the Court made comment that to fully explore facts is unusual since 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. Cross examination has, in the English Courts, been allowed in exceptional circumstances by virtue of the general power conferred on the courts by SCR Order 38, r.2(3).

80 It is suggested by some, including De Smith, fourth edition - "Judicial Review of Administrative Action" at page 579, that (cross examination) may "unduly prolong the proceedings and deprive them of the expedition that was in most cases such a strength of prerogative order proceedings".

The Defendant complains through counsel that there has been a denial of natural justice by the court precluding the right to cross examine. The Plaintiff makes no such complaint. In the exercise of a discretion I ruled cross examination not to be appropriate in this case. I decide the facts from the affidavits.

Those being the facts as I find them to be one must revert to the question posed by the Defence Counsel in her written submissions ... " (1) what is the decision of the defendant which is under review?"

90 (2) was the procedure followed in reaching that decision, according to law

On the facts as I have found them to be there was never a demand (i.e. never a "decision of the defendant") made on the plaintiff that he should pay the arrears of a former consumer, only that they must be paid by the registered consumer Tu'ihalama as re-connection fees, which were far less revenue producing than a first time fee which the plaintiff would have had to pay if his account of events is to be accepted by this court.

The Plaintiffs claim fails. I will hear counsel as to costs.