ATTORNEY-GENERAL

v

WESTERN SAMOA NATIONAL PROVIDENT FUND
AND BERKING

Supreme Court Apia
10, 12 January 1979
Duggan ACJ

ADMINISTRATIVE LAW (Statutory corporations) - Powers of appointment of managers and staff governed by empowering statute - Sole appointing authority of the Manager of the National Provident Fund held to be the Head of State acting on the advice of Cabinet by virtue of the proviso to s 5(1) of the National Provident Fund Act 1972 - Such proviso effectively "removes the Board's power to 'determine authoritatively' the Manager": Craies on Statute Law, 7th Edn., 218, Jennings v Kelly [1939] 4 All ER 464, 468 considered and applied.

PRACTICE AND PROCEDURE (Judgments and orders) - Declaratory orders (Role in cases where other coercive measures inappropriate) - Order considered superfluous where injunctions appropriate in the circumstances.

STATUTES AND ORDINANCES (Interpretation) - Effect of proviso.

The Board of the National Provident Fund having passed a resolution appointing the second defendant the Manager of the Fund application was made to the Court to declare the resolution ultra vires and invalid and for appropriate injunctions.

MOTION for a declaratory order and injunctions.

Injunction granted perpetually restraining the first defendant from acting on, or in any manner putting into effect its resolution of 27th December, 1978, or from appointing any person to be its Manager.

Injunction granted perpetually restraining the second defendant as from the 1st day of January, 1979 from continuing or acting or in any manner seeking or holding himself out as Manager of the Fund in pursuance of the resolution of the first defendant of 27th December, 1978, or from acting on or in any manner carrying out the said resolution.

Attorney-General Slade in person.
Retzlaff for defendants.

Cur adv vult

DUGGAN ACJ. This is an application by the Attorney-General on behalf of the Government of Western Samoa for a declaratory order and injunctions against the first and second defendants. The matter arises out of a resolution passed by the first defendant on the 27th December, 1978 wherein it purported to appoint the second defendant to be Manager of its Fund for a term of three years from the 1st January, 1979. The

dispute has arisen over the differing interpretations by the plaintiff and first defendant of section 5(1) of the National Provident Fund Act 1972 which provides as follows:-

> 5. Power to appoint Manager - (1) The Board shall have power to engage and appoint a staff consisting of a Manager and such other officers and servants as are in the opinion of the Board necessary for the purpose of carrying out the provisions of this Act:
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> Provided that the Manager shall be appointed by the Head of State acting on the advice of Cabinet.

The plaintiff contends that the sole appointing authority of the Manager of the Fund is the Head of State acting on the advice of Cabinet. The first defendant argues that it has the power to appoint the Manager subject to approval or ratification by the Head of State acting on the advice of Cabinet. Relying on such interpretation the first defendant argues that the resolution passed on 27th December, 1978 is intra vires and valid.

Under the National Provident Fund Act 1972 Parliament has created a corporate body, the Western Samoa National Provident Fund Board, to administer a superannuation or provident fund to which all employees in this country (with very few exceptions) are required to contribute. It follows that such body is one on which great responsibility rests, and it is also a very influential body. In a relatively small country where the economy is a constant concern it is not surprising to find that the Government keeps a close hand on the operations of an institution of such significant national importance. The Attorney-General, in his submissions, has drawn attention to the numerous ways in which Government has safeguarded its interests in various sections of the Act. One of the clearest examples is the membership of the Board with the Financial Secretary as Chairman and the Attorney-General as a fellow-member. Another clear example of the close relationship with Government is the requirement in section 12 that Government shall make an advance to the Fund if it is unable to meet any commitment. The Attorney-General submits that it is entirely within the scheme of the Act that Government has retained to itself through Cabinet the right to appoint the Manager of the Fund. Mr Retzlaff, on the other hand, points to the experienced and responsible membership of the Board to demonstrate that Parliament must have intended that the Board should be free of political restraint in appointing the person to manage the Fund. He submits that any contrary interpretation would deprive the Board of one of its most important functions, namely, to employ and dismiss its own Manager.

I turn now to section 5(1). The Court's function is to ascertain the intention of the Legislature. The intention is to be sought primarily in the words of the statute. I bear in mind also another primary rule of construction that effect must be given, if possible, to all the words used for the Legislature is deemed not to waste its words or say anything in vain.

The difficulty in construing the present section arises from the use of the proviso. If the proviso were not included then the meaning would be clear. The enacting portion gives the Board the power to engage and appoint a staff. The staff is defined to include a Manager and such other officers and servants as are in the opinion of the Board necessary. The proviso requires that the appointment of the Manager shall be by the Head of State acting on the advice of Cabinet. A distinction is made between "engage" and "appoint" in the enacting portion. It is necessary to consider whether there is any distinction between these terms. The Shorter Oxford Dictionary defines "engage" to mean, "to lay under obligation", and "appoint" to mean, "to determine authoritatively". The distinction then becomes clear and, looked at in this way, but for the proviso the Board would have power to "lay under obligation" a Manager, officers (that is office bearers of the Fund) and servants (or all other employees). It would also have power to "determine authoritatively" each of these three persons or classes of

person. The proviso, however, removes the Board's power to "determine authoritatively" the Manager which is made the responsibility of the Head of State acting on the advice of Cabinet. This would still leave the power of the Board to "lay under obligation" a Manager.

I refer to Craies on Statute Law, 7th Edn., p. 218:-

> The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it;
> . . . .
> "When one finds a proviso to a section," said Lush J. in Mullins v. Treasurer of Surrey,[88] "the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso."
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> [88] (1880) 5 Q.B.D. 170, 173.

This statement accords with my own reading of section 5(1) as referred to above. Read in this way, there is no contradiction in the subsection. This accords also, I think, with the view expressed by Viscount Maugham in Jennings & Another v. Kelly [1939] 4 All E.R. 464, at 468:-

> We must now come to the proviso, for there is, I think, no doubt that, in the construction of the section, the whole of it must be read, and a consistent meaning, if possible, given to every part of it.

and at p. 470:-

> There can, I think, be no doubt that the view expressed in Kent's Commentaries on American Law, 12th Edn., Vol. 1, p. 463, n (cited with approval in Maxwell on the Interpretation of Statutes, 8th Edn., p. 140), is correct:
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> "The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail."

To accept the interpretation urged by Mr Retzlaff would not give a consistent meaning to the whole of the subsection in question. It would either reduce the proviso to mere surplusage or it would give a concurrent power to the Board and to Cabinet to appoint a Manager which is, I think, an absurd result and one that should be avoided.

I am left with the conclusion that, although expressed in inartistic drafting language, the intention of Parliament in section 5(1) is clear, and that although, in the case of its Manager, the Board may engage such a person, the final decision on whether he is acceptable and should therefore be appointed to the position is a political decision resting as it does with Cabinet which advises the Head of State. This conclusion is supported by the general tenor of the Act which shows that Government intends to keep a close hand on the administration of this Fund.

It follows then that in passing the resolution which it did on 27th December, 1978 to appoint the second defendant as its Manager for three years the first defendant has acted without authority and its resolution is ultra vires and invalid.

I turn now to the remedies sought by the plaintiff. A declaratory order is sought and in addition permanent injunctions to restrain the first defendant from putting into effect its resolution and the second defendant from acting pursuant to it.

The Attorney-General submitted that this Court has jurisdiction to issue a declaratory order. He cited sections 31 and 39 of the Judicature Ordinance 1961, section 349 of the Samoa Act 1921, and the authorities cited in the text of S.A. de Smith Judicial Review of

Administrative Action, 3rd Edn., Chap. 10, p. 424. To my knowledge this Court has not previously exercised such jurisdiction nor did counsel refer me to any such instance.

The Attorney-General submitted further that in addition to a declaratory order, coercive measures in the form of injunctions were necessary in this case. Now if this Court issues injunctions as sought, then to make a declaratory order in addition would appear to be superfluous. From a perusal of the authorities referred to by de Smith, the proper role of a declaratory order appears to be in a situation where coercive measures are inappropriate, or simply not sought by the parties.

Now one might think that it should be quite unnecessary to issue coercive measures against the first defendant bearing in mind the membership of its Board to which I have already referred. But the affidavits filed in these proceedings are strongly suggestive of a deep undercurrent of feeling about this matter and explicitly show a situation of some considerable turmoil on the Board. The Board has chosen to ignore the advice of the Attorney-General for Western Samoa, who, quite apart from his own high office, is one of the very members of the Board. For this reason I treat with great respect his urging before this Court that an injunction is necessary in this case. The remedy is of course, by its nature, discretionary, but bearing in mind the factors I have referred to I have reached the conclusion that injunctions should issue. There will be an injunction therefore perpetually restraining the first defendant from acting on, or in any manner putting into effect its resolution of 27th December, 1978, or from appointing any person to be its Manager. There will be a further injunction perpetually restraining the second defendant as from the 1st day of January, 1979 from continuing or acting or in any manner seeking or holding himself out as Manager of the Fund in pursuance of the resolution of the first defendant of 27th December, 1978, or from acting on or in any manner carrying out the said resolution.

If there is any matter as to costs arising I will leave it to the parties to file a Memorandum on such subject.