

Nauru

Heinrich v. Nauru Phosphate Corporation

Supreme Court
Donne C.J.
9 February 1987

Constitutional law – legal persona of Republic – instrumentality of the Republic – whether statutory corporation an instrumentality of the Republic.

10 *Constitutional law – sovereign immunity – claim against Republic in tort – condition precedent to proceedings – leave by Cabinet.*

Practice and procedure – civil proceedings filed against instrumentality of Republic – requirement of Cabinet leave prior to commencement of proceedings – leave of Cabinet after commencement of proceedings not effective.

20 The plaintiff brought a civil action, in tort, against the defendant corporation. The defendant, through the Secretary for Justice, argued that the Supreme Court had no jurisdiction to hear the action, as no prior Cabinet leave had been given. Under section 3 of the Republic Proceedings Act 1972, no civil proceedings can be taken against the Republic or an instrumentality of the Republic, unless Cabinet leave has been given prior to the commencement of the proceedings. Cabinet purported to give leave some five months after the commencement of the proceedings.

HELD: The Court had no jurisdiction to hear the action.

- 30 (1) The defendant, the Nauru Phosphate Corporation was, in fact, an "instrumentality of the Republic" and thus covered by the requirements of section 3 of the Republic Proceedings Act 1972. The defendant was established by the Nauru Phosphate Corporation Act 1969, and the capital is wholly subscribed by the Republic. The Cabinet (of the Government of Nauru) appointed the directors, including a Managing Director. The defendant corporation was therefore an "instrumentality" established by an Act and constituted by officers of the Republic.
- (2) Section 3 of the Republic Proceedings Act requires that Cabinet leave be given before proceedings are commenced against an instrumentality of the Republic. Although leave was obtained five months subsequent to the commencement of proceedings, the condition precedent was not fulfilled, and section 3 acts as a bar against proceedings.

Case referred to in judgment:

In re East and West India Dock Company (1888) 38 Ch.D. 576

40 **Legislation referred to in judgment:**

Republic Proceedings Act 1972
Nauru Phosphate Corporation Act 1969

R. Kaierua for the plaintiff
Secretary of Justice for the defendant

EDITOR'S OBSERVATION: See the clear restatement of the principle of sovereign immunity, in a Pacific setting, per Holmes J. of the United States Supreme Court in *Kawananakoa v. Polyblank* 205 U.S. 349; 51 L. Ed. 834, 353 and 836 respectively:

50 A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends

Holmes J. cited Hobbes, *The Leviathan* Ch. 26, 2 as authority.

DONNE C.J.

Judgment:

In this action in tort, there has been raised a preliminary point by the Secretary for Justice. He submits that section 3 of the Republic Proceedings Act 1972 (hereinafter referred to as "the Act") applies to the proceedings, that leave of the Cabinet to commence them was not given before they were commenced and that 60 accordingly the Court has no jurisdiction to hear the action.

The relevant portions of section 3 of the Act read as follows:

3. (1) Where any person has a claim against the Republic or against any Government department or instrumentality of the Republic or the President, the Cabinet, any Minister or any public officer in his official capacity, howsoever it may be founded, no civil proceedings may be taken against the Republic or against such Government department or instrumentality of the Republic or the President, the Cabinet, any Minister or any public officer in his official capacity, nor may a counter claim be made in proceedings commenced by the Republic, a Government 70 department, an instrumentality of the Republic, the President, the Cabinet, a Minister or a public officer, in his official capacity, to enforce that claim unless, before the commencement of the proceedings or the making of the counter claim, the Cabinet has given leave for them to be taken.

(2) ...

(3) ...

(4) The Cabinet may, by notice in the Gazette, apply the provision of this section to any statutory corporation which is wholly owned by the Republic. 80

The basis of the Secretary's submission is that the defendant is an "instrumentality of the Republic" and is thus covered by section 3. It is not disputed by the parties that the proceedings are "civil proceedings". Nor is it disputed that the leave of Cabinet was not obtained before they were commenced although Cabinet subsequently gave leave about five months after they were filed. The argument of the Secretary is that leave having been obtained, new proceedings should have been commenced by the plaintiff. I should mention that if in such circumstances, it were in my power to allow the present suit to proceed, I would certainly exercise that power in favour of the plaintiff. However, the Act does not provide for this course to be taken. I also mention the option of waiver which would be available. 90

What is the status in law of the Nauru Phosphate Corporation? It is, of course, a statutory corporation. The preamble to the Act creating it, the Nauru Phosphate Corporation Act 1969, determines its purpose, viz, to implement the agreement

made between the three governments named therein and the Nauru Local Government Council to establish the corporation. Its capital is wholly subscribed by the Republic (section 22). It is therefore a corporation wholly owned by the Republic. Consequently, it is the type of corporation which Cabinet, by notice in Gazette under section 3(4) of the Act, could have designated as coming within the provisions of the said section 3. This step has not been taken.

100 The failure of the Cabinet to act under the aforesaid subsection 4 could allow an inference to be drawn that it did not desire the provision of section 3 of the Act to apply to the Corporation. On behalf of the defendant, however, it is argued that by its nature, the Corporation is an "instrumentality of the Republic" and thus comes under the protective umbrella of the section. The term "instrumentality of the Republic" is defined under section 2 of the Act as:

"Instrumentality of the Republic" means a body established by or under an Act or Ordinance and constituted by the President or an officer of the Republic or by two or more such officers either with or without the President.

110 The definition is a clumsy one and the word "instrumentality" as a noun defies definition in any of the recognized authorities on the English language. It certainly appears legally never to have been defined. However, the draftsman has chosen it and has attempted to explain it in the above way. As I read it, the term means that it is:

- (1) A body established by or under an Act of Parliament and;
- (2) "constituted" by;
- (3) the President or an officer of the Republic or by two or more such officers either with or without the President. "Officer" of the Republic includes (inter alia) a Minister (section 2).

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In the case of the defendant corporation, requirement 1 is satisfied.

However, to define the term "constituted", in relation to the definition, poses some difficulty. I have been referred to two definitions from reputable English Dictionaries of the verb "constitute".

The *Concise Oxford Dictionary* 1982 Edition defines the word "constitute" as:

v.t. appoint (constitute him president; constitute oneself a judge; establish, form (this does not constitute a precedent); given legal form to (assemble etc.); frame, form, (esp. in pass, of bodily or mental constitution), make up, be the components of.

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The *Collins Shorter English Dictionary* 1973 Edition defines the word "constitute" as:

v.t. to appoint to an office or function; to establish; to set up; to form; to compose.

I have also considered a definition of the term "constituted" given by Chitty J. in *In re East and West India Dock Company* (1888) 38 Ch. D. 576. The learned Judge considered the phrase "a company constituted by Act of Parliament". At p. 582 he said:

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The term "constituted" is not equivalent to "incorporated", it is of wider import. It seems to be equivalent to "establish".

Chitty J. was dealing with a company "constituted" by Act of Parliament. Here we are dealing with an instrumentality "constituted" by the President and/or officers of the Republic. They are analogous and I adopt the meaning given by the learned Judge to the term.

To give the word "constituted" that meaning, I am faced with a definition which defines an "instrumentality" as a body *established* by enactment and *established* by the President and/or officers of the Republic. I therefore must consider whether
150 "established" has the same meaning in each case. I do not think it has.

Parliament in enacting creates the body, it bring it into being, and it is in that sense it establishes it. There must, however, be an implementation of the enactment by the setting up of the body and it is in that respect it is established by the President and/or the officers of the Republic. I am therefore satisfied that an "instrumentality of the Republic" under the Act is a body created by enactment and set up by the President or an officer of the Republic or by two or more such officers either with or without the President.

Applying that meaning in relation to the defendant corporation, I am satisfied it is an "instrumentality of the Republic". It is created by statute. It is more than just a
160 body wholly owned by the Republic. It was set up by Cabinet by the bringing into operation of the Nauru Phosphate Corporation Act 1969 (section 2). Cabinet appointed its Directors, Chairman of Directors and Managing Director and has that power under the Act (sections 6, 8, and 19). Cabinet, of course, is comprised of the President and Ministers of the Republic. The defendant corporation, therefore, has been set up i.e. established, by the President and officers of the Republic within the meaning of the Act. It is an "instrumentality of the Republic", under that Act and I so hold.

Finally, I would again refer to section 3(4) of the Act. The object of the Act is to ensure civil proceedings brought against the Republic in cases involving the affairs
170 and property of the Republic are not brought without executive government having the prior knowledge of them and consenting to their institution - see preamble to the Act. Section 3 fixes the scope of the proceedings and the bodies and persons covered by the statutory umbrella, the latter being in all cases, other than the wholly owned statutory corporations, necessarily involved in the affairs of the Republic. It does not follow that the wholly owned corporations would be so involved, but, being the property of the Republic, the subsection gives Cabinet the power to bring them within the purview of section 3.