

**IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA**

**CA 6/2019
LAND 247/2019**

BETWEEN ERIC SHORT
Appellant

**AND PA TEPAERU TEARIKI
UPOKOTINI MARIE
ARIKI**
Respondent

Coram: White P, Williams JA, Asher JA

Hearing: On the papers.

Appearances: L Rokoika for the Appellant
 T Browne for the Respondent

Judgment: 12 October 2021

**JUDGMENT OF THE COURT OF APPEAL
RECALLING THE JUDGMENT DATED 14 DECEMBER 2020**

[1] In a judgment delivered on 14 December 2020 this Court declined an application by the Appellant dated 31 October 2019 for special leave to appeal to the Court of Appeal under Article 60(2) of the Constitution of the Cook Islands against a judgment of Savage J in the High Court (Land Division) delivered on 2 October 2019.

[2] In its judgment declining special leave to appeal, the Court:

- (a) held there was no right to appeal under Article 60(2); and
- (b) refused the application for special leave to appeal under Article 60(3).

[3] The Court also issued a later costs judgment in which the Respondent was awarded costs of \$2,500.

[4] In reaching its decision, the Court relied on the version of Article 60(2) and (3) of the Constitution set out in the memorandum of the Respondent in opposition dated 3 April 2020. The relevant parts of this version, which is also to be found in the PACLII database, read as follows:

Jurisdiction of the Court of Appeal

60 (1) Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to hear and determine any appeal from a judgment of the High Court.

(2) Subject to the provisions of this Constitution, and except where under any Act a judgment of the High Court is declared to be final, an appeal shall lie to the Court of Appeal from a judgment of the High Court-

[...]

(e) With the leave of the High Court in any other case, if in the opinion of that Court the question involved in the appeal is one which by reason of its general or public importance, or of the magnitude of the interest affected, or for any other reason, ought to be submitted to the Court of Appeal for decision.

[(3) Notwithstanding anything in subclause (2) of this Article, and subject to such limitations as may be prescribed by Act, the Court of Appeal may in any case in which it thinks fit and at any time, grant special leave to appeal to that Court from any judgment of the High Court, subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit.]

[5] Counsel for the Respondent, Mrs Browne, in her memorandum for the Respondent in opposition and in her oral argument before the Court on 14 December 2020, submitted:

- (a) there was no right of appeal under this version of Article 60(2) because the judgment of Savage J was declared to be final; and
- (b) there was no jurisdiction to grant special leave to appeal under this version of Article 60(3) because there was a limitation prescribed by Act which provided there was no appeal in this case. In this respect she

relied on the decision of the Court of Appeal in *Ariki v Upokotini* [2008] CKCA 3.

[6] In the submissions for the Appellant in response to opposition dated 6 April 2020, Ms Rokoika relied on a different version of Article 60(2) of the Constitution which reads:

(2) Notwithstanding anything in subclause (1) of this Article, and any limitations as may be prescribed by Act, the Court of Appeal may in any case in which it thinks fit and at any time, grant special leave to appeal to that Court from any judgment of the High Court, subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit.

[7] In the course of oral argument, which was conducted by way of audio-visual link because the Covid-19 pandemic prevented the Court from sitting in Rarotonga, neither Counsel drew any further attention to the differences between the provisions of Article 60 which they relied on. Indeed Ms Rokoika in her submissions seemed to accept the version of the Article relied on by Mrs Browne because she sought to distinguish the nature of the prescribed statutory limitation and the decision in *Ariki v Upokotini*.

[8] In these circumstances and without access to other Cook Islands materials, the Court relied on the version of Article 60 as published in PACLII.

[9] As a result of other work, however, the Court has now become aware that the version of Article 60 relied upon by Mrs Browne and published in PACLII was amended by section 7 of the Constitution Amendment 2009/17. The new Article reads as follows:

(1) Subject to the provisions of this Constitution, and as may be prescribed by Act, the Court of Appeal shall have jurisdiction to hear and determine, -

- (a) any appeal from a judgment of the High Court; and
- (b) any cause or matter removed by the High Court to the Court of Appeal.

(2) Notwithstanding anything in subclause (1) of this Article, and any limitations as may be prescribed by Act, the Court of Appeal may in any case in which it thinks fit and at any time, grant special leave to appeal to that Court from any judgment of the High Court, subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit.

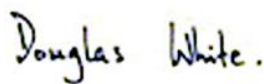
[10] In terms of granting special leave to appeal, the provisions of the new Article 60(2) are materially different from the provisions of the previous version of Article 60(3). The words "subject to", which appeared in the previous version of Article 60(3), no longer appear in the new Article 60(2). The scope of the jurisdiction of the Court of Appeal to grant special leave has therefore been significantly broadened.

[11] It is now clear to the Court that its judgment of 14 December 2020 proceeded on the basis of the wrong version of Article 60 of the Constitution.

[12] It is well established that when a Court has not had its attention drawn to a legislative provision of plain relevance, or for some other very special reason, the Court may recall its judgment: *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No.2)* [2009] NZSC 122, [2010] 1 NZLR 76, at [2].

[13] The Court is satisfied that this is a case where it should recall its judgment of its own volition and it formally does so.

[14] In order to determine the next steps to be taken now the judgment has been recalled, there will be a telephone conference between the President of the Court and Counsel on the first convenient date.



Douglas White, P



David Williams, JA



Raynor Asher, JA