IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

OA No. 1/11

IN THE MATTER	of Sections 3, 9, 11 and 13 Declaratory Judgments Act 1994
AND	
IN THE MATTER	of Cook Islands National Superannuation Fund Act 2000 and the Cook Islands Constitution
BETWEEN	**MINISTER OF COOK ISLANDS NATIONAL SUPERANNUATION FUND** Plaintiff
AND	**ARORANGI TIMBERLAND LIMITED** First Defendant
AND	**ANDY OLAH** Second Defendant
AND	**MANEA FOODS** Third Defendant
AND	**BECO LIMITED** Fourth Defendant
AND	**JAMES BEER** Fifth Defendant
AND	**SUPER BROWN LIMITED** Sixth Defendant
AND	**RAINA TRADING LIMITED** Seventh Defendant

Date of Hearing: 22, 25-28 November 2013

Counsel: K Saunders (Solicitor-General) and
MJ Ruffin for plaintiff
T Arnold for the defendants

Judgment: 31 January 2014 (NZT)

JUDGMENT OF THE COURT

Introduction

[1] This proceeding concerns the constitutionality of the Cook Islands National Superannuation Act 2000 (the Act) which established a national superannuation scheme for the Cook Islands (the Scheme). The issues that are now for resolution by the Court first arose in the context of criminal enforcement proceedings instituted against certain employers for failing to pay employer contributions. These employers argued, by way of defence, that the Act was unconstitutional.

[2] In the face of that challenge, the plaintiff (the Minister in charge of the Scheme under the Act) brought an application seeking a declaratory judgment on 25 November 2011. Two defendants were cited. Over time, further defendants have been joined. My understanding is that all of the defendants now face criminal enforcement proceedings as mentioned above. At earlier stages, different counsel appeared for the defendants but, from around August 2013, Mr Arnold has acted for all. There is no particular reason to distinguish as between the different defendants who effectively all have the same interest for the purposes of this proceeding. For reasons of convenience, I will treat the defendants as if they are one party only. Thus, references in this Judgment to *"each of the parties"* assumes there are two parties with the defendants being a collective whole.

[3] The application raises difficult and important issues. In all respects, these have tested the ability of the Court – which operates on the basis of Judges sitting part-time and has limited resources – to resolve the dispute. The

process has been greatly assisted by the plaintiff engaging experienced New Zealand counsel, Mr Ruffin, and by Mr Arnold acting for all the defendants. Both counsel have undertaken an enormous amount of work and have reviewed relevant cases from around the world. I am grateful for their assistance. Further, the Ministry obtained extra funding so that I could attend in Rarotonga for the sole purpose of conducting the trial.

The application

[4] The application for declaratory judgment sought relief in very broad terms declaring that the Act *"does not breach the Constitution of the Cook Islands in any way…"*. Some thirteen specific grounds were then set out including clause 1.7 in the following terms:

> *"[The Act is binding because] contributions to the [fund] by employers and employees are exempt from the provisions of Article 40(1) because such contributions are a tax, duty or rate as provided in Article 40(2)(a)."*

[5] I immediately observe that the primary form of relief sought by the plaintiff is too broad. It is not competent for a Court, in the air, to declare that an Act is constitutional. Prima facie, an Act is assumed to be constitutional. Over time, the plaintiff has come to accept this proposition as have the defendants. As will be seen, Mr Arnold has effectively assumed the role of plaintiff challenging the constitutionality of the Act with the plaintiff then defending that constitutionality.

[6] In July 2013 Mr Arnold, who was then acting for the first and second defendants only, filed a notice of opposition. Then, in August 2013, having taken over conduct of the case for all defendants, he filed a further notice of opposition in mirror terms.

[7] I set out below, in more detail, some of the procedural steps undertaken which may help record the history of this proceeding. As will become apparent, I commenced management of the proceeding in August 2013 and was immediately concerned that the application, and notice of opposition, did not adequately define the dispute (at that point to be determined by the Court in two stages as will be explained). From that time on, I directed counsel to agree a Statement of Issues which properly established the ambit of the matters in dispute. This turned out to be a useful exercise because it forced

each party to confront its respective case by reference to the position of the other. Over time, and during the course of the hearing itself, the Statement of Issues has been refined and, ultimately, has become a substitute for pleadings at the hearing.

[8] At risk of inaccurate summary, and for the purposes of introduction only, there are five key steps to this proceeding. In this summary, I refer to provisions of the Constitution which are set out below at [36]. First, does Article 64(1)(a) of the Constitution, in its reference to *"security of the person"*, thereby incorporate the notion of social security? Is the Act unconstitutional as being in breach of such an interpretation of the Constitution?

[9] Secondly, is the Act unconstitutional by reference to Articles 40(1) and 64(1)(c) of the Constitution dealing with rights to property? In order to address these arguments, it is necessary to analyse the Scheme in order to see whether there is a *taking* or *acquisition*, or a *deprivation* of property, or both. If so, prima facie the Act is unconstitutional (subject to the third step below).

[10] Thirdly, in relation to Article 64(1)(c), there is an overriding obligation of proportionality under Article 64(2). There must be a balance taken between the importance of the public purposes served by the Act and the effect on persons of the means selected to achieve those public purposes.

[11] Fourthly, and if the Act is found to be unconstitutional in terms of Article 40(1), is it saved by Article 40(2)(a) which provides that the State can tax its citizens? This requires analysis of the contributions made by employers and employees under the Scheme to ascertain whether they amount to a tax.

[12] Fifthly, there is the question of remedies. Mr Arnold does not seek to have the entire Act discarded because he accepts there is much good in what it is attempting to do. Rather, his goal is to achieve remedies so that Parliament, with the guidance of the Court, can amend the Act to make it constitutional. Counsel did not spend a great deal of time addressing remedies and there will need to be another hearing on that topic as I describe below.

Procedural history

[13] Shortly after the application was filed in February 2011 it was called before Hugh Williams J who gave preliminary directions on 6 April 2011. There were further call-throughs in May and July 2011.

[14] In the period March to October 2011 the plaintiff filed a series of affidavits in support of the application. Thereafter, and through until June 2012, there was little activity. In June 2012, the plaintiff filed several more affidavits making a total of six filed to that point. There was then a call-through before Hugh Williams J on 21 June 2012 and he gave various directions including that the defendants were now to file their affidavits.

[15] The defendants did not immediately do this. On 3 August 2012 Mr Arnold filed what he described as an updating memorandum reporting to the Court on a variety of matters including his preliminary views on the legal issues. He also said he was not ready to file his affidavits in reply. Somewhat optimistically, he suggested a timetable culminating in a hearing before the Chief Justice in September 2012.

[16] The defendants still did not file affidavits and there was then a further gap in proceedings through until May 2013. On 6 May 2013 the plaintiff filed a memorandum seeking allocation of a fixture and other directions. Mr Arnold immediately responded. He also applied for discovery against the plaintiff.

[17] On 29 May 2013 the matter came before Hugh Williams J once again and he made a detailed Minute setting out the procedural history to that point which included a telephone conference on 21 May 2013. He directed that the file should be placed before him for a further conference in the July 2013 sitting.

[18] On 26 July 2013 the Judge commenced hearing the defendants' discovery application but during the course of the day it became common ground that the better way to address the matter was to split the case into two parts with the first stage (dealing with the tax issue) being heard by me in the September 2013 sitting. It was anticipated that the first week of that sitting would be taken up with hearing stage one of the case followed by the discovery application. It was then understood that the discovery application might change shape depending on the outcome of stage one. The Judge issued a detailed Minute on 26 July 2013.

[19] In the period July/August 2013 the defendants filed some nineteen affidavits including a lengthy affidavit from Mr Trevor Clarke on 23 July 2013.

[20] Following the issue of the Minute dated 26 July 2013, I commenced management of the file. I was present in the Cook Islands on 9 August 2013 on other official business and took the opportunity of meeting with counsel. I had spent several hours beforehand familiarising myself with the issues on the file (with which I had not previously engaged). I was immediately concerned that the splitting of the trial might be counterproductive but acknowledged that both the Judge and counsel had evidently believed it to be the best approach. Part of my concern reflected the absence of any clear identification of the issues. For the first time, I introduced the notion of a Statement of Issues which thereafter became the process to define the dispute.

[21] Following the conference on 9 August 2013 I produced a series of Minutes. This reflected an intense period of management of the file during which the parties were filing submissions on the assumption that I would determine stage one of the proceeding. Indeed, Mr Arnold's submissions were filed on 9 August 2013, the same day as the conference mentioned above. I had not had a chance to read the submission prior to that conference but did so thereafter. These submissions plainly assumed that the Act was prima facie unconstitutional. Mr Arnold said:

> *"It is common ground between the parties that the contributions under the Act amount to a compulsory taking of property in the form of monies. The Crown asserts that those are taken by way of tax."*

[22] Although not explicit in the above quote, the then assumption of the parties was that the Act was prima facie in breach of Article 40(1) as amounting to a taking without compensation. Presumably, this flowed from the decision of the Supreme Court of Zimbabwe in *Nyambirai v National Social Security Authority* [1996] 1 LRC 64, a decision discussed in more detail below. The parties, in that case, assumed that the superannuation contributions amounted to a compulsory acquisition. As will become apparent from the matters discussed in this Judgment, whether that is so here is a fairly large assumption. Moreover, having made such an assumption, and then turned to the tax issue, the parties ignored the effect of Article 64(1)(c). In other

words, if there were an assumed breach of Article 40(1) did that also speak in terms of Article 64(1)(c)? Although I did not fully appreciate these, and other subtleties, immediately, I had concerns in relation to the making of such an important assumption in relation to Article 40(1).

[23] When I subsequently received the plaintiff's submissions on or about 23 August 2013 my preliminary intuition that Mr Arnold had overstated the matter (see [21] above) was proved correct. I do not say that in any way critical of Mr Arnold. I think, in part, it reflects the plaintiff's changing appreciation of his case.

[24] As it had become increasingly clear to me that the perceived benefits of splitting the trial were dissipating, I convened a telephone conference of counsel. By this time counsel appreciated the problem and it was common ground that the orders splitting the trial needed to be set aside. The detail of this is recorded in Minute (No. 4) which I issued in Rarotonga on 12 September 2013.

[25] The upshot of all of that was that the hearing scheduled to commence on Monday 9 September 2013 (of stage one) did not proceed. Instead, I was told that discovery and disclosure (under the Official Information Act) were all now agreed and were well underway. I was not required to make formal orders. There was then an extensive discussion as to the issues in dispute. Counsel undertook to reduce these issues into the form of an agreed Statement of Issues recording, to the extent necessary, any divergent views within the one document. A further draft of this was discussed between counsel and me on Thursday 12 September 2013. At that point I made directions that the Statement of Issues was to be finalised and then regarded as final from 4 October 2013. Any amendments thereafter could only occur by consent or, in the absence of consent, by Order of the Court.

[26] Pursuant to agreed timetable orders, submissions and case books were prepared and exchanged. The defendants' submissions exceeded 200 pages and the plaintiff's exceeded 100 pages. The defendants then replied at length. There were nine separate case books and, during the course of the hearing, further materials were handed up from time to time. A large

proportion of these authorities were reported in the series, Law Reports of the Commonwealth (LRC).

The Superannuation Scheme - Introduction

[27] It needs to be noted, at the outset, that there is an existing form of welfare benefits in the Cook Islands for those persons over the age of 60. This is paid pursuant to the Welfare Act 1989. Presently, pensioners are paid some $100 per week irrespective of their means. It is generally recognised that this is a very low level of support. Nevertheless, it appears there is concern as to whether even this level of support can be sustained by the Cook Islands in the long term. This entitlement sits outside the Scheme which I am to address and discuss below. As I understand it, though, one of the legislative intentions was that the Scheme, over time, would replace the current welfare payments.

[28] Mr Ruffin submitted that the status quo should be assumed to prevail. That is, in assessing the constitutionality of the Act I should assume that the current system of welfare would continue. He submitted that, if and when the current system is terminated, the issue may then be reviewed by the Court. Mr Arnold rejected such a narrow approach. So do I. I believe it would be artificial to ignore both the stated parliamentary intention to discontinue the existing scheme and the economic realities facing the Cook Islands. Consequently, I have not assumed the continuation of the existing welfare arrangements.

[29] The details of the proposed superannuation scheme emerged in the late 1990s and thereafter matured fairly quickly into legislation which came into force on 24 November 2000. A core concept within the Act was that the assets would be held pursuant to a trust deed with the Public Trustee (of New Zealand) as the Trustee. The deed itself appears to have been drafted once the Act was in force and is dated 19 September 2001 (the Trust Deed or the Deed). It is common ground that the entire Scheme (that is the Act, the Deed and other relevant materials) were drafted by experts in New Zealand. The various personnel involved in the drafting of the Scheme are recorded in Hansard at pages 825 and 845 (second reading on 23 November 2000).

[30] Affidavits filed by both the plaintiff and the defendants record something of the political and cultural environment in which the Scheme had its provenance. The defendants, in particular, paint a picture of financial crisis in the 1990s said to be due to Government maladministration. Strictly speaking, the admissibility of this sort of material is problematic because it records a variety of opinions and perspectives on matters that go wider than might usually be considered when interpreting legislation. Both parties, however, submitted that I should read these affidavits (plus exhibits) for a variety of reasons. For example, it was said that many of the matters covered were in the nature of materials of which a Judge might ordinarily be expected to take judicial notice. However, in the case of the Cook Islands, with itinerant Judges, there was a concern that Judges might not have the necessary background.

[31] In a broad sense, the evidence in the affidavits does correspond with my own knowledge and experience of the Cook Islands which extends back some fifteen or so years. I intend no disrespect to the deponents if I do not specifically refer to their evidence but, ultimately, I do not think this case is to be resolved by detailed analysis of the affidavits. I also observe that the speeches recorded in Hansard (during the various readings of the Bill which culminated in the Act) appear to me broadly consistent with what is set out in those affidavits and, indeed, what can be distilled from construing the Act itself.

[32] While it is not, as a matter of law, automatic that a Court should have regard to Hansard, both parties directed my attention to Hansard, each emphasising those portions believed to assist their respective cases. It is clear that many Members of Parliament anticipated there would be at least some amendment to the Act over the first few years of its life. Teething problems were anticipated. It is also clear that the Act had been passed at considerable speed. Indeed, the Opposition expressly complained about that. Although the Opposition, ultimately, supported the Bill, it does appear there was a general appreciation on both sides of the House that there would be further amendments to the Act in due course. The nature of those amendments does not appear to have been explored.

[33] It is now common ground that the hybrid structure of the Scheme – that is, a mixture of statute and of a private law trust deed providing for separate accounts for each member but not guaranteed by the Government – is unique to the Cook Islands. The parties have made extensive inquiries amongst other Pacific countries including Australia and New Zealand, and also further afield. They have not been able to locate a superannuation scheme directly equivalent.

[34] There are various reports before the Court as to the current state of the Fund. Presently, there is some $64m invested and some 7,000 members. The Scheme has been progressively rolled out so that not all employers and employees within the Cook Islands are yet covered by it. Since the question of constitutionality of the Act has been raised, there have been no further members introduced pending resolution of the case.

The Constitution

[35] The Cook Islands became self governing in 1965. The Constitution came in to being by way of the Cook Islands Constitution Act 1964 (NZ).

[36] The main Articles in the Constitution which are relevant are those numbered 40, 64 and 65 and I now set out material extracts:

> *"40(1) No property shall be taken possession of compulsorily, and no right over or interest in any property shall be acquired compulsorily, except under the law, which of itself or when read with any other law –*
>
> *(a) Requires the payment within a reasonable time of adequate compensation therefor; and*
> *(b) Gives to any person claiming that compensation, a right of access, for the determination of his interest in the property and the amount of compensation, to the High Court; and*
> *(c) Gives to any party to proceedings in the High Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that court sitting as a Court of original jurisdiction.*
>
> *(2) Nothing in this Article shall be construed as affecting any general law –*
>
> *(a) For the imposition or enforcement of any tax, rate or duty; or*
>
> *…*

> (g) *Relating to trusts and trustees; or*
>
> *…"*
>
> *"64(1) It is hereby recognised and declared that in the Cook Islands there exist, and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms –*
>
> (a) *The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law;*
> (b) *The right of the individual to equality before the law and to the protection of the law;*
> (c) *The right of the individual to own property and the right not to be deprived thereof except in accordance with law:*
>
> *…*
>
> (2) *It is hereby recognised and declared that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed, by any enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands."*
>
> *"65(1) Subject to subclause (2) of this Article and to subclause (2) of Article 64 hereof, every enactment shall be so construed and applied as not to abrogate, abridge, or infringe or to authorise the abrogation, abridgement, or infringement of any of the rights or freedoms recognised and declared by subclause (1) of Article 64 hereof, …*
>
> (2) *Every enactment, and every provision thereof shall be deemed remedial, whether its immediate purpose is to direct the doing of anything that the enacting authority deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment [[of the object] of the enactment or provision thereof according to its true intent, meaning and spirit.*
>
> *…"*

[37] In addition, the defendants refer to other Articles within the Constitution at the point the tax argument is addressed. I will set out those provisions at that stage.

[38] Article 64 was added to the Constitution by way of the ninth amendment in 1981. It is common ground that this was based on the Canadian Bill of Rights 1960.

[39] Articles 40(1) and 64(1)(c), taken together, are generally referred to as a double property guarantee. This format appears to have been common in post-colonial Lancaster House type constitutions. This is discussed in a helpful book placed before the Court by the plaintiff, Constitutional Property Clauses by J van der Walt (Kluwer Law International, 1999). The relationship between Articles 40(1) and 64(1)(c) is complex and was the subject of much argument during the hearing. I need to make various findings on that relationship and this is discussed in more detail below.

[40] Van der Walt discusses the balancing of interests between a State's power of e*minent domain* on the one hand and the private property rights of a citizen of the other. This reflects the recognised power of expropriation – the power to take property subject to the payment of compensation. The State's power of eminent domain can be contrasted with a State's *police-powers* which, as the name, suggests, are of a different character. These powers exist at the other end of the scale. An example would be regulations limiting the use of property for various health or safety reasons. At this end of the spectrum, the exercise of such powers would not necessarily engage the interest of the Constitution. Broadly speaking, though, a provision such as Article 64(1)(c) more naturally focuses on the exercise of a State's police-powers.

[41] It is common ground that the relationship between Articles 64 and 65 has been addressed by the Court of Appeal in *Clarke v Karika* [1985] LRC (Const) 732 and that that decision is binding upon me. In reality, though, the Court of Appeal touched very lightly upon the issues now before the Court and I will need to make a more complete analysis than did the Court of Appeal in the earlier case. The Court of Appeal was concerned as to the effect of Articles 64 and 65 on pre-existing legislation. That problem does not arise in the present case.

[42] Prior to the commencement of the hearing, the parties had put an interpretation issue before the Court. The issue was whether Article 64(2),

which obviously qualifies Article 64(1), also qualified Article 40(1). The plaintiff argued that it did; the defendants said that it did not. Having heard argument from Mr Arnold, Mr Ruffin accepted that the defendants' approach was correct. Moreover, both parties came to accept that the proportionality argument (previously identified as a separate issue) was really another way of stating the balancing exercise inherent within Article 64(2). I discuss this in more detail later.

[43] In terms of Article 39(4) the Court has power to declare an Act invalid on the basis that it is inconsistent with the Constitution and there is an echo of this in Article 41(1) which also speaks of inconsistency with the Constitution. Interestingly, these terms were not used by the Court of Appeal in *Clarke v Karika* which spoke in terms of declaring contravening legislation *"inoperative"*. The Court set out Article 39 (see page 741) but did not specifically refer to Article 39(4). I note, in passing, that Article 64 as set out in the report of that decision appears to be in error.

Constitution – the Act – Interpretation Principles

[44] In order to address this application I need to undertake an interpretation exercise in relation both to the Constitution and to the Act. That exercise is not necessarily to be conducted discretely. For example, in construing the Act, it may be necessary to have regard to the Constitution as is discussed below.

[45] In this case, the defendants do not contend for a settled and established meaning of the Constitution. Although there has been some brief discussion of Article 64 by the Court of Appeal (*Clarke v Karika* noted above) there is no suggestion that the current application is to be resolved by following earlier Cook Island precedent.

[46] Starting, then, with the Constitution. As a written document it is uncontroversial to say that it should be interpreted both textually and contextually – much as a Court would approach interpretation of a statute. At a first level, it is a matter of determining what the words mean.

[47] Tom Allen's book, The Right to Property in Commonwealth Jurisdictions (Cambridge University Press, 2000), provides a useful overview of how

constitutional interpretation has altered over the years. He points to a general trend of legalistic interpretation which then, in the 1970s, gave way to a more generous and open interpretation. It is common ground that this sort of interpretation is appropriate in this case. Relevant authorities are now discussed.

[48] Lord Diplock, presiding in *Hinds v R* [1976] 1 All ER 353, discussed how a constitution should be interpreted at pages 359 and 360. He said:

> *"A written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject-matter and of the surrounding circumstances with reference to which it was made… They [relevant constitutions] differ fundamentally in their nature from ordinary legislation passed by the Parliament of a Sovereign State. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the State as to the structure of the organs of government through which the plenitude of the sovereign power of the State is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the traditions of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom…"*

[49] Some twenty years later, Lord Woolf in *La Compagnie Sucriere v Mauritius* [1995] 3 LRC 494, 500, endorsed two principles based on earlier dicta of Lord Wilberforce in the important case of *Minister of Home Affairs v Fisher* [1980] AC 319 who had emphasised:

> *"…two principles which have to be applied when interpreting constitutional provisions of this nature: the first being that they should be given a generous rather than a legalistic interpretation while at the same time giving effect to the purpose for which they were enacted; the second being that respect must still be paid to the language used, while at the same time taking into account the traditions and usages which give meaning to that language."*

[50] There are some fundamental constitutional principles which underpin the above discussion. For example, the requirement that a statute be interpreted consistently with the Constitution if at all possible reflects the role of the state to safeguard and promote the interests of its citizens. This was stated at least as long ago as the eighteenth century by William Blackstone when he said:

> *"For the principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature..."*

[51] The High Court of New Zealand in *Solicitor General v Miss Alice* [2007] 2 NZLR 783 observed:

> *"It is the constitutional role of the State, represented by the Crown, to safeguard and promote the interests of its citizens. It has no other justification..."* (paragraph [41])

[52] Even more recently, the Privy Council in *PSAB v Maraj* [2010] UKPC 29 said:

> *"The constitutionality of a Parliamentary enactment is presumed unless it is shown to be unconstitutional... In short, in interpreting these provisions, the Board should assume that Parliament intended to legislate for a purpose which is consistent with the fundamental rights and not in violation of them."*

[53] Lord Cooke sitting as a member of the House of Lords in *Daly v Secretary of State* [2001] 2 AC 532 spoke of the fundamental rights affirmed by constitutions. At paragraph [30] he said:

> *"The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, Bills of Rights and the like respond by recognising rather than creating them."*

[54] Mr Arnold submitted that the general thrust of these authorities, which is to give constitutions a generous interpretation, does not necessarily also guide interpretation in relation to limitations contained within these constitutions – limitations which cut back the fundamental rights identified. Lord Reed in *Bank Mellat v HM Treasury* [2013] UKSC 39, [68] emphasised that fundamental rights should only be restrained as necessary – and no further.

[55] Here, an important part of the contextual interpretation issue is to note that Article 64 is modelled on the Canadian Bill of Rights 1960 (replaced by the Charter in 1982, as it happens). Both parties approach the case on the basis that Canadian jurisprudence is important and that, it seems to me, must be so. The Canadian cases refer to the need to interpret a constitution as a living document (as opposed to an historical artefact frozen in time). This is specifically acknowledged in the decision of the Supreme Court of Canada in *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429, a decision strongly

relied upon by the defendants in this case. While *Gosselin* is not the only source of such dicta, the majority decision at [82] can be noted for its reference to the need to interpret a constitution as *"a living tree capable of growth and expansion within its natural limits"*.

[56] The dissenting Judge in that case, Arbour J, put it in this way:

> *"The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed... It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the Charter. The tree is rooted in past and present institutions but must be capable of growth to meet the future."* (paragraph [317])

[57] In other words, it would be mistake to regard a constitution as frozen or its content as having been exhaustively defined in earlier cases. *Gosselin* shows that the Supreme Court of Canada is inclined to keep an open mind about the future but, then, to choose its cases carefully. Developments are not to be rushed.

[58] In other jurisdictions (the USA, for example) some Judges do not treat constitutions as living documents. Without engaging with such reasoning, however, I state my preference for the Canadian approach which I adopt.

[59] Part of the relevant context, too, is that of international law. The Privy Council in *Reyes v R* [2002] UKPC 11 (a mandatory death penalty case) observed:

> *"...The Courts will not be astute to find that a Constitution fails to conform within international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does."* (paragraph 28)

[60] While the double negative in the extract above presents its own difficulties, the short point is that a Court should assume that a constitution is intended to conform with international standards of humanity and individual rights. I think it is common ground that the Cook Islands Constitution should be interpreted in a way reflective of both international law and common law fundamental rights.

[61] In summary, I believe the Constitution should be interpreted:

[a] by reference to the words actually used and their context;

[b] generously rather than legalistically;

[c] as a living document;

[d] consistently with international law and international standards of humanity.

[62] Turning, then, to the Act and its interpretation. The usual principles of statutory interpretation apply. Other than in relation to section 21(2) there is no particular controversy in that regard, as will be seen shortly. But there is an overarching obligation to interpret the Act, if at all possible, in a way consistent with the Constitution.

[63] Article 65, of course, applies to the interpretation of a statute. A statute is to be given a fair, large and liberal interpretation. There is no particular controversy about that in this case.

[64] To what extent, if at all, should the Court defer to the legislature? In interpreting the Act, the Court is not expected to defer to the legislature. As Bastarache J put it in *Gosselin v Quebec*:

> *"...In this case, the Government claims that the group that it is in fact trying to protect is the very same group whose rights have been infringed. This should militate against an overly deferential approach. If the Government wishes to help people by infringing their constitutional rights, the Courts should not, given the peculiarities of such an approach, be overly deferential in assessing the objective of the impugned provision or whether the means used were minimally impairing to the right in question."* (paragraph [262])

[65] The short point is that, if the Court concludes that the Act infringes the Constitution, it cannot shy away from that conclusion. Notwithstanding the above, there is a suggestion that there should be some deference and this emerges from the Supreme Court of Zimbabwe in *Nyambirai v National Social Security Authority* [1996] 1 LRC 64, 72. Mr Ruffin accepted that if I found that the Act was unconstitutional then no rule of deference was available to save it.

The Act - interpretation

[66] The Cook Islands National Superannuation Act 2000, in conjunction with the relevant Trust Deed (discussed below), establishes the Superannuation

Fund. Although established by statute, the Fund itself is private in that it is organised by reference to the Trust Deed and the Public Trustee (created by a New Zealand statute) is the trustee of that trust.

[67] Perhaps unsurprisingly, the Act is reasonably detailed and some parts might even be described as complex. But, with the exception of section 21(2), there are no particular interpretation difficulties facing the Court. The defendants' objections (discussed below) are fairly evident and not in dispute (in an interpretation sense).

[68] The Superannuation Scheme is a defined contribution scheme in that the amount to be paid by employees and employers is defined in the statute. It is not, though, a defined benefit scheme. Put simply, the various benefits available (section 18) will ultimately depend upon the success of the Trustee's investment skills.

[69] The Act defines the Fund in section 2 as meaning: *"The Cook Islands National Superannuation Fund established by the Trust Deed."* Section 17 then provides that all contributions are to be paid into the Fund and *"credited to the account of the contributor"* and then used to make the section 18 benefits available to the member in due course.

[70] The provisions relating to employee contributions can be found in section 36 et seq. Section 36 provides that employees who are employed in the Cook Islands by a Cook Island employer (or who are employed outside the Cook Islands while resident there) shall make contributions to the Fund unless excluded by section 37. Section 38 provides for the transfer of existing employee superannuation schemes to that created by the Act. As is noted below, the defendants are critical of the way in which the legislature sought to squeeze out existing superannuation schemes. Section 39 sets out the percentage rate of contribution and section 41 provides that employee contributions shall be made by way of deduction by the employer. If the employer does not do that, section 43 sets out the obligations upon the employee to make the contributions directly.

[71] The obligation of employers is then set out in section 44 et seq. By the time of the hearing it was accepted that employer contributions, made in relation to the employment of employees, were a term of individual employment

contracts. In other words, at the point the contribution was made by the employer, it became, strictly speaking, the employee's property. That discussion over-simplifies the position but it makes it clear that the Court is focusing primarily upon the employee rather than the employer.

[72] Section 53 provides that a contributor is not entitled to withdraw any amount from the Fund other than in terms of that contributor's entitlement to receive benefits. Section 53(3) provides an exception to this in the case of employees employed for terms of less than three years in terms of section 52(2) (migrant workers). In their case, they can withdraw contributions when they leave the country. The catch to this, though, is that the employer contributions then are paid into a reserve fund (which is described in the Trust Deed).

[73] Migrant workers are not necessarily required to take this step. Section 54 provides that they have the option of leaving both their contributions and those of their employer in the Fund notwithstanding that they have left the country. One of the criticisms made by the defendants focuses upon what is said to be the plight of migrant workers which is caused by section 53. This is discussed further below.

[74] The Act also contains provisions as to the content of the Trust Deed. For example, pursuant to section 20 there are various provisions implied into the Trust Deed including that the Trustee shall exercise the usual care, diligence and skill of a prudent and professional provider of Trustee services. Moreover, by means of regulation, there is scope for the legislature to imply further terms into the Trust Deed. The scope to do this is of uncertain dimension but the potential certainly exists. I believe that the power to regulate should be interpreted pursuant to the e*jusdem generis* rule by reference to sub-clauses (a) and (b) immediately preceding it. I do not need to reach a final view on this. The fact remains that no such regulations have been promulgated.

[75] Section 21 allows the Trust Deed to be amended but section 21(2) contains a qualification upon that. This provides:

> *"An amendment to the Trust Deed shall not adversely affect a contributor's right or claim to benefits or the amount of those benefits that have accrued up until the date of the amendment..."*

[76] The defendants submit that the above provision provides far less protection than, at first sight, it might be thought. The section falls naturally into two parts. First, it says that amendments shall not adversely affect a contributor's right or claim to benefits. Mr Arnold rightly says that there is no entitlement to benefits until, prima facie, the contributor reaches retirement age. Secondly, there is reference to the amount of benefits *"that have accrued up until the date of the amendment"*. This, too, said Mr Arnold, must refer to the period following retirement. Mr Ruffin, by contrast, submitted there were no such difficulties in interpreting section 21(2). He said that once it was understood that the *"right or claim to benefits"* included a future right the section made perfect sense. I accept his interpretation.

[77] As a consequence, I consider that Mr Arnold's criticisms of this section are overdone. I believe the section does provide real protection, particularly when coupled with the provisions of the Constitution. I am reluctant, though, to define the extent of that protection any more precisely in the absence of particular facts.

[78] Mr Ruffin emphasised section 30 of the Act, the effect of which is to make earnings in the Fund tax free. He spoke of this in terms as a Government contribution to the superannuation scheme. I think that is a fair characterisation.

[79] Turning, then, to the Trust Deed which was executed as a deed on 19 September 2001. At this point of the discussion, I note that I invited the plaintiff to contact the Public Trustee to see if he wished to be involved in this litigation. I was conscious that I might be required to interpret some aspects of the Scheme and that I would be doing so in the absence both of the Trustee and members. I am advised that the Public Trustee declined the Court's invitation to have any role in the litigation.

[80] For the avoidance of doubt, I make it clear that although, necessarily, I am required to analyse the Act and the Trust Deed, nothing that I say in this Judgment is binding upon the Public Trustee and members. If any particular

issues arise in the future then they will be resolved by the Court in the usual way.

[81] The Trust Deed provides that contributions are paid into the Fund (clauses 9 and 10). They are held to the account of the member prior to that member's entitlement to receive a benefit (clauses 15 and 18).

[82] The member has no right or interest in the Fund (clause 4) and has no right to withdraw (clause 47). Notwithstanding these limitations, the members' interest is described as *"fully vested"* (clause 69). Mr Arnold submitted that this did not mean fully vested in an equitable sense. Rather, this was said to be a term of art in relation to superannuation schemes. Mr Ruffin was inclined to accept that the reference to *"fully vested"* should not be understood as an equity lawyer would do so. He submitted that an appropriate understanding of this provision is informed by a consideration of the High Court of Australia decision in *Finch v Telstra Super Pty Limited* (2010) ALR 236 discussed below.

[83] The reserve account discussed above in paragraph [72] is spelled out in some detail (clauses 27, 28 and 66).

[84] Benefits are provided for in clauses 39, 42 and 44 in particular. There is provision in clause 67 by which benefits are forfeited.

[85] Finally, in this survey, I note that the rights and obligations of the Trustee, including to an indemnity, can be found in particular in clauses 74, 76, 78 and 79.

[86] Based on the above, Mr Arnold for the defendants painted a fairly glum picture of vulnerable members ripe for exploitation either by the Trustee or, perhaps more ominously, by the Government using powers to amend the legislation or otherwise. He also painted a picture of members vulnerable to the vagaries of international investment. In theory, many (but not all) of the risks painted by him exist and they are discussed in more detail below. But the fact remains that, over the last thirteen years, the Fund has been reasonably successful notwithstanding the GFC. The Public Trustee is a highly reputable Trustee. The Government has not intervened, despite its powers to do so. Theory needs to be tempered with reality.

Other Pacific Superannuation Schemes

[87] There were a number of Pacific superannuation schemes placed before the Court and the differences between those schemes, and that of the Cook Islands, were strongly emphasised by Mr Arnold. I will shortly refer to some of the main points made by him. First, though, there is a note of caution to be sounded.

[88] Details of the different superannuation schemes were put before the Court mainly by means of attaching copies of relevant legislation as exhibits to an affidavit. In addition, the deponent referred to some materials located on relevant websites. None of this material was mediated through experts in the relevant law of the different countries and there can be no certainty that the various references were complete.

[89] Having sounded that caution, though, some reasonably consistent themes emerged.

[90] First, other than Papua New Guinea (and, of course, the Cook Islands), all of the countries surveyed had some form of Government underwriting or support for the relevant scheme. This support came in different shapes and sizes. At one end, perhaps, was that of Tonga where the relevant provision provided that if there was a shortage of necessary funds then a request could be made to the Minister for assistance. Other countries had more specific Government obligations. Vanuatu, for example, in section 18 of the relevant legislation had this obligation:

> *"If the Board is at any time unable to pay any sum which is required to be paid under the provisions of this Act, the sum required shall be advanced to the Board by the Government and the Board shall as soon as practicable repay to the Government the sum so advanced if required to do so under the terms of the advance."*

[91] Many of these provisions are coupled with a minimum rate of return (for example 2½% or 4%). Strictly speaking, the combination of these two factors do not amount to guarantees but they amount to a form of underwriting by the respective Governments. I think it is appropriate to refer to the combination of these features as a guarantee and, as long as the term is understood in this sense, I will continue to use such a label to describe this type of arrangement.

[92] Secondly, some of the countries excluded migrant workers from coverage of the scheme at all or contained provisions allowing them to extract all relevant contributions upon leaving the country concerned.

[93] Thirdly, some of the countries allowed employees effective access to their superannuation funds to pay for education or by way of loans to pay for housing.

[94] Fourthly, many of the countries allowed members of a scheme to take their contributions with them if permanently leaving the country. For example, in Samoa, the *"date of entitlement"* arrives if a member intends to depart or has departed from Samoa to reside permanently outside Samoa.

[95] It should also be noted that Mr Arnold made reference to the fact that most other countries allowed for the existence of multiple superannuation schemes and did not mandate the single compulsory scheme which is that now before the Court.

World Bank Report: Averting the Old Age Crisis – Policies to Protect the Old and Promote Growth, published by the World Bank, 1994 (OUP)

[96] Both parties referred the Court to the World Bank Report as it came to be called. This is a substantial document of some 200 pages. In particular, reference was made to what are called the three pillars of old age income security. The first pillar is that of a mandatory publicly managed fund financed through tax. The sort of schemes discussed below by reference to *Nyambirai* and *Apostolou* are examples of this sort of old age social security.

[97] The second pillar is a mandatory but privately managed pillar and it is common ground that the Cook Islands Scheme is of this nature.

[98] The third pillar is that of the voluntary scheme of which the New Zealand Kiwi Saver is the best example (although, strictly speaking, the New Zealand arrangements are based on both the first and third pillars).

[99] The World Bank publication points out the risks of having single-pillar systems and says that no country has ever tried to use them as such. In this context, Mr Arnold strongly emphasises that the existing welfare scheme

under the Welfare Act 1989 is intended to end at some point. As things presently stand, the Welfare Act provides a first pillar support for the second pillar scheme now under review. For the reasons discussed above, continuation of this support cannot be assumed.

[100] Having reviewed the World Bank Report, and also the Constitutions of many Pacific countries, Mr Arnold confidently submitted that the Cook Island Scheme was unique. There was no serious opposition to that submission.

Covenants

[101] In addition to referring to the World Bank Report, both parties also referred to the International Covenant on Economic, Social and Cultural Rights to which the Cook Islands is a party. I received extensive submissions on this covenant but, in the end, and with respect, I do not feel the need to refer expressly to either the covenant or the submissions made in relation to it.

[102] Mr Arnold referred to another covenant being the International Covenant on the Protection of the Rights of all Migrant Workers and Members of their Families. This has not been acceded to by the Cook Islands. Nevertheless, Mr Arnold submitted that Article 32 of this was relevant to the position of migrant workers. Article 32 provides:

> *"Upon the termination of their stay in the State of employment, migrant workers and members of their family shall have the right to transfer their earnings and savings and, in accordance with the applicable legislation of the State's concern, their personal effects and belongings."*

[103] Mr Ruffin referred, also, to the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

An overview of the cases

The defendants' case

[104] Mr Arnold argued that the Cook Islands Scheme is unique in its particular structure. He called it a flawed hybrid in that it breached some of the principles in the International Covenant on Economic, Social and Cultural Rights introduced above, breached some of the fundamental rights protected by the Constitution, was an ill-conceived departure from the multi-pillar

approach advocated by the World Bank, and was a second pillar structure contrary to the recommendations of the World Bank.

[105] The defendants' fundamental objection to the Scheme is said to be as follows:

> *"It uses State compulsion to force contributions into a Fund that, itself, has inherent risk of partial or total failure – without the State assuming any responsibility to contributors if that should occur."*

[106] Hand in hand with this fundamental objection, was said to be the lack of entrenchment. Even if there were a Government guarantee then, in the absence of entrenchment, the protections might be illusory. So it was these two aspects – Government guarantee and entrenchment – that the defendants emphasised. Mr Arnold realistically accepted that, in the Cook Islands, old age social security is more likely to focus on the second pillar because a single first pillar approach would be beyond the financial means of the country.

[107] The defendants had other objections, too. First, there was the particular case of the migrant workers and what was said to be prejudicial to them. Secondly, there was the ability of poorer members of society to make any contributions at all (and how the requirement to make such contribution could prejudice their ability to feed themselves or their families). And, thirdly, there was also the collapse of the existing schemes into this new scheme which was criticised. But all of these criticisms were subsidiary to the main argument of lack of government guarantee and lack of entrenchment.

[108] Mr Arnold's attack was focused in three particular ways. He started with Article 64(1)(a) and emphasised that the reference to *"security of the person"* had a social welfare dimension about it. He argued for a positive duty to promote social welfare for the elderly as well as a negative obligation not to deprive them of their autonomy to manage their own affairs. Mr Arnold readily acknowledged that this argument had emerged somewhat late in the piece and, indeed, it was still developing at the point of the hearing. While I do not say that is a criticism, it was not always entirely easy to place this argument and identify its individual components.

[109] Secondly, Mr Arnold focused on Article 64(1)(b) and the alleged inequality by reference to migrant workers. While he did not ultimately resile from these arguments, Mr Arnold did not pursue them at the hearing, content to leave them to be taken as read. Realistically, he accepted that this argument could more usefully be assessed as part of the third argument now discussed. That, indeed, is how I approach the argument and I will not specifically address the second argument reserving, to the extent necessary, Mr Arnold the right to advance it more fully if he needs to do so on any subsequent appeal.

[110] Thirdly, Mr Arnold focused upon taking or deprivation of property in terms of Articles 40(1) and 64(1)(c). Amongst other things, this third argument involved consideration of a proportionality argument as already introduced.

[111] During the course of argument, I put it to Mr Arnold that his first argument (based upon *"security of the person"*) was in many ways radical. I suggested it was unlikely to succeed if he failed in relation to this third argument. In other words, his third argument (based on property) was his strongest and he should focus his efforts upon that.

[112] Initially, Mr Arnold was not much persuaded by this and held to his first argument. Indeed, he argued that the first and third arguments were strongly interdependent. He argued that the case was both about security of the person and the enjoyment of property rights needed to achieve the constitutionally guaranteed right of security of the person. The two rights were mutually reinforcing, he submitted. Over the course of the hearing, however, he retreated somewhat and came to accept that his property argument was his strongest and, moreover, enabled him to advance his arguments as required.

[113] Finally, and if there were an unconstitutional taking under Article 40(1) (as he argued), Mr Arnold argued that it was not a tax. In this, he was replying to the submissions of the plaintiff, now introduced.

Plaintiff's case

[114] In dealing with Article 64(1)(a), Mr Ruffin focused upon the definition of *"security of the person"*. He submitted, in short, that it could not include

dimensions of social welfare in terms of Mr Arnold's argument. He traversed the relevant Canadian cases which were, he submitted, the best foundation that Mr Arnold could array. Nevertheless, he said that the Canadian Courts had not yet accepted the position contended for by Mr Arnold. He submitted that this Court should not go further. Consequently, the argument based on Article 64(1)(a) should fail.

[115] Mr Ruffin spent more time addressing the property arguments advanced by reference to Articles 40(1) and 64(1)(c). He characterised Article 40(1) as recognising the Government's power of eminent domain. He emphasised the law in Australia which required, in order for there to be an acquisition, that there should be an identifiable recipient (either the State or some other party). He said there was no such recipient in this case.

[116] In terms of Article 64(1)(c) he submitted there was no deprivation. Certainly, he submitted there was no basis to argue that the absence of a government guarantee (in the absence of identified loss in the Fund) was relevant to determining whether there was a taking or deprivation. He accepted that the absence of a government guarantee might be relevant in undertaking the balancing act under Article 64(2) but said it had no other part to play.

[117] He then submitted that if there were a breach of Article 40(1) by way of the Act, the acquisition (a necessary consequence of such a finding) amounted to a tax and thus fell within one of the limited exceptions in Article 40(2). He said that this should be a wide conception of tax. In particular, the reference in Article 40(2)(a) to a tax should not be limited by the requirements of Article 69 (set out at [243] below).

[118] Finally, Mr Ruffin addressed the question of remedies and I discuss that below.

First issue – Article 64(1)(a) – security of the person

Introduction

[119] The parties stated their summary of this issue differently.

[120] For the plaintiff, it was a simple issue of whether Article 64(1)(a) was relevant to the constitutional challenge and if so how.

[121] For the defendants, it was more nuanced and started by asking whether the Act engaged issues, in particular, of security of the person within the meaning of Article 64(1)(a).

[122] Following on from that, the defendants asked whether the article conferred either a positive right to security of the person or a right not to be deprived of security of the person except in accordance with law. In the case of the latter, the defendants then asked whether there was a deprivation and whether, in the circumstances, there was a positive obligation on the State to guarantee the losses which might be suffered by the Fund.

[123] As I understand it, this first issue comes down to two legal issues. First, whether the expression *"security of the person"* encompasses economic concepts of social security or whether it is more limited to issues associated with the administration of justice in the sense of the integrity of the body. Secondly, whether, in addition to the negative right (not to be deprived etc) there is also a positive right to security of the person.

Defendants' arguments

[124] Mr Arnold's main submission is that the Constitution confers a positive right to security of the person that obligates the State, having *"engaged"* the right to security of the person by passing the Act, to guarantee the Fund so as to assure that security of the person. Closely related to that is an argument that the Constitution confers a negative right not to be deprived of security of the person. That right has been infringed by the Act in its compulsory taking of the property (both the employee's and employer's contributions) that is intended for a person's retirement, the partial or total loss of which cannot be made good by a retired or disabled person without support from the Government.

[125] The defendants argued that the State guarantee mentioned earlier (see [90] and [91]) should extend to all funds credited to the account of a contributor, that a capital guarantee and modest inflation adjustment (it is not clear whether this aspect is still pursued) is necessary, and that the absence of the guarantee is constitutionally objectionable.

[126] Put in other words, the key issue for the defendants:

> *"...is the State's action in depriving persons of autonomy and control of their own property, yet refusing to stand by the consequences of any loss that may result."*

[127] Mr Arnold accepted that the starting point for his argument is to ascertain the meaning of *"security of the person"*. He also accepted that neither the Act nor the Trust Deed speaks in terms of security. At this preliminary point it might be observed that this can be contrasted with the situation in *Apostolou v Republic of Cyprus* [1985] LRC (Const) 851 in which the relevant Constitution provided: *"Every person has the right to a decent existence and for social security. A law should provide for the protection of the workers, assistance of the poor and for a system of social insurance."*

[128] Mr Arnold was not daunted by the absence of such an express provision in the Cook Islands Constitution, arguing that *"security of the person"* effectively leads to the same consequences.

[129] Following on from that, if *"security of the person"* does have the meaning contended for by Mr Arnold, he then formally asked whether Parliament engaged with it in legislating for the Act. There seems little doubt that this was the case (all else to one side). In that instance, the question is whether Parliament got it right from a constitutional perspective.

[130] While Mr Arnold drew on a number of sources for his submission that *"security of the person"* has a wider rather than narrower meaning, there were two main authorities. First, he relied upon the commentaries of Blackstone dating from the eighteenth century. He said the Blackstone's *"genetic footprint"* could be found in legal writing thereafter culminating in Article 64. Secondly, he relied upon Canadian jurisprudence and in particular the decision of the Supreme Court of Canada in *Gosselin*.

[131] Mr Arnold made the beguiling submission that, *"The Cook Islands' right can be traced directly back from 1981 to 1840 and from there to Blackstone's description of it in 1766."*

[132] He went on to submit that:

> *"...the interrelationship of the rights of personal security and private property long predate Blackstone and his commentaries. From his account, they would appear to have emerged over the 200 years*

> *prior as the statute and common law relating to the poor develop from the early 1500s onwards."*

[133] Indeed, Mr Arnold went back further in time and ultimately went back to the Magna Carta.

[134] Despite Mr Arnold's confidence that his argument was well founded, the fact is there is no clear acceptance of which I am aware that the expression *"security of the person"* includes a negative right (let alone a positive right) so far as it concerns access to social security. I think Mr Arnold's submission can, fairly, be described as radical. In these circumstances, I questioned whether it was appropriate that a first instance Judge should found a conclusion simply on the basis of Blackstone's commentaries. I put this proposition to Mr Arnold and he was largely unmoved by it. He pointed, as one example of Blackstone's influence, the express reference by Lord Reed in the very recent Judgment of the UK Supreme Court in *Bank Mellat v HM Treasury* [2013] UKSC 39, [68].

[135] Mr Arnold took the Court through extensive references to Blackstone. In short, he argued that *"security of the person"* was clearly understood by Blackstone as a reference to the relief of poverty and care of the poor.

[136] These deeply considered arguments then culminated in Mr Arnold's reliance upon Canadian jurisprudence in relation to the Canadian Bill of Rights 1960 which was, in 1982, superseded by the Charter of Rights and Freedoms. The high point of his argument was the Supreme Court decision of *Gosselin* already mentioned. Mr Arnold argued that, in Canada, the concept of *"security of the person"* has been held to extend to rights affecting a person's body and health, and as a right that is protective of the physiological integrity of an individual. He submitted that *Gosselin* was a case regarding social welfare (that is correct) and that the circumstances in that case were, subject to two important distinctions, directly relevant to the present case. He acknowledged the majority view in *Gosselin* (which is essentially unfavourable to him despite his endeavours to paint it in a positive light) and then placed considerable reliance upon the dissenting decision of Arbour J from which he distilled some eleven principles. This analysis culminated in a submission that the dissenting Judge's reasoning supported a submission

that there was no doubt that there was a positive right to security of the person in the Cook Islands.

[137] There was considerable discussion between bench and bar in relation to whether there was both a positive and negative right. Prima facie, the words in Article 64(1)(a) would suggest there are both. But a similar structure in the Canadian Charter has not lead to that conclusion in that country. The majority view in *Gosselin* clearly shows reluctance on the part of the Court to embrace a positive right – no doubt, because that might have unfortunate and unintended consequences.

[138] Mr Arnold then extensively discussed the negative right and also addressed the question of whether there needed to be actual harm or whether reasonably apprehended harm was sufficient. He submitted it should be the latter.

Article 64(1)(a) - the plaintiff's arguments

[139] Mr Ruffin's submissions focused on the meaning of *"security of the person"*. He submitted that, in accordance with Canadian jurisprudence, it should be interpreted to mean physical security of the person or bodily integrity. But, however it was defined, it could not include economic notions of social welfare.

[140] He noted that some of the Canadian cases speak in terms of *"well-being of a natural person"* and he said that this, too, excluded any sense of social welfare obligations. He referred to a range of cases decided in Canada between 1979 (at the earliest) and 1993. He concluded this discussion by reference to the Supreme Court of Canada decision in *Gosselin* particularly at paragraphs [75]-[83]. These paragraphs are part of the Judgment of the majority in that case which, he submitted, made it clear that the Supreme Court, first, did not accept any positive obligation and, secondly, had not yet accepted a meaning of *"security of the person"* commensurate with Mr Arnold's characterisation of that expression.

[141] Mr Ruffin joined with Mr Arnold in accepting that the expression found in both Articles 64(1)(a) and 64(1)(c) – *"in accordance with law"* - effectively meant

in accordance with principles of fundamental justice as that term appears in the Canadian Charter.

[142] Finally, Mr Ruffin referred to the Cook Island legislation, Ministry of Finance and Economic Management Act 1995-1996, in the context of Mr Arnold's submission that there should be a government guarantee in the scheme. While this Act was discussed by Mr Ruffin at this point in his submissions, I am not convinced that this is the appropriate place to consider it. But, in any event, I am not sure that it is particularly relevant. This Act is concerned, inter alia, with whether the Government can give guarantees and indemnities (section 60). It does not, however, purport to deal with the situation of whether the Government, by statute, could guarantee or somehow underwrite a superannuation scheme.

Article 64(1)(a) – discussion and decision

[143] I propose dealing with this issue relatively briefly, conscious of my subsequent conclusion that there has been a breach of Article 64(1)(c). In those circumstances, I see no need to make a final decision in relation to an argument which, if accepted, would amount to a significant development of the law. As I say below, I have reservations about the argument but I think it better to leave a final decision to another case which more directly engages with the issue and where there are no other alternatives. Here, Mr Arnold's arguments more naturally fall to be determined by reference to Article 64(1)(c) and my preference is to address them at that stage.

[144] However, and in deference to Mr Arnold's strongly made argument, I do want to make some observations. I am also conscious that this matter may go further and that it may be necessary for Mr Arnold to revisit the topic in another Court.

[145] First, I have reservations whether the framers of the Constitution intended the expression *"security of the person"* to have the wide-ranging economic dimension of social security. Mr Arnold has gone to much trouble to draw an historical thread extending over a period of at least 300 years up to 1965 when the Constitution was adopted. Enlightenment writers plainly had notions of old age security in mind in writing generally about fundamental human rights. William Blackstone in his Commentaries (Book 1, Chapter 1)

referred to what he said were the three principal rights being the right of personal security, the right of personal liberty and the right of private property. In relation to the first (the right of personal security) he said that this consisted *"in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation."* He expanded upon this by saying: *"The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support."*

[146] The reference by Blackstone to a right to enjoyment of life finds echo in the other Enlightenment writers referred to by Mr Arnold. Although not mentioned by counsel it might be observed that there is an arch that extends from the Enlightenment to the present. The late Ronald Dworkin, in his more recent writings, states that one of the two fundamental principles underpinning the law is that each human life should succeed rather than fail – that people should live well.

[147] But all of that does not necessarily mean that an expression such as *"life, liberty and security of the person"* was intended to bring in economic or property concerns. I immediately accept that, in thinking about quality of life concerns, regard needs to be paid to economic dimensions. But if *"security of the person"* is to extend beyond notions of bodily integrity (associated with health for example) it is difficult to see where the field ends. Ultimately it might be argued that anything that impacts upon the life of a human being is thereby incorporated within Article 64(1)(a). That seems an unlikely proposition.

[148] Secondly, I note the structure of Article 64(1) and, in particular, Article 64(1)(c) with its focus upon property rights. The present case shows that at least some aspects of social security can be dealt with by reference to that Article. A broad interpretation of Article 64(1)(a) arguably would replace the need for Article 64(1)(c). This sort of analysis suggests that the framers of the Constitution intended that *"security of the person"* should be read in a narrower sense. I accept, of course, that a Constitution is to be interpreted both by reference to the framers' intentions and as a living document.

[149] Thirdly, section 7 of the Canadian Charter is in the following terms:

> *"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."*

[150] This section in the Charter appears under the heading *"Legal Rights"*. Section 7 is followed by sections 8-14 dealing with protection against unreasonable search and seizure, arbitrary detention and administration of justice topics of that dimension. The Canadian cases generally show a narrower interpretation of the expression *"security of the person"* by reference to this context. The same cases also discuss the deliberate decision, in wording section 7 of the Charter, to exclude any reference to property which was contained in section 1(a) of the Canadian Bill of Rights 1960 which was the predecessor provision.

[151] A number of Canadian cases were cited to me but I propose discussing only the most recent in the series being the Supreme Court of Canada decision in *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429. This decision is useful for a number of reasons. First, it directly concerns social security (although not old age security). Secondly, it specifically addresses the meaning of *"security of the person"* by reference to social security. Thirdly, it contains a strongly reasoned dissent by Arbour J which, if it had prevailed, would have provided a foundation for the defendants' case.

[152] The facts of the case were briefly this. In 1984 the Quebec Government created a new social security scheme which set the base amount of welfare payable to persons under the age of 30 at roughly one third of the base amount payable to those 30 and over. The purpose of this was to get recipients under 30 into work and training programmes that would make up for the lower base payment received by them while, at the same time, teaching them valuable skills in order to get permanent jobs. The applicant, a welfare recipient, brought a class action challenging the scheme.

[153] The decision is lengthy. In relation to section 7 of the Charter, there was a 7-2 majority. Five of those majority Judges joined in a joint Judgment written by the Chief Justice and the relevant discussion can be found in paragraphs [75]-[84]. This part of the Judgment refers to the dominant strand of jurisprudence on section 7 as focusing on an individual's interaction with the justice system and its administration. At paragraph [77]:

> *"Under this narrow interpretation, s7 does not protect against all measures that might in some way impinge on life, liberty or security, but only those that can be attributed to State action implicating the administration of justice."*

[154] Then, at paragraph [80], the Chief Justice noted that there was still an open question as to whether section 7 protected rights or interests wholly unconnected to the administration of justice. For example, it was unresolved whether it might protect interests central to personal autonomy such as privacy and economic rights fundamental to human survival.

[155] Having recorded those unresolved questions, the Judgment then addressed, from [81], whether section 7 also placed a positive obligation on the State to ensure that each person enjoyed life, liberty or security of the person. While recognising that, one day, section 7 might be interpreted to include positive obligations, the question was whether the present circumstances warranted *"a novel application of s7"* to found a positive obligation to guarantee adequate living standards. The Judgment, at [83], concluded that the circumstances did not warrant this course.

[156] For the reasons briefly summarised above, and if required to do so, it is likely I would have rejected this argument. Ultimately, though, I prefer to express no final view on it. I am conscious that in the area of constitutional rights, it is unwise to express conclusive views unless that is clearly necessary. Here, it is not necessary and I say no more about it.

Second issue – Articles 40(1) and 64(1)(c) - Property

Definition of property

[157] Initially, there was dispute between the parties as to whether the superannuation contributions of the employer and the employee were property in terms of the relevant Articles. By the time of the hearing, however, both parties accepted that they did amount to property. Moreover, both the contributions of the employee and the employer amounted to property of the employee. I proceed on that basis.

Defendants' submissions

[158] While a number of authorities were relied upon by Mr Arnold, and are discussed later, the case at the centre of his argument is the Privy Council decision already introduced, *La Compagnie Sucriere v Mauritius* [1995] 3

LRC 494. The relevant portions of the Mauritian Constitution were similar although not identical to the equivalent portions of the Cook Islands Constitution.

[159] Mr Arnold's argument was that the State-mandated superannuation Scheme amounted both to a taking (or acquisition) in terms of Article 40(1) and a deprivation in terms of Article 64(1)(c). He referred to a number of authorities to support a proposition that it was not necessary to rely upon one single restriction but, rather, upon an accumulation of minor restrictions. *Sucriere* discusses this at pages 501-503 by reference to a number of earlier authorities including the decision of the US Supreme Court in *Pennsylvania Coal v Mahon* (1922) US 393, 415-416. There are similar statements of principle in more recent decisions of the Privy Council being *Grape Bay v Attorney General (Bermuda)* [1991] UKPC 43 and *Campbell-Rodriques v Attorney General of Jamaica* [2007] UKPC 65. Canadian authority such as the decision of *Manitoba Fisheries v R* [1979] 1 SCR 101 is to similar effect.

[160] Mr Arnold referred, also, to Australian authority, although made the point that care needed to be taken for several reasons including the fact that, in Australia, the High Court of Australia had concluded that, in order to show an acquisition, it was necessary that someone had received a corresponding benefit. Mr Arnold submitted that that was not a requirement of the common law and that there might be a taking or acquisition of property without any other person actually acquiring it or using it. He spent some time, in reply, developing this argument.

[161] He referred, in particular, to the Privy Council decision *Societe United Docks v Government of Mauritius* [1985] AC 585 and referred to Lord Templeman's emphasis on the individual's loss rather than the State's gain. He referred, too, to an article by Kevin Gray who said how the Australian jurisprudence had been *"bedevilled"* by the distinction in that country: (2007) 24 Environmental and Planning Law Journal 161. Mr Arnold then expanded upon that by reference to two decisions of the High Court of Australia. He referred to Callinan J in *Smith v ANL* [2000] HCA 58 particularly at paragraphs [155] and [157]. He also referred to the Chief Justice in *Commonwealth v WMC Resources* (1998) 194 CLR 1. These references, he said, showed that the Australian Judges themselves had considerable

reservations and had effectively read down the requirement. In Australia it was sufficient if there were some slight or insubstantial acquisition by the Commonwealth or another.

[162] Furthermore, in reply, Mr Arnold responded to Mr Ruffin's argument that Article 40(1) on the one hand and Article 64(1)(c) on the other were directed at different concerns. In effect, Mr Ruffin had argued that the two concepts did not overlap. Mr Arnold submitted this was fundamentally wrong. He illustrated his point by way of a Venn diagram. The outer and larger circle was that of deprivation. Included within that larger set was a smaller subset of taking/acquisition.

[163] Based on the authority of *Sucriere*, and the other cases mentioned above in paragraph [159], Mr Arnold argued that the cumulative effect of the Scheme amounted to a taking (or acquisition) and also a deprivation. The argument is multi-pronged. First, Mr Arnold characterised the rights that the members had in the scheme as those of *"mere expectancy"*. He referred to various materials, including by Tom Allen, noting that such rights do not amount to property. Put in the language of Callinan J in the High Court of Australia (*Smith v ANL* at paragraph [194]) the property right possessed by the member before making the contribution was considerably more ample than it was afterwards – property contributed to the Scheme by way of contribution was replaced by a mere expectancy.

[164] Secondly, the State (represented variously by the Executive as well as Parliament) retained significant rights to alter the scheme.

[165] Thirdly, the protection provided by section 21(2) was more illusory than real. I have already addressed that argument at [76] and [77] above.

[166] Fourthly, the Cook Islands scheme lacked those features otherwise available in the equivalent schemes of other Pacific countries (see discussion above at paragraphs [87]-[95]).

[167] In reply, Mr Arnold developed these arguments in light of the possibility that he needed to show a taking in what he called *"the classic sense"*. He developed this argument by referring to the compulsory nature of the transaction – what he called a forced exchange. The employee's existing

property rights were extinguished and new property rights replaced them. I am by no means certain that these are two discrete approaches. They seem to me simply different was of characterising the same fundamental issue.

[168] Against these submissions, Mr Arnold submitted that each of Articles 40(1) and 64(1)(c) was engaged. In terms of Article 40(1) that then required consideration of the tax exception in Article 40(2). In relation to Article 64(1)(c), that then required consideration of the balancing exercise inherent in Article 64(2).

[169] In relation to the latter, Mr Arnold focused his submissions around the very recent decision of the UK Supreme Court in *Bank Mellat v HM Treasury* [2013] UKHC 39. He emphasised, in particular, paragraphs [20]-[21] of Lord Sumption's speech for the majority. He also drew my attention to paragraphs [68]-[76] of Lord Reed's speech in dissent (which paragraphs, however, Lord Sumption specifically endorsed). Mr Arnold's particular focus was upon the third and fourth factors being whether a less intrusive measure could have been used without compromising the achievement of the main objective and whether, in an overall balance of the severity of the measure on the right of persons to whom it applied, that outweighed the importance of the objective. This was a comparison between the rights of the complainant and the rights of others. While the State might be a proxy for the rights of others, ultimately this was not a comparison between the State as some abstract entity and the complainant. Mr Arnold submitted that, for all the reasons set out above (see in particular paragraphs [163]-[166]) the proportionality test failed.

Articles 40(1) and 64(1)(c) – plaintiff's argument

[170] Mr Ruffin started by addressing Mr Arnold's argument that, first, there was a positive as well as a negative duty. In that regard, Mr Ruffin referred to the commentator, Van der Walt, who at page 12 of his book asked whether that proposition had any real content. Mr Ruffin submitted there could be no such positive duty. The balance of his submissions focused on the alleged negative duty.

[171] Mr Ruffin characterised Articles 40(1) and 64(1)(c) as two discrete rights intended to deal with different circumstances. I asked him to picture these

as Venn diagrams in the same way as had Mr Arnold. Mr Ruffin drew them as two entirely separate circles with no overlap. He acknowledged that an accumulation of factors making up a deprivation might, as a matter of fact and degree, ultimately become an acquisition. However, at that point, the relevant conduct could no longer be characterised as a deprivation but would, rather, become an acquisition. His submission was that Mr Arnold's case should more appropriately be thought of in terms of Article 64(1)(c) rather than under Article 40(1) (although, of course, he did not concede that Article 64(1)(c) was breached).

[172] The plaintiff argued that Article 40(1) was concerned with the State's power of eminent domain and was primarily concerned with the taking of tangible property and the giving of compensation for it. The taking of land by the State under compulsory powers – and in exchange giving compensation – was the straightforward example of such powers at work.

[173] Mr Ruffin emphasised that for there to be a taking or acquisition under Article 40(1) there needed to be a recipient. In that regard, he reviewed the Australian authorities and in particular *Commonwealth v WMC Resources* (1998) 194 CLR 1. By reference to this (and other authorities) he submitted there could be no acquisition of property by the State without a distinct financial benefit being conferred upon the State (or another party) involving some identifiable benefit or advantage relating to the ownership or use of the property. He submitted that the acquisition, by the Trustee, of the legal interest in the contributions, did not satisfy this requirement.

[174] He submitted that, in reading cases such as *Sucriere* or *Nyambirai*, it was necessary to appreciate that the Court was, in essence, dealing with applications for compensation in relation to constitutions where the double property guarantee in each case required the payment of compensation. He contrasted that with the situation in the Cook Islands where only Article 40(1) was directly linked to the payment of compensation. He submitted that this distinction meant that dicta in these cases should be read carefully. It is by no means clear to me that each of *Sucriere* and *Nyambirai* did involve applications seeking the payment of compensation. In *Sucriere*, it seems that the applicants sought a declaration that the legislation contravened the Constitution. In *Nyambirai*, they sought redress under section 24(1) of the

Constitution (although what that entailed is not clear from the Judgment). I agree, though, that in each case, the relevant constitution did link compensation to each of the two property guarantees.

[175] Turning, then, to Article 64(1)(c), Mr Ruffin submitted that the relevant conduct did not amount to a deprivation. For example, he argued that the absence of a Government guarantee was irrelevant in the absence of evidence of a loss (and this argument also applied equally to Article 40). The act of deprivation (the compulsory making of a contribution in terms of section 36 of the Act, for example) was the point at which the Court should focus. If there were to be a loss, in the future, then that was not relevant to assessing whether there was an actual deprivation at the time of making the contribution.

[176] He challenged Mr Arnold's characterisation of vulnerability on the part of contributors. He said that, based on the Australian decision of *Finch*, as discussed in Professor Dal Pont's text, Equity and Trusts in Australia (5ed), chapter 28, members did have an equitable interest which was something more than an expectancy. Certainly, their interest was something more than that of a discretionary beneficiary. They could enforce the trust. He also emphasised the obligation upon the Public Trustee to act as a prudent person. He said this obligation had real consequences.

[177] Mr Ruffin submitted that the protection in section 21(2), although not entrenched, was a real protection. He submitted that if the State endeavoured to remove a member's rights (putting that in the broadest sense) then the Court would be vigilant to protect them including by reference to the Constitution.

[178] Mr Ruffin did discuss Article 40(2)(g). Under questioning by me, he accepted that, ultimately, its ambit was not entirely clear and that his case did not rely on it. For example, he was not endeavouring to argue that the Act could be characterised as general law relating to trusts and thus somehow sitting outside the effect of Article 40.

[179] By the end of the hearing, both counsel were substantially agreed as to the exercise of the proportionality assessment in terms of Article 64(2). Mr Ruffin, although rejecting the absence of a guarantee as being relevant to

assessing whether there is a deprivation (see above) accepted that it might be relevant in the proportionality assessment.

Articles 40(1) and 64(1)(c) – discussion and decision

[180] The first issue is to identify the relationship of Articles 40(1) and 64(1)(c) one to the other. In broad terms, I need to determine what each Article addresses and whether they are quite discrete or whether and to what extent they overlap. This exercise needs to be undertaken because the defendants claim under both Articles without differentiation on the basis that the two Articles overlap.

[181] Article 40 was in the Constitution when enacted. Article 64 was introduced some 15 years later as part of the ninth amendment. This, it might be thought, supports an argument that the framers of the amendment had particular purposes in mind in introducing it. It makes more sense to assume that Article 64(1)(c) was intended to deal with something other than the property concerns already addressed by Article 40. Why else would it be added?

[182] I accept Mr Ruffin's submissions that, prima facie, Article 40(1) is concerned with the doctrine of eminent domain – the right of the State to take tangible property subject to the payment of compensation. That is its central function. That is not especially controversial. What is more difficult is whether that also defines the boundaries of Article 40(1).

[183] Article 40's use of language *"taken possession of compulsorily"* and *"acquired compulsorily"* can be contrasted with Article 64(1)(c)'s use of *"deprived"*. It can properly be assumed that the framers of the various provisions chose their words carefully. Those words used in Article 40(1) are consistent with the expropriation cases of eminent domain. These words, too, are consistent with there being both a loss (or deprivation) and a receipt. That can be contrasted with the use of *"deprived"* in Article 64(1)(c) which is more consistent with the notion of police powers where there is then a balancing exercise between the rights of the individual and the rights and interests of the majority.

[184] The Australian Constitution in section 51(xxxi) speaks in terms of *"acquisition of property"*, broadly corresponding to our Article 40. The Australian Courts

have generally interpreted *"acquisition"* to require a recipient of property. Simply being deprived of property, in the absence of any beneficiary of that, does not breach the Australian Constitution.

[185] In a language sense, *"deprived"* appears to be a broader and more generous concept than that of *"taking/acquisition"*. And that lies behind Mr Arnold's submission that taking/acquisition is a subset of deprivation. That approach, however, is not supported by a close reading of the important Privy Council decision, *La Compagnie Sucriere v Mauritius* [1995] 3 LRC 494. The case concerned a new statutory obligation imposed upon landowners to re-let farmland (already subject to leases) to sugarcane farmers. The purpose was to provide those farmers with some security of tenure. The landowners argued that the Mauritius Constitution contained two relevant provisions which were breached. They sought a declaration to that effect.

[186] The two relevant provisions in the Mauritius Constitution were sections 3(c), broadly corresponding to Article 64(1)(c) in our case, and section 8, broadly corresponding with Article 40(1) in our case. There was a material difference, though, because section 3(c) (Article 64(1)(c)) also contained a right to compensation. Ultimately, I do not think this difference material but it is always important carefully to analyse relevant constitutions when referring to cases from other jurisdictions.

[187] Lord Woolf delivered the advice of the Board (interestingly, Hardie-Boys J then of the New Zealand Court of Appeal also sat).

[188] The preliminary parts of the decision set out the statutory background and the text of sections 3(c) and 8. On page 500 there is a discussion about interpretation principles which is then followed by a reference to Lord Templeman's speech in *Societe United Docks v Government of Mauritius* [1985] LRC (Const) 801 which had previously considered sections 3 and 8. An extract from Lord Templeman is set out culminating in this:

> *"Loss caused by deprivation and destruction is the same in quality and effect as loss caused by compulsory acquisition."*

[189] Mr Arnold placed considerable reliance upon this statement but, as I go on to discuss, subsequent Courts have not taken this to mean that the notions of

taking on the one hand and *deprivation* on the other are necessarily the same.

[190] Lord Woolf then discussed the relationship between sections 3 and 8. Notwithstanding Lord Templeman's observation about the relationship between deprivation and acquisition, it is difficult to see that Lord Woolf ultimately embraced such an approach. He stated:

> *"The correct approach is therefore to read section 3(c) and section 8 together, with the relevant language of each section influencing the interpretation of the other."*

[191] Pausing at that point, it might be respectfully observed that the direction to read the two provisions together provides no real assistance. And it is not entirely consistent with the conclusion of that lengthy paragraph:

> *"There is therefore a significant distinction between the protection provided by section 3(c) and section 8, notwithstanding their close relationship."*

[192] This is a critical paragraph in the decision. Lord Woolf speaks of section 3(c) (Article 64(1)(c)) as being a broader provision than the other but also subject to a broader qualification. Part of that reasoning hinges on a slightly different definition of *"property"* in the Mauritius Constitution. Even taking that into account, Lord Woolf still identifies an important distinction between the two approaches.

[193] Ultimately, the Privy Council approached section 3(c) and section 8 differently. At page 504, Lord Woolf identified that the issue before the Court was more appropriately treated as depending on section 3 (Article 64(1)(c)) than section 8 (Article 40). Even on a generous interpretation of section 8, it could not be said there was a compulsory taking possession of or an acquiring.

[194] The Court ultimately focused on section 3 (Article 64(1)(c)). Later, on page 504 Lord Woolf said:

> *"The ownership of land has a multiplicity of incidents and every regulation of those incidents in the public interest does not attract a prima facie right to compensation… However, even assuming that section 3 [Article 64(1)(c)] does apply because cumulatively the controls in section 5A [the impugned legislation] amount to a constructive deprivation of property, it by no means follows that*

> *section 5A contravenes section 3. The restrictions on the contract of Metayage [the relevant lease] only contravene the protection provided by section 3 if, because of the lack of any provision for compensation, they do not achieve a fair balance between the interests of the community and the rights of the individuals whose property interests are adversely affected."*

[195] The analysis in the case, and the subsequent conclusions, more closely support Mr Ruffin's approach than that of Mr Arnold. That is, Article 40(1) primarily focuses on a compulsory acquisition of tangible property plus compensation and Article 64(1)(c) focuses upon deprivation which may result from a multiplicity of factors in any given case. Broadly speaking, the two situations will not necessarily overlap. It is more likely that one Article will apply to a given situation and the other will not. Having said that, I think it would be unwise to decide that the two are entirely discrete and will be so in all cases. The present facts can, I think, be resolved without needing to reach any final decision on that point which should be left for a case where it must be decided directly.

[196] I refer to two decisions of the Privy Council at this stage. First, *Grape Bay Limited v Attorney General Bermuda* [1999] UKPC 43, a decision concerning legislation preventing McDonalds setting up in Bermuda. The issue was whether legislation having that consequence deprived the applicant of property in breach of the Constitution. The challenge ultimately failed on the facts of the case. The discussion at paragraphs [27]-[29] is, with respect, useful and I now set it out.

> *27. It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid. The best example is planning control (Westminster Bank Ltd. v. Beverley Borough Council [1971] A.C. 508) or in American terminology, zoning laws (Village of Euclid v. Ambler Realty Company (1926) 272 U.S. 365). The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest. The principles which underlie the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for*

the public benefit. This is so even if, as will inevitably be the case, the legislation in general terms affects some people more than others. For example, rent control legislation restricts only the rights of those who happen to be landlords but nevertheless falls within the general principle that compensation will not be payable. Likewise in Penn Central Transportation Co. v. City of New York (1978) 438 U.S. 104, the New York City's Landmarks Preservation Law restricted only the rights of those people whose buildings happened to have been designated historic landmarks. Nevertheless the Supreme Court of the United States held that it was a general law passed in the public interest which did not violate the Fifth Amendment prohibition on taking private property without compensation.

28. Whether a law or exercise of an administrative power does amount to a deprivation of property depends of course on the substance of the matter rather than upon the form in which the law is drafted. In the leading Canadian case of Manitoba Fisheries Ltd. v. The Queen (1978) 88 D.L.R. (3d) 462, the Canadian Freshwater Fish Marketing Act, R.S.C. 1970, C.F-13 conferred upon a statutory corporation the monopoly of exporting fish from Manitoba. The appellants had previously been exporting fish and the effect of the Act was to destroy their business. The Supreme Court of Canada held that they had been deprived of their property, namely, the goodwill of the business, even though that goodwill had not been directly transferred to the corporation. The substantial effect was to enable the corporation to acquire their previous customers. Societe United Docks v. Government of Mauritius [1985] A.C. 585, in which the plaintiffs alleged that their businesses had been destroyed by a monopoly of handling sugar for export conferred upon a statutory corporation, was treated as being in principle a similar case, but the plaintiffs failed on the facts because they were unable to show a causal connection between the establishment of the monopoly and the loss of their businesses.

29. Their Lordships consider that this case is clearly within the principle of general regulation in the public interest. The prohibition on what for convenience their Lordships will call franchise restaurants applied to everyone in Bermuda. It was highly specific in effect, not prohibiting restaurants or any other form of activity other than restaurants operated in a manner which fall within the statutory definition. It affected Grape Bay more than others because they were actually engaged in negotiations with a view to setting up a McDonald's restaurant. But there was no existing business of which they were deprived, as in the Manitoba Fisheries case. Still less was there, as in that case, what amounted in substance to an acquisition of that business by a public authority. And in the present case, unlike the cases on planning control or landmark preservation orders, Grape Bay did not even own land affected by the restriction. It merely had an option to take a lease."

[197] A more recent decision of the Privy Council also provides insight. This is *Campbell-Rodriquez v Attorney General of Jamaica* [2007] UKPC 65 which

concerned a toll road and whether the institution of a toll infringed the constitutional property protection. I set out paragraph [17]:

> *"17. It has been generally recognised, both in a long series of cases in the United States and in other jurisdictions, that taking is not limited to direct appropriation, but may encompass regulation of the use of land which adversely affects the owner to a sufficiently serious degree: see, eg, Lucas v South Carolina Coastal Council, supra; Penn Central Transportation Company v New York City (1978) 438 US 104. It is equally well recognised that states may pass legislation regulating the use of land in the public interest which does not carry the right to compensation as a taking of property, even though it may have significant adverse economic effects for property owners. The American cases are constantly cited in this context and examples may be found from other jurisdictions. It may be necessary to use such authorities with a degree of caution, bearing in mind the differences in wording of the applicable constitutional provisions, but a common thread is visible in a number of developed systems. The principle was approved by the House of Lords in Belfast Corporation v OD Cars Ltd [1960] AC 490, which was concerned with planning restrictions on the use of land. Viscount Simonds, at p 519, cited with approbation a passage from the judgment of Brandeis J in Pennsylvania Coal Co v Mahon (1922) 260 US 393, 417:*
>
> > *"Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use."*
>
> *The qualification which Viscount Simonds made was that adumbrated by Holmes J in the same case (260 US 393, 415), that if regulation goes too far it will be recognised as a taking, it being a question of degree."*

[198] The relevant constitutional provision in that case was broadly equivalent to our Article 40 and this, of course, framed the discussion.

[199] I rule a line at this point. It seems to me plain that there is a distinction between taking/acquisition on the one hand and deprivation on the other. Therefore, I do not accept Mr Arnold's submission that taking/acquisition is entirely a subset of deprivation. That, though, does not necessarily mean that I agree with Mr Ruffin's submission that they are entirely separate concepts with no overlap. I now address specific legal issues arising by reference to each of the two Articles.

[200] I start with Article 40(1). The first line of Article 40(1) speaks of property being taken possession of compulsorily. This can be contrasted with the second line which goes on to provide that no right over or interest in any property shall be acquired compulsorily. The position of the two approaches must be assumed to refer to different concepts. Why, otherwise, contain both? Mr Ruffin submitted that the first most sensibly refers to tangible property with the second referring to a broader range of property types. I agree. The notion of taking possession of property makes most sense in the context of tangible property. The use of language such as *"right over or interest in…"* shows the framers then addressing less tangible ownership. In my opinion, it is the second expression which is relevant to the present case. Henceforth, I will talk in terms of compulsory acquisition rather than taking.

[201] At that point, it is necessary to address the Australian position that compulsory acquisition requires a recipient. The first case to address is *Commonwealth v WMC Resources* (1998) 194 CLR 1, a majority decision of the High Court of Australia, in the field of oil exploration permits. WMC, an oil explorer, sued the Commonwealth seeking a declaration that the statutory attempt to excise certain areas from the permit area was in breach of paragraph 51(xxxi) of the Constitution. In Australia it is established that unless the Commonwealth or some other person acquires proprietary rights under a law of the Commonwealth there is no acquisition upon which paragraph 51(xxxi) attaches. In Toohey J's Judgment, the following can be found:

> *"At the same time, it is not necessary that what is acquired correspond precisely with what was taken. It is enough if it be shown that the Commonwealth acquired an interest in the property of WMC, even though the interest acquired be slight or insubstantial."*

[202] Two years later, this was followed by *Smith v ANL Limited* [2000] HCA 58, a case concerning the statutory withdrawal of common law rights in relation to accidents suffered by seafarers. This recorded, too, the need for there to be actual acquisition of some sort. Callinan J at [157] set out an important discussion of section 51(xxxi). He made the point that a narrow view should not be adopted and that the provision may extend to innominate and anomalous interests. He emphasised that there need not be

correspondence in appearance, value or characterisation between what has been lost and what has been acquired.

[203] This illustrates that, even in Australia, the need for there to be some correspondence between what has been lost and what has been acquired is approached broadly. But the issue remains. Should Article 40(1) be interpreted on this basis or should it focus upon identifying the loss only?

[204] On the facts of the case, I do not believe it is necessary to reach a final view on this although, provisionally, I support the Australian approach. Here, as will be discussed, I believe it is possible to identify a receipt which, as it happens, is more than slight or insubstantial (the Australian test). The more difficult (and critical) issue, though, is to assess whether these circumstances amount to an acquisition in the sense contemplated by Article 40(1). It is a mixed question of law and fact which I will discuss once I have addressed legal issues arising by reference to Article 64(1)(c). It is common ground that if there has been an acquisition in terms of Article 40(1) then no compensation has been paid and that, subject to considering the tax argument under Article 40(2), the Constitution has been breached by the Act.

[205] I now deal with the remaining legal issues arising under Article 64(1)(c). There appear to be two to be discussed. The first concerns whether there is a positive right that is relevant in this case. Article 64(1)(c) speaks of a right to own property. Here, that right is not challenged. The real issue is whether there has been a deprivation in terms of the balance of Article 64(1)(c). Therefore, I do not believe it necessary to discuss whether there is a positive right because, even if there is, it is not relevant.

[206] Secondly, I address the meaning of the expression *"except in accordance with law"* which appears in Article 64(1)(c) – and also in Article 64(1)(a). As identified by the Court of Appeal in *Clarke v Karika* it clearly means more than whether the deprivation occurs pursuant to an act of Parliament. If that were all it meant then the protection is essentially meaningless because it would be a simple matter of Parliament usurping the constitutional right by passing an enactment. In the end, both parties reached the conclusion that the expression should be interpreted along the lines of the Canadian Charter which uses the qualifier *"except in accordance with the principles of*

fundamental justice". By this, the Article would import both procedural and substantive protection. Mr Arnold argued that subparagraphs (a) and (c) corresponded with Blackstone's absolute rights and contrasted the relative rights in the other subparagraphs in Article 64.

[207] Ultimately, I do not believe I need to resolve this issue because Mr Ruffin did not argue that the case turned on it. Rather, he said there was no acquisition or deprivation for reasons which I will shortly address.

[208] Against that background, it is necessary to analyse the factual matters complained of by the defendants to ascertain whether there is a deprivation, an acquisition, or both.

[209] As noted above, it is assumed that both the employee's contribution and the employer's contribution represent relevant property of the employee. The contributions are made out of monies otherwise payable to the contributor for his or her employment. Once the contributions are made to the Fund, the contributing member is left with a future contingent interest – a beneficial interest in trust assets. The rights are comparatively limited but are greater than that of a discretionary beneficiary who simply has a right to call for performance of a trust. In essence, I adopt Mr Ruffin's argument set out at [176] above.

[210] Payment of the monies into the Fund constitutes the Trustee as legal owner subject to the terms of the Trust. Mr Arnold sought to make much of this and it is true that the Trustee has rights to take fees and an indemnity in specified circumstances. Nevertheless, there are significant restrictions upon the Trustee and his acquisition of the legal title is not a licence to abuse those assets.

[211] It seems to me that, for an individual contributor, the loss of full ownership of the contributions in exchange for an equitable interest arguably amounts to a deprivation. There is the loss of present enjoyment of the property. Certainly, that is the case in relation to the member's own contributions. It is not immediately obvious that the same conclusion arises in relation to employer contributions. After all, in the absence of the Act, these would not be made at all. Nevertheless, I think that the employer contributions, too, can properly be thought of in terms of deprivation. Although the obligation to

pay them arises under the Act, they are a component of the contract of employment.

[212] Having said that, any superannuation scheme, analysed simplistically, could be characterised in terms of deprivation. After all, it is about deferring the present enjoyment of earnings in order to provide future benefits at retirement. There is a cost (the deprivation) but there is also a benefit. In a well-designed superannuation scheme, thought must be given to the relationship between the deferment of present expenditure in favour of the benefits of retirement income. In my opinion, the fact, alone, that a member may exchange full ownership of contributions for an equitable interest in a fund is not, without more, usefully characterised as a deprivation (or loss) for constitutional purposes. This assumes that the superannuation scheme has adequately met the balance between the present and the future. I now address that.

[213] I start with the lack of a Government guarantee. Or, more precisely, the absence of provisions comparable to those in other relevant constitutions in which the State will provide advances to the superannuation scheme in case of need. These powers are generally coupled with a minimum rate of return. By a combination of these features, the member gains greater certainty of outcome than is the case for the current Scheme which does not have these features. Of course, this assumes the Government can (and does) stand behind its obligations in any given case. While that assumption needs to be made, I believe that such a guarantee does need to be assessed in the mix. Coupled with this, is the lack of entrenchment. Even if the Act provided for a Government guarantee, that could be removed by simple majority in the absence of entrenchment. Realistically, then, I think the two need to be considered together and I do so.

[214] Mr Ruffin strongly argued that the absence of a guarantee was not relevant to assessing whether there was a deprivation. He said that until a loss occurred, the absence of the guarantee had no tangible effect. There was no loss. This, I think, is far too literal. In simple economic terms, there is a difference between loaning money to someone without a guarantee and a situation where the loan is supported by a guarantee. That hardly seems

controversial. If it were otherwise, why would banks generally seek guarantees of personal loans?

[215] In my opinion, it is largely irrelevant whether loss has actually occurred. That is a matter of quantification. Rather, what we are talking about is economic risk. In my opinion, Mr Arnold is right to submit that the lack of a guarantee, together with the lack of entrenchment, is directly relevant to assessment of the defendants' claim of deprivation.

[216] The other features relied upon by the defendant were said to be secondary to the above points but were, nonetheless, important. First, there is the fact that a member's contributions may be locked for a period of 40 years or more assuming the employee becomes a member at the commencement of his or her employment. Unlike other Pacific schemes there is then no scope in the Cook Islands Scheme for members to access funds for any purposes prior to their entitlement to a benefit at retirement. There is no scope to borrow money for housing or to use money for education purposes.

[217] Secondly, a migrant worker leaving the jurisdiction can take their contributions but, in doing so, will lose those made by the employer. As already noted, section 53(2) provides for the case of migrant workers. I gain the impression that the provisions in section 53(3), which allow a migrant worker to take his or her contributions but not the employer's, was actually seen as a concession to the position of migrant workers. It recognised it would not be fair to lock them in. But it is by no means clear to me why migrant workers should lose their employer contributions in those circumstances. Whatever the reason, dispossessing migrant workers of their employer contributions seems both unnecessary and unfair.

[218] A citizen who is permanently leaving the Cook Islands is not entitled to withdraw their contributions. They are locked in until the age of retirement.

[219] Thirdly, for the poorer members of society it was said that making any payment at all would be a struggle and the resulting benefit (in due course) would be equally small and of little value.

[220] Fourthly, members of previous schemes lost the benefits of those as a result of the collapse of their schemes by the Act.

[221] In different ways, these were aspects of what Mr Arnold characterised a loss of autonomy. I think that is a fair characterisation although some care needs to be taken. As the World Bank report shows, individual citizens need some persuasion (or incentive) to save for their retirement. There are always things in the short term which seem to take priority over the longer term goals of saving for one's retirement. That is why Governments tend to make retirement saving compulsory. It is, thus, unrealistic to assume that employees automatically suffer some loss of choice or autonomy simply by being forced to participate in this Scheme. In the absence of such compulsion, it is unlikely they would participate in any other. Mr Arnold, I think, recognised this in accepting that the Scheme was capable of being remedied – it was not irredeemably bad.

[222] Nevertheless, the sort of factors described immediately above, coupled with the more important features also described (lack of guarantee and entrenchment), do in my opinion amount to a prima facie deprivation of property. I test this against the broad judgement made by Callinan J in the High Court of Australia discussed in paragraph [163] above. The employees started with something (their contributions) and have ended up with a diminished replacement. Certainly, they still have rights and, in due course, are likely to benefit.

[223] While I think there is little doubt that these features prima facie amount to a deprivation in terms of Article 64(1)(c), it is far more difficult to characterise them as an acquisition in terms of Article 40(1). True, the Trustee acquires a legal interest. But the other matters complained of seem even more removed from the notion of an acquisition. Ultimately, it seems to me, this must be a matter of judgement informed by the relative purposes of Articles 40(1) and 64(1)(c). It is nonsensical to think that the Scheme – if it amounts to a compulsory acquisition – would somehow be met by a payment of compensation (as required by Article 40(1)). That, of course, would entirely defeat the whole purpose of the Scheme which is to require individuals to save for their retirement. The Crown contributes to this goal by way of the tax-free concession but that cannot amount to compensation and, perhaps more importantly, is not intended to do so.

[224] Because Article 40(1) operates within a framework of a taking (or acquisition) of property in the context of compensation, I think it is necessary closely to examine the character of the matters under consideration. In my opinion, it is simply not apt to think of these in terms of Article 40(1).

[225] I recognise that this approach does not initially appear to be consistent with the assumption of the parties made in *Nyambirai v National Social Security Authority* [1996] 1 LRC 64 that the compulsory superannuation contributions in that case amounted to a compulsory acquisition of property. In that case, and in contrast with the present circumstances, the contributions were paid to the State rather than to the Trustee on behalf of the member. This does appear to be a material distinction between the two cases.

[226] While I have reached a prima facie conclusion of breach of Article 64(1)(c) I still need to address two issues. First, I need to weigh the various features of the Act which have led to my conclusion that there has been a deprivation. Secondly, I need to address whether the Act as a whole is prima facie unconstitutional or whether there are relevant provisions which can be severed and declared to be invalid. Ultimately, these two issues are intertwined.

[227] It seems to me inevitable that my prima facie conclusion of unconstitutionality must affect the entire Act. That is because the purpose of the Act is to establish the superannuation Scheme and the various provisions in that Act all go to establish that one Scheme. It is an indivisible whole. The defendants' complaints focus both on actual provisions as well as the absence of other provisions. As I now describe, it is primarily the absence of those provisions which gives rise to my conclusion.

[228] I have little doubt that the absence of a Government guarantee (in the form described above), coupled with the absence of entrenchment, is a significant flaw. That was the defendants' primary argument and I uphold it. It undermines the trade-off inherent in a superannuation scheme as discussed above. The Scheme is compulsory and is effectively the only one available. There is a risk that a member's contributions could be lost in the future – and at a time when the member has no realistic ability to recoup those losses.

Government-financed welfare cannot be assumed to be available to fill any gaps. All of this amounts to a serious objection.

[229] It is more difficult to be precise about the next layer of objections. These focus upon the rights of migrant workers, upon low paid poor persons (and their inability to make contributions) and the absence of any provision entitling contributors to access their funds prior to their retirement.

[230] It seems to me that the combination of these factors is relevant to my assessment but they are, assessed cumulatively, of less weight than the primary argument of the defendants. I do not think it appropriate that I should draw a bright line describing exactly what amendment to these features would change my opinion of the constitutionality of the Act. Ultimately, that is within the province of Parliament. I believe I have given enough indications of my concern which will enable Parliament, should it be so minded, to make amendments to the Act. In doing so, I believe that Parliament will need to give consideration to the following:

[a] the lack of a Government guarantee;

[b] the lack of entrenchment;

[c] whether migrant works should be subject to the Act at all or whether the existing provisions should be amended;

[d] whether there should be some right on the part of contributors to access funds before retirement (for example if they leave the Cook Islands permanently, or whether they are needed for housing or education purposes).

[231] For the avoidance of doubt, I do not think that other complaints raised by Mr Arnold must necessarily result in amendment to avoid a conclusion of unconstitutionality. First, whether the poorer members of society can or should make contributions is, I believe, a matter more properly addressed by Parliament than the Courts. Secondly, the fact that this Scheme is a statutory monopoly is of less moment if the other complaints as above are addressed by Parliament. Thirdly, the existing power of Parliament to amend the Scheme unilaterally is inevitably diminished or removed in the face of entrenchment.

[232] Within the broad observations, however, I intend leaving room to Parliament to make appropriate decisions about what amendments (if any) it believes it should make. My job is to assess whether the Act, in its current form, is prima facie unconstitutional. The Court's role does not extent to drafting amending legislation should Parliament choose to follow that route.

[233] I now turn to address the proportionality argument. This requires the Court to balance the prima facie breach of the Constitution identified above against a broader context. For the reasons now set out, I do not believe that the prima facie breach is saved by reference to a proportionality argument.

[234] This discussion starts by recognising that every citizen has duties to other citizens. In other words, although persons have fundamental rights, they also have correlative duties. This underpins the balancing exercise then set out. A person claiming the benefit of fundamental rights may be subject to an enactment (or rule of law) for protecting the rights of others or:

> *"in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands."*

[235] In this case, the focus has come upon *"the general welfare"* of the Cook Islands as being the relevant portion of the above extract relied upon. That is, in establishing the Scheme, there needs to be a balance between the rights of a member on the one hand and the general welfare of the Cook Islands on the other. It is common ground that there is a public good in the form of a superannuation scheme. The defendants do not contend otherwise. There is much, they say, in the Scheme to commend it. Their approach, rather, is to say that the Scheme needs to be fixed up.

[236] The balancing exercise inherent within Article 64(2) has been discussed in a number of cases. Initially, the defendants based their approach on *R v Oakes* [1987] LRC (Const) 47, a decision of the Supreme Court of Canada. This identified three aspects of the balancing test. First, the measures adopted must be carefully designed to achieve the objective in question – they should not be arbitrary, unfair or based on irrational considerations. Secondly, they should impair as little as possible the right or freedom in question. Thirdly, there must be an overall proportionality between the effects of the measures which are responsible for limiting the constitutional

right or freedom and the objective which has been identified as being of sufficient importance.

[237] The defendants argued that these considerations should effectively be read into Article 64(2). Shortly prior to the hearing, however, the UK Supreme Court issued its decision in *Bank Mellat v HM Treasury* [2013] UKSC 39. Reference has already been made to this. This decision restated the various steps. Lord Sumption at paragraph [20] set out the majority's test. Then, at [74] Lord Reed (in dissent) set out his formulation. In substance, this appears to be the same as that adopted by Lord Sumption but both counsel in the present case preferred that formulation. I observe that Lord Sumption specifically endorsed Lord Reed's speech at this part. I set out paragraph [74] of the Judgment:

> *"74. The judgment of Dickson CJ in Oakes provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in Oakes can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in De Freitas, and the fourth reflects the additional observation made in Huang. I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."*

[238] I now address the four steps. There is no particular dispute or controversy about the first two steps. It is accepted by the defendants that the objective of the Act is sufficiently important to justify the limitation of a protected right. It is also accepted that there is a rational connection between the Act and its objective. However, it is not accepted that less intrusive measures could have been taken. This, directly, takes us back to the features discussed above which are said to amount to a deprivation. In my opinion, it is quite

clear that less intrusive measures could have been adopted. Most importantly, I believe that by giving a Government guarantee and entrenching the Act, the impairment represented by the Scheme would have been minimised. I also think that the absence of any ability to access the monies prior to retirement is too restrictive and the position, generally, of migrants is not satisfactory. If these concerns are then tested by reference to the fourth factor, which is an overall assessment, I think it is possible to conclude that the impact of the breach of fundamental rights (deprivation of property) is disproportionate to the likely benefit of the impugned measure.

[239] I accept this can only be a matter of judgement but it seems to me that is inherent in a balancing exercise of this sort. In short, then, I do not believe that the prima facie breach established by reference to Article 64(1)(c) is justified on a proportionality basis. In my opinion, the Constitution is breached by the Scheme in its current form. I repeat that this is not a conclusion stating that the entire Scheme is bad. Rather, the appropriate balance between present and future interests (see [212] above) has not been met in its current form.

Third issue – Article 40(2)(a) – Tax exception

An assumption

[240] In order to address this topic it is necessary to assume a breach of Article 40(1). That is, that there has been an acquisition of property without compensation. By necessity, this also assumes a finding of compulsion which is then carried through into the following analysis.

[241] Although probably self evident, this argument does not directly impact upon Article 64.

[242] In light of my findings as above, there is no need for me to reach a final view on this argument. However, in case the matter goes further I set out some observations.

Further articles in the Constitution

[243] There are another three articles in the Constitution which are directly relevant to the tax argument. They are:

> *"67 There shall be a Cook Islands Government Account and such other public funds or accounts as may be provided by law.*
>
> *68 No taxation shall be imposed except by law.*
>
> *69 All taxes and other revenues and money raised or received by the Government of the Cook Islands shall be paid into the Cook Islands Government Account unless required or permitted by law to be paid into any other public fund or account."*

Plaintiff's submissions

[244] The burden of this argument is upon the plaintiff and I start with his submissions.

[245] Mr Ruffin commenced with a detailed examination of the Zimbabwean decision *Nyambirai v National Security Authority* [1996] 1 LRC 64, a decision of the Supreme Court of Zimbabwe delivered by Gubbay CJ. He described this as *"the leading case in the point under consideration"*. I accept it as an important and relevant authority.

[246] Mr Ruffin also referred to other relevant authority including the European decision *X v The Netherlands* [1971] YB 14 224. However, the majority of his focus came upon two Australian decisions being *Air Caledonie International v Commonwealth of Australia* (1988) 165 CLR 462 and the subsequent decision of *Australian Tape Manufacturers Association v Commonwealth of Australia* (1993) 176 CLR 480. He placed particular emphasis upon the latter, a case concerning the exaction of compulsory levies upon the sale of blank tapes distributed to copyright holders (which the High Court of Australia said amounted to a tax). Mr Ruffin acknowledged that the more recent decision of the High Court of Australia in *Roy Morgan Research Pty Limited v FCT* [2011] HCA 35 had cast doubt on some aspects of those decisions but nevertheless he submitted they remained good law in relation to the definition of tax.

[247] Mr Ruffin accepted that the well known dicta of Latham CJ in *Mathews v Chicory Marketing Board* (1938) 60 CLR 263 still remained useful:

> *"The levy is, in my opinion, plainly a tax. It is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered."*

[248] Mr Ruffin argued that all aspects of this were satisfied. He said that the exaction was undertaken by Parliament by means of the Act. He said, too, it was for the public benefit in the sense identified in the World Bank Report that a public superannuation scheme was a public good.

[249] He concluded by addressing all permutations of the different tests emphasising that there was a compulsory contribution or exaction imposed on and required from the general body of citizens in order to support Government for a public purpose.

[250] Finally, Mr Ruffin was forced to accept that his definition of *"tax"* in Article 40(2)(a), based on the Australian authorities as above, was a broad one. He submitted it was broader than that used in Article 69. Somewhat faintly he endeavoured to argue that, in Article 69, the adjective *"public"* did not qualify the noun *"account"*. If he were right in this, he submitted, then payment of the contributions into the Fund satisfied the constitutional reference to an *"account"*.

The defendants' argument

[251] Mr Arnold strongly attacked Mr Ruffin's argument that *"tax"* in Article 40 was somehow different (broader) to *"tax"* in Article 69. He submitted that if he were right as to this, then that was the beginning and the end of the matter. He said it was inconceivable that the drafters of the Constitution would use *"tax"* in two different senses. He also drew attention to the particular definition, in Australia, of the Consolidated Revenue Fund in section 81 of the Constitution. This defines the Consolidated Revenue Fund in a very inclusive manner less prescriptive than the equivalent definition in the Cook Islands Constitution.

[252] Mr Arnold then addressed the remaining arguments on the assumption that the above proposition did not provide a complete answer. He argued that the decisions of *Air Caledonie* and *Australian Tape Manufacturers* should be given little weight in light of the more recent decision of the same Court in *Roy Morgan*.

[253] Mr Arnold argued that the exception mentioned by Latham CJ in *Mathews v Chicory* set out above for the provision of services applied here. He said that a contributor effectively purchased insurance services.

[254] Mr Arnold then argued that it was not correct to submit, as Mr Ruffin had done, that there was an exaction by Parliament. He argued that the enforcement powers of the Board (e.g. section 51) meant that it was the body exacting the compulsory payments. He argued it was not a public authority in terms of the relevant test.

[255] Overall, Mr Arnold submitted that it was necessary to stand back and test the sense in which the compulsory contributions were said to be a tax. It is a matter of looking at the substance of the exaction rather than the label given to it. By way of illustration he referred to the recent decision of the US Supreme Court in *National Federation of Independent Business v Sibelius* 648 F.3d 1235 dealing with the Obama health proposals. He submitted that the recognition evidenced in that decision that payments of this sort did not amount to a tax was a helpful illustration.

[256] Mr Arnold tested his submission as above by arguing that if the various contributions did amount to a tax (contrary to his submission) they were thereby the property of the State – which was entirely inconsistent with the Scheme and the intentions of Parliamentarians in setting it up. He concluded by submitting that the plain words of the Act did not purport to impose a tax and that Parliamentarians certainly did not speak in those terms when passing the Act. He noted that the funds are not paid into the Cook Islands Government account (see Articles 67 and 69) but that, rather, funds are credited to an individual's account in the Fund in terms of section 17 of the Act. He entirely rejected any suggestion that the contributions amounted to a tax.

Tax – discussion and observations

[257] In light of my finding that Article 40(1) is not breached, it is strictly unnecessary for me to address the tax exception in Article 40(2)(a). Nevertheless, and in case the matter goes further, I make some observations.

[258] I would not have found that the compulsory payment of contributions to the Fund amounted to a tax in terms of Article 40(2)(a).

[259] A useful starting point is the statement of principle by Lathham CJ in the Australian case *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 276 who spoke of the three features necessary to stamp an exaction of money with the character of a tax:

> *"a compulsory exaction of money by a public authority for public purposes, enforceable by law, and… not a payment for services rendered."*

[260] This, of course, is not a statutory definition but it is generally agreed that it highlights the factors that need to be thought about.

[261] The various authorities were analysed by Gubbay CJ in *Nyambirai v National Social Security Authority* and the Chief Justice summarised the effect of these at page 71 as follows:

> *"From these authorities the following features which designate a tax may be said to emerge: (i) It is a compulsory and not an optional contribution; (ii) Imposed by the legislature or other competent public authority; (iii) upon the public as a whole or a substantial sector thereof; (iv) the revenue from which is to be utilised for the public benefit and to provide a service in the public interest."*

[262] There was no real contest about the first feature. If a breach of Article 40(1) had been found then, by definition, there would have been a compulsory acquisition. So the question of compulsion was not really in dispute.

[263] In relation to the second feature, it was accepted that the compulsory nature of the contributions flowed directly from the Act. Mr Arnold argued that this was not an exaction by Parliament because the enforcement of contributions was left to the Board. In my opinion, that is not correct. This is not a case where the key decision-making and levying was left to some other body with a consequence that decisions would be required as to whether that body is a public authority. In the present case, the Act is the authority for the making of compulsory contributions. The fact that the Board may subsequently be required to enforce those contributions, if they are not made, is simply a machinery provision.

[264] The third feature, that it be imposed upon the public as a whole or as a substantial sector is, too, met in the present case. A very substantial part of the population is intended to be subject to the Act.

[265] That leaves the fourth feature of the test as to whether the exaction is imposed for the public benefit. This, it seems to me, is where the current issue falls to be decided. As will become apparent when I discuss the Australian authorities below, it appears to be that, in Australia, there is seen to be a distinction between an exaction for public purposes (which may be a tax) and an exaction said to be in the public interest (which is not necessarily a tax).

[266] While it is not a specific feature of the test as stated by Gubbay CJ, it seems to me sensible that there should be a final step to be taken by the Court in any assessment which is to stand back and look at the overall character of the payment involved.

[267] The summary as above largely ignores the qualification introduced by Latham CJ referring to the provision of services (see [259] above). Mr Arnold did argue that that qualification was engaged in the present case. By reference to *Jones v AMP* [1994] 1 NZLR 690 he characterised the contributions as the purchase of services being insurance services. This, I think, is too highly refined and I reject it. But, for all that, I do think it is useful to consider the qualification because it forces a Court to look at the character of the exaction.

[268] At this point, and before assessing the fourth *Nyambirai* feature, it is necessary to review the three Australian cases which occupied much time at the hearing. The first is that of *Air Caledonie International v Commonwealth of Australia* (1988) 82 ALR 385. The Commonwealth imposed an arrivals tax on all immigrants to Australia to be collected by the relevant airline. The appellant challenged the constitutionality of this by reference to section 55 of the Constitution which requires that a taxation statute deal with no more than taxation. This is a provision peculiar to Australia designed to avoid what is described as *"tacking"* (page 392). The particular constitutional objection is not relevant here but the characterisation of the clearance fee as a taxation is material.

[269] At page 389 the Court acknowledged the dicta of Latham CJ mentioned above in paragraph [259]. It then added three comments, the first of which is relevant:

> *"The first is that it should not be seen as providing an exhaustive definition of a tax. Thus, there is no reason in principle a tax should not take a form other than the exaction of money or why the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public."*

[270] The conclusion, that the arrivals levy was a tax for constitutional purposes, does not appear to have been based on such reasoning. That is, the above quoted extract is obiter. As I read page 390 of the report, the actual conclusion appears to have been based upon reasonably orthodox grounds.

[271] The next decision of the High Court of Australia is *Australian Tape Manufacturers v Commonwealth* [1993] HCA 10. This decision was the high point for the plaintiff who argued that the conclusion in that case, that the relevant levies amounted to a tax, was directly analogous to the present case.

[272] The facts were these. Pursuant to the terms of an enactment purchasers of blank tapes were levied a royalty payment and the proceeds distributed by the statutory body (the collecting society) directly to copyright holders (and not to the Consolidated Revenue Fund). This was intended as part of a legislative package whereby the copyright protection otherwise available to copyright owners was removed in the case of home taping of sound recordings. For present purposes, the issue was whether the levy was a tax for the purposes of section 55 of the Constitution. It was argued by the plaintiffs that the levy was not a tax on the basis that it was not exacted by a public authority and neither was it exacted for public purposes: paragraph [11].

[273] The majority Judgment dealt, first, with whether it was necessary for the exaction to be undertaken by a public authority. The Court concluded that the better view is was that this is not essential to the concept of a tax: paragraph [13]. The Court then addressed whether it was necessary for the exaction to be for public purposes. The Court noted that, in Australia,

payment into the Consolidated Revenue Fund is regarded as conclusive evidence that a levy is exacted for public purposes. At paragraph [17] the majority then said:

> *"But neither principle nor Australian authority provides any support for the converse proposition that an exaction is not a tax if it is not paid into the Consolidated Revenue Fund. The requirement imposed by section 81 of the constitution that all revenue or monies raised or received by the Executive Government form one Consolidated Revenue Fund is not, and cannot constitute, a criterion for what is a tax."*

[274] At [20] the majority acknowledged that in one sense the purpose of the levy was private in that it concerned the interests of the two groups only. It answered that, though, by saying that the legislative solution to the problem

> *"Proceeds on the footing that it is imposed in the public interest. Indeed, the purpose of directing the payment of the levy to the collecting society for ultimate distribution of the net proceeds to the relevant copyright owners as a solution to a complex problem of public importance is of necessity a public purpose."*

[275] The majority reached the conclusion that the levy was a tax and there was a breach of section 55 of the Constitution as a result.

[276] Two of the minority (Dawson and Toohey JJ) issued a strongly argued dissent. They concluded that the levy imposed by the legislation was not an exaction by a public authority for public purposes. See discussion, in particular, at paragraphs [23], [24] and [29]. They had reservations about the dicta quoted above from *Air Caledonie*: paragraphs [24]-[26]. They believed that the body performing the function (the collecting society) was not a public authority but a private organisation.

[277] McHugh J issued a further dissenting Judgment. He said that a compulsory exaction of money under statutory authority is not by itself sufficient to constitute a payment of tax: paragraph [3]. He described it as a private scheme designed to compensate the copyright owners. That is, the end for which the payment is imposed, was private not public. The royalty formed no part of the revenues of the Commonwealth: paragraph [8].

[278] Three years ago, the High Court of Australia returned to the issue in *Roy Morgan Research v FCT* [2011] HCA 35. This case concerned a superannuation scheme whereby employers were charged a

Superannuation Guarantee Charge (SGC) if they did not make superannuation payments on account of employees. The issue for decision was whether the SGC was a tax. The payment of the SGC was to be made into the Consolidated Revenue Fund. The appeal to the High Court was to determine whether the payment was imposed for public purposes because, it was submitted by the appellant employer, it conferred a private and direct benefit on employees. The High Court rejected that argument.

[279] The majority (Heydon J issued a separate but concurring decision) referred both to *Air Caledonie* and *Australian Tape Manufacturers*. Paragraph [37] of the majority decision is as follows:

> *"The majority in Tape Manufacturers suggested that it is not essential to the concept of a tax that the exaction should be by a public authority. That suggestion would constitute a large and controversial step beyond what was said in Matthews. As the reasons of the majority in Tape Manufacturers show, whether that step could or should be taken depends, at least in part, upon what meaning would be given to the expression "non-public" authority if "one of its functions is to levy, demand or receive exactions to be expended on public purposes". It was not necessary to decide that question in Tape Manufacturers and the majority in that case did not do so. Nor is it necessary in this case, given the addition of the proceeds of the Charge to the Consolidated Revenue Fund, to pursue that question, or any broader questions about whether it is essential to the concept of a tax that the exaction should be by a public authority."*
>
> [footnote references omitted]

[280] Mr Ruffin argued that this statement was limited to the consideration of exaction by a public authority (or not) and that it was not directed at the notion of public purposes. On its face that appears to be correct. But, equally, I would not be confident that *Australian Tape Manufacturers*, so far as it concerned the notion of *"public purposes"* is still regarded in Australia as good law. In that regard, I note paragraph [19] of the majority Judgment and paragraph [68] in Heydon J's separate (but concurring) Judgment.

[281] The High Court rejected the notion that the SGC was invalid because the legislation conferred a private and direct benefit upon employees. Ultimately, the payment of SGC into the Consolidated Revenue Fund was sufficient to conclude that the monies were appropriated for public purposes.

[282] With respect, the position in Australia appears to be rather uncertain and I would be reluctant, on the basis of these cases, to conclude that *Australian Tape Manufacturers* represents the current Australian approach to the assessment of public purposes for the purposes of characterising a tax.

[283] Mr Ruffin submitted that the Scheme was in the public interest because a mandatory public superannuation scheme is a public good. That, of course, is true. In one sense, the submission could be criticised as it simply amounts to a proposition that any legislation enacted by Parliament is assumed to be for the public benefit. However, as discussed in *Nyambirai*, it is plainly arguable that a mandatory public superannuation scheme is a public good. It is at this point that the distinction drawn in *Roy Morgan* between an exaction in the public interest and an exaction for public purposes assumes some importance.

[284] As I understand it, this arises from the fact that it can be assumed that legislation will generally be in the public interest. However, simply because a payment is compulsory pursuant to legislation does not, without more, make it a tax. To use *"public interest"* as the benchmark may then admit too wide a category of payments as taxes. This sort of thinking, it would seem, lies behind the use of language by Latham CJ focusing on *"public purposes"*.

[285] There is a risk, in all of this, of treating judicial dicta as if they were of statutory significance. Consequently, there is a risk, I think, in approaching the question of tax by way of a formulation from cases dealing with situations different to those presently before the Court. In each case, it is necessary to look hard at the character of the payment made and the constitutional arrangements in the relevant country. In undertaking that exercise here, there is something fundamentally counter-intuitive about the plaintiff's case: how can a payment made by a contributor into a trust fund to be held, ultimately, for the benefit of that member, be characterised as a tax? To characterise this as a tax (which, if nothing else, has a notion of a redistributive transaction) seems inapt. I do not believe that even *Australian Tape Manufacturers* would support such a conclusion.

[286] That, then, brings us, to Article 69 of the Constitution which requires a tax to be paid either into the Government Account or, if permitted by law, into *"any*

other public fund or account". Mr Ruffin argued that *"public"* did not qualify *"account".* I reject that. It would make no particular sense if payment into any account sufficed. That would defeat the whole purpose of the provision. Perhaps recognising the likelihood of that conclusion, Mr Ruffin's argument was that the notion of *"tax"* as in Article 40(2)(a) was broader than that in Article 69. That is, he argued it was not fatal to his argument that the compulsory contributions were not paid into a public account designated as such by law.

[287] It seems to me inherently unlikely that *"tax"* would be used in two different senses within the abovementioned Articles. The tax exemption in Article 40(2)(a) is, with respect, a sensible recognition that taxation does not amount to a compulsory acquisition in breach of the Constitution. Where that same Constitution, in another provision, specifically provides for the payment of a tax, it seems sensible to regard these provisions as complementary rather than independent. I would have upheld Mr Arnold's primary submission that the plaintiff's case on tax falls at the first hurdle.

Fourth issue - Remedies

Parties' submissions

[288] Mr Ruffin made helpful written submission on the topic of remedies referring, first, to a recent decision of Hugh Williams J in the High Court of the Cook Islands, *George v Attorney General* (1/13, 28 August 2013) and, secondly, the recent New Zealand decision *Spencer v Attorney General* [2013] NZHC 2580, a decision the Chief High Court Judge, Winkelmann J.

[289] In these authorities one can find reference, first, to declarations of invalidity as being the appropriate judicial response to unconstitutional legislation and, secondly, the possibility that such declarations may be suspended for a period to allow Parliament to take appropriate steps to cure any unconstitutional legislation. Other than drawing these authorities to my attention, however, Mr Ruffin did not make detailed submissions as to the appropriate remedies if some or all of Mr Arnold's arguments were upheld.

[290] Likewise, Mr Arnold said little about the remedies. His primary position was that the Act, as a whole, was unconstitutional (as a fallback, he identified specific sections which were said to be unconstitutional). At the same time,

though, he stressed that his clients were not seeking the wholesale demolition of the superannuation Scheme. What he sought was to have Parliament legislate to tidy up what he saw as the flaws in the existing Act. However, he made no submissions as to how remedies might be devised to achieve this end.

[291] Mr Arnold drew my attention to a recent Canadian decision, *Canada (Attorney General) v Hislop* [2007] 1 SCR 429, which he subsequently supplied to me following the hearing. Neither he nor Mr Ruffin made submissions in relation to *Hislop*.

[292] In short, neither counsel made comprehensive submissions as to the actual remedies which would be appropriate if the Court upheld some or all of Mr Arnold's arguments. Although it was not explicit, I think that both assumed there would need to be a further hearing at the point I issued this Judgment.

Discussion and decision

[293] In light of the fact that neither counsel fully addressed me on the topic of remedies I think it inevitable that there should be another hearing in relation to remedies. This, though, needs to be carefully delineated because, in this Judgment, I have reached certain conclusions which are intended to be definitive. There needs to be a clear demarcation between those conclusions (which are now established) and the means by which effect is given to those conclusions (yet to be established).

[294] In order to put this in context I need to discuss the authorities. As Winkelmann J pointed out in *Spencer v AG*, the Canadian cases show that when the Canadian Courts make an order suspending a declaration that is a shorthand for two quite distinct things. First, there is a declaration of invalidity and that is accompanied by, secondly, a simultaneously issued declaration that the Act is nevertheless deemed valid for a fixed period of time. She reviewed the authorities supporting this including the Supreme Court of Canada decision *Schachter v Canada* [1992] 2 SCR 679.

[295] In *Schachter*, the Court said:

"Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:

A. striking down the legislation without enacting something in its place would pose a danger to the public;

B. striking down the legislation without enacting something in its place would threaten the rule of law; or,

C. [Not relevant]"

[296] The Court made it clear that these were guidelines only.

[297] The more recent decision of *Hislop*, another decision of the Supreme Court of Canada, contains a more detailed discussion of some of the problems facing a Court in declaring an Act unconstitutional. Is the Act thereby a nullity from that time onward (prospective) or is it a nullity from the date of its enactment (retroactive)? If a declaration of invalidity is retroactive it could have dramatic consequences for all those who have acted in reliance upon the assumed validity of the relevant Act. While, in *Hislop*, there was a difference of reasoning as between the majority and Bastarache J, both agreed that a declaration of invalidity was not automatically to be assumed to be retroactive. The Court would actively need to engage with that issue. In appropriate circumstances the normal retroactive effect of a judgment may be adjusted to protect other legitimate interests. The use of transition periods and suspended declarations of invalidity are one way of temporarily limiting the retroactive effect of constitutional remedies. But, further, the Court may actively require retroactivity to be limited. Issues such as reasonable reliance, good faith, fairness to litigants and Parliament's role are important considerations in making that assessment.

[298] I now turn to this case. First, I believe that my finding in relation to section 64(1)(c) would support a declaration of invalidity of the Act. I will need to be addressed in relation to how such a declaration should be worded but, in broad terms, I believe that such a declaration would be appropriate.

[299] Secondly, I believe that a suspension of such a declaration would be appropriate to allow Parliament to remedy the defects identified by me. Of course, Parliament may choose not to do so in which case the declaration of invalidity would become effective.

[300] Thirdly, and this is perhaps the most difficult aspect, I would need to address whether the declaration should be retroactive. In considering this issue, there may be a distinction to be drawn between the defendants (who are facing criminal proceedings as a result of alleged breaches of the Act) and all other members of the Scheme. Because I believe the Scheme is, in substance, a public good and that, with amendments, it can be made efficacious, I would be very reluctant to make a declaration of invalidity that would unwind the Scheme back to 2000.

[301] The position of the defendants, though, is different. They are facing criminal proceedings for allegedly breaching the Act. It may be necessary to declare that the declaration of invalidity is retroactive so far as they are concerned.

[302] I have not heard counsel on any of this. I would be most reluctant to reach any final view without full argument.

[303] It is, of course, possible that counsel may reach agreement as to the form of remedies without the need for further argument. If that is so, I am prepared to receive a consent memorandum and, if necessary, convene a telephone conference to discuss same.

[304] I suspect, though, that such agreement may be difficult to achieve and that a hearing will be required. I cannot presently see that I would be able to convene such a hearing before the September 2014 sitting in which I am otherwise scheduled to sit. I am concerned about that delay but I cannot see any realistic alternatives if there is to be full argument by counsel in person (which seems to me desirable if consensus is not reached).

[305] If the matter is to be delayed until then various consequences arise. First, I specifically acknowledge that Parliament may take the opportunity, in the meantime, to remedy the Act. In that regard I note the following evidence before the Court.

[306] There are references in affidavits before the Court by Mr Rasmussen and Mr George in their Parliamentary capacities. These state that the non-government members would likely support amendments along the lines submitted by Mr Arnold. For example, at paragraph 82(a) of his affidavit, Mr Rasmussen notes that the Opposition is united in the view that

> *"Legislation must be passed – constitutionally entrenched – that recognises member's accounts as being in the nature of private property, incapable of being appropriated for other purposes by a Government act with anything less than a constitutional mandate to do so.*
>
> *The Government, in a constitutionally entrenched way, must guarantee the fund – as is the case with other similar funds in substantially all other small Pacific Island States."*

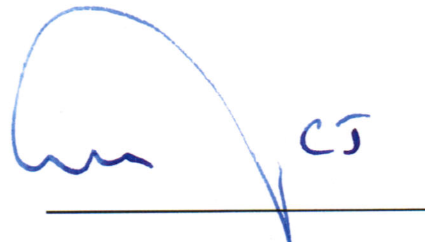
[307] I emphasise that I would not see immediate Parliamentary amendment of the Act as a usurpation of the judicial function by Parliament. Indeed, I respectfully believe that it would be an appropriate recognition that issues of constitutionality are prima facie matters for Parliament to address.

[308] Secondly, I recognise that either or both parties may wish to appeal this decision notwithstanding the fact that remedies are not yet complete. While it is a matter for the parties, and the Court of Appeal, I believe I would still need to resolve the question of remedies if any appeal is brought.

[309] I direct counsel to confer and to advise the Court within fifteen working days (or such longer period as is agreed between them) as to their preferred way forward. I am prepared to convene a telephone conference to discuss these issues if that would assist.

Costs

[310] The parties are agreed that costs are reserved for further consideration. It may be sensible for counsel to advise their positions on the question of costs as part of the same process identified above.



Tom Weston
Chief Justice