

**IN THE COURT OF APPEAL
OF SOLOMON ISLANDS**

Civil Appeal No. 2 of 2001

BETWEEN: GUADALCANAL TRAVEL SERVICE LTD Appellant
AND: PHILIP WANGA Respondent

CORAM: Lord Slynn P., Ward JA., Kubulan JA

HEARING: Wednesday 7th February 2001

JUDGMENT: Wednesday 7th February 2001

JUDGMENT OF THE COURT

Mr Wanga was employed by the Guadalcanal Travel Service Ltd for some years until he was dismissed on 29th May 1992. As an employee he was issued shares in the Company but under Articles 4 and 6 of the Company's Articles of Association apparently in force at the time of his dismissal he was obliged to offer his shares to the other existing shareholders. He refused to do so and the Company sought specific performances of his obligation. He replied that there had never been a valid amendment of the Articles to incorporate this obligation, indeed there had never been a lawful meeting of the shareholders to consider the change. The Chief Justice found that there had been such a meeting and that the articles had been validly changed so as

to incorporate the obligation relied upon by the Company. According he ordered that Mr Wanga comply with these Articles by giving notice within 14 days of his wish to offer his shares to the existing shareholders and that he execute a transfer "*in exchange for the price of the shares calculated up to the date hereof*". That date was 27 February 1998.

The Company appealed on the basis that he should only be paid the value of the shares at the date of his dismissal less his outstanding account with the Company. Mr Wanga cross-appealed contending that the amendment to the articles was invalid and he asked that he be paid his share of the dividends from 1992 to 1998 with interest at 12½% per annum. The Court of Appeal, upholding the Chief Justice, held that the articles had been validly changed. However they held that the relevant date to value the shares was the date when he refused to execute the transfer of shares in accordance with the Articles namely 11 November 1994. The Court of Appeal recorded that Mr Wanga's counterclaim that he was entitled to dividends paid after the date of his appointment had not been dealt with at the trial and the Court remitted that matter to the High Court.

When the case came back before the Chief Justice he held that Mr Wanga was entitled only to dividends declared by the 11th November 1994. That meant that he was entitled to the dividends declared for 1992 (\$63,000.00) and 1993 (\$18,500.00). He accepted evidence that the value of the shares at 11th November 1994 was \$29,585.03.

Thus the total sum due was \$111,085.03 but less \$53,275.21 owed by Mr Wanga to the Company.

The Company also claimed to set off \$52,000 costs claimed by the Company pursuant to the orders already made - i.e., by the Chief Justice on the first hearing when he said that Mr Wanga must pay the costs and by the Court of Appeal which awarded the Company the costs. On the second hearing the Chief Justice held that the costs were matter of discretion and that the Company should have the costs of its claim but that the defendant who had established his right to dividends should have the costs of establishing that. According he refused to deduct the sum of \$52,000 from the value established.

On this appeal two points are taken by Mr Radclyffe for the Company. The first is that the amount of the dividends to be paid must be the amount after the deduction of withholding tax.

It is plain under section 36 (1) of the Income Tax Act that the Company shall deduct from the amount of any dividend paid to the shareholder out of any profits, whether or not charged, under section 3, tax at the rate of twenty cents in the dollar for persons who are resident in Solomon Islands. By subsection (3) the amount of tax deductible from the payment of dividends in accordance with subsection (1) shall be due and payable by the Company to the Commissioners within the prescribed period.

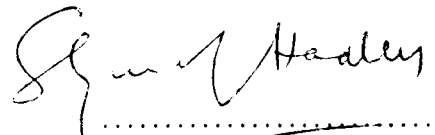
The Company is obliged to notify the Commissioners of the amount of tax deducted and the net amount received by the shareholders. By section 36 (4) if the Company fails to deduct any tax in breach of subsection (3) the Commissioners can collect the tax either from the Company or from the person to whom the dividend was payable.

It seems to the Court that the debt due from the Company to Mr Wanga was not the gross amount of the dividend declared but the net amount after deducting the tax which was due and payable by the Company to the Commissioners. It is no answer to say that the Company has not proved that it paid the tax. The tax was due and payable and it is properly described as a withholding tax. The Court therefore substitutes for the gross dividends of \$63,000 and \$18,500 the net amounts after deducting tax respectively of \$22,050.00 and \$6,475.00 that is to say \$40,950 and \$12,035, making a total of \$52,985. From that sum added to the value of the shares must be deducted the sum of \$53,275.00 as found to be due by the Chief Justice.

The Chief Justice did not deduct the amount of \$52,000 in respect of costs. His order as has been seen, is that Company should have the costs of the claim, Mr Wanga the costs of the counterclaim. In making that order, he expressly said that the Company was to have its costs as awarded by the Court of Appeal but the Chief Justice did not refer to the fact that he had already awarded the costs of the first trial to the Company. That order was not challenged before the Court of Appeal nor did the Court of Appeal amend it. The Court cannot now be satisfied that the Chief Justice intended

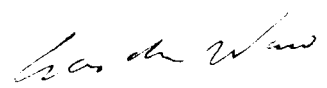
to change his initial order since he does not expressly say so, assuming that he had jurisdiction to do so. His initial order on costs, like that of the Court of Appeal, must therefore stand. The order on the second hearing before the Chief Justice thus relates to the costs of those proceedings. The Company is entitled to the costs of the claim, to the defendant the costs relating to the counterclaim, (i.e. the dividends claim). All costs must be taxed if not agreed and from the total due to the company must be deducted the costs awarded to Mr Wanga. The final sum in respect of taxed costs is to be set off against the balance owing to Mr Wanga for the value of the shares (\$29,585.03) and the dividends less tax (\$52,985.00) i.e. a total of \$82,570.00 less \$53,275.00 owing in any event, ie. \$29,290.

The Appeal is allowed and the Company is to have the costs of this appeal.



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President, Court of Appeal

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Judge of Appeal



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Judge of Appeal