

**DALGRO (SI) LIMITED & OTHERS -V- THE ATTORNEY-GENERAL (Representing the Chairman, Members and Secretary of the Investment Board).**

**HIGH COURT OF SOLOMON ISLANDS  
(PALMER J.)**

**CIVIL CASE NUMBER 009 OF 2000**

**HEARING: 28 JANUARY 2000  
JUDGMENT: 28 JANUARY 2000  
(Reasons: 11 February 2000)**

**SOL-LAW FOR THE PLAINTIFFS  
G. SAMUELS FOR THE DEFENDANT**

**PALMER J.:** On 28 January 2000 I gave judgment in favour of the Plaintiffs and said I would give reasons in writing later. I now do so.

The First Plaintiff, Dalgro (SI) Limited (*hereinafter referred to as "Dalgro"*) first approached this Court for orders of Prohibition against the Defendant in *Civil Case Number 285 of 1999*, by Writ of Summons filed 3rd September 1999. It did not hide anything. It was very concerned right from the beginning that the Defendant had not complied with the requirements of section 15(2) of the Investment Act (Cap. 142) to provide in writing sufficient particulars of the nature of any contravention or non-compliance with the terms of its certificate of approval, issued under said Act and without also first affording it an opportunity to represent its case to the Investment Board (*hereinafter referred to as the "Board"*).

The second Plaintiff, Fakatho Holdings Limited ("*Fakatho*") and the third Defendant, Tropical Resources Development Company Limited ("*Tropical Resources*") were local logging companies that had entered into technology agreements with Dalgro in the pursuit of their logging activities. Whilst Dalgro considered these agreements to be within the terms of its certificate of approval, out of caution, Fakatho and Tropical Resources sought and obtained the Board's approval for those agreements (*see Exhibits "KD 4", "KD 5", "KD 6" and "KD 7" and also affidavits of Joseph Maru filed 14 January 2000 and Peter Kwaoga filed also on same date*). Without any notice or warning of the meeting of the Board on 22nd December 1999 and without any opportunity to be heard or make representations, the Board also revoked Fakatho and Tropical Resources certificates of approval. They too came to this Court for relief and were granted relief on the same day.

As for Dalgro its saga can be traced back to a conference called by the Prime Minister on 29th April 1999 in which it was suggested Dalgro may have been acting outside of its Investment Board approval by reason of its arrangements with Togosa Resources Development Company Limited (*a locally incorporated company engaged it seems in the business of logging and referred to hereinafter as "Togosa"*). Note, at that meeting

or sometime thereabouts, there were allegations also levelled against the Managing Director (*Keith Douglas*) of Dalgro, that he might have been assisting and allowing company vehicles and equipment to be used in criminal and unlawful activities being perpetrated by the unlawful society, known then as the Guadalcanal Revolutionary Army ("GRA") now the Isatabu Freedom Movement ("IFM"). Dalgro was extremely concerned that it might be victimised by those allegations and so went to great lengths to have its activities clarified. It engaged renowned Counsel Mr Sullivan of Sol-Law, right from the beginning to deal with its case. In that conference with the Prime Minister, Counsel Sullivan was present and took notes. With legal acumen gleaned from years of experience, he could detect the simmerings of a possible threat to have the Certificate of Approval of the Plaintiff revoked. On the very next day (30th April 1999), learned Counsel wrote to Secretary of the Board seeking to set out his client's views of its related activities with Togosa. At least he took the initiative to clarify his client's position and sought the Board's view in anticipation. A copy of his client's contract was even included in that letter (see Exhibit marked "DM 1" referred to in the affidavit of Dennis James McGuire filed 3rd September 1999). At the last paragraph of page 1 of that letter and top of page 2, learned Counsel wrote as follows:

*"Accordingly, our client calls upon the Investment Board to acknowledge that its contract with Togosa falls within its certificate of approval. Should the Board disagree with this view, we invite you to write to us setting out the basis upon which the Board thinks otherwise."*

This was followed by reminders (see Exhibits marked "DM 2" and "DM 3"). No reply was ever received to the concerns expressed in that letter of 30th April 1999. When Defendant replied, it was merely to advise that they were seeking the Attorney-General's advice (see letter dated 12 July 1999 - Exhibit "DM 4"). On or about 24 August 1999, Secretary to the Board further wrote, but this time to give the Plaintiff seven days to show cause why its certificate of approval No. 8/94 should not be reviewed or cancelled (Exhibit "DM 5"). It was clear no attempt was being made by the Board to respond to the genuine queries and concerns of Dalgro. Dalgro was taken aback. Not only did it feel ignored, it felt insufficient particulars of the alleged breaches (if any) had been divulged as required under subsection 15(2), and that it would not be given adequate opportunity to represent its case. Accordingly on 3rd September 1999 it applied for and obtained leave from this Court to commence proceedings against the Defendant for orders of Prohibition by Writ of Summons. Matter was listed for hearing for 6th September 1999 but not heard until 22 September 1999.

In the hearing before this Court on 22nd September 1999, learned Counsel for the Defendant (obviously under instructions from the Board) gave assurances that Dalgro would be given opportunity to be heard even if it felt sufficient particulars had been provided. He went further and said there were no threats of cancellation and that Dalgro was seeking prohibition of what the Board had never said it would do. He also mentioned the Board was getting to the point where it would inform Dalgro in detail of the conditions of approval alleged to have been breached. The most clear impression given was that the Board was cognisant of its obligations under the Act and would comply.

It is important to appreciate the requirement to give particulars and opportunity to be heard are statutory requirements set out under section 15(2) of the Investment Act. I quote:

*“Before taking any action under subsection (1), the approved enterprise **shall be informed in writing** of the nature of the contravention or non-compliance and be **afforded an adequate opportunity** to represent its case, and the Board may, if it thinks fit permit an opportunity for the contravention or non-compliance to be corrected.”*

Based on the assurances given by the Defendant through its Counsel, this Court made the following conclusions at page 2, last paragraph of the judgement delivered on 6th December 1999 in Civil Case 285 of 1999:

*“It seems to me Dalgro had been under the misconception, insufficient details of the breaches had been provided, and thereby overly concerned it would not be given adequate opportunity to address those issues. Secondly, it seems Dalgro is also under the misconception that since it felt there was no breach that it was not open to the Board to review its certificate of approval. As to the first concern, the details provided in my respectful view are more than sufficient to enable Dalgro prepare its case for hearing before the Board. If there are matters which arise at the hearing itself which Dalgro might feel it needed more time to address, I see no reason why it should not be given time to address those issues. As to the view there was no breach to be addressed, that is a matter for the Board to determine if it considers a hearing before it is necessary. Dalgro will then have opportunity to present its case as to its innocence and compliance with the terms of its certificate of approval.”*

The application for orders of prohibition against the Defendant was viewed as premature and dismissed. Court was convinced by the assurances given by learned Counsel for the Defendant that the requirements of section 15(2) would be complied with and that there was actually nothing for the Plaintiff to be worried about. But, to the surprise of the Plaintiffs and contrary to its own assurances, the Board went ahead to convene meeting on 22nd December 1999 without notice or warning to Dalgro and proceeded to cancel its certificate of approval. Dalgro only became aware of this decision when its staff returned to work in the morning of 27 December 1999. It had been sent by fax on 24 December 1999 at about 4.20 p.m. (see affidavit of Keith Edward Garland Douglas filed 14 January 2000). Dalgro naturally felt betrayed. Here was a Board which had said one thing before this Court and was doing the very opposite in blatant disregard of its very own assurances. It had misled this Court into believing that not only was it aware of its obligations under the Act but that it was going to comply anyway. This was a Board that had disregarded simple, clear and easy to understand instructions from its own Counsel (see Exhibit 3). It had also disregarded the advice of its Board Secretary contained in the Board Paper (despite the fact his advise was somewhat incorrect), to give Dalgro 14 days to show cause to the Board (see Exhibit 4). This was a Board that was aware of the judgment of this Court delivered on 6th December 1999 which reiterated the need and importance of complying with statutory requirements set out in subsection 15(2) of the Investment Act. This was a Board that can be said to be plainly

and fully aware of its obligations under the said Act and ignored them all. Little wonder, Counsel for the Defendant in his frustration's and disappointment with the actions of such a high powered Board, invested with such great responsibility and expectations, and **had duty** to act honestly, objectively and fairly, described it as a "rogue Board". More accurately the decision was made in bad faith. Statutory requirements were thrown overboard.

Dalgro accordingly had to apply again on 14 January 2000, to this Court for relief, this time for orders of certiorari to have the decision of the Board removed to this Court and quashed. After hearing submissions of Counsel for the Plaintiff and that of Defendant's Counsel, I gave judgment straightaway. Mr Samuels graciously conceded that he had been embarrassed by the actions of the Board. He had made assurances in good faith consistent with his advice to the Board. The Board did not even consult him after judgment had been delivered on 6th December 1999 in Civil Case No. 285 of 1999 as to what it should do in the circumstances. He too it seems had been taken by surprise at the actions of the Board. He quite rightly declined to make any further submissions in response to submissions of learned Counsel for the Plaintiff and did not raise objection when asked about the question of costs.

What should the Board have done? First, it should have set out in detail the breaches it alleges have been committed and have that delivered to Dalgro. It said it was in the process of doing this anyway! Why didn't it do it? It has able Counsel Mr Samuels, to assist in having this drawn up if it wasn't sure. Secondly, it should have given Dalgro adequate opportunity to represent its case to the Board; fourteen days should have been sufficient. Dalgro was basically ready in any event, to make representations to the Board, having anticipated the actions of the Board and having instructed Sol-Law to make its representations on its behalf. Thirdly, if the Board still is of the view that the representations of Dalgro are insufficient to explain away those breaches, it should turn its mind to the question whether opportunity should be given to Dalgro to have the contravention or non-compliance corrected before any decision to have the certificate of approval revoked or cancelled.

One of the orders issued by this Court when leave was granted on 17 January 2000 for leave to apply for an Order of Certiorari by Writ of Summons under Order 61 Rule 2, was for pre-pleadings discovery of the copy of the minutes of the meeting of the Investment Board of 22 December 1999 and any other documents placed before it (save for any privileged advice from the Defendant's Counsel to the Defendant) regarding the cancellation of the Plaintiffs' certificates of approval. This unfortunately was not complied with. Explanation given was that the advice of the Attorney-General was being awaited. With respect, that is a lame excuse. An order of the Court is to be obeyed. If there is objection to such order, Defendant or its Officers should have instructed its legal counsel (Mr Samuels) to make application straight-away to have that order discharged or varied, and not sit on its rights. The Board and its Officers must be equally vigilant in the due discharge of their duties and responsibilities and not take casual and lax approach. They must set examples of commitment and dedication to duty, and fairness and objectivity in decision making, at all times and in all cases and applications that come before it. The Board sad to say, had failed to do that in the circumstances of the Plaintiffs in this case. As a result not only did the Plaintiffs have to

come to this Court for relief, but they've had to seal a writ of Subpoena Duces Tecum to compel the Board produce the relevant documents already made the subject of this Court's order of 17th January 2000. That would have been unnecessary if the order had been complied with from the beginning. In my respectful view, the order for costs on indemnity basis is justified in all the circumstances of this case. What Board members and officers of such statutory bodies must realise is that such conduct and actions can open up possible claims against them in their personal capacity, apart from the fact that unnecessary costs are being incurred by someone else.

**ORDERS OF THE COURT:**

1. (a) **The decision of the Investment Board made at its meeting of 22 December 1999 withdrawing/cancelling the First Plaintiff's Investment approval and Certificate number 8/94 issued pursuant to the Investment Act;**  
  
(b) **The decision of the Investment Board made at its meeting of 22 December 1999, withdrawing/cancelling its approval of the agreement between the First and Second Plaintiffs referred to in Certificate number 28/99 issued pursuant to the Investment Act; and**  
  
(c) **The decision of the Investment Board made at its meeting of 22 December, 1999 withdrawing/cancelling its approval of the agreement between the First and Third Plaintiffs referred to in Certificate number 29/99 issued pursuant to the Investment Act;**  
  
each be removed to this Court and quashed.
- 2 **The Defendant pay the Plaintiffs' costs on an indemnity basis.**

**THE COURT.**