SOLOMON ISLANDS NATIONAL PROVIDENT FUND BOARD -v- SOLOMON ISLANDS ELECTRICITY AUTHORITY

HIGH COURT OF SOLOMON ISLANDS
(FRANK O. KABUI, J)

Civil Case No. 055 of 2000

Date of Hearing: 11th February and 24th April 2002
Date of Judgment: 07th May 2002

Mr J. Apaniai for the Plaintiff
Mr A. Nori for the Defendant

JUDGMENT

(Kabui, J): By a Writ of Summons and a Statement of Claim filed on 28th February 2000, the Plaintiff claims against the Defendant the sum of 16, 323, 058. 51, plus interest at 14 per cent per annum from 31st January 2000 until payment. The Plaintiff also claims the following orders -

1. **An order that the Defendant register a first charge mortgage in favour of the Plaintiff in respect of Parcel No. 192-007-5.**

2. **An order for leave to sell Parcel Nos. 191-014-32, 191-034-12, 191-039-2, 191-039-3, 191-036-5, 191-029-126, 191-029-125, 191-029-124, 191-029-47, 191-029-46, 192-002-84, 192-004-14, 191-023-44, 191-018-88, 098-009-7, 191-034-8, 191-041-212, 192-007-5, 171-001-72, 171-001-73, 171-001-74, 171-097-13, 097-005-14, 097-005-15, 098-012-13, 097-005-14, 097-005-15, 098-012-13, 098-012-14, 098-012-15, 098-012-16, 098-012-17, 098-012-18 and 192-007-5 by public tender and directions as to the sale of the said properties.**

3. **An order that the Plaintiff be a liberty to sell the chattels specified in the Bill of Sale registered on the 14th December 1994, Book No. 94 Folio 218/94 in accordance with the terms of the Bill of Sale.**

4. **Such further or other orders as the Court deems fit.**

5. **Costs.**

The Facts

The Plaintiff is the National Provident Fund, the Lender. The Defendant is the Solomon Islands Electricity Authority the Borrower. They are both statutory authorities established by an Act of Parliament. In the case of the Lender, section 7(2) of the Solomon Islands National Provident Act (Cap.109) (the SINPF Act) empowers the Fund's Board to invest its fund in investments approved by the

Minister of Finance. In the case of the Borrower, section 16 of the Solomon Islands Electricity Act (Cap. 128) allows the Authority to borrow money with the approval of the Minister of Finance. Under these respective provisions, each party decided in this case to act in its own interest with the other. The Borrower obtained a total of six loans from the Lender. These loans are referred to as Loan 3, Loan 4, Loan 5, Loan 6, Loan 7 and Loan 8. Loan 3 was obtained in August 1987. The loan was in the sum of $3,000,000.00 at the interest rate of 12.5 % per annum for a period of 10 years. This loan was to be repaid on a 6 monthly basis for 10 years. The security for this loan was a guarantee signed by the then Minister of Finance on 1st July 1987 under section 28 [now section 33] of the Public Finance and Audit Act Cap.[120] "**the Act**". As at 31 12 1999, loan arrears stood at $611,922.72. As at 31st January 2000, the arrears stood at $1,000,882.56 and are continuing to accrue. The Defendant has defaulted on this loan despite requests for repayment. Loan 4 was obtained in October1988. The loan was in the sum of $500,000 at the interest rate of 12.5% per annum for a period of 10 years. This loan was to be repaid on a 6 monthly basis for 10 years. The security for this loan was a guarantee signed by the then Minister of Finance on 29th September 1988 under section 28 [now section 33] of the Act. As at 31st December 1999, the loan arrears stood at $208,283.47 and are continuing to accrue. The Defendant has defaulted on this loan despite requests for repayment. Loan 5 was obtained in May 1990. The sum was in the sum of $500,000 at the rate of 13.5% per annum for a period of 10 years. This loan was to be repaid on a 6 monthly basis for 10 years. The security for this loan was a guarantee signed by the Minister of Finance on 26th March 1990 under section 28 [now section 33] of the Act. As at 31st December 1999, the loan arrears stood at $361,139.72 and are continuing to accrue. The Defendant has defaulted on this loan despite requests for repayment. Loan 6 was obtained in August 1990. The loan was in the sum of $3, 800,000.00 at the interest rate of 14% per annum for a period of 10 years. This loan was to be repaid on a 6 monthly basis for 10 years. The security for this loan was a charge over the Authority's estates (assets) set out in Schedule 5 to the Loan Agreement signed on 31st August 1990. The charge was dated 29th January 1992. As at 31st December 1999, the loan arrears stood at $2,743,003.80.are is continuing to accrue. The Defendant has defaulted on this loan despite requests for repayment. Loan 7 was obtained in December 1991. The loan was in the sum of $1,000,000.00 at the interest rate of 14% per annum for a period of 10 years. This loan was to be repaid on a quarterly basis for 10 years. The security for this loan was a charge over the Authority's estates (assets) set out in Schedule 2 to the Agreement. The charge was dated 7th January 1992. As at 31st December 1999, the loan arrears stood at $1,015,221.92 and are continuing to accrue. The Defendant has defaulted despite requests for repayments. Loan 8 was obtained in 1994. The loan was in the sum of $8,106,000.00.at the interest rate of 14% for a period of 10 years. This loan was to be repaid on a quarterly basis for 10 years. The security for this loan was a guarantee signed by the Minister of Finance on 31st August 1994 under section 28 [now section 33] of the Act. In addition, a charge was created over the Authority's estates (assets) set out in Schedule 5 of the Loan Agreement. A Bill of Sale was also created over the Authority's chattels set out in Parts A and B of the Schedule thereto executed on 31st August 1994. This Bill of Sale appears not to have been registered.

The 1st Defendant's position

The 1st Defendant filed its defence on 3rd April 2000 in which the Defendant stated that the Plaintiff had no statutory power to grant the said loans and in so doing, acted beyond the terms of the enabling Act. That is to say, the loans having been issued out of the General Reserve Fund were not loans concerned with social security of its members, were made in breach of trust, and were made without the approval of the Minister of Finance. The creation of charges over the Authority's properties as security for the said loans was in breach of the Act. For these reasons, loans 3 to 8 were both unlawful and unenforceable against the Defendant. The Defendant therefore denied owing the sum of $16,323,058.51, owing interests on the said loans and denied that the Plaintiff could secure court orders for the registration of further charge over Parcel No. 192-007-5 and the sale of the properties listed in the claim. The Defendant's defence remained the same despite the Plaintiff's Amended Writ of Summons and Statement of Claim filed on 4th April 2001 with a special indorsement for the sum of $16,323,058,51. At the trial, the Plaintiff called one witness and then closed its case. The Defendant called no witness and made its submission. Counsel for the Defendant, Mr. Nori, in his submission admitted liability for loans 3,4,5 and 8 but denied liability for loans 6 and 7. He argued that loans 6 and 7 were made in contravention of the provisions of the **("SINPF Act")** [Cap.109]. The 2nd Defendant by its Counsel Mr. Waleanisia, offered no defence but said he would make submissions on points of law. As Counsel for the 1st Defendant, Mr. Nori, admitted liability for Loans 3, 4, 5 and 8,I find no difficulty in granting the relief sought by the Plaintiff in respect of these loans. I accordingly grant the orders sought and enter judgement for the sums due under Loans 3,4 5 and 8 plus interest of 14% per annum from 31st January 2000 until payment. However, Mr Nori, would seem to suggest that the 1st Defendant would be absolved from liability upon the Minister of Finance meeting the 1st Defendant's liability under the guarantees guaranteeing the repayment of loans 3, 4, 5 and 8. This point does affect the position of the 2nd Defendant.

The 2nd Defendant's position

There is no doubt that there are government guarantees for the repayment of Loans 3, 4, 5 and 8 in the event the 1st Defendant is unable to repay these loans. The guarantee signed by the Minister of Finance on 1st July 1987 in respect of Loan 3 provides that the guarantee be a continuing guarantee and would remain in force until repayment of the entire principal plus interest. It also provides that the guarantee be honoured upon demand by the Borrower upon the Guarantor whereupon the Guarantor will pay the amount outstanding plus interest thereon. The same provisions also apply to the guarantees signed by the Minister of Finance on 29th September 1988, 26th March 1990 and 31st August 1994 in respect of Loans 4, 5, and 8 respectively. The guarantees for Loans 3, 4, 5 and 8 also state that the requirements of section 28 (now section 33) of the Public Finance Act have been satisfied. Counsel for the 2nd Defendant, Mr Waleanisia, however argued that at the trial no evidence was produced to prove that such requirements had been satisfied. Section 33 (1) gives the power to the Minister of Finance to guarantee the repayment of any loan raised locally or outside of Solomon Islands. This power would not be exercised until certain conditions are satisfied. These conditions are

set out in section 33 (2) of the Act. First, the Minister of Finance must approve the purpose of the loan and is satisfied that the servicing of the loan is within the capacity of the Borrower. Second, there must be provision appropriating and applying the loan for the purpose for which it is approved by the Minister. It means there must be a loan agreement in place for the disbursement of the money for the approved purpose. Third, there must be provision for any part of the loan money that is unused to be withheld or be used for any purpose that the Minister approves. Fourth, there must be provision for charging on the income or assets of the Borrower or any other income the principal and interest of the loan and other charges on the loan or if that is not possible in the opinion of the Minister, then to ensure the repayment of the principal, interest and other charges in some other way. Fifth, there must be provision for charging on the income and assets of the Borrower the repayment to the Government of any sum paid out of the general revenues plus interest or if that is not possible in the opinion of the Minister, then to ensure the repayment of the principal interest and other charges in some other way. Sixth, there must be provision for raising or securing the raising of sufficient money to meet the above charges. In practice, negotiation and discussion between the Lender and Borrower would have taken place during which the Minister of Finance would have discussed the conditions set out in section 33 (2) above. The Minister of Finance having been satisfied, the matters agreed should be set out in a tri-partite agreement between the Lender, the Borrower and the Guarantor, in this case, the Minister of Finance. In this way, the Lender would know exactly the terms of the relationship between the Borrower and the Guarantor regarding the guarantee as security for the repayment of the loan. In the past, this was not the case. The bulk of the negotiation and discussion as regards the terms of the proposed loan would have been done by the Lender and the Borrower. The Minister of Finance would have been briefed simultaneously or a little later of the purpose of the proposed loan and the terms of the proposed loan by the Lender if the Borrower should raise Government guarantee as security for the proposed loan The loans often guaranteed by the Minister of Finance were often done in a hurry because the urgency of the need to release the money was the dictating factor in these cases. Political factors also played a role. The need to protect the Government against loss was often forgotten. The Attorney-General in my experience was never consulted by the Minister of Finance except to be asked to quickly vet the Guarantee document before the Minister of Finance signed it. Section 33(3) of the Act clearly envisages the repayment of any money paid out of the Consolidated Fund to be repaid to the Consolidated Fund. Clearly, the Government has the right to recover to itself money it has paid out of the Consolidated Fund from the Borrower after it has honoured its guarantee. The conditions in section 33(2)(b)(ii), (iii), (iv) and (v) of the Act have so far been superficially applied by the Minister of Finance clearly at expense of the Government. Loans 3, 4, 5 and 8 are not exceptions in this regard. There were no tri-partite agreements signed in respect of these loans. This omission does not in any way invalidate the loans but its effect is that the Government has been left unprotected in terms of its right to recover its loss against the Borrower. I mean, no genuine attempts were made to ensure that the Borrower was put in a position that would enable it to service its loans successfully in the terms set out in section 33 (2)(b), (ii), (iii), (iv) and (v) of the Act. In the case of Loans 3, 4, 5 and 8, any attempt by the Government to recover its money from the Borrower would most likely result in the liquidation of the Borrower. Most likely public interest would suggest other

solutions than liquidation. In this respect the honouring of the guarantees by the Government is very crucial to the survival of the Borrower in this case. Such an action by the Government would surely save the sale of the Borrower's assets as security for the loans. It is for the Lender to call up the guarantees and the Government would likewise honour them. The Government's liability in this regard cannot be denied or avoided. The Government is bound to honour its guarantees to their fullest extent. The Government is therefore liable to repay the loans if payment is demanded by the Lender. There is no way out of this liability by any stretch of imagination. As I have said, the Government is at liberty to recover from the 1st Defendant moneys it pays out of the Consolidated Fund to fulfil its guarantees to the 1st Defendant.

Loans 6 and 7

In each of these two loans, there was no government guarantee provided under the Act as security for the repayment of them. The security was in the form of charges created over the Authority's estates set out in the Schedules to the respective loan agreements. In terms of Order 23 rule 1 of the High Court [Civil Procedure] Rules, 1964 "**the High Court Rules**", a mere denial of the debt would be inadmissible because in each case, the sum that is claimed is a liquidated sum which is a debt under a contract.

However Mr Nori's argument was that there is no evidence to show that these loans were granted in accordance with section 7(2)(a)(iii) of the SINPF Act, which reads-

..."The Board shall be the Trustee of the Fund, and the moneys belonging to the Fund-

(a) shall, subject to the directions of the Minister,-

(i) .....
(ii) .....
(iii) be invested in any other security or any other loan specifically approved as an investment for the purposes of this Act by the Minister or guaranteed by the Government under the Public Finance and Audit Act; and"...

The crucial words are **..."any other loan specifically approved as an investment for the purposes of this Act by the Minister"...**

However, Mr Nori called no evidence to support his case. He was perhaps simply surprised why the Minister of Finance decided not to guarantee loans 6 and 7 when he had done so for loans 3, 4, 5 and 8. I can only judge the situation by looking at the Loan Agreements themselves in the absence of any evidence from the 1st Defendant. Loan 6 was signed on 31st August 1990. The Minister of Finance was represented in that document by Mr Maenu'u who was then the Permanent Secretary of Finance and the Chairman of the Plaintiff. I say this because I do recognise the signature of Mr Maenu'u. I was the Attorney-General at that time.

Loan 7 was signed on 13th December 1991. The Minister of Finance was represented in that document by Mr Sogavare who was then the Permanent Secretary for Finance and the Chairman of the Plaintiff. I say this for the same reason above. The practice is that the Permanent Secretary of Finance is always the Chairman of the Plaintiff. This practice is one of convenience and is still valid today. I would be surprised that both Mr Maenu'u and Sogavare would have signed Loans 6 and 7 without the knowledge and approval of the Minister of Finance who had just guaranteed Loan 5 on 26th March 1990. I am sure that the late Abe was the Minister of Finance that time. He probably did not wish to commit the Government any more than he did on 26th March 1990 but would comply with section 7(2)(a) (iii) above if the 1st Defendant would fork up sufficient security to satisfy the Plaintiff. Clearly, the Plaintiff was satisfied with the security provided by the 1st Defendant that it signed Loans 6 and 7. I find on the balance of probability that the then Minister of Finance did act within section 7(2)(a)(iii) above in respect of Loans 6 and 7. Mr Nori further relied on section 8 of the Trustee Act 1925 of the United Kingdom, which reads-

...**"Loans and investments by trustees not chargeable as breaches of trust.**

(1) A trustee lending money on the security of any property on which be can properly lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the court-

(a) that in making the loan the trustee was as acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situated or elsewhere; and

(b) that the amount of of the loan does not exceed two third parts of the value of the property as stated in the report; and

(c) that the loan was made under the advice of the surveyor or valuer expressed in the report.

(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such a loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase, or in lending money upon the security, absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with

prudence and caution would have accepted.

(4) This section applies to transfers of existing securities as well as to new securities and to investments made before as well as after the commencement of this Act"...

In this case the SINPF Board is the Trustee of the Fund. This means the SINFP Boards Members are collectively the trustees of the Fund. The penalty for improper investment by a trustee is that which is stated in section 9 of the Trustee Act 1925 above which does not apply to this case. I do not think the enforcement of Loans 6 and 7 would be breach of trust. I think it would be the other way round, because it is in the interest of the NPF contributors as beneficiaries that Loans 6 and 7 are recovered for the benefit of the Fund. There may be a case of negligence but that is beside the point in this case. The fact here is that the 1st Defendant wanted the money from the Plaintiff and the Plaintiff gave the money to be repaid as set out in the terms of Loans 6 and 7. Is it right for the 1st Defendant to now turn around and say, **"I have used all the money but I cannot repay it? I do not need to repay because I believe the then Minister of Finance did not specifically approve Loans 6 and 7 as investments within the meaning of section 7(2)(a)(iii) of the SINPF Act".** I am sure the 1st Defendant would have been most upset if Loans 6 and 7 had not been granted by the Plaintiff. Surely, the 1st Defendant was most grateful for Loans 6 and 7. It came back for more in 1994 and got $8,106,000.00 guaranteed by Mr Nori who was then the Minister of Finance. There was obviously a need for more money for the 1st Defendant from the Government but failing that the Plaintiff became the source of financing for the 1st Defendant. The 1st Defendant surely was most grateful for the Plaintiff's assistance in that regard. I do not accept the ungrateful behaviour shown by the 1st Defendant towards the Plaintiff regarding Loans 6 and 7. Even assuming that the then Minister of Finance did not act within the meaning of section 7(2)(a)(iii) of the SINPF Act, the position would not change. The monies disbursed in Loans 6 and 7 are the property of the contributors of the Fund loaned to the 1st Defendant by the SINPF Board being the trustee acting on behalf of and for the benefit of them. There are indeed exceptions to the general rule which denies recovery under illegal or void contracts etc for omission of statutory requirements, or for illegality etc. One such case was **Bowmakers Ltd v Barnett Instruments, Ltd** [1944] 2 A.E.R. 579. In that case certain tools owned by the Plaintiffs were hired out for instalment payments with the option to purchase them by the hirer under three agreements. The hirer subsequently sold the tools except those under agreement No. 2. The Plaintiffs sued for damages for the conversion of those tools and were met with the defence of illegality. The illegality alleged was the provision of the Defence (General) Regulations of the United Kingdom, which regulated the price of new tools. The prices at which the tools had been sold to the Plaintiffs were an infringement of the Regulations. The Plaintiffs sued for damages and succeeded against the Defendants. Upon an appeal by the Defendants, the Court of Appeal said the trial judge was right in favouring the Plaintiffs against the Defendants. At pages 582-583, Du Parcq had this to say, **..."The question then is whether in the circumstances the plaintiffs are without a remedy. So far as their claim in conversion is concerned, they are not relying on the hiring agreements at all. On the contrary they are willing to admit for this purpose that they cannot**

rely on them. They simply say that the machines were their property, and this, we think, cannot be denied. We understood counsel for the appellants to concede that the property had passed from Smith to the plaintiffs, and still remained in the plaintiff s at the date of the conversion.

In our opinion a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim"...

..."The Latin maxim which Mellor, J., cited must not be understood as meaning that where a transaction is vitiated by illegality the person left in possession of goods after its completion is always and of necessity entitled to keep them. Its true meaning is that, where the circumstances are such that the court will refuse to assist either party, the consequence must in fact follow that the party in possession will not be disturbed. As LORD MANSFILED said in the case already cited, the defendant then obtains an advantage "contrary to the real justice" and, so to say," by accident".

It must not be supposed that the general rule which we have stated is subject to no exception. Indeed, there is one obvious exception, namely, that class of cases in which the goods claimed are of such a kind that it is unlawful to deal in them at all, as for example, obscene books. No doubt there are others, but it is unnecessary, and would we think be unwise, to seek to name them all or to forecast the decisions which would be given in a variety of circumstances which may hereafter arise. We are satisfied that no rule of law and no considerations of public policy compel the court to dismiss the plaintiffs' claim in the case before us, and to do so would be, in our opinion, a manifest injustice"...

Clearly, in this case the Loan funds do remain the property of the Plaintiff and nothing can change that fact. The 1st Defendant has converted the funds to its own use which it must repay.

I find the 1st Defendant liable for Loans 6 and 7. I grant the Orders sought by the Plaintiff in respect of Loans 6 and 7, and accordingly enter judgment for the Plaintiff. Costs will be paid by the 1st Defendant to be taxed if not agreed.

F.O. Kabui
Judge