

IN THE MATTER OF THE SOLTAI FISHING AND
PROCESSING LIMITED

AND

IN THE MATTER OF COMPANIES ACT (CAP 175)

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.)

Civil Case No. 451 of 2005

Date of Hearing: 20th September 2005

Date of Judgment: 23rd September 2005

C. Hapa for the Applicant

JUDGMENT

Kabui, J. Soltai Fishing and Processing Limited (Soltai) has applied for extension of time to enable it to register allotment of shares beyond one month, the time limit prescribed by section 51(1) of the Companies Act, (Cap. 175) for registration. The application can be granted if good reasons are given to justify the extension. There is however the question of whether the shares, being a matter of fact, have been transferred to Investment Corporation of Solomon Islands (ICSI) and to the Western Provincial Government, following the demise of Solomon Taiyo Limited. And if so, whether already allotted shares can be re-allotted by a new company formed out of the old one.

The Background.



Fishing is an important industry in Solomon Islands. Solomon ~~Taiyo~~ Limited was a joint-venture company incorporated in Solomon Islands some years ago. The Japanese partner was Taiyo Gyogyo Kabushiki Kaisha. The other partner was the Solomon Islands Government through the former Government Shareholding Agency. Subsequently, Taiyo Gyogyo Kabushiki Kaisha became Maruha Corporation and the Government Shareholding Agency became ICSI. In 2001, Maruha Corporation decided to pull out of Solomon Islands joint-venture being the former Solomon Taiyo Limited. There was then the urgency to organize something to replace it. A shareholding arrangement had to be settled. Soltai is that organized replacement. Soltai is a going fishing and processing company situated at Noro in the Western Province. Soltai was incorporated as a private company on 23rd January 2001. The authorized capital of Soltai is \$200,000,000.00 divided into one dollar share each. ICSI is

said to be holding fifty-one percent of the shares whilst the Western Provincial Government is said to be holding the remaining forty-nine percent shares. The first allotment of shares was dated 27th June 2001 showing one hundred ordinary shares with two dollars paid up nominal shares.

The reasons for the delay to register the allotment of shares.

The share structure of Soltai remained in doubt for sometime until calls were made on 16th August 2001 to the shareholders to inject further capital into the company. No fresh capital being available on call, the Soltai Board of Directors threatened forfeiture on 31st August 2004 whereupon ICSI produced a copy of the Cabinet decision that authorized the holding of forty-nine per cent shares by the Western Provincial Government in Soltai. This was the first time the management of Soltai became aware of the Western Provincial Government being the minority shareholder in Soltai. By that time, the one month period under section 51 of the Companies Act had long expired. It would appear that the extension is necessary because the allotment of shares had been made since 4th July 2002. The other reason was that the political status of the Western Provincial Government was in a limbo until this year when elections were held to elect a new government for that Province. I do not dispute these facts.

The promoters of Soltai.

The departure of Maruha Corporation of Japan signaled the demise of the former Solomon Taiyo Limited. ICSI found itself being landed with having to hold the fifty-one percent shares jettisoned by Maruha Corporation of Japan plus its existing forty-nine percent. ICSI had to find another partner but no one would come forward to buy any substantial number of shares. The Government in 2001 decided to reward the Western Provincial Government with forty-nine percent of the ICSI's one hundred percent ownership of Soltai. This was a political decision. There is however no evidence to show that the fifty-one per cent shares previously held by Maruha Corporation had been legally transferred to ICSI. Where is the transfer agreement under which the fifty-one per cent shares had transferred to ICSI? ICSI and Maruha Corporation are two separate legal entities. Likewise, there is no evidence to show that ICSI had transferred its forty-nine percent shares to the Western Provincial Government? That is, where is the agreement of the Western Provincial Government to accept the forty-nine per cent shares in Soltai? There is nothing in the Deed of Assets Transfer dated 22nd August 2001 signed by ICSI, SOLTAI, SOLOMON TAIYO LIMITED and MARUHA CORPORATION about the new shareholding structure of Soltai and the amount of shares each shareholder would hold in Soltai. There is no shareholding agreement between ICSI and the Western Provincial Government regarding the forty-nine per cent shares nor is there one between ICSI and

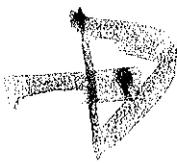
Maruha Corporation regarding the fifty-one per cent shares. The anticipated shareholding structure for Soltai was stated at page 4 of the Cabinet Paper CAB [2001] 11 and contained in Annexure A attached to that Cabinet Paper. What I understand to be the Cabinet Conclusion dated 29th January 2001, only approved, amongst other things, the proposed incorporation of Soltai and its Memorandum of Association and Articles of Association. The Cabinet Paper is a political document reflecting government policy. It can never be a shareholding agreement. I have not seen the Memorandum of Association but I suppose the share subscribers would have been stated in that Memorandum of Association. ICSI and the Western Provincial Government would have been nominal shareholders because the total net value of assets in 2001 stood at \$85,591,424.00. The book value in 1999 was \$160 million. This net value of assets must have led to the filing of the return of allotment of shares dated 4th July 2002 filed by Motis Pacific Lawyers. I have not seen who signed for the Western Provincial Government as one of the two share subscribers in the Memorandum of Association.

The forty-nine per cent shares for the Western Provincial Government.

There is no evidence to show that the Western Provincial Government was aware of its status as a new shareholder in Soltai and had accepted the offer from ICSI. It was a mistake to call up the Western Provincial Government to inject further funds into Soltai on 16th August, 2004 and then to threaten it with forfeiture. It had no legal obligation to inject further funds. The notice of forfeiture had subsequently been retracted by the Soltai Board of Directors in a meeting held on 19th November 2004. In that meeting the Board decided that \$85,591,424.00 being the net value of the assets of Soltai should be divided into fifty-one and forty-nine share structure. ICSI was to hold fifty-one per cent of the shares and the Western Province Government, forty-nine respectively as envisaged by Cabinet. The Board therefore allocated \$43,651,626.00 share value to ICSI and \$41,939,798.00 share value to the Western Provincial Government. The shares would have been fully paid up at the time of the apportionment of the shares to ICSI and the Western Provincial Government. That apportionment was a political decision. ICSI had no choice because it is the investment arm of the Government. The Western Provincial Government is also a political entity at the provincial level. Be that as it may, the shares must be legally transferred to both ICSI and the Western Provincial Government for they are property by legal status.

The allotment of shares.

The allotment of shares to Maruha Corporation and ICSI in the former Solomon Tayio Limited would have been done a long time ago. The fifty-one per cent shares and the forty-nine per cent shares respectively should have been transferred directly to ICSI and the Western Provincial Government before or



simultaneously with the incorporation of Soltai in 2001. They cannot be re-allotted by Soltai because they had been paid up then and became shareholdings previously of Maruha Corporation and ICSI to be transferred to new owners being ICSI and the Western Provincial Government. Soltai of course can allot any new shares yet to be allotted for consideration. The arrangement in the Deed was that the assets and liabilities of the former Solomon Tayio Limited had been transferred to Soltai as the new company. The net value of the assets stood at \$85, 591,424.00. The shareholding of each shareholder, there being only two, would reflect that valuation. No shares are to be issued because the existing shares were simply to be transferred to the new shareholders. The assets had simply been capitalized, representing fully paid shares. The arrangement then was that the former Solomon Tayio Limited being voluntarily wound up, transferred its assets and liabilities to Soltai simultaneously with the transfer of the then existing shareholding to new shareholders. The next step is to issue new share certificates to the new shareholders. ICSI and the Western Provincial Government had not acquired any new shares for consideration so that allotment of the shares is a necessary step under section 51 of the Act. The shares were simply gifts by the Government by agreement of the former shareholders.

Conclusion.

The draft Forms 4 (return of allotment of shares) and 5 (contract relating to shares), both undated, are misleading in this case. Firstly, there is no evidence that fifty-one per cent formerly held by Maruha Corporation had been transferred to ICSI to confirm that ICSI does hold that percentage of shares in Soltai. Secondly, there is no evidence to show that forty-nine per cent formerly held by ICSI had been transferred to the Western Provincial Government to confirm that the Western Provincial Government does hold that percentage of shares in Soltai. If none of them is the holder of each of those respective percentages of shares, then none of them is a shareholder in Soltai. If that is the case, then none of them is entitled to fulfill the wish of the Cabinet. Each of them may apply for allotment of new shares but that is not the Cabinet arrangement in 2001. Alternatively, even if ICSI and the Western Provincial Government are valid shareholders in Soltai, none of them is entitled to be re-allotted shares which they simply inherited from the former shareholders. Those shares simply represent the already allotted shares to the former shareholders in the former Solomon Tayio Limited which already are allegedly in the hands of the new shareholders. Whichever is the case, Soltai would have no reason to make any allotment of the shares representing the value of the net assets of Soltai. It is misleading to think that there are new shares to the net value of \$85,591,424.00 for Soltai to allot. Any shares representing that valuation are old shares in the former Solomon Tayio Limited already allotted and simply donated to ICSI and the Western Provincial Government for political expediency. New shares may be allotted to any new investor who is

interested to buy into the capital of Soltai. Clearly, Soltai needs new injection of funds to improve its operations. It is therefore not right to extend time as requested for the above reasons.

The application has been misconceived. The application is refused.

F.O. Kabui
Puisne Judge