

DEVELOPMENT BANK OF SOLOMON ISLANDS -v- NORTH MALAITA COCONUT PRODUCTS LIMITED AND COMMODITIES EXPORT MARKETING AUTHORITY

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

Civil Case No. 144 of 2005.

Date of Hearing: 18th November 2005.

Date of Judgment: 24th November 2005

B. Titulu for the Plaintiff.

No appearance for the 1st Defendant.

N. Moshinsky QC with M. Ipo for the 2nd Defendant.

JUDGMENT

Kabui, J. By a Writ of Summons and a Statement of Claim filed on 15th March 2005, the Development Bank of Solomon Islands (the DBSI) claimed against the Commodities Export Marketing Authority (CEMA) and the North Malaita Coconut Products Limited the sum of \$152,500.00 plus interest as from 12th March 2005 until full payment of the sum claimed by the DBSI.) CEMA and the North Malaita Coconut Products Limited failed to enter appearance resulting in a default judgment being entered against CEMA on 13th September 2005.

The DBSI by summons filed on 13th October 2005 applied for a show cause order against CEMA as to why Parcel Nos. 191-020-22 and 191-014-14 should not stand charged with the payment of sum of \$152,500.00 plus interest as per default judgment.

The Solicitor-General appeared for CEMA and the North Malaita Coconut Products Limited and opposed the application on the ground that CEMA is immune from execution proceedings such as the DBSI's application.

The Statement of Claim.

CEMA is a statutory body set up by Parliament. On 7th May 1999, CEMA and the DBSI agreed that the DBSI lend \$152,500.00 to the North Malaita Coconut Products Limited for the purpose of financing of milling equipment plus working capital. CEMA became the guarantor for the loan of \$152,500.00 plus interest on 20th July 1999 by executing a Deed of Guarantee. The North Malaita Coconut Products Limited's obligation was to repay the loan by a monthly installment of \$3,709.00. It had failed to repay the loan by 30th September 2004 in the sum of \$299,780.88 and the sum has since increased. CEMA therefore had been called on to honour its guarantee but failed to do so as well.

The Crown immunity argument.

The starting is section 23(4) of the Crown Proceedings Act (Cap. 8) which does not allow execution, attachment or any process of that nature against the Crown or any Government Department or an officer of the Crown. Applied to statutory bodies set up by an Act of Parliament, the argument becomes that the statutory body is the servant or agent of the Crown and so it is immune from execution, attachment or any proceedings of that nature.

The test to be applied in finding out whether any statutory body is a servant or agent of the Crown.

The test to be applied is "the control test." There is however no hard and fast rule about the application of this test because the facts of each do vary from one case to the other. In other words, the true position in each case is determined by the provisions of the Act that sets up the particular statutory body in question. That is, such provisions would have to be carefully scrutinized to establish the final and correct conclusion at the end of the day.

The provisions of the CEMA Act (Cap.36) which may indicate a likeness of the Crown.

The long title of the CEMA Act sets out the objectives of the CEMA as being to provide for the development of the production of certain commodities for export by promoting and regulating their marketing and for matters connected or incidental to those objectives. The broad objective of CEMA is clearly the commercial development of certain commodities for the purpose of marketing and exporting them for the benefit of the country.

The governing body for CEMA.

Schedule 2 governs the appointment of members of CEMA. There are thirteen members of CEMA. Seven of them are representatives of the Provinces. Two members represent the producers involved in producing the commodities in the country. Two members represent the export, investment and marketing expertise. Two other members, one being the Permanent Secretary or his nominee for the Ministry responsible for CEMA and the other is the General Manager for CEMA. The Minister appoints the members of CEMA except the General Manager and the Ministry officials who are ex officio members. CEMA pays the remuneration of the members out of its funds. CEMA appoints the General Manger and the Secretary and pays for their remuneration out of its funds.

This is a normal provision in any statutory body that is created by Parliament. It creates a link between the executive government and that body in terms of general policy. The Minister also answers for it in Parliament because the body will have come under the responsibility of a Government Minister in the assignment of ministerial portfolio.

Amending the Schedule 1.

Under section 3, the Minister may, with the recommendation of CEMA, by order published in the Gazette, amend Schedule1 which specifies the commodities for which CEMA is responsible under the CEMA Act.

Schedule 1 contains the commodities for which the Authority is responsible. Any changes to the Schedule will have been initiated by CEMA and simply approved by the Minister as a matter of formality.

Functions of CEMA.

Section 6 (1) gives CEMA the absolute power to develop the production of the commodities and their efficient marketing. However, implementing its national plan in terms of developing, assisting and promoting the commodities, CEMA requires the approval of the Minister. Any joint ventures or projects for the promotion of export of the commodities must have the approval of the Minister as well. The performance of any additional functions by CEMA under section 7 also needs Ministerial approval.

This provision really exists for the purpose of ensuring that CEMA does things within the broader government policy regarding the development of the commodities in relation to other commodities not already listed in Schedule 1.

Control of superannuation schemes for employees.

The Minister must under section 8 approve any superannuation schemes for the employees of CEMA. There is a need to see that any scheme for CEMA's employees does not clash with the National Provident Fund that already exists or if there is a need for a separate scheme that it receives the same treatment under the Income Tax legislation.

Control of general matters of policy.

Under section 9, the Minister may call for interim reports on the operations of the CEMA. Where it is necessary, the Minister may direct the Authority in a general way in consultation with CEMA compliance with the provisions of the CEMA Act in the public interest. The Minister may sanction compliance by removal from office of any member of the Board.

This provision is to ensure that CEMA does not deviate from its main responsibilities under the CEMA Act.

Prohibition of export of any commodity in the public interest.

Under section 10, the Minister may, in the consultation with or on recommendation of CEMA, prohibit by order, the export of any commodity or carrying out of any prescribed activity to protect the use of any such product within the country etc. without compensation for any loss caused by such ban or suspension.

This provision is to ensure that in the case of emergency, the Government will intervene for the public good. Such measures by the Government would be temporary only until the emergency is over.

Appointment of ports.

Under section 14, the Minister may, by order published in the Gazette, appoint any port for the export of any commodity. Here, the Minister will be acting for the benefit of CEMA if the need arises.

Hearing of appeals.

Under section 16, the Minister may deal with appeals but the costs of such appeals are to be met by CEMA. This power by the Minister is administrative in nature.

Approval of other funds.

Under section 20, CEMA with the approval by the Minister may approve certain funds and the manner and purpose for which the funds are to be used.

Approval of borrowing by the Authority.

Under section 22, CEMA may not borrow funds unless approved in writing by the Minister of Finance.

Approval for guarantees.

Under section 23, CEMA may not guarantee any loans unless the Minister has approved after he has consulted the Minister of Finance.

Approval for lending.

Likewise, under section 24, CEMA may not lend money unless the Minister has approved it after he has consulted the Minister of Finance.

Approval for investment of funds.

Likewise, under section 25, CEMA may not invest funds unless approved by the Minister after he has consulted the Minister of Finance.

Approval of accounts, audit and annual report.

Under section 27, the Minister must receive each year the statements and accounts at the end of each financial year and must lay before Parliament the report of its operations.

Powers of the Minister and the Minister of Finance in Part IV headed "Finance," in sections 20-27 are necessary because the financial position of CEMA forms part of the economic position of the whole country for which the Minister of Finance is responsible, apart from CEMA's own financial position. CEMA's debts will be a concern to the Government. Its demise will certainly have social and financial repercussions.

Exemption from the provisions of the CEMA Act.

Under section 32, the Minister may exempt any person or class of persons from the provisions of the CEMA Act in the public interest. This power is necessary because there may be legitimate reasons in the public interest for certain persons or class of person to be excused from the provisions of the CEMA Act.

Power to make regulations.

Under section 34, the Minister may make regulations for the implementation of the Act. This is an administrative power to make detail regulations to regulate the administration of the CEMA Act in terms of its implementation.

The extent of control by a Minister of the Government.

CEMA is a corporate body with a common seal and is vested with the attributes of a legal personality for all purposes. (S.5). It has the power to appoint its own employees and to pay them. It can hire and fire them. (S.8). It does not pay tax to the Government. (S.28). CEMA appoints its own General Manager who takes his instructions from it. (Schedule 2, para.2).

The most significant control the Minister has over CEMA is his power to appoint the members of the CEMA Board and to remove them from office. The Minister's influence on policy matters is minimal because of the fact that the Minister always acts either upon the recommendation of or in consultation with CEMA itself. Apart from these, the other controlling powers are of regulatory and administrative nature only. There is no provision which confers upon CEMA the status of being a servant or agent of the Crown.

Conclusion.

Section 5(2) clearly states that CEMA is responsible for the policy and management of CEMA in accordance with the provisions of the CEMA Act. The provisions of the CEMA Act do not treat CEMA as the servant of the Crown nor do they treat it as an agent of the Crown. It is therefore not possible to conclude that CEMA bears the hallmarks of the Crown and therefore it follows that CEMA does clothe itself with immunity from execution, attachment or other process in that nature as envisaged by section 23 (4) of the Crown Proceedings Act cited above.

Parcel Nos. 191-020-22 and 191-014-14 are therefore not immune from execution or attachment as the case may be. I rule accordingly.

Frank O. Kabui
Puisne Judge