

SOLOMON ISLANDS NATIONAL PROVIDENT FUND BOARD V. RUSSELL ISLAND'S PLANTATION ESTATE'S LIMITED (FIRST DEFENDANT) AND PATRICK WONG AND WIM VAN VLYMEN (SECOND DEFENDANTS) AND AUGUSTINE ROSE AND OTHERS (THIRD DEFENDANTS) AND JOHN WHITESIDE (FOURTH DEFENDANT).

**High Court of Solomon Islands
(Palmer CJ.)**

Civil Case Number 301 of 2005

Date of Hearing: 7 October 2005

Date of Judgement: 8 November 2005

G. Fa'aitoa for the Plaintiff

A. Radclyffe for the second and fourth Defendants

Palmer CJ.: This is an application by the second and fourth Defendants ("the Defendants") to have the Writ and Statement of Claim as against themselves struck out on the grounds that no reasonable cause of action is raised. The second Defendants also ask that in any event, the service of the writ on them should be set aside as irregular on the grounds that the Plaintiff did not obtain leave to serve the writ out of Jurisdiction.

The Solomon Islands National Provident Fund Board ("the Board") administers a superannuation and or savings scheme for all employees in the country. It alleges that the Defendants, who are directors and company secretary of the first Defendant ("RIPEL") were obliged under the Solomon Islands National Provident Fund Act (cap. 109) ("the NPF Act") to:

- (i) produce relevant payroll or wage records pursuant to section 40(1)(h) of the NPF Act;
- (ii) pay to the Plaintiff relevant contributions in respect of RIPEL's employees pursuant to section 13(1) of the NPF Act; and
- (iii) pay to the Plaintiff the relevant surcharge which RIPEL was liable to pay in respect of unpaid contributions pursuant to section 40(1)(d) of the NPF Act.

The issues which arise from the Statement of Claim of the Plaintiff for determination in my respectful view are:

- (i) whether sections 40(1)(h) and 47(c) of the NPF Act as read with section 43 of the same Act, imposes a duty on the Defendants to produce relevant payroll or wage records;
- (ii) whether section 13(1) and section 40(1)(b) as read with section 43 imposes personal liability on the Defendants to pay relevant contributions of RIPEL's employees pursuant to paragraph 6(ii) of the Plaintiff's Statement of Claim; and
- (iii) whether section 16 and section 40(1)(d) as read with section 43 also creates personal liability on the Defendants to pay surcharge on the relevant contributions pursuant to paragraph 6(ii) of the Plaintiff's Statement of Claim.

First Issue.

Part X of the NPF Act deals with "Offences, Penalties and Proceedings". Section 40(1)(h) comes under that sub-heading. It creates an offence where there has been a failure to produce specified documents requested in writing pursuant to section 47(c). I quote:

"40.—(1) If any person—

...

(h) fails to produce at the time specified, any document required to be produced by notice in writing under section 47(c),

he shall be guilty of an offence and liable to a fine of five hundred dollars or to imprisonment for one year, or to both such fine and such imprisonment."

The documents referred to were the relevant payrolls and or wage records of RIPEL. Section 47(c) reads:

"An inspector appointed under section 5(3) may at any reasonable time—

...

(c) require the production of any document which an employer is required to keep under the provisions of this Act or of the Labour Act or any other document which the inspector may reasonably require for the purpose of ascertaining whether the provisions of this Act are being or have been complied with and the inspector may make a copy or an extract from any such documents and, for this purpose, may by notice in writing sent by registered post to an employer's address, require such production at any place reasonably accessible to such employer on a date and at a time specified in such notice:

Provided that the date so specified shall not be less than twenty-one days from the date of service of such notice and the notice shall be deemed to have been served upon the employer when the notice would have been delivered or received in the ordinary course of post; and in proving such service it shall be sufficient to prove that the envelope containing the notice or other document was properly addressed and was posted;"

Paragraph 47(c) imposes a statutory obligation on an employer (RIPEL) to produce documents which may be required by an inspector of the Board at any particular point of time. The purpose or intention of this legislation to ensure accountability and transparency on the part of an employer in the payments of relevant contributions of its employees which can be checked and verified by an officer of the Board.

Where an employer fails to comply with such request under section 47(c) it constitutes an offence under paragraph 40(1)(h) of the NPF Act and can be prosecuted under the said paragraph for failing to comply with the requirements of section 47(c) of the NPF Act.

By virtue of section 43 of the NPF Act the liability of an employer in relation to any offence committed under the Act is also **deemed** to be an offence which a director or company secretary is guilty of and capable of being prosecuted for as well, unless they

can prove that the offence was committed without their consent or connivance and that they exercised all such diligence to prevent the commission of the offence as they ought to have exercised, having regard to the nature of their functions in that capacity and to all the circumstances. I quote:

“43. Where an offence under this Act has been committed by a body corporate, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer or a partner of the body corporate, firm, society or other body of persons or was purporting to act in such capacity shall, as well as such body corporate, firm, society or other body of persons, be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.” [emphasis added]

The enactment of section 43 is fatal to the application of the Defendants to strike out. In my respectful view, not only does it impute liability to the directors and secretaries but by necessary implication it imposes/extends statutory obligation to them as well for the production of any documents requested under section 47(c). Otherwise it would make nonsensical of the penalty sought to be imposed upon the directors and secretaries without the necessary duty or obligation attached. It is my respectful view that the intention, purpose and objective of section 43 was to include directors and company secretaries under the obligations imposed under section 47(c), unless they can prove that the offence was committed without their consent or connivance and that they exercised all such diligence to prevent the commission of the offence as they ought to have exercised, having regard to the nature of their functions in that capacity and to all the circumstances. To argue that section 43 is confined only to criminal liability and cannot be extended to include civil liability is to take an unnecessarily restrictive approach of that provision. Where an offence has been created with a penal sanction attached, it necessarily infers the existence of a corresponding duty. Normally the prosecution of such offence would be sufficient deterrence to the directors and company secretaries to ensure compliance with the requirements of the Act and that it may not be necessary to have to take civil proceedings to enforce the provisions of the Act.

Second and Third Issues

The same reasoning raised under the first issue, applies equally to the second and third issues. Both issues are interconnected with each other and if liability arises in one it also must necessarily apply to the other.

The second issue raised relates to the question whether section 13(1) and section 40(1)(b) as read with section 43 imposes personal liability on the Defendants to pay relevant contributions of RIPEL's employees pursuant to paragraph 6(ii) of the Plaintiff's Statement of Claim. By the same token the third issue asks the same question but in relation to the payment of surcharge under section 16 and section 40(1)(d) of the NPF Act.

It is not in issue that section 13(1) imposes duty on the employer to pay relevant NPF contributions in respect of its employees. Whilst there is no other provision which

directly imposes liability under the NPF Act on the directors or the company secretary to pay relevant contributions, it is important to bear in mind that section 40(1)(b) also creates an offence where there has been such a failure. I quote:

“If any person –

...

(b) fails to pay to the Fund in any month any amount which, under section 13(1), he is liable to pay in that month in respect of any employee; ...

he shall be guilty of an offence and liable to a fine of five hundred dollars or to imprisonment for one year, or to both such fine and such imprisonment.”

By virtue of section 43 the directors and company secretary of RIPEL would be capable of being sued and prosecuted for failing to pay any relevant contributions due to its employees unless they can prove otherwise, that the offence was committed without their consent or connivance and that they exercised all such diligence to prevent the commission of the offence as they ought to have exercised, having regard to the nature of their functions in that capacity and to all the circumstances.

In the same token, by process of necessary implication, it follows (from the effect of section 43) that the directors and company secretary are also personally liable for the payment of all relevant contributions. The creation of an offence (in the case of directors and company secretary, by deeming provision, section 43) necessarily implies the creation of a statutory duty/obligation.

In the case of the employer (RIPEL) the existence of such duty/obligation is expressly stated. In the case of directors and company secretary, unless there is express provision which imposes such obligation, their duties would be confined to common law duties (such as the duty to act in the best interests of the company¹, a duty of trust, so as to act in good faith and honestly², a duty not to make profits from a position as a director³ etc.) and any such other duties imposed under the Companies Act [cap. 175]⁴. It is my respectful view that the deeming provision, section 43, not only imposes personal liability on the directors and the company secretary for any offences committed by the company but extends personal liability on them as well for any outstanding unpaid contributions of the employees. Otherwise the deeming provision is nonsensical. The purpose and objective of the NPF Act needs to be borne in mind. It was set up as a superannuation type savings scheme for all employees in the country who are members of the Fund. It imposes strict liability on an employer to make monthly deductions and pay contributions of its employees to the Fund. Those contributions inter alia, are exempt from taxation and take priority in the event of bankruptcy proceedings and liquidation of the employer. When seen in the totality of that light, it is only logical and reasonable that section 43 should be enacted to ensure that not only the employer but its directors and company secretary ensure that such contributions receive priority.

¹ Understanding Business Law 2nd edn. Brendan Pentony, Stephen Graw, Jann Lennard, David Parker, p.602; see also Percival v. Wright [1902] 2 Ch 421

² Grove v. Flavel (1986) 43 SASR 410, 111 ACLR 161

³ Peso Silver Mines Ltd v. Cropper (1966) 58 DLR (2d) 1a

⁴ sections 170-196