MOBIL OIL LIMITED AND SHELL PACIFIC ISLANDS COMPANY LIMITED –V- THE PREMIER OF GUADALCANAL PROVINCE

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

Civil Cases Nos. 171 and 173 of 1998

Date of Hearing: 28th October 2002
Date of Judgment: 7th November 2002

Mr J. Katahanas for the 1st and 2nd Plaintiffs
No appearance for the Defendant

JUDGMENT

Kabui, J. The 1st and 2nd Plaintiffs **("the Plaintiffs"),** filed an Originating Summons on 18th September 1998 seeking the following orders-

1. **That the time limited for appearance on this Originating Summons be abridge to the hearing of this summons.**

2. **A declaration pursuant to Order 58 rule 2 that the Defendant, his servants, agents or contractors has no authority pursuant to the Guadalcanal Province Business and Hawkers Licensing (Amendment) (No. 2) Ordinance 1993 to close or force the closure of the Plaintiffs' businesses in respect of Fuel Supply Services conducted at Henderson Airport.**

3. **A declaration pursuant to Order 58 rule 2 that the Plaintiffs are entitled to carry on their said businesses without further interference by the Defendant, his servants, agents, or contractors save in accordance with due process and an order of a court of competent jurisdiction.**

4. **Further or other relief**

The Defendant filed a Memorandum of Appearance on 22nd September 1998. At a hearing on 22nd September 1998, the Chief Justice made certain orders one of which was to direct the Registrar to give separate file numbers to the Writ of Summons filed on 21st September 1998 and the Originating Summons filed earlier on 18th September 1998 above. The Originating Summons action was numbered as Civil Case No. 171 of 1998 whilst the Writ of Summons action was numbered as Civil Case No. 173 of 1998. No further step had been taken by the Plaintiffs to set a date for the hearing of the

Originating Summons. After almost 2 years of inaction, the Plaintiffs filed a notice of intention to proceed on 8th August 2001. At a hearing on 19th September 2001, the Registrar made further orders for directions, directing, amongst other things, that the Defendant deliver its defence in Civil Case No. 173, and any or all affidavits on which it intended to rely and that both cases be heard together at a date to be fixed. At that same hearing on 19th September 2001, the Registrar also made a number of directions respecting steps to be taken to move forward Civil Case No. 173. The 1st Plaintiff filed its Statement of Claim on 15th January 2002 well out of time. The Defendant has filed no defence to date. In fact, the Defendant had not entered a Memorandum of Appearance in respect of Civil Case No. 173.

The Brief Facts

The Plaintiffs are both distributors of fuel and petroleum products in Solomon Islands. As such, they supply Aviation gas, Jet A1 gas and other fuel and petroleum products from their facilities at Henderson airfield. On 4th June 1998, the Defendant through its licensing officer, demanded by letters, the payment of a business and hawkers licence fee of $100,000.00 each for the year 1988/1999. By letter dated 31st July 1998, the Defendant by its collecting agent, demanded the 1st Plaintiff to pay $100,000.00 licence fee for 1988/1999. Likewise, the Defendant had demanded from the 2nd Plaintiff by letter dated 4th June 1998 the same fee. The Defendant threatened to close down each of the Plaintiffs' facilities at Henderson if the fee of $100,000.00 was not paid as demanded. The Defendant demanded the fee under its Business and Hawkers Licensing (Amendment NO. 2) Ordinance, 1993. The Plaintiffs have refused to pay the fee on the ground that it is a tax in disguise or that it is excessive and unreasonable.

Notice of Motion for judgment.

In the case of Civil Case No. 171, the Plaintiffs seek the following orders-

1. **The Plaintiffs have leave to enter Judgment against the Defendant.**

2. **Judgment be entered for the Plaintiffs against the Defendant in terms of the declarations sought in the Originating Summons filed herein on 18 September, 1998 in default of the Defendant filing any affidavits as ordered by the Registrar of the High Court on 19th September, 2001.**

3. **The Defendant pay the Plaintiffs' costs of and incidental to this action including this motion to be taxed if not agreed.**

4. **Unless there be any further or other application by the Plaintiffs in respect of costs then, pursuant to the High Court (Civil Procedure) (Amendment) Rules 1975, Appendix J ("the Scale of Costs") Item 43, a certificate issue for an increase in the charges which may be claimed**

by the Plaintiffs pursuant to the Scale of Costs by virtue of order 2 to provide for payment to the Plaintiffs for all legal professional costs incurred by the Plaintiffs on a party and party basis of an incidental to these proceedings at the rate of $650.00 per hour.

5. **Such further orders as to this Honourable Court may seem meet.**

In the case of Civil Case No. 173, the Plaintiffs seek the following orders-

1. **Judgment be entered for the Plaintiffs against the Defendant in default of defence.**

2. **The Defendant pay the Plaintiffs' costs of an incidental to this action including this motion to be taxed if not agreed.**

3. **Unless there be any further or other application by the Plaintiffs in respect of costs then, pursuant to the High Court (Civil Procedure) (Amendment) Rules 1975, Appendix J ("the Scale of Costs") Item 43, a certificate issue for an increase in the charges which may be claimed by the Plaintiffs pursuant to the Scale of Costs by virtue of order 2 to provide for payment to the Plaintiffs for all legal professional costs incurred by the Plaintiffs on a party and party basis of an incidental to these proceedings at the rate of $650.00 per hour.**

4. **Such further orders as to this Honourable Court may seem meet.**

At the trial, the Defendant was not present in Court by Counsel or any of its representatives as its agent. However, by affidavit filed on 28th October 2002, Mr. Dofe swore that he had served Bridge Lawyers on 17th October 2002 the documents listed in his affidavit by leaving those documents with Mrs. Delma Nori at Mr. Nori's residence at Skyline and doing the same on 21st October 2002 with Mrs. Lily Mata, the Guadalcanal Province Premier's Secretary at China Town Plaza. I was therefore satisfied that the Defendant had been duly served and was well aware of the date and time of the hearing of the cases on 28th October 2002. I accordingly allowed the Plaintiffs to proceed in the absence of the Defendant. As far as Civil Case No. 171 is concerned, Bridge Lawyers were their Solicitors but not in Civil Case No. 173. As far as Order 7, rule 2 of the High Court (Civil Procedure) Rules1964 **"the High Court Rules"** is concerned, Bridge Lawyers are still the Solicitors on record for the Defendant in Civil Case No. 171. (See ruling dated 12th November 1999 in **Reef Pacific Trading Ltd.& Joan Marie Meiners v. Price Waterhouse, Richard Anthony Barber & William Douglas McClusky**[1]). Mr. Nori had informed Sol- Law Solicitors by letter dated 17th October 2002 that he had told the Defendant to find another lawyer to represent him in Court. He has not formally withdrawn from acting for the Defendant in Civil Case No. 171. The proper step to take

[1] *Civil Case No. 164 of 1999*

is to seek leave of the Court to withdraw under rule 20(3) of the Legal Practitioners (Professional Conduct) Rules 1995. (See **Somma Limited v. Goodwill Industries Limited** and **Solomon Islands Broadcasting Corporation v. Mark Bisili**[2]). This step remains to be taken in Civil Case No. 171.

Civil Case No. 171 of 1998

Since this application can be likened to an exparte application due to the absence of the Defendant, Mr. Katahanas out of fairness to the other side did cover points in favour of the Defendant in the course of his submission. One point he mentioned was the application of Order 29, rule 14 of the High Court Rules. Rule 14 requires leave of the Court before a judgment is entered in default of defence in proceedings against the Crown. Leave has to be sought by way of notice of motion or by summons served within 7 days before the return date. The Originating Summons did not give any time limit for appearance. In fact, order 1 of that Summons sought an order to abridge the time limit for appearance. The first hearing took place on 22nd September 1998 at which the Chief Justice made orders for directions. No hearing date was fixed for over 3 years by either of the parties. The notice of intention to proceed was filed on 8th August 2001 and expired on 8th September 2001. The next hearing date was 19th September 2001 at which directions were made. None of the directions made required the Defendant to file any defence but affidavits only intended to be used by the Defendant at the trial. The hearing date was fixed for 28th October 2002 at which the Defendant failed to appear in person or by Counsel. I think Order 29; rule 8 of the High Court Rules is inappropriate in this case. The question of lack of defence does not arise because an application under Order 58, rule 2 of the High Court Rules does not call for the supply of a defence for obvious reason. The reason is that the relief that is available in rule 2 above is either a determination of a question of construction of any provision of any written law or a declaration of the right claimed. I do not therefore need to consider Order 29, rule 14 of the High Court Rules for that reason. I think Order 38, rule 5 of the High Court Rules should apply wherein the Plaintiffs should have proceeded to prove their case in the absence of the Defendant. In fact that was what happened here although Order 38, rule 5 above were not cited. Paragraph 2 of the Originating Summons seems to be saying that the Defendant has no legal authority to close or force the closure of the Plaintiffs' business in respect of services provided at Henderson Airport. Paragraph 3 follows that by concluding that if paragraph was correct in law then the Plaintiffs were entitled to carry on their businesses at Henderson Airport. Then there was a request for further or other relief.

Civil Case No. 173 of 1998

Perhaps realizing the non-coercive nature of declaratory orders, the Plaintiffs filed a Writ of Summons and a Statement of Claim on 21st September 1998. At the hearing on 19th September 2001, the Plaintiffs were ordered, amongst other things, to file their Statement of Claim within 14 days. They did so on 15th January 2002. Both the orders for

[2] *Civil Case No. 178 of 2000 & Civil Case No. 218 of 1998*

directions and the filing of the Statement of Claim were well out of time. The relief sought in that Statement of Claim was a declaration that the Business and Hawkers Licence of $100,000.00 imposed by the Guadalcanal Government pursuant to the Guadalcanal Province Business and Hawkers Licensing (Amendment No. 2) Ordinance 1993 in respect of fuel supply service businesses of the Plaintiffs was ultra vires the Guadalcanal Provincial Government and therefore was void and unenforceable. This case and Civil Case No. 171 above are the same in terms of facts and issue. I do not know why they were not consolidated into one case under Order 52 of the High Court Rules. There might have good reason to keep them as separate cases.

The issue in both Civil Cases Nos. 171 and 173

The issue in both cases is whether or not the imposition of a business fee of $100,000.00 is within the powers of the Guadalcanal Provincial Government and therefore is lawful, valid and enforceable. This issue is well served in Civil Case No. 173 than in Civil Case No. 171. For this reason, I will decide Civil Case No. 173 first before I say anything about Civil Case No. 171. There is no evidence to show that the Defendant had entered a Memorandum of Appearance in Civil Case No. 173 nor delivered a defence. Mr. Dofe in his affidavit of service filed on 1st February 2002 confirms that he had served Bridge Lawyers with the sealed copy of the Statement of Claim on 17th January 2002. There is however no evidence to show that the Defendant had been served with a sealed copy of the Writ of Summons and Statement of Claim filed on 21st September 1998. There would not have been for that reason a need to enter a Memorandum of Appearance. So, there was, as a result, no appearance on the part of the Defendant. There cannot be service of a Statement of Claim without the service of the Writ of Summons, which commences the action. It follows therefore that there can be no delivery of defence prior to effecting service of the Writ of Summons and a Statement of Claim and thus availing the Defendant the opportunity to enter a Memorandum of Appearance. The Plaintiffs had omitted to serve the Defendant with a sealed copy of the Writ of Summons and the Statement of Claim filed on 21st September 1998. This is confirmed by the fact that the Writ of Summons itself had not been indorsed in accordance with Order 9, rule 12 of the High Court Rules. (See **Francis Saemala v. Gordon Kiko Zinehite**[3]). I do notice however that the Writ of Summons filed on 21st September 1998 was served on Bridge Lawyers on 21st October 2002 after 4 years of delay. Service was effected too late. The Writ is already stale and has not been renewed under Order 8 of the High Court Rules. It has not also been indorsed under Order 9, rule 12 of the High Court Rules. (See **Francis Saemala v. Gordon Kiko Zinehite** cited above). No default judgment is permitted for non-appearance in such a case as this under this rule. I do not think the question of lack of defence arises here because it does only if the Writ of Summons and the Statement of Claim had been served and either an appearance was entered or there was a default of appearance. Only then would a defence have been due to be delivered. This is clearly not the case here. That being the case, Order 29, rule 8 would not apply. I would refuse to give judgment in favour of the Plaintiffs. The application in Civil Case No. 173 is

[3] *Civil Case No. 162 of 2000*

dismissed. I now turn to Civil Case No. 171. Clearly, the Plaintiffs are interested parties in this case. There is no dispute about the fact that the Plaintiffs do operate at Henderson Airport as suppliers of fuel and petroleum products for the use of aircrafts taking off and landing at Henderson Airport. There is no dispute that the Defendant demanded the payment of $100,000.00 from the Plaintiffs as business licence fee for the 1988/1999 periods. There is also undisputed evidence that the Defendant had threatened to close the operations of the Plaintiffs if the fees demanded were not paid by the Plaintiffs. The Plaintiffs refused to pay the fee of $100,000.00, alleging that the said fee was unlawful, null and void. Counsel for the Plaintiffs cited section 26(1) of the Provincial Government Act (No. 7 of 1997) as read with Schedule 3 thereto as being limited in scope. Paragraph 4 of schedule 3 is in these terms,

"4. Raising revenue by-

(a) basic rates;

(b) property rate;

(c) fees for services performed or licences issue by or on behalf of the Provincial Executive (other than services performed or licences by them as agents of another); and

(d) such other means as may be approved for the purposes of this paragraph by the Minister by order"..

Clearly, fees can be imposed for licences issued by the Provincial Executive but the amount of fees to be imposed is a matter left to the Provincial Executive to decide. This is where the problem lies. How much fee should be imposed? The guide is of course section 67(3) of the Interpretation and General Provisions Act (Cap. 85). Section 67 states,

..."(1).....
(a).....
(b).....
(c).....
(d).....
(e).....
(f).....
(2).....
(a).....
(b).....
(c).....
(d).....
(e).....

(3) Where any fees or charges referred to in subsection (1), is in respect of any services provided by any public body, such fees or charges shall as far as practicable be within a range properly chargeable in respect of the services provided, and shall not be excessive or unreasonable"...

The relevant part of the Guadalcanal Province Business and Hawkers Licensing (Amendment No. 2) Ordinance 1993 is Part 1 of Schedule 1 (**fees**) at page 19, which states,

"Fuel Supply Service $100,000.00".

Is the fee of $ 100,000.00 excessive or unreasonable?

This issue was raised in **Y. Sato & Company Limited and Solomon Motors v. Honiara Appointed Council**[4].

The Court at page 13-14 said,

..."Generally speaking, a tax is a charge which is made solely for the purpose of raising general revenue whereas a licence fee is a charge made primarily for the authority or privilege of carrying on a particular activity and for he purpose of defraying the costs of regulating that activity and of providing services which will benefit those carrying on that activity. The relationship between the amounts charged on the one hand and, on the other hand, the value of the privilege or authority, the costs of regulating and provision of services and benefits does not call for mathematical accuracy or something approaching that degree of accuracy"...

The Court continued at page 15 thus,

..."The licence fees are charged for the privilege or authority of doing something, which would be otherwise unlawful. To say that does not mean the licence fees cannot amount to a tax. But to show that the licence are taxes, it must appear that in amount they exceed the value of the privilege or authority and that the amount is unreasonable in the sense that it is materially disprotionate to the expense of regulation so as to justify the conclusion that the fees are levied solely for the purpose of raising general revenue"...

The word **"excessive"** could also mean **"unreasonable,"** both meaning being disproportionate to the value of the privilege or authority or the expense of regulating the service industry. There is in this case no evidence to show the relationship between the

---

[4] *Civil Appeal Nos. 15 and 16 of 1998*

fee of $100,000.00 and the value of the privilege or authority or service that the Plaintiffs derive from the Guadalcanal Provincial Executive. The fee is therefore excessive and unreasonable.

Is it a tax in disguise?

I think the answer must be in the affirmative. Section 31 of the Provincial Government Act states,

..."(1).....
(a).....
(b).....
(2).....
(3).....
(4).....
(5) **A Provincial Assembly has no power to make laws imposing, altering or abolishing any tax, except where power to do so is expressly conferred on the Provincial Assembly by or under this Act"...**

This is consistent with section 106 of the Constitution which states,

..."No taxation shall be imposed or altered except by or under an Act of Parliament"...

The evidence to show that the Guadalcanal Provincial Executive provides regulatory service to the Plaintiffs is in the negative. (See affidavits of Messrs Korowa and Yates filed on 21st September 1998). There is no further evidence to demonstrate that the fee of $100,000.00 is for the value of the privilege or authority to operate in the jurisdiction of Guadalcanal Province. Even if there is that evidence, the amount of the fee imposed is clearly far too much for an annual fee payable by any businessman for that matter. To use the words of the Court of Appeal in **Y Sato & Company Limited and Solomon Motors v. Honiara Appointed Council** cited above, ..."**the distinction between a licence fee which is not a tax and a tax, the distinction being one which is notoriously difficult to make**"... That remark was made in respect of two paragraphs in the judgment of Kirby, P. in **Solomon Motors Ltd. v. Honiara Town Council**,[5] quoted at pages 7 and 8 of the judgment. I quote again at page 7 where Kirby, P. said,

> ..."**If all that the respondent were to do was to provide a piece of paper, called a 'licence', to any business applicant, conducting no investigations, no inspections or enquiries and providing no services at all, clearly the 'licence' fees would be revealed as nothing more than the raising of revenue for the respondent**"...

[5] *Civil Appeal No. 11 of 1994*

Clearly, the evidence in this case does point to that same conclusion. A piece of paper called a **'licence'** is issued upon the payment of $100,000.00 without, to use the words of Kirby, P. **..."conducting no investigations, no inspections or enquiries and providing no services at all"...** can point to no other conclusion than pointing to the raising of revenue as the sole purpose for its imposition. It is therefore a tax than a licence. I will grant the declarations sought in paragraphs 2 and 3 in the Originating Summons.

Costs

The Plaintiffs have asked that I issue a certificate for an increase in the charges, which may be claimed by the Plaintiffs in terms of item 43 in Appendix J in the High Court Rules. I discussed the application of item 43 in some detail in **Gemstar Seafood Limited v. Robin Bycroft**[6]. I think I would somehow have to say what the words **"having regard to all the circumstances of the case"** mean as used in item 43 in Appendix J. above. I think those words can be substituted for the words, **"taking into account all the facts of the case"**. I think the words must necessarily mean all the circumstances (facts), which would justify an increase in the charges. That is, those circumstances (facts) need to be a little more than the ordinary to stand a chance of convincing the Court to grant the increase. What then are all the circumstances (facts) of this case for the purpose of certification for an increase of costs? It is not disputed that the conduct of the Defendant that caused the Plaintiffs to act to protect their rights as perceived by them. The Plaintiffs' Solicitors then wrote letters to the Defendant in response to letters of demand and threat from the Defendant to close down the operation of the Plaintiffs at Henderson Airport. By 15th September 1998, the Plaintiffs' Solicitors issued a threat of Court proceedings if the Defendant did not desist from his earlier threat to close down the Plaintiffs' operation at Henderson Airport. The Plaintiffs' Solicitors filed an Original Summons on 18th September 1998, followed by a Writ of Summons and a Statement of Claim filed on 21st September 1998. Copies of the Originating Summons were served on the Secretary of the Premier of Guadalcanal Province and the Attorney-General on 18th September 1998. Bridge Lawyers entered a Memorandum of Appearance on 21st September 1998. There is no evidence to show that the Writ of Summons and the Statement of Claim had been served on the Defendant. An exchange of correspondence then followed in 1999 culminating in an attempt by the Plaintiffs' Solicitors to settle the matter by way of a consent judgment. That attempt did not succeed because the Premier of Guadalcanal could not be contacted for instructions. By letter dated 22nd June 1999, the Defendant's Solicitor informed the Plaintiffs' Solicitors that the Defendant had decided not to enforce the fee against the Plaintiffs. This was one of the reasons why the Defendant did not see a consent judgment being necessary to conclude the dispute. Exchange of correspondence continued into 2000 and onwards. After a delay of almost 3 years the Plaintiffs by their Solicitors filed a notice of intention to proceed on 8th August 2001. The Statement of Claim in Civil Case No. 173 was filed only on 15th January 2002

[6] *Civil Case No. 370 of 1999*

and was served on Bridge Lawyers on 17th January 2002. The Defendant had entered no appearance. No defence had also been delivered. The Plaintiffs then decided to apply to the Court by Motion for judgment under Order 29, rule 8 of the High Court Rules. It is true that the Defendant had caused the Plaintiffs to incur costs and then backed away without incurring any costs, if any. If there was any cost at all, it was minimal only although the Defendant had instructed Bridge Lawyers in the first place. I think the Plaintiffs are entitled to their costs in prosecuting Civil Case No. 171. I am not so sure, however, that I should certify for an increase of the relevant charges in Appendix J. The issue raised in this case had been decided in this jurisdiction in **Allardyce Lumber Co. Ltd., Kalena Timber Co. Ltd., Golden Springs International (S.I.), Hyundai Timber Co. Ltd. v. The Premier of Western Province, Solomon Motors Ltd. v. Honiara Town Council, Allardyce Lumber Company Limited, Kalena Timber Company Limited and Silvania Products (S.I) Limited v. The Premier of Western Province, Y. Sato & Company Limited v. Honiara Appointed Council**, and **Solomon Motors Limited v. Honiara Appointed Council**[7]. The issue raised in these cases had also gone to the Court of Appeal for its decision. The issue of the validity of business fees is therefore a settled issue in this jurisdiction. The issue did not involve a difficult point of law that required many hours of research or obtaining an opinion of senior Counsel from overseas. Nor did it require the calling of expert or many witnesses at great expense. The delay in prosecuting the case cannot wholly be said to be the fault of the Defendant. The justification advanced by Counsel for an increase was the fact that the scale of fees had not been increased since 1975. I do not dispute that fact. As evidence in support, Mr. Kingmele filed an affidavit showing the current rate of charge per hour in two cases being $600 and $800 respectively. I think I was being asked to certify an increase because the Rules Committee under section 90 of the Constitution has not yet increased the charges in Appendix J since 1975. I do not think item 43 in Appendix J can be a convenient substitute for the lack of action by the Rules Committee to increase fees and costs in Appendix J. As I have already said, the Plaintiffs are entitled to their costs in respect of Civil Case No. 171 on a party-to-party basis but without certification for an increase as requested by the Plaintiffs. I order accordingly.

F.O. Kabui
Judge

---

[7] *Civil Case No. 234 of 1994, Civil Case No. 11 of 1994, Civil Case No. 161 of 1996, Civil Case No. 48 of 1998 & Civil Case No. 55 of 1998.*