SOLOMON ISLANDS NATIONAL PROVIDENT FUND BOARD – V- SOLOMON ISLANDS ELECTRICITY AUTHORITY AND ATTORNEY-GENERAL

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.)

Civil Case No. 055 of 2000

Date of Hearing: 30th April 2003
Date of Judgment: 9th May 2003

Mr J. Apaniai for the Plaintiff
Mr A Nori for the 1st Defendant
Mr F. Waleanisia for the 2nd Defendant

JUDGMENT

Kabui, J: By Summons filed on 10th April 2003, the Plaintiff sought a number of orders regarding the sale of properties listed in the first column of the Schedule attached to the said Summons. The Summons was to be heard at 9.30 am in April 2003. The 1st Defendant then filed another Summons on 28th April 2003 seeking an order to stay the intended sale of the said properties. The other order being sought was to demand the 2nd Defendant to pay up the 1st Defendant's debt in the action. The 1st Defendant's application was set down for the same day and time listed for the hearing of the Plaintiff's application. The 1st Defendant's application was heard first as it sought to stay the sale intended by the Plaintiff.

Brief background

The 1st Defendant was a borrower of funds owned by the Plaintiff. Part of the borrowing was guaranteed by the Government through previous Ministers of Finance. The remaining part of the loan was secured by the mortgage of the assets of the 1st Defendant without any Government guarantee. The full facts were set out in my judgment of 7th May 2002. Having defaulted on the loans, the Plaintiff sought orders of the Court to sell the properties of the 1st Defendant in an effort to recover the loan money that is currently owing to the Plaintiff. The Plaintiff obtained a Court order to that effect on 9th May 2002, following my judgment delivered in favour of the Plaintiff on 7th May 2002.

Is there a need for another order to demand the 2nd Defendant to pay up to the Plaintiff?

The starting point would be the terms of the court order signed on 9th May 2002. Paragraph (5) of the said order is as follows-

> "...**In the event that the First Defendant fails to pay the sums and interest claimed against the First Defendant in respect of loans 3,4,5 and 8, that the Second Defendant do pay the said sums and interests upon demand therefore being made by the Plaintiff to the Second Defendant...**"

This part of the court order is to be activated on two conditions. First, the 1st Defendant must first fail to pay up loans.3, 4, 5 and 8 with interest. Second, the Plaintiff must make a demand to pay on the 2nd Defendant. The securities for the repayment of these loans were guarantees issued by previous Ministers of Finance. To activate this order the 1st Defendant needs to say in writing to the Plaintiff and the 2nd Defendant that it is unable to repay loans 3, 4, 5.and 8 and cannot fulfill its obligation under the terms of the said loans. Upon receipt of that information, the Plaintiff must write a letter of demand to the 2nd Defendant demanding payment of the said loans with interests under the terms of the guarantees issued by the previous Ministers of Finance. This order is in a way self-executing and does not need another order to activate it. I refuse to make the order on this matter as requested by the 1st Defendant.

Should the Plaintiff be denied the fruit of its success?

Counsel for the Plaintiff, Mr., Apaniai, did argue that the Plaintiff was simply reaping the benefit of its success and it was entitled to do so in this case. He argued that if the 1st Defendant's intention was to stop the sale of the properties, then it should have moved for the stay of the orders of the Court signed on 9th May 2002. This, he argued, the 1st Defendant did not do. Instead, he said, the 1st Defendant chose to prevent the sale of the properties listed in the Plaintiff's application which in effect was a kind of way to attempt a stay of execution of the Court orders signed on 9th May 2002 without saying so in so many words. Counsel for the Plaintiff, Mr. Apaniai, seemed to have thought that the 1st Defendant was only interested in preventing the sale of the properties set out in the Schedule to the Plaintiff's application. This not how I understood Mr.Nori's application. His approach was to secure an order demanding the 2nd Defendant to pay up the loans guaranteed and outstanding to the Plaintiff and having got that to secure another order to stay the execution of the Court orders signed on 9th May 2002. Each Counsel came to court, so it seems, with a different mind-set as what the issues were in this case. But, as I have said above, Mr. Nori must be taken to have asked for the stay of the sale of the properties set out in the court orders signed on 9th May 2002, including the properties set out in the Schedule to the Plaintiff's application. This is the only way one can make sense of the formulation of the 1st Defendant's application. To simply attack the sale of the 3 properties set out in the Schedule to the Plaintiff's application in isolation to the sale of all the properties set out in paragraph 3 of the court order of 9th May 2002, would not make sense. I may misunderstood both Counsel on this point but this point matters no more in view of my refusing to grant the first order sought above by the 1st Defendant. The application for a stay of sale of properties owned by the 1st

Defendant must now stand alone for consideration. Loan 6 was secured by creating a first charge over parcels of land owned by the 1st Defendant. Those parcels of land were set out in Schedule 5 to the loan agreement signed on 31st August 1990. Similarly, loan 7 was secured by creating a first charge over parcels of land owned by the 1st Defendant. Those parcels of land were set out in Schedule 2 to the loan agreement signed on 13th December 1991. The 3 properties being up for sale are parcels of land set out in Schedule 5 to the loan agreement being loan 6. Loans 6 and 7 are not covered by any Government guarantees. In fact, paragraph (3) of the court order orders the sale of all parcels of land listed in that paragraph. The sale of the 3 properties the subject matter of the Plaintiff's application is in pursuance of this order. The sale is lawful and is in order under the said court order. Can paragraph (3) of the court order be stayed as requested by the 1st Defendant which in effect will put on hold the sale of all the properties in paragraph (3) of the court order? Or for that matter, can the sale of the 3 properties set out in the Schedule to the application by the Plaintiff be stayed separately? I take it that what the 1st Defendant is seeking is an order to stay paragraph (3) of the court order of 9th May 2002 and not just the sale of 3 properties cited above.

What does the law say about such a situation as this?

Counsel for the 1st Defendant advanced 'public policy' as being the determining factor as to whether or not I should grant the order to stay the sale of the properties. What the Plaintiff has done is an act of enforcement of its right as a chargee under section 171 of the Land and Titles Act (Cap. 133), which allows the chargee to dispose of the interest charged by disposition through sale. This section says nothing about the Court having any power to stay such disposition for whatever reason. Nor does Order 54 of the High Court (Civil Procedure Rules) 1964; 'the High Court Rules' (sale by the court) say anything contrary to section 171 of the Land and Titles Act cited above. The inherent jurisdiction of the courts to grant stay of execution or of proceedings does not seem to apply to this case because what the 1st Defendant sees as an injustice being the sale of its properties is justice in the eyes of the Plaintiff. The fact is that the 1st Defendant borrowed monies belonging to the Plaintiff and used them for its purposes with a promise to repay with interest and failed to do so. Where then is the injustice to itself. If there is any injustice, the Plaintiff is the party that suffers injustice because it has lost $16,323,058.51 plus interest. This is a huge loss to the Plaintiff. For the 1st Defendant to say that loans 6 and 7 should not be recovered by selling the assets of the 1st Defendant would be a slap in the face of the Plaintiff. The 1st Defendant had agreed that in the event it was unable to repay loans 6 and 7, the Plaintiff would enforce the registered charges created over the 1st Defendant's parcels of land set out in the Schedules to the loan agreements. The Plaintiff therefore sees itself as simply reaping the fruit of its success. The 1st Defendant did not appeal the court decision so that an application for a stay of execution may be considered pending appeal. That scenario does not arise in this case. Nor is this an application for a stay pending the resolution of the matter by negotiation. Whilst the Court can claim inherent jurisdiction in granting staying orders, the power to make such orders is discretionary upon compelling evidence from the party seeking the orders. In this case, there can be no case for a permanent

stay of the order for the sale of the 1st Defendant's properties. No evidence has been given to say why there is a need to stay the Court order pending something being done to resolve the dispute. The fact is that nothing else is being done to resolve the dispute so as to warrant the staying order being sought. The 'public policy' argument advanced by Mr. Nori does not seem to have a legal basis than to say that the action taken by the Plaintiff is certainly an act of liquidating the 1st Defendant. I had foreshadowed this when I said in my judgment delivered on 7th May 2002, these words ..."**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...**" What I meant was that if the Government did honour its guarantees and paid off those loans, any attempt by it to recover it back from the Borrower would be fatal to the very existence of the Borrower for loans 3, 4,5 and 8 amounted to $12,106,000.00 plus interest. The effect would be the same if the Plaintiff insists upon the enforcement of the charges registered in its favour under loans 6 and 7. These two loans amounted to $4,800,000.00 plus interest. If the 1st Defendant is to remain and continue as the only supplier of power in Honiara and elsewhere in Solomon Islands, another solution would have to be found to the satisfaction of the Plaintiff. Any rescue package to get the 1st Defendant out of its financial woes rests squarely upon the shoulders of the Government. I am certain that other guarantees issued by previous Ministers of Finance are being considered as well by the lenders of money to borrowers in Solomon Islands. The Government itself is debt ridden up to the hilt to the tune of $2 billion. I take judicial notice of this fact. The Court cannot make a staying order for the fear that any sale of the properties of the 1st Defendant would have the effect of undermining the very existence of the 1st Defendant for it is the only supplier of electricity in the country. The risk of the 1st Defendant closing down its operation in the country is a great concern let alone its importance to the Government. The Government has got to address the issue in the public interest. This is where 'public policy' as a reason for doing the right thing becomes relevant in resolving the debt owed by the 1st Defendant to the Plaintiff outside of Court. The Court cannot stay on a permanent basis its own order on the basis of public policy or public interest in the case of recovery of debt following a money judgment as advanced by Mr. Nori. Unfortunately, Mr. Nori cited no legal authority for his argument, nor have I found any in my research. My hands are tied in this case. I can do nothing more than to refuse the application for a stay of sale of the relevant properties as requested by the 1st Defendant. The Plaintiff has got the right to enforce its registered charges over the 1st Defendant's properties in order to recover its money from the 1st Defendant. The 1st Defendant's Application is therefore dismissed with cost.

F.O. Kabui
Judge