Solomon Islands

Auditor General v Attorney General (representing the Accountant General)

[2005] SBHC 4

High Court
Palmer CJ
10 March, 22 April 2005

(1) Administrative law – Ministerial power – Exercise – Public finances – Statutory power to issue Financial Instructions – Whether such instructions subsidiary legislation – Whether subject to procedural requirements for such legislation – Interpretation and General Provisions Act (Cap 85), s 62 – Public Finance and Audit Act (Cap 120).

(2) Constitutional law – Public finances – Audit – Auditor General – Constitution conferring independence from control or direction of other authority – Minister of Finance – Minister having responsibility for government finances – Auditor General having responsibility for government accounts – Central Tender Board having responsibility to approve certain government contracts – Whether potential conflict between such functions – Auditor General authorising accountant to audit government accounts under contract – Procedure prescribed by Financial Instructions for such contracts not followed – Whether such procedure mandatory – Whether subjecting Auditor General to control of another authority in breach of Constitution – Whether waiver of Financial Instructions by minister – Effect – Whether contract enforceable – Public Finance and Audit Act (Cap 120), ss 6, 36(2)(b) – Financial Instructions, paras 519(2), 520(1), 521, 529 – Constitution of Solomon Islands 1978, s 108.

The Auditor General appointed M, by way of a contract, to conduct an audit of the Solomon Islands Government annual accounts for 1997–1999. The value of that contract was $540,000. In 2004 the Accountant General queried the validity and enforceability of the contract, as it did not comply with key provisions of the Financial Instructions issued by the Minister of Finance under s 6(2) of the Public Finance and Audit Act ('the PFAA') as revised in 2004, and refused to release the first set of payments or to commence payment, despite preparatory work having been commenced. The contract was then suspended. Paragraph 519(2) of Ch 22 of the Financial Instructions required that the procurement of services over $500,000 had to be made by tender and evaluated by the Central Tender Board ('the CTB'). Clause 520(1) of the Financial Instructions prohibited the calling of quotations/tenders 'unless sufficient funds to meet the anticipated costs have been included in the relevant year's budget'. Paragraph 529(1) of Ch 22 of the Financial

Instructions set out the procedural requirements to be adhered to for ensuring that the payment of procurement of services adhered to standard requirements. Paragraph 521 of the Financial Instructions enabled the necessity for quotations to be waived where the commodity/source was only obtainable from one source or at a fixed price or on the express authority of the Permanent Secretary for the Ministry of Finance. The contract was never channelled through the CTB for evaluation and approval. However, by letter to the Auditor General the Minister of Finance directed the Permanent Secretary for the Ministry of Finance to waive the provision of the Financial Instructions requiring the contract to go through the CTB, although that direction had not been implemented. The Auditor General applied to the High Court to establish whether the Auditor General had the legal power under s 108 of the Constitution to authorise another person to conduct an audit on his behalf and, if so, whether or not the Auditor General was subject to the tender process specified by the Financial Instructions . Section 108(5) of the Constitution provided: 'In the exercise of his functions under this section, the Auditor-General shall not be subject to the direction or control of any other person or authority.' The Auditor General therefore argued that a requirement that he comply with the Financial Instructions was tantamount to interference with the discharge of his constitutional functions. The Auditor General also challenged the validity of the Financial Instructions on the grounds that, as subsidiary legislation, the relevant provisions requiring validation had not been complied with. Section 62(1) of the Interpretation and General Provisions Act (Cap 85) ('the Interpretation Act') required that the Financial Instructions had to be laid before Parliament whilst s 61(1) of the same Act required that they be published in the Gazette. The Auditor General argued that in view of the non-compliance with the above requirements, the Financial Instructions could not apply to him. The Auditor General also argued that there was a conflict between duties of the Permanent Secretary for the Ministry of Finance to sign government accounts and his duties as Chairman of the CTB.

HELD: Application allowed. Declaration made that contract binding on government and legally enforceable.

(1) The Financial Instructions were not a form of legislation which required to be laid before Parliament as required by s 62 of the Interpretation Act, because they were neither 'regulations' nor 'instruments' within the definition of 'subsidiary legislation' provided in s 16(1) of the Interpretation Act. That was confirmed by the provision in the Financial Instructions themselves that, in the event of conflict between the Financial Instructions and a law, the law would prevail. The issue of instructions to govern financial procedures regarding control and management of public finances was consistent with the concept of delegation of administrative powers, more commonly referred to as 'the Carltona principle', which recognised that ministerial functions were normally exercised under ministerial authority by responsible officials. In the instant case, such powers were exercised by the Permanent Secretary for the Ministry of Finance for and on behalf of the Minister of Finance. It was sufficient if the Financial Instructions were

published under the authority of the PFAA, it did not have to be published in the Gazette to be effective (see pp 365–367, below).

(2)(i) In the discharge of his constitutional obligation to account for the finances of government, the Minister of Finance exercised general direction and control over the Department of Finance. The powers of the Auditor General were more particularly spelt out in s 108 of the Constitution. The power of the Auditor General thereunder to authorise another person to carry out, inter alia, audit duties was repeated in s 36(2)(b) of the PFAA. The duties of the Auditor General and the Minister of Finance were quite separate and distinct and did not necessarily overlap. The Minister of Finance, for instance, could not interfere with the decision of the Auditor General to authorise someone to carry out audit services. The procedures for entering into contracts with the government and the power to enter into binding contracts with government, however, were regulated by legislation, certain regulations and, in the instant case, Financial Instructions. Whilst the power to authorise another person to carry out audit services on his behalf was vested in the Auditor General, the power to authorise payments for those audit services or to approve/execute the contract was vested in another authority/person. In the absence of specific legislation, the requirements set out in the regulations and Financial Instructions were obligatory. The requirement for such procurement of services to be channelled through the CTB was imposed under s 6 of the PFAA and was not specific to the Auditor General, but applied to all offices, from the top right down to the bottom. Whilst the power to authorise vested in the Auditor General, the power to approve the procurement of services which exceeded $500,000 vested in the CTB. Those were separate powers with distinctive responsibilities and did not necessarily conflict; they were also consistent with principles of public accountability and transparency. They had to do with concepts of good governance management and checks and balances to avoid or guard against the arbitrary use or misuse of such powers. Therefore, they could not be construed as subjecting the Auditor General, in the exercise of his functions, to the direction and control of the CTB. It was as much in the interest of the Auditor General as it was in the interest of the Minister of Finance that there was an independent or separate body to evaluate the contract for services that was sought to be entered into. No government department or public officer should be expected to commit government to a contract which it could not pay, unless there were assurances of payment from other sources to meet the costs of services required. Whilst the provision of services should always be uppermost in any officer's mind, there were limitations to the costs government could endure. Paragraph 520(1), prohibiting tenders unless appropriate funds had been included in the budget, merely stated the obvious and was crucial to responsible governance; it could not be construed as an impediment to the effective and efficient discharge of the Auditor General's functions. Government could not be compelled to do what it could not possibly do. Whilst auditing work was crucial it was subject to the availability of funds. There was no evidence that the Permanent Secretary for the Ministry of Finance would act arbitrarily to interfere with the powers of the Auditor General. The requirements imposed by para 529, Ch 22 of the

Financial Instructions were normal standard procedures set in place and applied to all such contracts. Those requirements sought to ensure that the best persons were engaged for the best price and that payments were justifiably spent or released. In such big management structures or organisations, such directions or controls were absolutely necessary to avoid/minimise mismanagement, wastage and unnecessary costs or expenses. The Financial Instructions were binding rules critical to sound management practices within the government machinery (see pp 367–371, below).

(ii) However, the waiver of the application of the Financial Instructions was a matter within the sole discretion of the Minister of Finance under s 6(2) of the Public Finance and Audit Act and unless it could be shown that it was illegal or ultra vires, for instance issued in bad faith, the waiver should have been implemented as instructed. In the instant case, the ministerial direction that the requirements of the Financial Instructions to have the matter go before the CTB were to be waived applied and remained in force until revoked. The effect of that direction was to clear the way for the contract to be implemented. Therefore the Auditor General was not obliged to seek the approval of the CTB. The contract was therefore capable of legal enforcement as between M and the Auditor General. The Auditor General was entitled to have the contract enforced and the respondent obliged to implement it (see pp 372–374, below).

[*Editors' note*: Section 108 of the Constitution of Solomon Islands 1978, so far as material, is set out at pp 364, 367, below.

Section 6 of the Public Finance and Audit Act (Cap 120), so far as material, is set out at p 365, below.

Section 36 of the Public Finance and Audit Act, so far as material, provides: '... (2) In the exercise of his duties to audit, enquire into and examine accounts the Auditor-General may— ... (b) authorise any person publicly carrying on the profession of accountant or any public officer to conduct on his behalf any enquiry, examination, or audit and such person shall report thereon to the Auditor-General ...'

Section 61 of the Interpretation and General Provisions Act (Cap 85), so far as material, provides: '(1) Subsidiary legislation made after the commencement of this Act—(a) shall be published in the Gazette; and (b) shall come into operation on the date of publication or, if it is provided that the subsidiary legislation is to come into operation on some other date, on that date. (2) Subsidiary legislation is in operation as from beginning of the day on which it comes into operation.'

Section 62 of the Interpretation Act, so far as material, provides: '(1) Subject to subsection (3), subsidiary legislation made under an Act after the commencement of this Act shall be laid before Parliament ... (3) Subsection (1) does not apply to any subsidiary legislation a draft of which is laid before, and approved by resolution by, Parliament before the making of the subsidiary legislation.'

Paragraphs 520 and 529 of the Financial Instructions, so far as material, are set out at pp 370, 371, below.]

Cases referred to in judgment

Bjanner Pty Ltd v Comptroller of Customs and Excise (29 September 1992, HCSI–CC 279–92, unreported)
C & J Clark Ltd v Inland Revenue Comr [1973] 2 All ER 513, [1973] STC 299, [1973] 1 WLR 905, UK Ch D
Carltona Ltd v Comrs of Works [1943] 2 All ER 560
Cobiac v Liddy (1969) 119 CLR 257, [1969] ALR 637, Aus HC
RG Capital Radio Ltd v Australian Broadcasting Authority [2001] FCA 855, (2001) 185 ALR 573
Smith v London Transport Executive [1951] 1 All ER 667, [1951] AC 555, UK HL

Legislation referred to in judgment

Constitution of Solomon Islands 1978, ss 35, 37, 40, 100–105, 108
Customs and Excise Act, ss 195–196, 221
Interpretation and General Provisions Act (Cap 85), ss 16(1), 61(1), 62(1)
Public Finance and Audit Act (Cap 120), ss 6(1)–(2), 7(1)–(2), 36(2), 51

Other sources referred to in judgment

Bennion *Statutory Interpretation* (3rd edn), p 64
Black's Law Dictionary (6th edn)
Financial Instructions, Ch 1, paras 1, 3, Ch 22, paras 519(5), 520, 521, 529(1), r 5
Manual and the International Organisation of Supreme Audit Institutions
Osborn's Concise Law Dictionary (6th edn)
Pearce and Geddes *Statutory Interpretation in Australia* (5th edn), 7.19
Stroud's Judicial Dictionary of Words and Phrases (4th edn), vol 1, A–C

Application

The applicant, the Auditor General, applied to the High Court for clarification of his powers to authorise another person to audit government accounts on his behalf and challenged the mandatory application of the Financial Instructions issued under the Public Finance and Audit Act (Cap 120) in the instant case. The respondent, the Attorney General (representing the Accountant General), opposed the application. The facts are set out in the judgment.

G Suri for the applicant.
N Moshinsky QC and *J Gordon* for the respondent.

22 April 2005. The following judgment was delivered.

PALMER CJ.

The applicant seeks answers to the following questions in its re-amended originating summons filed 1 December 2004:

'1. Whether the Auditor General has the legal power under section 108(3) of the Constitution and section 36(2)(b) of the Public Finance and Audit Act [Cap. 120] to authorize another person to do auditing on his behalf and to report to him?

2. If the answer to question 1 is in the affirmative, whether the said power of the Auditor General also includes the power to select and award or enter into contract with the person so authorized or is the Auditor General subject to the tender process under the Financial Instructions issued by Minister under section 6(2) of the Public Finance and Audit Act [Cap. 120]?

3. Whether it is mandatory under section 62(1) of the Interpretation and General Provisions Act [Cap. 85] to lay before the Parliament any Financial Instructions issued by Minister under section 6(2) of the Public Finance and Audit Act [Cap. 120] and to publish such Instructions in the Gazette pursuant to section 61(1)(a) of the Interpretation and General Provisions Act [Cap. 85] before such Instructions could come into operation?

4. Whether the Audit Services Contract for provision of auditing entered into between the Applicant and CBL Practising Accountants on or about 30 April 2004 to audit SI Government Annual Accounts for years 1997, 1998 and 1999 is legally enforceable?

5. Further or other orders as the Court deems meet.

6. Costs of and incidental to this application be paid by the Respondent.'

THE BRIEF FACTS

On or about 30 April 2004 the Auditor General appointed Mr Mathew Cooper Wale ('MCW') whose business address was listed as CBL, 1st Floor, Komifera Pako Building, PO Box 1004, Honiara, Solomon Islands, to conduct an audit of the Solomon Islands Government annual accounts for the years 1997, 1998 and 1999 and to report back to him. This was done by way of a contract (hereinafter referred to as 'the Contract') entered into between the Solomon Islands Government and MCW dated 29 April 2004 (see 'Exhibit 2' to the affidavit of Floyd Augustine Fatai filed 18 November 2004). The value of that contract was $540,000. It was signed by Mr. Fatai on behalf of the Solomon Islands Government ('SIG'). Following execution of the contract, it seemed MCW was authorised to commence auditing services straightaway by way of preparatory audit tasks. On or about 14 July 2004 the Accountant General ('the respondent') queried the validity and enforceability of the contract pointing out that key provisions of the Financial Instructions as revised in 2004 had not been complied with and refused to release the first set of payments or to commence payment, despite preparatory work having been commenced. The contract was then suspended.

THE CLAIM OF THE APPLICANT

The applicant says that s 108(3) of the Constitution and s 36(2)(b) of the Public Finance and Audit Act (Cap 120) ('the PFAA') authorise him to enter into a binding contract with MCW for the purposes of carrying out audit services.

THE DEFENCE OF THE RESPONDENT

The respondent on the other hand disagrees. The learned Solicitor General argues that the Auditor General, like any other public officer, is subject to the requirements of the Financial Instructions and therefore obliged to comply, failing which, the respondent is not obliged to honour the contract or have it implemented.

COUNTER-ARGUMENT OF THE APPLICANT

In response the applicant seeks to argue that the Financial Instructions ('FI') are not binding on him on a number of grounds.

First, he argues that the FI are unenforceable and not binding on the grounds of invalidity. Learned counsel, Mr Suri, submits that the FI issued under s 6(2) of the PFAA are subsidiary legislation and therefore governed by the provisions of ss 62(1) and 61(1) of the Interpretation and General Provisions Act (Cap 85) ('the Interpretation Act'). Section 62(1) requires that the FI must be laid before Parliament, whilst s 61(1) requires that they be published in the Gazette. They become effective only after publication or on such other stipulated date. Learned counsel submits that in view of the non-compliance of the above requirements, the FI cannot apply to him in the circumstances of this case.

His second ground of objection is that by requiring him to comply with FI it is tantamount to interference with the discharge of his constitutional functions under s 108(5) of the Constitution, which provides that:

> 'In the exercise of his functions under this section, the Auditor-General shall not be subject to the direction or control of the any other person or authority.'

By requiring him to comply with FI his constitutional functions are being subject to the direction and control of the Central Tender Board.

THE STATUS OF THE FINANCIAL INSTRUCTIONS ('THE FI')

One of the crucial issues in the successful determination of the dispute in this case regards the status of the FI and their application as they relate to the applicant.

Financial Instructions are instructions issued under s 6(2) of the PFAA by the Minister of Finance for the better carrying out of the provisions and purposes of the Act. The introduction to the PFAA sets out the broad objectives and purposes of the said legislation. I quote:

> 'An Act to provide for the control and management of the Public Finance of Solomon Islands; for the collection, issue and payment of public moneys; for the regulation of public debt; for the duties and powers of the Auditor-General; for the audit and examination of public accounts and of the accounts of other bodies; and for other purposes connected therewith and incidental thereto.'

In particular, s 6(1) spells out the duties of the Minister of Finance as follows:

> 'The Minister shall so supervise the finances of the Government so as to ensure that a full account is made to Parliament and for such purpose shall, subject to the provisions of this Act, have the management of the Consolidated Fund and the supervision, control and direction of all matters relating to the financial affairs of the Government.'

Subsection 6(2) provides:

> 'For the purpose of ensuring compliance with the provisions of subsection (1) the Minister may issue instructions to be called Financial Instructions and Stores Instructions for the better carrying out of the provisions and purposes of this Act.'

Section 7(1), in turn, provides:

> 'Every accounting officer and every accountable officer shall obey all instructions that may from time to time be issued by the Permanent Secretary in respect of all accounting or accountable matters for which he is responsible.'

The effect of s 7(1) is that the FI apply to all accounting and accountable officers.

VALIDITY OF THE FI CHALLENGED

The applicant challenges the validity of the FI on the grounds that as subsidiary legislation the relevant provisions requiring validation had not been complied with. Learned counsel, Mr Suri, for the applicant relies on the definition of 'subsidiary legislation' provided for in s 16(1) of the Interpretation Act which provides as follows—

> ' "subsidiary legislation" means any legislative provision (including a delegation of powers or duties) made in exercise of any power in that behalf conferred by any Act, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument.'

Learned counsel submits that the FI are 'regulations' or 'other instruments'. No authority, however, has been cited in support of this submission.

In my respectful view the FI cannot be construed to be 'regulations' as the power of the minister to make regulations is specifically catered for under s 51 of the PFAA. These instructions were not issued under that provision.

As to the meaning of the word 'instrument', *Black's Law Dictionary* (6th edn) defined the word as—

> 'a formal or legal document in writing, such as a contract, deed, will, bond, or lease ... Anything reduced to writing, a document of a formal or solemn character, a writing given as a means of affording evidence. A document or writing which gives formal expression to a legal act or agreement, for the purpose of creating, securing, modifying, or terminating a right. A writing executed and delivered as the evidence of an act or agreement.'

The *Osborn's Concise Law Dictionary* (6th edn) defines 'instrument' as: 'A formal legal document in writing; e.g. a deed of conveyance.' *Stroud's Judicial Dictionary of Words and Phrases* (4th edn), vol 1, A–C, defined it as:

> 'An instrument is a writing, and generally imports a document of a formal legal kind.'

On the definitions quoted above, I am not satisfied the FI can be described as an instrument either.

Mr. Moshinsky submits that the FI could not be regarded as legislative provisions because they do not require to be published in the Gazette to be effective. It is sufficient if they are published under the authority of the PFAA. Learned counsel cites para 1 of Ch 1 of the FI as an example, which expressly states that the FI are published under the relevant section. Mr. Moshinsky also points out that the FI are issued by the Permanent Secretary for the Ministry of Finance ('the PS Finance') under s 7(1) of the PFAA and therefore, unlike legislative provision, revocable in his discretion without the requirement of prior legislative approval. Learned counsel points out that such a provision is not characteristic of a legislative provision because the presence of parliamentary control is an indicator of the legislative character of a decision or an instrument. Learned counsel relied on the authority of *RG Capital Radio Ltd v Australian Broadcasting Authority* [2001] FCA 855 at 51–54. Learned counsel further points out that this discretionary exercise of the PS Finance is reflected in r 5 of the FI which provides that:

> '... Where, in the opinion of the Permanent Secretary, the result of strictly following Financial Instructions would, in particular circumstances, not be in the best interests of Solomon Islands, he may direct in writing the procedures to be followed in those particular circumstances ...'

I couldn't agree more with learned counsel's submissions. The issue of instructions to govern financial procedures regarding control and management of public finances is consistent with the concept of delegation of administrative powers, more commonly referred to as 'the *Carltona* principle'—see Francis Bennion's *Statutory Interpretation* (3rd edn), p 64, where the learned author states:

> 'The *Carltona* principle usually governs delegation by a Minister to his or her officials. The principle is that "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them ... The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister ..." [See *Carltona Ltd v Comrs of Works* [1943] 2 All ER 560 at 563 Per Lord Greene MR.]'

In this instance such powers are to be exercised by the PS Finance for and on behalf of the Minister of Finance ('MOF') under s 7(1) of the PFAA.

Mr Moshinsky also submits that an indicator of the status of the FI can be obtained by considering its effect where there is a conflict with other forms of legislation. The principles of statutory interpretation require that where different forms of legislation are in conflict, the relationship between the two Acts—

> 'must depend upon a comparison of the actual language of each, to see whether they do stand together or whether the latter has, pro tanto, abrogated the former.' (See Cobiac v Liddy (1969) 119 CLR 257 at 268, quoted in Pearce and Geddes *Statutory Interpretation in Australia* (5th edn) at 7.19.)

In this particular case, where there is a conflict between Financial Instructions and a law of Solomon Islands, of necessity and by virtue of the express provisions of the former, the conflict must be resolved in favour of the legislative provision. (See Ch 1, cl 3 of the FI.) This learned counsel submits does not support the contention that the FI is a legislative provision.

I am satisfied the FI are not a form of legislation which require to be laid before Parliament as required by s 62 of the Interpretation Act.

DO THE FI BIND THE APPLICANT?

The applicant provides, in total, twelve reasons why the FI do not bind the applicant. The first reason seeks to suggest that the FI constitute directions or controls exerted by the MOF and which interferes with the constitutional function of the applicant in authorising some other person to carry out audit services on his behalf. This submission makes a number of presumptions. First, that there is a conflict between the constitutional functions of the applicant and the FI; secondly, that by virtue of the FI the applicant is being subjected to the direction and control of the Minister of Finance.

It is important to bear in mind that there are two separate offices or constitutional functions under consideration and they do not necessarily clash. The MOF also has a constitutional obligation to account for the finances of government. He is a member of Cabinet (under s 35 of the Constitution), which in turn is collectively responsible to Parliament. In the discharge of his constitutional responsibilities (under s 37 of the Constitution) he exercises general direction and control over the Department of Finance which, in turn, is under the supervision of a permanent secretary (under s 40), in this instance the Permanent Secretary of Finance. Sections 100 to 105 of the Constitution stipulate in very broad terms the financial responsibilities of the MOF, more specifically defined under the PFAA.

The powers of the Auditor General, on the other hand, are more particularly spelled out in s 108 of the Constitution. Subsection 108(3) in particular provides:

> 'The public accounts of Solomon Islands, of all Ministries, offices, courts and authorities of the Government, of the government of Honiara city and of all provincial governments, shall be audited and reported on annually by the Auditor-General, and for that purpose the

> Auditor-General or any person authorised by him in that behalf shall at all times be entitled to access to all books, records, returns and other documents relating to such accounts.'

The power of the Auditor General to authorise another person to carry out, inter alia, audit duties is repeated in s 36(2)(b) of the PFAA.

The duties of the Auditor General and the MOF are quite separate and distinct and do not necessarily overlap. The MOF, for instance, cannot interfere with the decision of the Auditor General to authorise someone to carry out audit services. The procedures for entering into contracts with the government and power to enter into binding contracts with government, however, are regulated by legislation, certain regulations and, in this instance, financial instructions. It would have been so much easier not only for the Auditor General but also for other government departments, if binding contracts by government can be entered into by him or the head of such department without having to comply with those cumbersome requirements. Unfortunately, it does not work that way in the government service and machinery. Whilst the power to authorise another person to carry out audit services on his behalf vests with the Auditor General, the power to authorise payments for those audit services or to approve/execute the contract vests with another authority/person. It is different in the private sector where the general manager not only has the power to authorise someone to carry out work for the company but also to sign the cheque book for his/her payment. Of course, specific legislation can be enacted to cater for such situations, for instance where the courts are given autonomy to operate their own budgets and do not require approval from the public service or the Department of Finance before any expenditures or contracts can be entered into. In the absence of such specific legislation, the requirements set out in the regulations and the FI are obligatory.

The second reason sought to be given by the applicant relies on the phrase in s 6(1) of the PFAA 'subject to the provisions of this Act' as necessarily subjecting the FI made under sub-s 6(1) to s 36(2)(b) of the PFAA and thereby cannot supercede the powers of the Auditor General to authorise and enter into contracts with whoever he selects. The phrase 'subject to' has been the subject of court decision in this country. In *Bjanner Pty Ltd v Comptroller of Customs and Excise* (29 September 1992, HCSI–CC 279–92, unreported) this court considered a similar phrase, 'Subject to the provisions of sections 195 and 196', in s 221 of the Customs and Excise Act. At p 3 the court referred to two English cases, *Smith v London Transport Executive* [1951] 1 All ER 667 and *C & J Clark Ltd v Inland Revenue Comr* [1973] 2 All ER 513, in which the words 'subject to the provisions of this Act' were considered. In the former, Lord Simons said:

> 'The words "subject to the provisions of this Act" ... are naturally words of restriction. They assume an authority immediately given and give a warning that elsewhere a limitation upon that authority will be found.'

Lord MacDermot was quoted ([1951] 1 All ER 667 at 676) as follows:

> 'That is an expression commonly used to avoid conflict between one part of an enactment and another, and I have difficulty in reading into it more than it says.'

In the second case, Megarry J said ([1973] 2 All ER 513 at 520):

> 'In any judgment, the phrase "subject to" is a simple provision which merely subjects the provisions of one subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is a collision, the phrase shows what is to prevail. The phrase provides no warranty of universal collision.'

Those case authorities are on all fours in this case. The submission of the applicant if accepted presumes that there is a universal collision with the application of s 36(2)(b) of the PFAA, which is incorrect, and thereby the FI must be construed as *subject to* the powers of the Auditor General to authorise MCW. I find no such universal clash or conflict.

The third ground relied on reiterates the misconceived approach taken by the applicant that subjecting the contract to the requirements of tender procedures under the FI is tantamount to interference with the independence of the Auditor General in the exercise of his constitutional functions.

Paragraph 519(5) of Ch 22 of the FI requires that procurement of services over $500,000.00 must be made by tender and to be evaluated by the Central Tender Board ('CTB'). Members of that Board include the Accountant General and the PS Finance who is the Chairman. The contract was never channelled through the tender Board for evaluation and approval. It was signed by the applicant and sought to be implemented without going through the prescribed procedures. For the submission of the applicant to succeed, it is incumbent on him to demonstrate that there is a conflict with the FI, which amounts to interference with the constitutional functions of the Auditor General. Unfortunately, he has failed to do so. The requirement imposed for such procurement of services to be channelled through the CTB is a requirement imposed under s 6 of the PFAA which stems from his constitutional and collective responsibilities to account to Parliament for the administration of the public finances of government. It is important to bear in mind those requirements are not specific to the Auditor General. They apply right across the board to all offices (see s 7(1)–(2) of the PFAA), from the top right down to the bottom. Whilst the power to authorise vests in the Auditor General, the power to approve the procurement of services which exceed $500,000.00 vests in the CTB. These are separate powers with distinctive responsibilities as can be gleaned from the relevant provisions of the FI and do not necessarily conflict. These are also consistent with principles of public accountability and transparency. They have to do with concepts of good governance management and checks and balances to avoid or guard against the arbitrary use or misuse of such powers. They cannot be construed therefore as subjecting the Auditor General in the exercise of his functions to the direction and control of the CTB. It is as much in the interest of the Auditor General as it is the interest of the MOF that there is an independent or separate body to evaluate the contract for services that was sought to be entered into.

The fourth reason raised against the application of the FI, that they have the potential of restricting or controlling the Auditor General if low fees are accepted, is presumptuous and hypothetical. There is no evidence that that is the case and even if a low fee is fixed that does not necessarily imply control or direction. There may be a legitimate reason why a low fee is recommended to be accepted instead of a higher fee.

The fifth reason raised, that prohibiting the calling of quotations/tenders 'unless sufficient funds to meet the anticipated costs have been included in the relevant year's budget' (see cl 520(1) of the FI) is a controlling factor and impedes the functions of the Auditor General, misconstrues the application and relevance of the FI and the constitutional functions of the Auditor General. No government department or public officer should be expected to commit government to a contract which it cannot pay up in the first place, unless there are assurances of payment from other sources to meet the costs of services required. Trying to do so may amount to misconduct. Whilst the provision of services should always be uppermost in any officer's mind, there are limitations to the costs government can endure. Clause 520(1) is simply stating the obvious and crucial to responsible governance. Part of the responsibilities of the CTB is to ensure that there are controls and checks and balances in place so that public officers and government departments do not 'blow' their allocated budgets. I do not see how it can be construed as an impediment to the effective and efficient discharge of the Auditor General's functions. Again this submission presumes that there is a conflict when that is not necessarily so.

Whether the Auditor General or any other government officer or department at the end of the day is able to discharge his functions or not due to unavailability of funds is not only his concern but a constitutional obligation of the government of the day. If the government coffers are insufficient then government has an obligation to consider other sources of funding to assist in the process. Government, however, cannot be compelled to do what it cannot possibly do. Whilst auditing work is crucial it is subject to the availability of funds at the end of the day. That cannot be construed as amounting to directing or controlling the Auditor General in the discharge of his functions.

The sixth reason given that there is a conflict in the duties of the PS Finance to sign government accounts on one hand and to sit as Chairman of the CTB and thereby being able to exert control and influence on the power of the Auditor General to authorise someone to do auditing services again raises presumption that the PS Finance would act arbitrarily to interfere with the powers of the Auditor General. There is no evidence of such for the simple reason that the contract has never been channelled through the correct procedure. This submission can be likened to putting the cart before the horse.

The seventh reason given again seeks to assume that in requiring the Auditor General under para 529(1), Ch 22 of the FI, to make recommendations to the CTB for acceptance of the contract, it is usurping its functions. Again this misconstrues the different role played by the CTB as the body responsible for ensuring that the payment of procurement of services

adheres to standard requirements. Paragraph 529(1) provides as follows:

> '(1) Prior to the award of any contract, the appropriate technical officer will submit a written report on each tender with his recommendation for acceptance. This report will advise the Board on the details of each tender and will include, as a minimum:
>
> (a) The technical officer's assessment of a reasonable cost for the tendered work;
>
> (b) A report on the competence of each tenderer to carry out the work;
>
> (c) An assessment of the ability of the contractor to complete the required work within his tendered price and period;
>
> (d) Details of the tenderer's previous performance; and
>
> (e) A report on the compliance of each tenderer with tender conditions and on the validity of each tender.
>
> (2) The form of all formal contracts must have the approval of the Attorney General before the contract is signed.
>
> (3) The terms of each contract must make it clear that it may not be assigned or sub-let without the consent of Government ...'

It should be clear from the above that the requirements imposed are normal standard procedures set in place and which apply to all such contracts. These seek to ensure that the best persons for the best price in the circumstances are being engaged and that payments are justifiably spent or released. In such big management structures or organisations, such directions or controls are absolutely necessary to avoid/minimise mismanagement, wastage and unnecessary costs or expenses. All that the FI seek to do is to set out how government calls for and awards contracts, how tenders are invited and how they are to be considered and examined by the CTB. Sub-clause 529(2) further ensures that the Attorney General is consulted and vets the contracts before execution. I fail to see how such requirement can be described as reducing or interfering with the functions of the Auditor General.

The eighth reason given seeks to submit that the FI does not apply as it is *'an Instrument or Regulation of general application'* and therefore cannot be applied so as to limit the constitutional discretion of the Auditor General. Again this submission presumes that the constitutional discretion of the Auditor General is being unnecessarily fettered by the FI, which is not so. The FI are binding rules critical to sound management practices within the government machinery. They are quite specific as opposed to submissions that they are of general application.

The ninth reason given submits that because the FI is a code the application of Ch 22 deprives the Auditor General of the exercise of his constitutional functions, in particular, that in authorising someone to perform auditing services on his behalf. This submission merely repeats earlier submissions and misconstrues the application, role and relevance of the FI. Whilst it is a code, the legislation makes clear that its application (s 7(1) of the PFAA) is vested in the PS Finance. This is reflected in para 521 of the FI (headed 'Quotations Required'), for instance, which provides that whilst at least three quotations in writing should be obtained for tender purposes, this may be waived in cases where the commodity/service is only obtainable from one source or is at a

fixed price. If any waiver was to be obtained, it can be provided on the express authority of the PS Finance. In the facts of this particular case, the Auditor General would have been entitled to apply to the PS Finance to have the requirements of para 521(3) waived on good cause.

The tenth reason or argument also seeks to repeat earlier arguments that the FI are not mandatory and should not be applied so as to diminish the constitutional powers of the Auditor General. This submission repeats the mistake in assuming that there is universal collision between the application of the FI as opposed to the discharge of the constitutional obligations of the Auditor General.

The second last reason given relates to the unworkability of the FI on the basis that it is inappropriate to apply them when the Auditor General has a separate and stringent standard, Manual and the International Organisation of Supreme Audit Institutions ('INTOSAI') standards, to follow and which should be sufficient. Unfortunately, this again presumes that there is a universal conflict in the application of the FI, which is not the case. The roles being performed are separate and distinct.

The final reason, and which eventually turns this case around in favour of the applicant, is the waiver of the application of the FI in the applicant's case. The very stick used against the applicant and which I have held applies from the beginning is the very stick at the end of the day that had been withdrawn so as to facilitate the processing of the contract without having to go through the CTB. *That is a matter within the sole discretion of the MOF and the PS Finance to determine and unless it can be shown this was illegal or ultra vires, for instance issued in bad faith, it ought to have been implemented as instructed.* In submitting that the FI unlike a legislative provision is revocable in the discretion of the PS Finance, without the requirement of prior legislative approval, so the MOF has discretion to waive the application of any particular provision 'for the better carrying out of the provisions and the purposes of' the Act (see s 6(2) of the PFAA). It is important to appreciate that the exercise of the discretion of the MOF in this particular instance will be subject to the sanctions of Cabinet and ultimately his accountability to Parliament. He is solely responsible for his actions in this particular matter and must answer to Parliament if what he has done is queried.

In this instance, at para 6 of the letter (see 'Exhibit 7' annexed to the affidavit of Floyd Augustine Fatai, filed 18 November 2004) dated 27 September 2004, addressed to the applicant and copied, inter alia, to the PS Finance, the minister expressly states:

> 'Since the contract has been concluded in accordance with conventional practice adopted by your office and regulated in the OAG Audit Manual, and which is also consistent with the advice of the Attorney General's Chamber referenced AG/66 dated 8Footnote reference, but no text associated with it. April 2004, *the Permanent Secretary, Department of Finance and Treasury is hereby directed, by copy of this letter, to waive the provision of the Financial Instructions which require the matter to go before the Central Tender Board.*' (My emphasis.)

Why this simple instruction by the former MOF was never complied with

by the PS Finance and implemented by the Accountant General and officers of the Treasury Division in the first place is not clear on the material before me but no issue has been taken by the learned Solicitor General in this instance, whether or not the MOF has power also to waive the application of any provision of the FI or whether or not his direction was unlawful and or ultra vires. Whether the PS Finance or Accountant General agrees or disagrees with this ministerial decision is immaterial. At the end of the day, it is the MOF who will account for his actions to Cabinet and thereby to Parliament. If there are concerns about the actions of the MOF as to what he had done, should do or could do, then it is incumbent upon all those responsible officers, to ensure that he is properly apprised of all relevant matters. Whether he accepts their advice or not in the exercise of his discretion, is a matter he alone will account for to Cabinet and Parliament. At the end of the day, this matter could have been easily resolved if a simple ministerial direction had been complied with.

CONCLUSION

The issues raised can now be answered as follows. In respect of question 1, I do not think any issue or challenge has really been raised by the learned Solicitor General as to the powers of the Auditor General to authorise another person to carry out auditing services on his behalf. This can simply answered in the affirmative.

As to the second question, it is important to appreciate the difference between the power to authorise someone, which is a general power and the power to select and enter into a binding contract with a particular person. In the absence of specific regulations or directions governing the procedure in which that general power is to be exercised, the Auditor General is bound to comply with the requirements of the FI regarding tender procedures. The erroneous assumption made in this application is that, in subjecting the process of selection through the CTB, the powers of the Auditor General are thereby being dictated to or controlled by the Board. This is not necessarily so as the CTB is not usurping the powers of the Auditor General so much as ensuring that broad standards of supervision, control and management are complied with in relation to the selection process. Those standards or guidelines apply right across the board to all government departments and public officers. The Auditor General is not an exception in this instance. The answer to the second question therefore is yes.

As to the third question whether it is mandatory to have the provisions of the FI laid before Parliament and for publication in the Gazette, this must be answered in the negative.

As to the fourth question, it is important to point out that the contract was executed by the Auditor General with MCW and not CBL Practising Accountants; there is a difference between the two entities. I find that the respondent was clearly entitled to decline to have the contract enforced from the beginning for failing to comply with the FI procedures. The scene, however, changed when the MOF, then the Hon Francis Zama, *directed* by letter dated 27 September 2004 that the requirements of the FI to have the matter go before the CTB to be waived. This was a ministerial direction in the

exercise of his sole discretion for the effective and better carrying out of the provisions and the purposes of the Act (see s 6(2) of the PFAA). *Until revoked that direction applies and remains in force.* The effect of his direction was to clear the way for the contract to be implemented. My finding therefore on the question of enforceability of the contract is that, as from 27 September 2004, the applicant was not obliged to seek approval of the CTB. The contract thereby became capable of legal enforcement as between MCW and the applicant. In view of the suspension imposed on the enforcement of the contract pending determination of issues before this court, the proper order would be to the effect that as at date of this judgement, the applicant is entitled to have the contract enforced and the respondent obliged to implement it.

On the issue of costs, it is my respectful view that the costs of the applicant should be borne by government. This application was brought to clarify certain crucial issues which hindered the amicable settlement of the stalemate reached between the parties through diverging opinions emanating from the Office of the Attorney General. To that extent it has not been completely unnecessary or a total waste of resources and time. I rule that the costs of the applicant be paid for by government.

ORDERS OF THE COURT

'1. Grant declaration that with effect from 27Footnote reference, but no text associated with it. September 2004, the Contract became a legally enforceable document and binding on the Solomon Islands Government.

2. The Applicant's costs of and incidental to this application to be paid by the Respondent, which in this case would be the Solomon Islands Government.'

Kiribati

Republic v Toromon and Another

[2005] KIHC 26

High Court
Millhouse CJ
21–22, 28 February 2005

Criminal law – Murder – Joint enterprise – Common intention – Unlawful purpose – Probable consequence – Large group attacking village under instruction of elders – Victim stoned to death – Actual perpetrators not identified – Defendants identified as participants – Whether guilty of murder – Penal Code, s 22.

The 'unimwane' (old men) (who had strong authority in Kiribati society) of Butaritari decided that all or some of the inhabitants of the village of Temanokunuea should be punished for some perceived misbehaviour. Hundreds of men from the villages had answered the call, including the two defendants. The men had stoned and burnt houses, terrifying the inhabitants. The two defendants were accused of stoning one man to death and were on trial for murder. Three prosecution witnesses gave evidence at the trial: all three identified one defendant and two identified the other as being involved in the murder. All three witnesses had known each accused for a long time. Overall, their recollections, in general, coincided. Duress was not argued at trial as a defence. Both accused admitted to being in the village at the relevant time but denied any participation in the murder. Both accused conceded that they had been wearing nothing over their face or head that evening.

HELD: Defendants convicted of murder and sentenced to imprisonment for life.

The attack on Temwanokunuea village was a joint enterprise by some hundreds of men at the direction of the unimwane of Butaritari, with the common intention to prosecute an unlawful purpose, a probable consequence of which was a death. The prosecution established beyond reasonable doubt that each accused was involved in the activities described: the facts that the witnesses had know the accused for a long time and that the accused were not wearing disguises made the identification easier and more certain. The aim was to do harm in the village. It did not matter who threw the stones which killed the victim; under s 22 of the Penal Code, the accused being part of the joint enterprise which led to his death were equally responsible with the others for it, there being no evidence that the actual perpetrators went beyond the original purpose of the joint enterprise. Applying either a subjective or objective test the scope of the original purpose of that enterprise had to have had as a probable consequence—and the accused had to have known it—that someone could be killed. The evidence