IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Case No. 151 of 2005

DAVID QUAN AND OTHERS

v.

MINISTER OF FINANCE AND TREASURY
(REPRESENTED BY ATTORNEY-GENERAL)

High Court of Solomon Islands
(Palmer CJ)

Date of Hearing: 14th April 2005
Date of Judgement: 27th April 2005

N. Moshinsky Q.C. and M. Haurii
J. Moti Q.C. and C. Hapa of Pacific Lawyers

Palmer CJ.: The Plaintiffs in this action were Board members of the National Provident Fund Board ("**the Board**") whose appointments were terminated by the Minister of Finance ("**the Minister**") by letter dated 22nd March 2005 communicated through the General Manager ("**the GM**") of the Board on the same date. No reasons were given for their termination; the Minister relying on the proviso to section 3(2) of the Solomon Islands National Provident Fund Act (cap. 109) ("**the NPF Ac**t"). I quote:

> "*(2) Members of the Board may be appointed for a term of three years or for such shorter period as the Minister may in his discretion in any case determine:*
>
> *Provided that the Minister may, in his absolute discretion, terminate the appointment of any such member at any time.*"

The Defendant takes the view that the termination of those Board members was effective immediately and that their positions became vacant for fresh appointments to be made.

On the next day, 23rd March 2005, the Plaintiffs ran to this court to seek relief against what they described as an "arbitrary decision" made by the Minister. They contended inter alia, in their Originating Summons filed 23rd March 2005 and Amended Originating Summons filed 4th April 2005 (hereinafter referred to as "**the Originating Summons**") that the Defendant acted "*ultra vires and/or in breach of the Solomon Islands National Provident Fund Act [Cap 109] (as amended) … and the requirements of natural justice and/or unfairly and/or improperly and/or unreasonably and/or unlawfully and/or unconstitutionally in purporting to revoke…*" their appointments on 22nd March 2005.

They also filed application for an ex parte hearing on 23rd March 2005 but this was directed by the Registrar of High Court to be served inter partes. Following service of documents, discussions commenced between the parties for some common understanding as to progress of their application to hearing. This however did not eventuate because on 5th April 2005 this court was required to sit after normal working hours to hear an

application ex parte following what was believed to be actions by the Minister in proceeding with publication notices in the Gazette for the termination and appointments of new members to the Board. This Court heard the application and with usual undertaking given for damages, issued interim restraining orders against the publication of the respective or any such notices in the Gazette the next day. Those orders read as follows:

> *"1. The publication of notices:*
>
> *(a) revoking the appointments of the:*
>
> *(i) First Plaintiff as Chairman and Member;*
> *(ii) Second Plaintiff as Deputy Chairman and Member; and*
> *(iii) Third Plaintiff, Fourth Plaintiff, Fifth Plaintiff, Sixth Plaintiff, Seventh Plaintiff and Eighth Plaintiff respectively, as Members;*
>
> *of the Solomon Islands National Provident Fund Board ("the Board"); and*
>
> *(b) Appointing new members to the Board*
>
> *is restrained pending the hearing and determination of the Originating Summons (as amended) filed herewith;*
>
> *2. the Plaintiffs file and serve their affidavits by 4.30 pm on Monday April 11, 2005 and the Defendants file and serve its affidavit by 4.30 pm on Friday April 15, 2005;*
>
> *3. the Amended Originating Summons be listed for hearing within 7 days thereafter;*
>
> *4. liberty to apply on three (3) days' notice; and*
>
> 5. *costs of and occasioned by this application be costs in the cause.*"

On 6th April 2005, the Defendant filed application by Notice of Motion to have the interim orders dissolved. This was listed for hearing on 7th April 2005 but eventually heard on 14th April 2005.

The Defendant challenges the validity of the orders on a number of grounds. First, that the order is defective in any event as it is not directed against the Defendant. It is directed more to a third party not represented in this action.

The second ground relied on is that the Order is not a form of subsidiary legislation within the meaning of section 61(1) of the Interpretations and General Provisions Act (cap. 85) ("**the Interpretation Act**") and therefore does not require publication in the Gazette in any event for it to become operative.

Thirdly, section 18(1) of the Crown Proceedings Act (cap. 8) prohibits injunctory orders against the Crown.

The fourth ground relied on the fact of non-disclosure of material matters at the ex parte hearing but it was agreed to have this matter deferred pending outcome of the above legal issues.

The Issues

This case on one hand is about termination of appointment of these Plaintiffs as members of the Board. I say this because the Minister had already exercised his powers to terminate the appointments of these members on 22nd March 2005. The learned Solicitor General says unless the Plaintiffs can demonstrate that the Minister had acted unlawfully and/or mala fides this action should be dismissed as vexatious and entirely without merit.

The Plaintiffs on the other hand argue the termination is subject to publication in the Gazette and thereby by obtaining restraining orders against the publication of those matters their status within the Board is held in abeyance or preserved until pending issues before this court can be determined.

The first crucial legal issue therefore for determination is whether the termination of the Plaintiffs amounts to subsidiary legislation and therefore requires publication in the Gazette to be operative.

Is the Notice/Letter of Termination subsidiary legislation?

Section 61(1) of the Interpretation Act requires subsidiary legislation to be published in the Gazette[1] and provides that it shall come into operation on the date of publication or on some other date stipulated therein[2]. Section 16(1) provides the definition of "subsidiary legislation" as:

> "*… 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;*"

Subsidiary legislation is more commonly referred to as "Delegated legislation". The underlying concept behind the use of such types of legislation is that the legislature delegates because it cannot directly exert its will in every detail. All it can do in practice is to lay down the outline[3].

The crucial words in determining the meaning of "subsidiary legislation" are the words "legislative provision", such examples of which are by-laws, notices, orders etc. In his submissions, learned Counsel Mr. Moshinsky submits that the act of termination was not a legislative act, rather it was an administrative act. Learned Counsel relies on the case of

[1] Paragraph 61(1)(a)
[2] paragraph 61(1)(b)
[3] see Francis Bennion Statutory Interpretation third edition at page 189.

RG Capital Radio Ltd v. Australian Broadcasting Authority[4] in support of his submissions. The Federal Court of Australia in that case, recognised that there is no simple rule for determining whether a decision is of an administrative or a legislative character[5]. At paragraph 43, the Court identified the most commonly stated distinction between the two types of decision as follows:

> "*… that legislative decisions determine the content of rules of general, usually prospective, application whereas administrative decisions apply rules of that kind to particular cases.*"

The Federal Court referred to other authorities **Minister for Industry & Commerce v. Tooheys Ltd** (1982) 60 FLR 325 (FCA/FC) ("**Tooheys Case**") and **Commonwealth v. Grunseit** (1943) 67 CLR 58 ("**Grunseit's Case**"), which made mention of the same distinction. In **Tooheys Case**, the Court stated at page 331:

> "*The distinction is essentially between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases*".

This distinction was reiterated in **Grunseit's Case** per Latham CJ as follows:

> "*The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular case*s".

The distinction sought to be brought out in the above cases when applied to the factual circumstances of this case point strongly in favour of the notice of termination as an administrative act rather than a legislative act. When the notice is viewed in the light of its determination of the content of a law, it fails to fulfil the basic requirements of a rule of conduct, or a declaration as to power, right or duty. It adds nothing further to the specific powers of appointment already spelled out in section 3(2) of the NPF Act. To the contrary, the notice of termination is nothing more than the exercise of that power already vested in him to a particular situation. To that extent it clearly falls within the ambit of an executive act.

Another characteristic of a legislative provision is that of retention of Parliamentary control[6]. In this particular case, that power is vested in the sole discretion of the Minister. There is nothing to suggest further that this was a matter over which Parliamentary control would have been intended to be retained.

In his submissions learned Counsel Mr. Moti submits that revocation/appointment notices fall within the ambit of "notices" defined in "subsidiary legislation". This however overlooks the distinction between notices issued as a legislative act and notices issued as an executive act. For instance, a notice of commencement of an Act is different from this

[4] (2001) FCA 855
[5] (ibid) paragraph 40.
[6] Aerolineas Argentinas v. Federal Airports Corporation (1995) 63 FCR 100 at 107

type of notice. Such notice relates to the commencement of legislation of general application and is considered to be read as part of an Act or legislation.

That such a notice of revocation/appointment is an executive act is reinforced by the fact that the Interpretation Act recognises the distinction between notices which require publishing in the Gazette as a Legal Notice and notices published as a Gazette notice. Section 16(1) defines a "Gazette Notice" as "*means any announcement not of a legal character nor subsidiary legislation made by or with the authority of the Government in the Gazette*". This is to be contrasted with a legal notice which is defined as: "*means any announcement of a legal character made by or with the authority of the Government in the Gazette*". The above construction is consistent with paragraph 121 of the General Orders Chapter B which is headed as "***NOTIFICATIONS ON APPOINTMENTS OF PUBLIC OFFICERS AND OTHER APPOINTEES***". It then goes on to say:

> "*Details of the following occurrences shall be published in the Public Service Commission monthly Circular Memorandum in respect of all officers. In addition this, the appointments of officers in the Superscale 1 and above, including all Statutory appointees shall be gazetted:-*
>
> *(a)* *appointments on probation or on contract to established offices;*
> *(b)* *confirmation in appointment;*
> *(c)* *acting appointments, indicating the duration of the appointment;*
> *(d)* *promotions;*
> *(e)* *retirements, dismissals, including terminations of appointment for any other reason;*
> (f) *transfers.*"

It is important to distinguish publications made under this head as a Gazette notice. The requirement of which arises from General Orders and which is done by prerogative of the Crown. The description of the sub-heading makes plain that they are for purposes of public notification. They do not become operative on publication, rather from the dates stipulated in their notices. The notices of termination/appointment of members of the Board accordingly do not require publication to become operative.

Serious Issues

The next crucial issue for determination is whether the Originating Summons raises any serious issues. It is a vital requirement in any application for interim orders or continuation of interlocutory orders that the Plaintiff demonstrates on the face of the records that there are serious issues to be tried and which justify invoking the jurisdiction of this court.

I have carefully assessed the Originating Summons of the Plaintiffs, the several affidavits filed in support of Martin Karani and George Kuper both filed on 23rd March 2005 and the affidavit in opposition of Luma Darcy filed 6th April 2005 and come to the concluded view that the only triable issue raised pertains to the question of breach of natural justice principles; whether or not the Plaintiffs had been given the opportunity to be heard, a requirement fundamental to fair procedure and the duty to act fairly.

The evidence adduced demonstrates a prima facie case in favour of the Plaintiffs of the breach of this requirement of a fair hearing; no notices were given before their termination. The only time they became aware was when they told about it by the GM. The Defendant on the other hand assumes it would seem, relying on section 3(2) of the NPF Act, of the right to terminate the appointments of the Plaintiffs as Board members with immediate effect without having to give notice or opportunity to these Plaintiffs to be heard. The proviso to subsection 3(2) of the NPF Act describes the power of the Minister which may be exercised in his **absolute discretion**. Whether that means he does not have to give notice and comply with principles of natural justice in this instance in my respectful view is a triable issue. It is not clear on the submission of the Defendant whether there is a concession that principles of natural justice are recognised as applicable in this instance but that he takes the view that he had in any event complied.

Effect of decision of the Minister

The decision of the Minister therefore takes effect immediately unless declared otherwise and whether rightly or wrongly, is a matter which can be determined at trial or hearing of the triable issue. Until declared invalid that decision remains operative.

The application in reality of the Plaintiff in this instance is to have that decision quashed.

Should the restraining orders continue?

Having determined that the actions of the Minister in revoking the appointments of the Plaintiffs was not subject to publication in the Gazette for its validity and effectiveness and in like manner the appointments of new replacement Board members is not subject to publication in the Gazette for their validity, the usefulness and justification for those restraining orders must lapse with immediate effect.

Further even if the issue of the adequacy of the respective remedies in damages available to the parties is considered, I am not satisfied the Plaintiffs will not be adequately compensated by an award of damages if at the end of the day they should win their case. Given that the issue of declaratory orders is discretionary and that even if a declaration is issued in favour of the Plaintiffs, but is not complied with by the Minister, the remedy of the Plaintiffs will lie in damages unless an order for mandamus is sought which is not the case here.

In the circumstances, there is no longer justification for the orders to continue.

The Crown Proceedings Act – section 18(1)(a) [cap. 8]

The issues raised regarding whether or not the Crown Proceedings Act applies or is in conflict with the provisions of the Constitution as they relate to the original unlimited jurisdiction of this Court and whether that authorises this court in any event to issue such types of orders no longer become relevant in this particular instance. In any case the powers of this court to grant relief under section 18 of the Constitution are not in issue here because this case has not been brought under that provision for redress[7], which requires inter alia, leave to be obtained. Further the Plaintiffs have not raised any

[7] Order 61A of the High Court (Civil Procedure) Rules, 1964 L.N. 9/82

arguable case of breach of any constitutional rights under section 3 to 16 (inclusive) of the Constitution.

Until section 18(1) is declared unconstitutional it applies as prohibiting the issue of injunctory orders against the Crown. All that section 18(1) of the Crown Proceedings Act does is to restrict the nature of relief which can be obtained against the Crown as they apply to the issue of injunctions and orders for specific performance and confine them to the issue of declaratory orders instead. There is no basis therefore to say that section 18(1) of the Crown Proceedings Act encroaches upon and delimits the High Court's "unlimited" original jurisdiction to hear and determine any civil proceedings under section 77(1) of the Constitution. I should point out though that the issue whether a declaratory order can be obtained as an interim or interlocutory order in lieu thereof has never been agitated before this court for its consideration as to whether such an order can be extended to include interim relief against the Crown especially where the policy seems to be in putting the Crown so far as is practicable in the same footing as a private litigant[8].

Section 18(1) therefore applies and prohibits the issue of injunctions against the Crown.

Injunctions

The final objection taken against the continuation of the interim orders of this court, relates to the manner in which the order had been framed and issued. Learned Counsel Mr. Moshinsky objects to the generality and lack of specificity of the order in so far as it failed to indicate to whom the order was expressly directed against or to. In so far as injunctions may be described as court orders forbidding or commanding the performance of an activity or thing, the one crucial requirement in their use in the court's process is that they be specific enough and be able to identify the person(s) to whom it is addressed. In this instance it must necessarily apply to the Defendant to be effective, failing which it cannot be allowed to stand, especially where a third party not joined may have been the subject of the orders.

Regrettably the orders issued by this court on 5th April 2005 cannot also be allowed to remain for generality and vagueness, and in so far as it purports to apply to a third party (the Solomon Islands Printers Ltd) not joined in this matter, apart from the fact that section 18(1) of the Crown Proceedings Act in any event prohibits the issue of injunctory orders against the Crown.

Learned Counsel Mr. Moti has sought to describe the orders as "conservatory", an interim protective order designed to preserve the status quo pending the hearing and determination of the Plaintiff's substantive case. Whatever the description, it is prohibitory in nature designed to prevent the publication of notices in the Gazette on the assumption that that was necessary before the notices became operative, but which is not the case. It is therefore injunctory and cannot be sustained for the reasons already given.

The orders issued on the 5th April 2005 therefore must be discharged forthwith with costs.

Orders of the Court:

[8] Administrative Law H.W.R. Wade sixth edn. Page 588.

(i) Discharge orders issued on 5th April 2005 with costs.

(ii) Unless further affidavits require to be filed, the substantive hearing of the Originating Summons should be listed for hearing by the Registrar of High Court within 14 days or anytime thereafter.

The Court.