

NATIONAL BANK OFFICERS' ASSOCIATION-v-DENNIS JAMES MCQUIRE

HIGH COURT OF SOLOMON ISLANDS
(Mwanosalua, J.)

Civil Case No. 483 of 2004

Hearing: 26th May 2005
Ruling: 13th June 2005

C. Ashley for the Applicant
A. Radclyffe for the Respondent

RULING

Mwanosalua, J: By Summons filed on 2nd May 2005, Respondent seeks the following orders –

1. That the Applicant provide the following further and better particulars of paragraph 2 of the amended Originating Summons within 7 days:
 - (a) *if the Applicant is alleging that the Respondent is in breach of trust, specify which clauses of the Deed of Trust he is alleged to have breached and provide particulars of the alleged breaches;*
 - (b) *if the Applicant is alleging that the provisions of the Deed of Trust contravene principles of the Law of trusts, specify which provisions contravene the said law and give particulars of the principles of the Law that are alleged to have been contravened.*
2. That order 6 of the Court Order dated 26th April 2005 be varied to provide that the security for costs be paid within 7 days and that in the absence of such payment the amended Originating Summons be struck out;
3. That order 3 of the Court Order dated 26th April 2005 be amended consequential to the above orders;
4. Such further or other orders as the Court thinks fit;
5. That the Applicant pay the costs of this application.

Paragraph 2 of the Amended Originating Summons filed on 29th April 2005 is in the following terms –

"2. If the answer to question 1 is "Yes", whether upon the proper construction and interpretation of the provisions of the Trust Deed, the Trustee would be acting in contravention of the known principles of Trust Law; in particular the following principles –

- (a) The standard of care and skill – the duty of a trustee to exercise his powers in the best interests of the present and future beneficiaries of the trust; holding the scales impartially between different classes of beneficiaries; and**
- (b) the duty not to personally benefit or profit at the beneficiaries detriment – a person occupying a position of confidence (such as a trustee or fiduciary) is prohibited from deriving any personal benefit by availing himself of his position in the absence of authority from the beneficiaries. In other words, the trustee should not place himself in position where his duty may conflict with his personal interest. If such a conflict does occur and the trustee obtains a benefit or profit, the advantage should be held on constructive trust for the beneficiaries; and**
- (c) the duty to act personally – a trustee is appointed by a settler because of his personal qualities. He may possess a number of attributes which appeal to the settler – such as honesty and integrity, reliability and business skill. It is expected that the trustee will act personally in the execution of his duty; and**
- (d) The duty to provide accounts and information – the beneficiaries are entitled to inspect the accounts as well as to be informed about matters concerning the trust; and**
- (e) The powers of investment – the trustee is required to consider the investment policy of the trust with the standard of care expected from an ordinary prudent man of business and always bearing in mind the best interests of the beneficiaries; and**
- (f) The power of advancement – the trustee is required to exercise his power of advancement in a fiduciary manner. The exercise will not be bona fide and will be void if the trustee advances trust funds not in the best interests of the beneficiaries; and**
- (g) The powers of sale – the trustee as Controller of Trust Property is required to manage the trust on behalf of and in the best interest of the beneficiaries. Where in the exercise of such powers the trustee incurred unreasonable expenses, the trustee has no right to recover, his losses from trust property.**

The Respondent says that wording of question 2 of the Amended Originating Summons is not clear. He points to the phrase "whether upon the proper

construction and interpretation of the provisions of the Deed of Trust, the Trustee would be acting in contravention of the known principles of Trust Law and in particular the following principles..." The Respondent does not exactly know what the Applicant is seeking in the question. The Respondent says that the use of the words "would be" suggests that hypothetical questions are being asked.

The Applicant says that the provisions of the Deed of Trust are contrary to the known principles of trust Law and it is on this basis that question 2 is posed for the court's determination. The Applicant wants the whole body of the Trust Deed to be constructed and interpreted.

The Applicant alleges that the Respondent is in breach of the principles of trust law which it listed in paragraphs (a) to (g) in question 2 when looked at against the Provisions of the Trust Deed. (See paragraph 6 of Applicant's Submission). However, the Applicant was silent on how such principles had been breached. It would only be right and fair that the Respondent knows the exact nature of such breaches before the full hearing of this case.

I have considered the submissions made on behalf of both parties. My view is that this is a case that will involve more than the construction of the provisions of the Trust Deed. There is likelihood that dispute may arise between the parties regarding the alleged breaches of principles of Trust Law in this case.. I will allow paragraph 1 of the Summons by the Respondent.

ORDERS OF THE COURT –

- 1. Allow paragraph 1 of the Summons by the Respondent.**
- 2. That the Applicant to provide further and better particulars requested by the Respondent within 7 days.**
- 3. The Applicant to file pleadings within 14 days if the Applicant alleges that the Respondent is in breach of the Trust Deed.**
- 4. Each party is to bear on Costs.**

**Francis Mwanosalua
Puisne Judge**