IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of the High Court of Solomon Islands (Higgins J)
COURT FILE NUMBER:	Civil Appeal Case No. 12 of 2020 (On Appeal from High Court Civil Case No. 180 of 2020)
DATE OF HEARING:	28 October 2020
DATE OF JUDGEMENT:	1st February 2021
THE COURT:	Goldsbrough P Lunabek JA Gavara-Nanu JA
PARTIES:	COMPASS COMPANY LIMITED -V- COMMISSIONER OF INLAND REVENUE
ADVOCATES: **APPELLANT:** **RESPONDENT:**	Sullivan J QC and Kingmele R Banuve S
KEY WORDS:	Crown Proceedings Act Judicial Review Interim Relief
EXTEMPORE/RESERVED:	Reserved
ALLOWED/DISMISSED:	Dismissed
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JUDGMENT OF THE COURT

A. Introduction

1. This is an appeal made against the judgment of Higgins J in the High Court delivered on 28th April 2020 whereby the judge heard and dismissed the Appellant's application for an interim injunction to stay the Respondent from doing any act or thing to give effect to or enforce a notice of demand issued pursuant to Section 87(1) of the Income Tax Act [CAP. 123] ("*ITA*") on the basis that the learned judge erred in law and in fact.

2. The Appellant sought orders, amongst other matters, that the appeal be allowed and the judgment appealed set aside.

3. When the Court heard this appeal by way of virtual hearing on 28th November 2020, the Court granted leave for the Appellant to introduce fresh material evidence after we heard from Mr Banuve Solicitor-General Representing the Respondent.

4. It has to be noted from the outset that, at the conclusion of this appeal, the Court gave leave to Counsel to make further written submissions on a constitutional point, already before the Court, and also on another wider question as to:- How should the Court resolve the apparent tension between –

   a. s.18 of the Crown Proceedings Act (Cap. 8) ("CPA"), which prohibits the grant of an interim injunction against the Crown or an officer of the Crown; and

   b. r.15. 3. 5 of the Solomon Islands Courts (Civil Procedure) Rules 2007("CPR") ("the Rules"), which permits interim injunctions in judicial review proceedings.

B. Background

5. The Appellant is and was at the relevant times – a company registered in the Solomon Islands in 2012; it carried on business in Honiara as a local retailer and wholesaler of goods, hardware and general merchandise until 31 December 2018; the Appellant is a resident company for the purposes of the Income Tax [CAP. 123] ("*the Act*").

6. The Respondent is the Commissioner of Inland Revenue charged with administering the Act.

7. Ihu Dang (also known as Don or Donnyzhu) was the sole director of the Appellant.

8. Ihu Dang was a resident up to and including the financial year ended 31 August 2018 and thereafter was a non-resident for the purposes of the Act.

9. By letter from the Respondent to the Appellant dated 16 April 2020, marked for the attention of Ihu Dang and received by the Appellant on or about 20 April 2020, the Respondent issued a demand notice pursuant to s.87 (1) of the Act demanding that the Appellant made payment of the sum of $9,276,467.00 as outstanding taxes and penalties on the Appellant on or before 23 April 2019.

10. In default of such payment, the Demand threatens that the Respondent will use his powers to collect the alleged taxes and penalties, which powers include the power of distress with force under s.89 of the Act, and would become available to the Respondent at any time from 24 April 2020.

11. On 23 April 2020, the Appellant filed a Judicial Review claim (Category A - Claim) under rules 2.2 and 15.3.4 of the CPR in the High Court with a sworn statement in support filed by Mr Rodney Kingmele of Ngossi, Honiara, on the same date. The claim sought a number of reliefs, among other relief, two declarations as follows:

    (a) Declarations to the effect that the 2016, 2017 and 2019 Assessments and the various assessments of withholding tax and impositions of penalties referred in the statement of case were each made ultra vires the Respondent's and are void ab initio and of no force or effect; and

    (b) A declaration that the Respondent's notice to the Appellant dated 18 April 2020 and received 20 April 2020 issued pursuant to s.87 (1) of the Income Tax [CAP. 123] requiring the claimant to pay the sum of $9,276,467.00 to the Respondent on or before 23 April 2020 was ultra vires the Appellant and is void ab initio and of no force or effect.

12. On 23 April 2020 also, the Appellant filed the present urgent application for an interim injunction to stay the Respondent from doing any act or thing to give effect to or enforce a notice of demand issued pursuant to Section 87(1) of the Income Tax Act.

C. Judgment of the High Court appealed against

13. On 28 April 2020, the Judge in the High Court delivered his judgment dismissing the said application for an interim injunction to stay the Respondent from acting to enforce a demand, pursuant to s.87(1) of the Act.

14. In his judgment, the learned Judge found, amongst other matters, to the following effect that:

> *"There is no doubt the Commissioner exercises the authority of the Crown. While s. 18(1) of the Crown Proceeding Act enables relief to be given against the Crown as if it was a subject, s. 18 (1) (a) forbids an injunction against the Crown by way of substantive relief. A declaration of right may be made in lieu. By virtue of s. 18 (2) the Court may not grant relief against an officer of the Crown if that would have that effect. A similar case of A–G v Maui [2016] SBCA4; SICOA CAC 24 of 2015 supports the contention of the Respondent. (See also Murphy v A – G [1994] SBHC 75; HCSI-CC88 of 1994 per Palmer J (as he then was)]. Those cases cited by Mr Banuve makes it clear that injunctive relief is not permitted by the Crown Proceeding Act against an officer of the Crown acting in his or her official capacity. That is not to say that abuse of power may not be restrained but this is not such a case.*
>
> *In so holding I do not reject Mr Kingmele's submissions that there is a serious question to be tried concerning the issue of the relevant assessments.*
>
> *It is open to the Claimant to offer security to the Respondent for the assessed tax liability. The Claimant has not offered any evidence to demonstrate that it cannot do so.*
>
> *Thus, in any event, the claimant has not satisfied the Court that the balance of convenience favours the grant of the interim relief sought."*

15. The Appellant appeals against the said judgment of the High Court of 28 April 2020 upon the grounds set thereunder.

D. Grounds of Appeal

16. The grounds of appeal are as follows:

    1. The learned judge erred in law and in facts.

    2. The application below was for inter alia an interim injunction pursuant to rule 15. 3. 5 to restrain the respondent, his officers, servants and agents from doing any act or thing to give effect to or enforce the respondent's notice of demand purportedly issued pursuant to ITA s.87(1).

    3. While it is conceded that the respondent is entitled to the shield of the Crown and the protection conferred by s.18(1)(a) of the Crown Proceedings Act (Cap

8) ('CPA"), the learned judge nevertheless erred in law by holding to the effect that CPA s.18(1)(a) operated in the present case to prevent the Court from granting an interim injunction against the Respondent as an officer of the Crown, when the same was sought in aid of a claim for judicial review from which officers of the Crown are not protected.

4. The learned judge erred in failing to hold that rule 15. 3. 5 operates as one of the recognised exceptions to CPA s.18 (1)(a).

5. The learned judge erred in failing in his reliance on the distinguishable cases of AG v Maui [2016] SBCA 4 and Murphy v AG [1994] 75, in neither of which was any exception to CPA s.18 (1)(a) invoked (although Murphy was a case of judicial review, it predates the Solomon Islands Courts CPR 2007 ("the Rules"), of which r. 15. 3. 5 is a part).

6. The learned judge erred in failing instead to rely on the Court of Appeal's decision in SMM Solomon Ltd v Axiom KB Ltd [2016] SBCA 1 at [327], which recognised that there may be statutory exceptions to the relief otherwise prohibited by s. 18 (1)(a) (in that case, specific performance against the Crown permitted by s. 69 (3) of the Lands Titles Act (cap. 133).

7. The learned judge erred in failing to recognise that the Rules were made in exercise of the separate legislative power of the Rules Committee conferred by s. 90 of the Constitution and are not subordinate legislation made under an Act of Parliament, but instead, by r. 15. 3. 5. Confer an independent jurisdiction on the High Court to grant an interim (not final) injunction in support of a claim for judicial review.

8. In the alternative, to the extent which he held to the effect that there was an alternative remedy to the judicial review by way of objection and appeal under ITA, then, the learned judge erred, because the Claim –

    a. Challenges the lawfulness of the purported demand under ITA s.87(1), as to which there is no provision for objection and appeal and which can only be challenged by way of judicial review;

    b. Goes not merely to mistakes and errors in the assessments as to which objection would lie but to whether the purported assessments were made ultra vires the respondent, which cannot be determined by the respondent but only by the Court in judicial review proceedings.

9. In the alternative, the learned judge while not rejecting nor accepting the Appellant's submission that there was a serious issue to be tried, nevertheless

erred in holding to the effect that the balance of convenience was against the grant of an interim injunction.

10. The learned judge should have expressly held that there was a serious question to be tried in relation to the relevant assessments.

11. The learned judge should have held, that on the material before him, that the balance of convenience favoured the grant of an interim injunction, because –

    a. Damages were not an adequate remedy;

    b. The powers granted to the respondent under ITA s.87(1), if exercised as threatened in the respondent's demand, had the likelihood of destroying the appellant's business;

    c. The appellant has good, if not very strong, prospect of success in the proceedings;

    d. The claim alleges in effect that the assessment were not merely erroneous or mistaken, as to objection and appeal would lie, but were in effect not assessments known to the law and/or were otherwise made ultra vires the respondent, an issue which is to be properly decided by the High Court by way of judicial review and which cannot properly be determined by the respondent on objection and is thus not an alternative remedy;

    e. The usual undertaking as to damages given by the appellant was in fact, contrary to the learned judge's finding, supported by evidence of solvency, as to which the respondent raised no objection;

    f. The respondent had failed to show any basis for the assertion in the demand that the respondent had reason to believe that appellant might default in payment of tax;

    g. The demand did not allow for the provision of security, contrary to the learned judge's reasons, which in any event would be entirely inappropriate in judicial review proceedings where the very power of the respondent to make a demand under the ITA s.87(1) is in issue;

    h. The balance of convenience favoured preservation of the status quo, all of which matters, the learned judge failed to consider or failed to properly consider.

17. Further, it is the law that the usual undertaking as to damages must be supported by evidence of solvency, but that security for the undertaking may be required where the respondent puts the value the undertaking in issue, which was not the present case.

18. Further, the learned judge erred in law and in fact in apparently taking into account the possibility of the respondent obtaining an order in the nature of a Mareva injunction, when there was not the slightest evidence before the Court that the appellant was seeing to conceal or patriate assets.

E. Issues arising in this appeal

19. The Appellant raises the following **issues** in this appeal, namely, whether-

    (i) the High Court has jurisdiction to grant interim injunctive relief, pursuant to r. 15.3.5, in a claim for judicial review against the Respondent;

    (ii) there is alternative relief available to the Appellant in lieu of judicial review;

    (iii) there is a serious question to be tried;

    (iv) the balance of convenience favours the grant of the injunction;

    (v) the usual undertaking as to damages must be supported by evidence of solvency.

20. We thank Counsel for their helpful and comprehensive submissions and assistance.

21. We propose to deal with the various grounds of appeal by way of separate issues as summarised by the Appellant's Counsel in his submissions dated 19th August 2020 as we set them out at paragraph 19 above.

F. Counsel submissions and Court consideration

ISSUE (i): Whether the High Court has jurisdiction to grant interim injunctive relief, pursuant to r.15.3.5, in a claim for judicial review against the Respondent.

22. The Appellant's primary submission is that the learned judge erred in holding to the effect that s.18 (1)(a) of the CPA operated to prevent an interim injunction under r.15.3.5 being granted against the respondent.

23. The appellant does not dispute that the respondent "exercises the authority of the Crown"; nor that ordinarily CPA s.18 (1)(a) operates to prevent an injunction (or specific performance) being granted against the Crown.

24. The Appellant submits that there are however accepted exceptions to CPA s.18(1)(a), as this Court recognised in the *SMM* case in relation to claims for specific performance under s.69(3) of the Land and Titles Act [CAP. 133] ("LTA"). The learned judge did not consider the SMM case.

25. The Appellant further contends that rule 15.3.5 of the Solomon Islands Courts (Civil Procedure) Rules 2007 is another such exception in that it provides for the grant of an interim injunction in judicial review proceedings in cases where it is "just and convenient to do so" having regard to the matters set out in that rule.

26. The Appellant advances that r.15.3.5 is a valid exception to CPA s.18(1)(a) for the following reasons –

    a. The Rules were made in exercise of the separate legislative power of the Rules Committee conferred by s.90 of the Constitution;

    b. The Rules are therefore a statute of independent force and are not subordinate legislation made under an Act of Parliament;

    c. The Rules, by r.15.3.5, confer an independent constitutionally ordained jurisdiction on the High Court to grant an interim (not final) injunctive relief in support of a claim for judicial review;

    d. It cannot be doubted that a rule providing for the grant of an interim injunction to preserve the status quo in judicial review proceedings is a rule of "practice and procedure" as contemplated by s.90 of the Constitution;

    e. Proceedings for judicial review necessarily contemplate proceedings against the Crown, Crown instrumentalities or Crown employees;

    f. r.15.3.5 is therefore a specific statutory provision allowing for limited interim injunctive against a Crown party in specified proceedings (juridical review);

    g. r.15.3.5 is thus akin to LTA s.69(3) and is a recognisable exception to CPA s.18(1)(a);

27. Interim injunctions against the Crown pursuant to this rule, even one granted by the learned judge, are not uncommon.

28. The Appellant notes that *Maui's* case, relied upon by the learned judge, provides a statement of the general principle set out in CPA s.18 (1a); it was not a judicial review case, but did concern the tension between CPA 1)(a) and s.19(1)(d) of the Magistrates Court Act [CAP. 20] ("MCA"), which provides for limited injunctive relief in Magistrates Court cases. The Court held that CPA s.18 (1)(a) operated to prevent reliance on MCA s.19(1)(d) for the grant of injunctive relief by a magistrate against the Crown.

29. The Appellant contends that the judge also relied on *Murphy's* case, which, although a judicial review case, preceded the Rules coming into force and is thus not relevant to the issue.

30. The Appellant, however, in his detailed supplementary submissions filed 13th November 2020, submitted to the effect that the decision in *Murphy's* case be reviewed in the light of the decision of the House of Lords 'Judgment *In re M v Home Office* [1994] 1AC 377; [1993] UKHL as suggested by Palmer CJ's dicta in *Hatilia's* case in *re Hatilia v Attorney General* (representing the Minister of Commerce, Industries, Labour and Immigration [2012] SBHC 101, independently from the constitutional arguments advanced on behalf of the Appellant by Counsel for the Appellant.

31. The Respondent asserts that the comments of the court on this issue were obiter and were not critical to its primary finding for refusing to grant interim relief. Further, the Respondent asserts that the High Court did not err in its surmise on the effect of section 18(1)(a) of the CPA and its application to r.15.3.5 of the Solomon Islands Courts (Civil Procedure) Rules 2008.

32. The Respondent contends that the error in the Appellant's reasoning lied on its treatment of r.15.3.5 as an exception to section 18(1)(a) of the Crown Proceedings Act, when properly construed, they can be read or applied consistently together.

33. The Respondent notes that rules 15.3.5 do not just deal solely with interim injunctions but also with interim declarations. Contrary to what the Appellant submits, it is clear that the grant of an interim injunction or declaration is always a matter for discretion for the Court to determine based on the requirement of clauses (a), (b) and (c). The Respondent contends that reading Rule 15.3.5(b) together with section 18(1)(a) of the C P A [CAP. 8] the Court would, (in the appropriate circumstance), in the exercise of its discretion, grant an interim declaration, not an interim injunction when dealing with an officer of the Crown.

34. Whilst, *obiter*, the comment by the High Court on the restriction imposed by Section 18(1)(a) of the Crown Proceedings Act [CAP. 8] on the grant of interim injunctions (as opposed to interim declarations) must be correct.

35. The Respondent Counsel, in his supplementary response submissions filed 13th November 2020, conveyed his unreserved apology to the Court and the Appellant's Counsel for not bringing to our attention the authority of the House of Lords judgment In *M v Home Office* [1994] 1 Ac 377 as discussed in *Hatilia v Attorney General* [2010] SBHC 101. He submitted that the availability of injunctive relief against the Crown (as developed from M v Home Office), has not been developed further in local jurisprudence. Be that as it may, the correct position would be that if a statute places a duty on a specified Minister or officers which creates s cause of action then there is no reason why injunctive relief cannot be sought or granted. If on the other hand, the duty is placed on the Crown in general then, s. 18 (2) of the CPA would prevent the grant of injunctive relief.

36. The Respondent noted the learned judge in the High Court did not represent the correct position as alluded to in the case of *Hatilia v AG* [2012] SBHC 101 when the judge stated that the cases cited by the Crown clarified that the injunctive relief is not permitted by s. 18(1) (a) of the CPA.

37. It is the Respondent's contention that bearing in mind consideration such as r. 15.3. 5 (b) for example that given the restriction imposed by s. 18 (1)(a) of the CPA, a Court would not grant an interim injunction, if a duty is placed on the Crown generally, (as opposed to a duty vested on and exercised by a Minister or official), but rather award an interim declaration against the Crown.

38. The question for this court is whether in light of the House of Lords authority in *M* v Home Office [1994] 1 AC 377, the decision of the High Court in *Murphy v Attorney General [1994] SBHC 75* should be overruled and that it be held that interim injunctive relief should be available in judicial review proceedings in this jurisdiction.

39. We consider the judgment of the High Court in *Murphy*, *inter alia* an ex parte interim injunction had been granted against the Director of Immigration who had cancelled Murphy's residence permit. The Attorney General move to have the injunction discharged on the ground that there was no jurisdiction to grant an injunction by reason of CPA s.18.

40. Palmer J (as he then was), in reliance on the House of Lords decision in the *Factortame* case, held that CPA s.18, which is in terms identical with the corresponding UK legislation, precluded the grant of an interim injunction and discharged the injunction.

41. We note the (*obiter*) comments of Palmer CJ in *Hatilia* v Attorney - General [2012] SBHC 101. There, the claimant sought a mandatory injunction against the relevant Minister and Crown official to grant, on constitutional grounds, a residency permit to her husband. The Attorney General sought to have the claim struck out on a number of grounds, including that the mandatory order would contravene CPA s.18 (1)(a).

42. In striking out the claim as an abuse of process, primarily on the ground of *res judicata*, Palmer CJ considered, expressly *obiter dicta*, the CPA s.18 point and the effect of the decision in *M's case*. After a brief review of the leading speech of Lord Woolf. Palmer CJ said he concurred with the view expressed by Lord Woolf in *M v Home Office* and he was satisfied that the original position taken by the High Court in *Murphy v Attorney General* should be reviewed, that injunctive relief is available against a specified Minister or other Official exercising a statutory power.

43. We now turn to the judgment of the House of Lords In *M v Home Office (referred to earlier)*, a citizen of Zaire, who had sought asylum, was deported from England and was not returned to England, contrary to a mandatory injunction of the High Court against the Secretary of State that M be returned to the jurisdiction, although M was still in the custody of Home Office officials, who had knowledge of but misunderstood the order. The Secretary of State was found by the Court of Appeal to be in personal contempt of court although he was not personally involved in the relevant events. On appeal, to the House of Lords, the ultimate question was whether proceedings for contempt could lie against the Secretary of State if there was no jurisdiction to make coercive orders such as a mandatory injunction against the Crown. That in part turned on CPA (UK) s.21.

44. Lord Woolf, with whom all Law Lords concurred, undertook a detailed analysis of the *Factortame* case and the speech of Lord Bridge, on which the Crown relied, and discussed the competing principles that "the King can do no wrong and cannot be sued in his courts" and that "*no man is above the law ... every man, whatever his rank or condition, is subject to the ordinary law of the realm and amendable to the jurisdiction*" of the courts. What was in dispute was not the validity of each principle but how they should be reconciled in practice.

45. Lord Woolf, amongst other matters, discussed the provisions of CPA (UK) 23(2)(a) (substantially equivalent to CPA s.21(2)(a), which governs the scope of CPA s.21 and

the definition of *"civil proceedings"* in CPA (UK) s.38(2), which provides that proceedings for judicial review are not *"civil proceedings"* for the purposes of the provisos to s.21 (1) or of s.21 (2) because they are therefore excluded by the definition in CPA (UK) s. 38 (2). Accordingly, s. 21 does not exclude the grant of an injunction in judicial review proceedings. Lord Woolf noted (at p.412D) – *"Proceedings for the prerogative orders were brought on the Crown side".*

46. We need to ponder and reflect on the notion of the "Crown" in order to understand its fundamental raison d'être, the nature and extent of the prerogative orders sought on the Crown side of the proceedings. In *M v Home Office*, Lord Templeman stated the following that:

> *"The expression "the Crown" has two meanings: namely the Monarch and the executive. In the 17th century Parliament established its supremacy over the crown as Monarch, over the executive and over the judiciary. Parliament supremacy over the Crown as Monarch stems from the fact that the Monarch must accept the advice of the Prime Minister who is supported by a majority of Parliament. Parliamentary supremacy over the Crown as executive stems from the fact that Parliament maintains in office the Prime Minister who appoints the Ministers in charge of the executive. Parliamentary supremacy over the judiciary is only exercisable by statute. The judiciary enforce the law against individuals, against institutions and against the executive. The judiciary cannot enforce the law against the Crown as Monarch because the Crown as Monarch can do no wrong but judges enforce the law against the Crown as executive and against individuals who from time to time represent the Crown. A litigant complaining of a breach of the law by the executive can sue the Crown as executive bringing his action against the minister who is responsible for the Department of State involved...To enforce the Law the Courts have powers to grant remedies including injunctions against a Minister in his official capacity. If the minister has personally broken the law, the litigant can sue the minister... in his personal capacity. For the purpose of enforcing the law against all persons and institutions, including ministers in their official capacity and their personal capacity, the courts are armed with coercive powers exercisable for contempt of court."*

47. De Smith Judicial Review in its Sixth Edition explained and clarified further the prerogative powers and orders of the "proceedings for the prerogative powers and orders brought on the Crown side" as follows:-

> *At [3-037], that the court may lack jurisdiction because the prerogative power of the Crown has been exercised directly by the Sovereign (rather than by Her Ministers) and as a matter of general constitutional principle, the Sovereign cannot be the subject of legal process. Those powers, called "personal" or "direct" prerogatives, "can be exercised legally by the person of the monarch*

him or herself". The main examples are the appointment of the Prime Minister, the dissolution of Parliament, and the Royal assent to legislation. The traditional constitutional justification for immunity of the Crown (as Sovereign) from public law remedies was "both because there would be incongruity in the Queen commanding herself to do an act, and also because the disobedience to a writ of mandamus is to be enforced by attachment." The Crown is, however, only the nominal claimant in claims for judicial review. The provisions of the Crown Proceedings Act 1947, which permitted claims to be brought against the Crown in the more general sense of the Crown as executive government, do not apply to the Monarch personally; nor do they apply to claims for judicial review or other public law proceedings on the Crown side of the Queen's Bench Division of the High Court. Moreover, the principal norm regulating the exercise of these "sovereign acts" (in distinction to merely executive acts) are also more in the nature of constitutional conventions than legal principles; and conventions are, broadly speaking, not enforceable by the courts.

And at [18-005], the prerogative orders (mandamus, prohibiting and quashing orders) and injunctions cannot be granted against the crown directly. Declaratory relief is however available. The justification given for this restriction is "both there would be an incongruity in the Queen commanding herself to do an act, and also because the disobedience to a Writ of mandamus is to be enforced by attachment."

48. Consequently, it can be noted that when judicial review proceedings began to be heard in England, they were administratively assigned to the Crown side of the Queen's Bench Division of Her Majesty's High Court of Justice. The Crown side of the proceedings existed when the CPA (UK) was enacted. It took all judicial review cases prior to rearrangement of the Queen's Bench Division into its present Divisions.

49. It has to be noted also that, in England, legal proceedings concerning these matters are taken in what is referred to as the Crown side of the Queen's Bench Division, because of the historical origins and evolution of the remedies (as described in paragraphs 46 and 47 above). Legal proceedings in the Crown side are those means by which the Queen's Bench Division came to exercise the ancient jurisdiction of supervising the inferior courts, commanding magistrates and others such as public authorities to do what their duty requires in every case where there is no specific remedy (or no equally convenient and effective method of appeal) and protecting public liberty of the subject by speedy and summary interposition. See Halsbury's Laws England, Vol. 2, 4th Edition at paragraph 1451 where the learned editors cited Blackstone's' commentaries (14th Ed.) and Coke's Institutes as authorities for this.

50. The definition of "Civil Proceedings" in CPA (UK) s.38 of the Act states expressly that "civil proceedings" does not include proceedings on the Crown side. Thus s. 21 did not

apply to judicial review as it was on the Crown side. "Civil proceedings" include proceedings in the High Court or the county court for the recovery of fines or penalties, but does not include proceedings on the Crown side of the then King's Bench Division (and King's changed thereafter to Queen's on accession of Her Majesty the Queen).

51. Based on the authority of *M v Home Office*, we now consider its application in the Solomon Islands.

52. Sections 2 (1) (2) and 18 (1) (a) and I2) of the CPA are the relevant provisions for consideration. They provide as follows:

> "2—(1) any reference in this Act to the provisions of this Act shall, unless the context otherwise requires, include a reference to rules of court made for the purposes of this Act.
>
> (2) In this Act, unless the context otherwise requires—
>
> "*civil proceedings*" includes proceedings in the High Court and Magistrates' Courts for the recovery of fines and penalties, but does not include proceedings of a nature such as in England are taken on the Crown side of the Queen's Bench Division of Her Majesty's High Court of Justice;
>
> 18.—(1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that—
>
> *(a)* where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
>
> *(b)* in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against any officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.

53. For present purposes, "*civil proceedings*" under s.2(2) of the CPA includes proceedings in the High Court and Magistrates' Courts for the recovery of fines and penalties, but does not include proceedings of a nature such as in England are taken on the Crown side of the Queen's Bench Division of Her Majesty's High Court of Justice. This definition of "*civil proceeding*" in CPA s.2 (2) (S.I.) is substantially similar to that in CPA s.38 (2)) (UK).

54. The supervisory jurisdiction used to be exercised principally by writs of habeas corpus, certiorari, mandamus and prohibition. That must mean that when Solomon Islands introduced its CPA, it intended the same effect even though its own High Court never had a Queen's Bench Division Crown side of proceedings. The High Court of the Solomon Islands never had a Queen's Bench Division at all.

55. By parity of reasoning with the decision in M's case, we agree and accept the view that judicial review proceedings are Crown side proceedings and are not civil proceedings for the purposes of CPA s.18, which is identical to CPA (UK) s.21. Therefore s.18 does not operate to prohibit the grant of an interim injunction under r. 15.3 .5 of the (Civil Procedure) Rules. We therefore answer affirmatively to issue 1.

56. On the constitutional arguments advanced by the Appellant's Counsel, we understand his constitutional arguments. However, we doubted if we would agree and adopt the approach put forward by him even if the question rose in issue (i), is not becoming moot or hypothetical.

57. We now consider **issues (ii), (iii) and (iv)** together. In the present case, based on the material before the learned judge in the High Court, the nature and processes of the type of the claim, there is a serious trial to be heard, as conceded by the learned judge in his judgment **(Issue (iii)).**

58. On the issue of whether there is alternative relief available to the Appellant in lieu of judicial review (**Issue (ii)**), we consider that it is premature at this stage as this question will be considered at a later stage by the High Court at the Chapter 15 Conference which is yet to occur on the substantive claim.

59. We are of the view that the question at this stage when considering the balance of convenience **(Issue (iv))** is not whether remedy is available at this stage, but consideration should be given to the steps the Appellant could take to avoid the need for interim relief. An option that the Appellant should have explored prior to seeking relief is a discussion with the Commissioner of Inland Revenue on security. We note

that the Commissioner did not ask for security but that misses the point. The Commissioner has his authority to levy distress. It is the Appellant who seeks to avoid that and the onus is on him to explore other remedies. Offering security to avoid levy of distress is one such option.

60. When the Appellant has not sought to negotiate a settlement with the Commissioner by offering security, the balance of convenience does not yet favour the appellant. If security is offered and unreasonably refused, then the balance may tip in favour of the Appellant. The reason for this is that we have been told, by the Appellant own legal Counsel Representative, of a businessman (Mr. Zhu Dang, sole Director of the Appellant) who used to be resident but is no longer, who has disposed of his business interest (the retail side) and now only has the small car hire business. We were not told of any other business which he may have so the picture presented is of a person gradually withdrawing – and that that picture does not come from the Commissioner of Inland Revenue but his own legal team. That puts the risk of the Respondent never recovering higher than in another case where there is a picture of settled business affairs. That increases the need for security to be offered if the appellant seeks the Court mandates intervention to assist him.

61. In this case under appeal, we would say that the learned judge may have been wrong to conclude that the Court had no power to grant interim relief but, as we agree with his decision on the balance of convenience, the question does not need to be answered.

62. As the balance of convenience does not favour the Appellant, we refused to grant the Appellant the interim relief sought.

63. The final matter is **(issue (v))** which relates to the undertaking as to damages. The Appellant took issue with the legal correctness of the statement made by the learned judge in his judgment when referring to the undertaking made by the Appellant as part of his application in seeking interim injunctive relief when the judge concluded that the usual undertaking as to damages "should be accompanied by sufficient evidence of solvency to cover the claim and costs."

64. We agree with the Appellant's counsel that the usual undertaking as to damages is mandatory unless the court orders otherwise, but evidence of solvency is not initially required. It may become relevant if a respondent to an application queries the worth of the undertaking, in which case it is not uncommon for a court to order security for the undertaking to be given, if it is not satisfied of its worth. In the present case, the Respondent was represented by the Solicitor General, who did not challenge the worth of the undertaking.

65. We just note that this last point has no bearing on the outcome of this appeal.

G. Disposition

66. The appeal is dismissed.

67. The Respondent shall be entitled to costs of and incidental to this appeal against the Appellant on the standard basis. Such costs shall be taxed failing agreement.

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Goldsbrough P

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Lunabek JA
Member

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Gavara-Nanu JA
Member