

**IN THE COURT OF APPEAL  
SOLOMON ISLANDS**

*(Registrar Withers)*

**CAC 19 of 2012**

<b>Between:</b>	<b>Axiom KB Limited</b>	<b>Appellant</b>
<b>And:</b>	<b>SMM Solomon Limited</b>	<b>1<sup>st</sup> Respondent</b>
<b>And:</b>	<b>Alfred Jolio (Anika Thai Clan)</b>	<b>2<sup>nd</sup> Respondent</b>
<b>And:</b>	<b>Martin Tango (Thavia Clan)</b>	<b>3<sup>rd</sup> Respondent</b>
<b>And:</b>	<b>James Ugura (Vihuvanagi Tribe)</b>	<b>4<sup>th</sup> Respondent</b>
<b>And:</b>	<b>Ben Salusu (Vihuvanagi Tribe within Chogea &amp; Beajong land areas within Takata)</b>	<b>5<sup>th</sup> Respondent</b>
<b>And:</b>	<b>Mafa Pagu (Thogokama Tribe)</b>	<b>6<sup>th</sup> Respondent</b>
<b>And:</b>	<b>Paul Fotamana (Veronica Lona Clan)</b>	<b>7<sup>th</sup> Respondent</b>
<b>And:</b>	<b>The Attorney General (Minerals Board)</b>	<b>8<sup>th</sup> Respondent</b>
<b>And:</b>	<b>The Attorney General (Minister for Mines, Energy &amp; Rural Electrification)</b>	<b>9<sup>th</sup> Respondent</b>
<b>And:</b>	<b>The Commissioner of Lands</b>	<b>10<sup>th</sup> Respondent</b>
<b>And:</b>	<b>The Registrar of Titles</b>	<b>11<sup>th</sup> Respondent</b>
<b>And:</b>	<b>Pacific Investments and Development Ltd</b>	<b>12<sup>th</sup> Respondent</b>
<b>And:</b>	<b>Robert Malo, Francis Selo, Leonard Bava, Rev. Wilson Mapuru &amp; Elliot Cortez</b>	<b>13<sup>th</sup> Respondent</b>
<b>And:</b>	<b>Bugotu Minerals Limited</b>	<b>14<sup>th</sup> Respondent</b>
<b>And:</b>	<b>The Attorney General (Director of Mines)</b>	<b>15<sup>th</sup> Respondent</b>

Mr J Sullivan QC for Applicant (Appeal 1<sup>st</sup> – 7<sup>th</sup> Respondents)

Mr M Pitakaka for Respondent (Appeal Appellant)

Mr D Nimepo for 13<sup>th</sup> Appeal Respondent

Mr W Togamae for 14<sup>th</sup> Appeal Respondent

Date of Hearing: 31 August 2012

Ruling 31 August 2012

1. This is an application to increase security for costs in respect of the above appeal.
2. There was no appearance for the 12<sup>th</sup> Respondent, who I understand from counsel has taken no part in the proceedings. The 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> & 15<sup>th</sup> Respondents (Attorney General) also did not appear today

3. Mr Togamae filed this morning a similar application to increase security for costs and I agreed that as his application mirrored the SMM application I would hear counsel in respect of both.
4. Counsel for the SMM applicant in this matter indicated the W Rano represented a party in parallel proceedings which had been ordered to be heard together with the High Court file to which this appeal relates.
5. Following leave being granted to appeal by Justice Chetwynd on 13 July 2012, I wrote to counsel by letter dated 16 July 2012 advising I had fixed security in the sum of \$30,000.00, with payment being required to be made within 14 days.
6. Payment of the required security was subsequently received on 25 July 2012.
7. On 22 August 2012 I made certain timetabling directions to enable the matter to be ready for determination at the next session of the Court due to commence in October 2012.
8. My timetabling directions resulted in an application by the Appellants counsel to review the directions, and I subsequently saw counsel on 29 August 2012.
9. My timetabling directions were amended following discussion with counsel. These included:
  - Appeal book to be filed no later than Friday 14<sup>th</sup> September 2012.
  - Appellant's submissions & a list of authorities to be filed and served no later than Friday 28<sup>th</sup> September 2012 (electronic & hard copy).
  - Respondent's submissions & list of authorities to be filed and served no later than Friday 12<sup>th</sup> October 2012 (electronic & hard copy).
  - All books of authorities to be filed by Friday 19<sup>th</sup> October 2012.
10. At the meeting before me Counsel for the 1<sup>st</sup> Respondent (SMM Solomon Limited raised the question of increased security. An application was then filed and I advised counsel I would hear from them on this matter today Friday 31 August 2012.
11. Mr Sullivan QC submitted the sum of \$30,000.00 I previously set on 16 July 2012, and advised to counsel the same date, be increased for the following 3 main reasons:
  - The Appeal has been listed for 2 days

- Significant submissions are required
  - Overseas counsel and Queens Counsel are involved in respect of some parties
12. Counsel appeared to agree that security for the last appeal between these parties, in respect of the same set of proceedings was fixed at \$50,000.00. I have not located this appeal file to confirm that amount.
  13. Counsel also agreed that following the last appeal \$120,000.00 costs were paid by the appellant Axiom KB Limited to SMM Solomon Limited.
  14. Mr Togamae in support of his application by the 14<sup>th</sup> Respondent for increased security endorsed the comments and submissions made by Mr Sullivan QC, although his application seeks the slightly higher sum of \$231,991.00.
  15. Mr Pitakaka in opposing the applications submitted that costs had already been fixed in accordance with r 12 of the Court of Appeal rules and there was no provision for the matter to be looked at again.
  16. He further submitted that as his client was a Solomon Island company it was not the practice to put up security for High Court proceedings, and the provisions were usually applied to overseas companies that do not have assets in this country.
  17. He advised there was no evidence before me that his client would be unable to meet any costs order against it, if ordered, following determination of the appeal. He supported his argument by stating that his client had paid costs on the previous unsuccessful appeal.
  18. Mr Pitakaka then addressed the issue of adequate notice being given for the hearing of the applications and referred the High Court rules requirement of 2 clear days' notice, and the requirement for the application to be supported by a Sworn Statement. Such Sworn Statement should furnish evidence that his client was not in a position to pay costs if the appeal was unsuccessful, and as such I had no evidence before me as to the financial position of his client.
  19. He again reiterated that the main issue in the case was between two big companies, and there was no real difference between the last appeal in terms of costs which his client had paid. Despite having previously advised me I had no information before me as to the financial affairs of his client, he went on to state that within the High Court pleadings was a record of the company assets which were more than sufficient.

20. He submitted that while the thrust of imposing security was to ensure the successful party was able to recover any amount ordered on a judgment, the interests of justice should be paramount, and that the \$30,000.00 already paid was sufficient.
21. He also advised that by making a determination to increase security I would be setting a precedent that could be followed in future appeal cases.
22. Mr Nimepo for the 13<sup>th</sup> Respondent advised he supported Mr Pitakaka's submissions.
23. Mr Sullivan QC in response to the question of notice for the hearing advised notice was given on Tuesday this week, the application was filed on Wednesday, and at Wednesday's directions meeting all parties agreed for the matter to be heard today. I agree and accept this view.
24. In terms of the Sworn Statement requirement his view was that these proceedings relate to the Court of Appeal and not to the High Court, as such the High Court rules did not apply. While I do not agree completely with this view, I am satisfied I have before me sufficient information contained in the application and the attached schedule to make a decision.
25. In terms of the objection to the Registrar having power to revisit the question of security, I am satisfied that I have such authority<sup>1</sup>.
26. The Court of Appeal rules 12 cover the setting of security
- 12(1) (b): Upon request of the Registrar made at any time after the filing of the notice of appeal –
- (ii) deposit such further sum, or give security therefor to the satisfaction of the Registrar, as the Registrar may fix as security for the payment of all such costs as may be ordered to be paid by the appellant.
27. There is obviously no dispute about the question whether security should be ordered or not in this case, as the appellant has already paid into court the sum \$30,000.00. The issue is the quantum.
28. In the application filed the 1<sup>st</sup> – 7<sup>th</sup> Respondents are seeking me to fix total security in the sum of \$202,613.00 to be paid within 14 days or all proceedings on the appeal be stayed. As I said earlier Mr Togamae for the 14<sup>th</sup> Respondent seeks the amount of security in respect of his client to be fixed in the sum of \$231,991.00.

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<sup>1</sup> CC 208/2000

29. The fixing of and the payment into court of security of costs enable the Respondents if the appeal is unsuccessful to recover all such costs as may be ordered to be paid.
30. Mr Sullivan and Mr Togamae both as part of their respective applications have submitted a schedule of likely costs based on schedule 3 of the High Court Rules including a mark-up for the Court of Appeal.
31. There appears to be no common formula that I have been able to find that is applicable to the Court of Appeal and the fixing of security and I am mindful of Mr Pitakaka's submission I would be setting a precedent that could follow for future appeals.
32. Therefore I have taken a slightly different approach in determining this matter. For guidance I looked to the New Zealand jurisdiction and their Court of Appeal (Civil) Rules 2005<sup>2</sup>.
33. Rule 35 (5) of those rules sets out a formula for the administrative task of calculating the amount of security payable in certain categories of civil appeals.
- The amount of security payable under subclause (2) is –*  
2 x a
- Where –
- a is the daily recovery rate for category 3 proceedings that is specified in Schedule 2 of the High Court rules*
34. Category 3 proceedings in New Zealand are defined as those proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court.
35. While the Solomon Islands under the Civil Procedure Rules does not classify cases or counsel in such a way, I intend to apply this to equate for the purpose of these applications to a Category A or complex claim.
36. The above formula therefore sets out the required mark-up applicable for Court of Appeal cases. I was referred to cases of *Yam v Wong and In re Fera* where the mark-up was set higher at 75% and advised by Mr Sullivan QC that previous decisions on the mark-up allowed for the Court of Appeal ranged from 40% as a starting figure. I have determined I will apply the formula set out in para 33 a figure above the starting point and less than the 75% sought.
37. The New Zealand principles applying to costs puts the daily recovery rate at two-thirds of the daily rate considered reasonable in relation to the

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<sup>2</sup> SR 2005/69

proceeding<sup>3</sup>. In respect of the purposes of the Solomon Islands Court of Appeal, I will simply use the Schedule 3 of the rules to determine recovery rate costs for the purpose only of fixing security.

- Costs in accordance with schedule 3
- Multiply by two as the Court of Appeal Mark Up

38. In respect of the application by SMM Solomon Ltd the schedule attached to the application sets out a number of costs with reference to Schedule 3 of the rules.

39. The amounts used in my calculation are purely for the purpose of fixing an appropriate amount as Security for Costs in respect of the Appeal and in no way are to be taken as an indication of recoverable costs if the appeal is unsuccessful and costs awarded to the Respondents

40. In this instance for the purposes of fixing security I calculate as follows:

*SMM Solomon Limited Application – 1<sup>st</sup> – 7<sup>th</sup> Respondents*

<p><b>Legal practitioner costs</b></p> <p>Up to and including the 1<sup>st</sup> court hearing or conference</p> <p>1 (a)</p>	<p>To cover receipt of Notice of Appeal &amp; taking instructions</p>	<p>\$3,000.00</p>
<p>After the 1<sup>st</sup> court hearing or conference up to and including a trial listing conference</p> <p>2 (a)</p>	<p>Preparation of the appeal including appeal brief</p>	<p>\$6,000.00</p>
<p><b>Counsel costs</b></p> <p>After the 1<sup>st</sup> court hearing or conference up to and including a trial listing conference</p> <p>2 (a)</p>	<p>Preparation of submissions and authorities</p>	<p>\$6,000.00</p>
<p>After a trial listing</p>	<p>Preparation for hearing</p>	<p>\$7,000.00</p>

<sup>3</sup> NZ High Court Rules (Principles applying to determination of costs(d))

conference up to and including the day prior to listing of trial 3 (a)		
Trial (2 days) 4 (b & c)	Appeal hearing (2 days)	\$11,000.00
<b>Queens Counsel</b> After the 1 <sup>st</sup> court hearing or conference up to and including a trial listing conference 2 (a) & 24.30 (b)(ii)	Preparation of submissions and authorities	\$12,000.00
After a trial listing conference up to and including the day prior to listing of trial 3 (a) & 24.30 (b)(ii)	Preparation for hearing	\$14,000.00
Trial (2 days) 4 (b & c) & 24.30 (b)(ii)	Appeal hearing (2 days)	\$22,000.00
		\$81,000.00
	X2 CoA	\$162,000.00

*Bugotu Minerals Limited – 14<sup>th</sup> Respondents*

<b>Legal practitioner costs</b> Up to and including the 1 <sup>st</sup> court hearing or conference 1 (a)	To cover receipt of Notice of Appeal & taking instructions	\$3,000.00
After the 1 <sup>st</sup> court hearing or conference up to and including a trial listing	Preparation of the appeal including appeal brief	\$6,000.00

conference 2 (a)		
After a trial listing conference up to and including the day prior to listing of trial 3 (a)	Preparation for hearing	\$7,000.00
Trial (2 days) 4 (b & c)	Appeal hearing (2 days)	\$11,000.00
<b>Counsel costs</b> After the 1 <sup>st</sup> court hearing or conference up to and including a trial listing conference 2 (a)	Preparation of submissions and authorities	\$6,000.00
After a trial listing conference up to and including the day prior to listing of trial 3 (a)	Preparation for hearing	\$7,000.00
Trial (2 days) 4 (b & c)	Appeal hearing (2 days)	\$11,000.00
		\$51,000.00
	X2 CoA	\$102,000.00

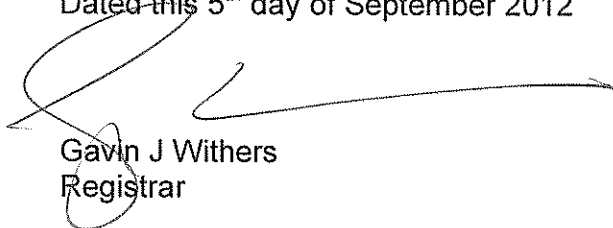
41. In summary

- The Appellant Axiom KB Limited to pay Security for Costs on the Appeal in respect of the 1<sup>st</sup> – 7<sup>th</sup> Respondents in the sum of \$162,000.00. Such sum to be paid within 21 days from today 5 September 2012.



- The Appellant Axiom KB Limited to pay Security for Costs on the Appeal in respect of the 14<sup>th</sup> Respondent in the sum of \$102,000.00. Such sum to be paid within 21 days from today 5 September 2012.
- The sum of \$30,000.00 security paid on 25 July 2012 is to be deducted equally between the above two orders set out above.

Dated this 5<sup>th</sup> day of September 2012



Gavin J Withers  
Registrar