

CAPE ESPERANCE COMPANY LIMITED & OTHERS -v- SUCCESS COMPANY LIMITED & OTHERS

High Court of Solomon Islands

(Palmer J.)

Civil Case No. 324 of 1993

Hearing: 11 August 1994

Judgement: 16 August 1994

T. Kama for Plaintiffs

P. Tegavota for the Defendants

PALMER J: By Writ of summons filed on the 27th September, 1993 the First, Second and Third Plaintiffs sought the following orders:

1. An injunction restraining the Defendants by themselves their agents, servants or contractors from
 - (a) conducting any timber operations and from felling or removing timber whether directly or indirectly from the area of Guadalcanal covered by the First Plaintiff's Timber Licence No. TIM 2/5/81, namely Ward 1 Guadalcanal.
 - (b) interfering in any manner whatsoever whether directly or indirectly with the contractual relations between the Second and Third Plaintiffs pursuant to an agreement between the said Plaintiffs dated 29 April 1993 sanctioned by this Honourable Court on 17 May 1993 including but not limited to taking any steps which may directly or indirectly result in non-completion of the said agreement.
 - (c) interfering in any manner whatsoever whether directly or indirectly with the contractual relations between the First Plaintiff and the landowners of Ward 1 Guadalcanal pursuant to a Timber Rights Agreement dated 5 December, 1990.

The Plaintiffs also sought damages for interference with contractual relations and such other relief, plus costs.

On the same date, by Notice of Motion filed, the Plaintiffs sought an interim injunction against the Defendants worded in the same terms as the orders sought for the injunction, at paragraph 1 of the Writ of Summons.

By order of the same date, an interim injunction was granted against the Defendants.

On the 6th of May, 1994 a Notice of Motion was filed by the Defendants seeking inter alia that the order of the court dated the 27th September 1994 be discharged, and that the Defendants be allowed to commence its logging operation pursuant to its logging agreement and licence within wards 1 and 2 (formerly Ward 1) of Guadalcanal Province.

On the 29th of June, 1994 an amended notice of motion was filed which deleted the second paragraph in the first notice of motion and only sought orders for the discharge of the interim injunction.

On the 1st of June, 1994 the Plaintiffs filed a cross-summons seeking inter alia that the the interim orders of the court be made permanent.

On the 9th of August, 1994 a further summons was filed by the Defendants, seeking to have the summons of the 1st June, 1994 struck off.

I will deal with this last summons first. The ground raised is that there is a procedural irregularity in the filing of the summons. It did not comply with the requirement of the High Court Civil Procedure Rules.

Mr Kama however points to Order 69 of the High Court Civil Procedure Rules. I am satisfied Order 69 would adequately cover the irregularity raised by the Defendants in that summons and accordingly that summons is dismissed.

The Defendants rely heavily on a number of factors that have occurred since the interim injunction had been imposed. One of these was the approval of an application to the Foreign Investment Board by the First and Third Plaintiffs for the sale and transfer of the First Plaintiff's shares to the Third Plaintiff, and the specific conditions attached to that approval.

Another of the factors relied on by the Defendant was that the logging agreement of the 5/12/90, relied on by the Plaintiffs, was so vague as to the names of the landowning groups, and the names of customary land which they claim to own. It was argued forcefully by Mr Tegavota that Ward 1 & 2 of Guadalcanal Province cover such a vast expanse of many customary lands and landowning groups.

He pointed out that the Landowners who purported to sign that logging agreement did not specify which tribe they were signing on behalf of, the name of their customary land, and the boundary of their customary land. That logging agreement was silent as to those details. Any person therefore who owns a customary land within Ward 1, who may have not had anything to do with that logging agreement have been unjustifiably caught by the injunction. He submitted that the injunction had worked injustice on such landowners from utilizing their own Forests as they wished.

The Plaintiff's submission on the other hand relies heavily on the validity of the Timber Licence No. Tim/2/81, issued on the 10/6/81, and the validity of the Timber Rights Agreement dated 5 December 1990. They also rely heavily on what they consider were representations made by the Second Defendant in the meeting of the 23rd and the 25th of June, 1993 at the Hibiscus Leaf haus, in which it was alleged in the affidavit of Henry Leong Yew Kong filed on the 4th November, 1993 at paragraph 37, that the Second defendant acted on behalf of the landowners and on behalf of the First Defendant, agreed and I quote: "*... that there would be no challenge by the landowners or Success to right of CEL to operate the concession without interference (that is as the sole operator) and that they would all work constructively with CEL and Esthepia to make the operation a success.*"

In the affidavit of Roselyn Dettke filed on the 25th March 1994, at paragraph 7, she denied that she ever made any agreement with the Plaintiffs to the effect that there would not be any interferences in the operations of the Plaintiffs or that she would cooperate with the Plaintiffs to make the operation a Success. It is not for me to make any decision on this matter at this stage as this will depend so much on this Courts assessment of the witnesses and their evidence after a trial proper.

The Defendants clearly dispute that the First Plaintiffs have an exclusive licence over Ward 1 and 2. They say that the logging agreement of the 5th December 1990 is valid only over those customary lands in Ward 1 and Ward 2 over which the signatories had signed on behalf of.

In that respect they are not disputing the validity of the logging agreement and the validity of the licence as an exclusive licence over those customary lands. The Defendants however say that the licence is not exclusive over those areas which the

signatories did not own or represent and therefore had no right whatsoever in custom to grant timber rights over. The issues on ownership of customary land raised in this case are quite similar to the customary ownership issues raised in the case of Cape Esperance Co. Ltd -v- S.L.H. Timber Co-operation, civil case no. 87 of 1994, unreported case, in a similar application for discharge of an interim order made by this court, judgment delivered on the 8th of April 1994. At page 2 of the judgment, last paragraph, Mr Radclyffe, for the Defendant, raised the very same issues now raised before this court, i.e. that names of the landowning groups or their tribe, nor the names of their customary lands were not stated in the logging agreement of the 5 December 1990.

Neither was the boundary of those customary lands ever delineated on a plan. Mr Radclyffe also pointed out that the boundary of ward 1 (now ward 1 & 2) was a political or constituency boundary, and therefore did not necessarily correspond to any customary land boundary. The court concluded in that case that there was a land dispute between the parties which can only be sorted out by the courts with the appropriate jurisdiction.

The crucial issues at stake in custom in this case are quite similar.

There are some glaring uncertainties in the logging agreement of the 5th December 1990 which needs to be clarified. At page 2 of that logging agreement, paragraph (1) it reads:

"In consideration of the undertaking by the company contained in this agreement and subject to the conditions, limitations and restrictions included herein, the Representatives hereby grant to the Company the right to fell, harvest and extract timber for sale from the Customary lands on Ward 1, Guadalcanal Province."

It is a fact that there are many customary lands within Ward 1 & 2, owned by separate groups of people or tribes. It is most unfortunate that the logging agreement did not specify, which tribes or landowning groups, did the Representatives signed the agreement on behalf of. It is also unfortunate that it did not state the names of their customary lands and delineate on a map, the boundaries of those customary lands. The only boundary shown it seems, is the constituency boundaries of Ward 1 (now Ward 1 & 2).

The defendants have filed a number of affidavits of various landowners with the purpose of showing to the Court that there are different customary lands and owners of those lands within Ward 1 & 2. In the affidavit of Anthony Limanisara filed on the 29th of June 1994, he states that he is from the Kakau Tribe and owns Kolokiki Customary Land, situated in Ward 2.

In the affidavit of Raymond Juapi filed also on the 29th June, 1994 he states that he is from the Haubata Tribe and owns Vai Customary Land situated in Ward 1.

The Defendants have raised in my view a very important matter which must necessarily be sorted out before further conduct of this case. This relates to the logging agreement of the 5th December 1990. The two crucial questions in respect of that logging agreement are:

(1) *Which tribes or landowning groups did the Representatives of the 5 December 1990 logging agreement sign on behalf of?*

(ii) *What was the names of the customary lands in Ward 1 (now Ward 1 & 2), and their respective boundaries which the Representatives granted timber rights over?*

It is clear in my mind that there are serious issues to be tried. These relate to issues in custom pertaining to the Logging agreement, and estoppel in respect of the alleged representations made by the Second Defendant in the meetings of the 23rd and 25th June 1993. This however does not give an automatic right to further continuation of the injunction.

Mr Tegavota also pointed out to the Court, the terms of approval by the Foreign Investment Board of the proposed sale of shares from the First and Second Plaintiffs to the Third Plaintiff. In the affidavit of Tony Makabo, supervising Secretary of the Foreign Investment Board, filed on the 7th June 1994, he referred to the approval letter of the Foreign Investment Board marked as "annexure A" to his affidavit, in which it was stated that the Third Plaintiff's activities were to include:

- "(i) *sawn timber*
- (ii) *veneer*
- (iii) *plywood and*
- (iv) *blackboard."*

There was no mention of logging activities. However, in the letter of the then Minister for Commerce, Employment and Trade, Honourable Joses Tuhanuku to the then Minister for Forests, Environment and Conservation, Rt. Hon. E. Alebua, (a copy of which is attached to the affidavit of Tony Makabo and marked "annexure B") the Hon. Minister for Commerce Employment & Trade, stated at the second paragraph of his letter: *"The logging activity was not approved by the Board and I have discussed this issue with Henry Leong in my Office before the Board meeting in which he agreed to it."*

The clear indication from this correspondence, Mr Tegavota submits is that the sale of shares to the Third Plaintiff can only be done pursuant to those conditions. If the Third Plaintiff and or the 1st and Second Plaintiffs do not agree with those terms then they should have lodged an appeal against the decision of the Foreign Investment Board.

Mr Kama for the Plaintiffs submits that in order for the Third Plaintiff to carry out the approved activities, it must necessarily be allowed to fell and remove trees. There is however little challenge to the submission of Mr Tegavota as to the terms of approval granted by the Foreign Investment Board.

Based on this crucial submission, despite my finding that there are serious issues to be tried, it is my view that it would no longer be in the interest of justice to allow the interim injunction to continue. There is no evidence to show that the decision of the Foreign Investment Board has not been accepted by the Plaintiffs or that an appeal has been lodged against its decision. The effect of the Foreign Investment Board decision virtually means that the Third Plaintiff will not be able to carry out any logging activities on acceptance of the terms of approval. It is not clear what alternative arrangements would be pursued by the Plaintiffs in terms of log or timber supplies for purposes of carrying out the approved activities. That is a matter that the Plaintiffs may have to pursue further with the Foreign Investment Board. The discharge of the interim injunction however in my view will not affect adversely any further dealings of the Plaintiffs with the Foreign Investment Board.

The issues in custom earlier raised can be partly solved by directing the Guadalcanal Local Court to make findings on the two questions earlier posed. Their findings should assist in ascertaining the extent of the logging agreement of the 5/12/90 over the customary lands in Ward 1 & 2.

I am satisfied that the discharge of the interim injunction will not materially affect the relationship of the Plaintiffs with the Representatives of the landowners in the logging agreement of the 5th December 1990. Neither will it affect the completion of the agreement between the Second and Third Plaintiffs, dated the 29th April, 1993.

The Plaintiff's timber licence No. TIM 2/5/81 over Ward 1 & 2 is dependent on the extent of the boundaries of the customary lands in Ward 1 & 2. It is exclusive over those customary lands in Ward 1 & 2 which is covered by the logging agreement. The delineation of those boundaries is a matter which the Guadalcanal Local Court should be able to identify. The discharge of the interim injunction will not materially affect the licence of the First Plaintiff.

I have considered the summons of the Plaintiffs filed on the 1st of June, 1994 seeking an order from the Court to make the injunction permanent. The order sought in my view is misdirected. The fact that the licence of the Defendants may have been invalid pursuant to the judgment of this court in the case of Forest & Another -v- Mahlon Ali & Attorney General cc1/94, unreported, judgment delivered on the 12 April 1994, does not necessarily mean that a permanent injunction should be imposed. There is nothing to stop the defendants from re-applying and complying with the correct procedures at a later stage. Further, it would be inappropriate in the circumstances of this case where the issues pertaining to the logging agreement are yet to be clarified. The effect of a permanent injunction will be to pre-judge the issues still to be tried.

That summons accordingly is dismissed.

ORDER: I direct that the Local Court make determinations on the two questions posed within 30 days of receipt of this order or as soon thereafter. Any other questions which the parties may wish to ask the Local Court to consider should be agreed upon by the parties and filed with the court for its consideration in chambers within 7 days.

The interim injunction of the 27th September 1993 is discharged.

Costs in the cause.

(A.R. Palmer)

JUDGE