

NORTH NEW GEORGIA TIMBER CORPORATION
AND
GOLDEN SPRING (INTERNATIONAL) SOLOMON
ISLANDS COMPANY LIMITED

1ST PLAINTIFF

2ND PLAINTIFF

v.
SAKE HIVU
CHIEF NELSON PULEKEVU
IKAN ROVE
SIONE BAENASI

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT

High Court of Solomon Islands

(Palmer J.)

Civil Case No. 387 of 1993

Hearing: 31/1/95

Judgment: 10/2/95

A. Radcliffe for the Plaintiffs

P. Lavery for the Defendants

PALMER J: By notice of application filed on the 24th of November, 1994, the Defendants seek inter alia, restraining orders, against the Plaintiffs, their servants or agents,

- (a) from continuing their operations upon Gerasi Land until trial of this action,
- (b) from paying any net profits arising from their operations on Gerasi Land to any person but to pay the same into an interest bearing account until trial; and for orders to provide an account of all timber extracted from Gerasi land by volume, species and value.

It is trite law that in order for an interlocutory injunction to issue, there must necessarily be established, "a pre-existing cause of action against the defendant (in this case the Plaintiff) arising out of an invasion, actual or threatened by him, of a legal or equitable right of the Plaintiff

(defendant) for the enforcement of which the defendant (Plaintiffs) is amenable to the jurisdiction of the court". (see *The Siskina* [1979] A.C. 210 at 256, and also the case of *Merle Agorau v. Terry and Ollie Talasasa*, cc 90/94, and also note words in brackets my additions).

The question in turn of the existence of that legal or equitable right is to be determined on the first of the four criterias as set out in the well celebrated case, *American Cyanamid v. Ethicon Ltd.* [1975] A.C. 396, being, 'Is there a serious issue to be tried'.

On that question Lord Diplock stated at page 407D that: "The court no doubt must be satisfied that the claim is not frivolous or vexatious ...". In *Tetrosyl Ltd v. Silver Pain and Lacquer C. Ltd.* [1979] C.A.T. 599, per Lawton L.J.: "A serious question ... can only arise if there is evidential backing for it".

And in *Mother care Ltd v. Robson Books Ltd.* [1979] F.S.R. 466 at 474, per Sir Robert Megarry V.C.: "The prospects of the Plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the plaintiff has prospects of success which, in substance and reality, exist. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails, for he can point to no question to be tried which can be called 'serious' and no prospect of success which can be called 'real' "

The Defendants base their application on two grounds. First, that there is a continuing breach of section 4(1) and (2) of the North New Georgia Timber Corporation Act, and secondly,

that having entered into an Agreement between the First and Second Plaintiffs, there had been a failure on the part of the First Plaintiff to monitor the activities of the second Plaintiff, and which it is alleged there have been serious breaches of the Agreement entered into by the 2nd Plaintiff.

A number of affidavits have been filed in support, but before they are considered in detail it is appropriate in my view to consider the relevant provisions of the North New Georgia Timber Corporation Act, from which this claim emanates.

The Act is described as "*An Act to establish a corporation for the purpose of utilising the timber resources of certain areas in North New Georgia and for matters connected therewith or incidental thereto*". It was assented to by the Governor-General on the 5th of July, 1979. The date of commencement however was couched in the following terms:

"This Act ... shall come into operation on such date having regard to section 4(2) as the Minister may by order appoint."

The significance of this provision, and in particular the manner in which it had been so phrased becomes clear, when one considers the purposes for which the Corporation had been established (section 3(1)), the provisions which relate to the transfer of the timber rights over the New Georgia lands (section 4), and the principal functions of the Corporation (section 6), and its powers (section 7).

Section 1 simply required the Minister to have regard to, or to take into account, the requirements as set out in subsection 4(2), before appointing by Order, the commencement date of the Act. Subsection 4(2) reads:

"There shall be prior negotiations (by the Corporation) with the customary land owners in connection with the transfer of the ownership of the timber on such lands and the customary land owners shall in respect of such negotiations be entitled to receive independent legal advice provided that the negotiations and entitlement as aforesaid carried out prior to the passing of this Act (and the enforcement of the North New Georgia Timber Corporation (Amendment) Act 1984) shall be taken into consideration"

The requirements imposed by subsection 4(2) which the Minister should have regard to, were that there should have been prior negotiations by the Corporation with the customary landowners in connection with the transfer of the timber on such lands, and that the customary landowners should have been entitled to receive independent legal advice. Once those requirements have been fulfilled, then he can by Order appoint the date when the Act shall come into operation. The North New Georgia Timber Corporation Act, 1979 came into force on the 3rd day of September 1979. (see L.N. 45/1979).

The requirements of subsection 4(2) therefore must have been complied with by the Corporation. It is my understanding of the reading of the Act that the correct contextual interpretation of subsection 4(2) is that those negotiations over *'the New Georgia Lands'* were to be conducted prior to the commencement date, to the satisfaction of the Minister, before he should appoint the commencement date by Order. There has been no challenge whatsoever to the actions of the Minister in appointing the 3rd day of September 1979, as the commencement date since, and accordingly it must be accepted that he had satisfied himself that the requirements of subsection 4(2) of the Act, of which he was required by section 1 to have regard to, had been satisfactorily complied with.

The above reasoning would seem to be the only logical conclusion when we consider the wordings and effect of section 4(1) and (3) of the Act. Sub-section 4(1) of the original 1979 Act read:

"The purpose of this Act shall be to transfer the ownership of all timber standing at the date of commencement of this Act on the customary lands within the New Georgia lands to the Corporation."

By the North New Georgia Timber Corporation (Amendment) Act 1984, the purpose was slightly changed so that the transfer was to be on the statutory trusts.

Subsection 4(3) then provides:

"From the date of commencement of this Act all timber standing on the New Georgia lands together with the right to grant licences to fell, harvest and extract for sale such timber is hereby vested in the Corporation ..." (underlinings mine).

As from the 3rd of September, 1979, the ownership of all timber standing on the New Georgia lands together with the right to grant licences to fell, harvest and extract for sale such timber were vested in the First Plaintiff. As from the 30th September, 1985 that ownership was converted to the statutory trusts.

The next question that follows then is what if any, are the terms of that statutory trust. Guidance and direction can be obtained from the Act itself. At section 3(1) we read that the principal object for which the Corporation was established was *"...to promote the utilisation of*

the timber resources of North New Georgia for the benefit of the customary land owners of the New Georgia land for the public benefit".

At paragraph 6(1)(a), one of the principal functions of the Corporation is as:

"to grant licences (hereinafter called 'felling licences') for the felling, harvesting and extraction for sale of timber vested in the Corporation to such persons or corporate bodies on such terms as it shall think fit and as shall be approved by the Minister".

At paragraph 6(1)(b), another principal function of the Corporation is:

"to take all steps necessary to ensure that every holder of a felling licence shall observe the conditions imposed by such licence".

At section 7, it states that in *"carrying out any of its functions, the Corporation ... may enter into contracts..."*

On the 10th of June 1989 a felling licence was granted to the 2nd Plaintiff by the 1st Plaintiff pursuant to section 6(1)(a) of the North New Georgia Timber Corporation Act. Approval of that licence in turn was duly granted by the Minister of Natural Resources on the 14th day of June, 1989.

Was that Agreement of the 10th June, 1989, executed between the 1st and 2nd Plaintiffs a breach of any of the provisions of the North New Georgia Timber Corporation Act or of the statutory trusts? The answer in my view must be no.

Did the 1st Plaintiff have the authority to enter into such an agreement? Yes (see section 1, section 3(1), section 4, section 6(1)(a) and section 7 of the Act).

Clauses (l), (ii) and (iii) in the recitals of the Agreement and sections 2(a) and (b) of the Agreement also recognise this.

The functions and powers of the 1st Plaintiff as set out under the Act have never been challenged since 1979, and since the executions of the Agreement in 1989, and the approval of the Minister of the felling licence. The lack of knowledge on the part of the defendants of those statutory powers is immaterial. They are deemed to have knowledge, and ignorance is no defence. The 1st Plaintiff had not in anyway acted ultra vires its powers. The allegations of breach of section 4(1) & (2) of the North New Georgia Timber Corporation Act and thereby a breach of its statutory duty had been misconceived. A proper reading of the North New Georgia Timber Corporation Act will show that the transfer of the ownership of the timber rights over the New Georgia lands was effected by operation of law, (see section 4(2)), and on the statutory trusts under the North New Georgia Timber Corporation (Amendment) Act of 1984. The Agreement of the 10th June 1988 and later Agreement of 10th June, 1989 and licence of 14th June, 1989, therefore were not invalid or done in breach of any of the provisions of the Act.

It is immaterial that the Defendants are now alleging that there was no prior negotiation or consultation and that their consent had not been obtained. This does not mean that one does not have sympathy for the concerns and grievances of the Defendants. But that cannot alter the position of the law. It can only be done by Parliament.

If the Defendants had been totally opposed to logging at Gerasi, then they should have made their views known way back in 1979, prior to the passing of the Act in Parliament, and in particular, prior to the commencement of the Act. If they were never fully informed of the effect of the Act, in particular, section 4(3) of the Act, then that is unfortunate, but the position of the law is clear and unequivocal.

The second part of the two pronged attack alleges breaches of trust by the First Plaintiff in failing to monitor the operations of the Plaintiff.

Section 6(1)(b) includes one of the principal functions of the Corporation:

"to take all steps necessary to ensure that every holder of a felling licence shall observe the conditions imposed by such licence".

This function is given recognition in the Agreement signed between the 1st and 2nd Plaintiff, of the 10th June 1988 and 10th June 1989.

For instance,

At clause 20(a) of the Agreement, it reads:

"The Corporation will ensure that so long as the Company is not in breach of any of its obligations hereunder it may carry on its lawful operations on the concession area without hindrance or interference..."

At clause 23, under the sub-heading 'Termination' it provides:

(a) *The Corporation shall be at liberty to terminate this Agreement by notice in writing to the Company in any of the following events:-*

(i) *If the Company, its agents contractors or employees commit any breach of or fail to observe and fulfil or comply with any terms or conditions, restrictions or obligations imposed on it by this Agreement or by law to a material extent.*

PROVIDED that the Corporation shall not be entitled to terminate this Agreement on grounds of breach unless and until it shall have given the Company written notice of the breach or breaches complained of together with reasonable time in which to remedy such breach or to invoke the arbitration proceeding set out in this Agreement where such proceeding could be relevant."

The affidavit evidence filed before this court alleges a number of breaches of the Agreement entered into between the First and Second Plaintiff, (*see para. 11 of the affidavit of Nelson Pulekevu filed on the 24th of November, 1994; para. 4, 5, 6, and 7 of the affidavit of Joseph Buka Zio filed on the 24th of November, 1994; and the affidavits of Brent Tegler and Kenneth Roga both filed on the 24th of November, 1994*).

The affidavit evidence also showed that the alleged breaches were duly reported to the First Plaintiff for appropriate action. In the exhibit marked "JBZ 2" attached to the affidavit of Joseph Buka Zio, filed on the 24th of November, 1994, the First Plaintiff were made aware of the concerns of the landowners on what the writer of that letter described as 'appalling logging practices', as early as June of 1994.

There is evidence to show that no action or little action has been taken by the First Plaintiff in its capacity as trustee for the landowners against the second Plaintiff for those alleged breaches.

There is evidence to show that the rights of the landowners as sought to be protected in the Agreement by the Corporation on the statutory trust, had been violated and continue to be violated. Those other customary rights, which include rights to clean rivers and streams, and the preservation and protection of fruit trees and Tambu sites etc., have not been transferred. Only rights to the timber were transferred, but on the statutory trusts, and therefore the Corporation is under obligation to enforce the terms of the Agreement stringently, in the interest and for the benefit of the landowners.

I had pointed out that the Corporation had been made aware of the complaints of the landowners as far back as June of 1994 and again in October and November of 1994. Nothing too had been done by the Corporation. This Court recognises that the Agreement between the First and Second Plaintiff does contain provisions which set out the procedures to be followed when addressing such breaches. However, the 1st Plaintiff has failed to respond to the complaints of the landowners and failed it seems too, to take such steps as are necessary to investigate into those complaints as part of its duty to the landowners. The alleged breaches of the rights of the land-owners continue.

These are serious issues, which have been raised and there is evidential backing for them.

In his submissions before this Court Mr. Radcliffe sought to submit that this Court should not grant the injunction on the basis that there had been illegal action taken against the 2nd Plaintiff's machineries. Mr. Lavery however correctly pointed out that this was a matter which had already been dealt with in an earlier judgment of this Court given on the 16th of September, 1994. It has little relevance therefore to the merits of this application.

I am satisfied that the injunction sought against the second Plaintiff should be granted forthwith.

On the requirement of an undertaking for damages that is dispensed with.

As to the orders sought under paragraph 3(b), there is also evidence in the affidavit of Joseph Buka Zio at paragraph 8, that Royalty payments and distribution had not been properly and fairly done. That is sufficient for purposes of this application to grant the order sought also.

The order sought under paragraph 3(c) is also granted.

Order:

- (i) *The Second Plaintiff, their servants or agents is restrained from continuing their operations upon Gerasi Land until further orders of this Court.*
- (ii) *The 1st and 2nd Plaintiffs are restrained from paying any net profits arising from their operations on Gerasi Land to any person, but to pay the same into an interest bearing account until further orders of this Court.*

(iii) *The 1st and 2nd Plaintiffs are to provide an account of all timber extracted from Gerasi Land by volume, species and valued.*

Costs in the cause.

ALBERT R. PALMER