JOHN WESLEY TALASASA
-v-
ATTORNEY GENERAL
THE COMMISSIONER OF LANDS
THE WESTERN PROVINCIAL GOVERNMENT
SOLOMON ISLANDS WATER AUTHORITY
SOLOMON ISLANDS ELECTRICITY AUTHORITY
SOLOMON TAIYO LIMITED

High Court of Solomon Islands
(Muria, CJ.)
Civil case No. 43 of 1995
Hearing: 26 April 1995
Judgment: 15 May 1995

John Wesley Talasasa Plaintiff
C. Ashley for 1st, 2nd, 3rd and 4th Defendants
A. Radclyffe for the 5th Defendant
J.R. Moti for the 6th Defendant

MURIA CJ: There are two applications now before the Court. The first is an application by the plaintiff for an interlocutory injunction against the defendants and the other application is by the fifth defendant seeking to have the plaintiff's claim as against it struck out and also challenging the *locus standi* of the plaintiff. For convenience it was agreed that the two applications be heard together.

In this judgment, I shall deal with the applications separately and I shall now consider the first one, the plaintiff's application.

The Plaintiff's Application.

In his application the plaintiff seeks an interlocutory injunction restraining all the defendants, their servants or agents from continuing their act of trespassing upon his land known as Kazukuru Left Hand Land (KLHL) which is where the river called Ziata River is situated. In support of his application, the plaintiff relied on a number of affidavits which he had filed in Court.

Basically the plaintiff's case is that he has legal rights in KLHL which the defendants are interfering with. Those rights he says, are confirmed by the cases of *Kevisi -v- Talasasa* (1983) SILR 87. CLAC No. 2 of 1980 and Land App. Cas. No. 23 of 84. As such when the fourth, fifth and sixth defendants entered the land without the plaintiff's permission, they were trespassing. The first, second and third defendants, says the plaintiff, had sanctioned the other defendants actions and are equally responsible as well. They all should be restrained, says the plaintiff.

I will deal with the plaintiff's complaint against the first, second and third defendant later but now let me first deal with the complaints against the fourth, fifth and sixth defendant.

The fourth defendant is a Statutory Authority established under the Solomon Islands Water Authority Act 1992 which came into force on 17th May 1993. One of the functions of the Authority is "to provide, construct, operate, manage and maintain buildings, works, systems and services for impounding, conserving and supplying waters for domestic, industrial, commercial and other purposes."(* see section 7(d) of the Act.) The Act also provides that in order to carry out those functions the Authority is empowered by section 10 of the Act "to do anything which is calculated to facilitate the discharge of its functions, or is incidental or conducive to their discharge." That is clearly a very wide power given to the Authority.

It is not clear on the affidavit evidence nor in the plaintiff's submission as to what exactly the fourth defendant did on the land in question. But I deduce from the plaintiff's argument in reply that the fourth defendant had prior to 1993 entered the land and installed water pump for the supply of water to the sixth defendant's operation at Noro and to the Noro township itself. By virtue of section 59 of the Act such acts of the then Water Unit shall be deemed to be the acts of the Authority. That was the act complained of by the plaintiff as trespass.

In one of his notes of "Instruction" sent to Attorney General by fax on 8 February 1994, the plaintiff reiterated his position saying that -

> *"The Government, Water Authority and SIEA do not have the slightest right under any existing law, including SIEA Act, Water Act or Road Act to do what they have been doing on my land as is clear from the terms of s.8 of the Constitution and ss.59 - 75 inclusive of the Lands Act."*

On the materials before the Court, including the plaintiff's affidavits, there seems to be suggestions that the Authority may have been given permission to enter the land in question which is coloured yellow in Exhibit "JWT 8." I say, *may have been given permission* as the truth of it is yet to be established and this is not the time to do that.

There can be no doubt that the plaintiff has shown that he has legal interest in KLHL. I accept that the earlier cases mentioned do show the legal interest of the plaintiff in KLHL.
However, the extent of that legal interest is another matter which can be best left to be dealt with when the claim of the plaintiff is fully considered.

The fifth defendant is a statutory authority established under the Electricity Act. One of its functions is to construct, maintain and operate supply lines, generating stations transformer stations and all other appropriate stations, buildings and works in Supply Areas so that it can secure the supply of energy. (see s.14 of the Act)

In so far as the plaintiff's complaint gainst the fifth defendant, it is again an allegation that the defendant has entered the KLHL and laid electricity cables upon the land without the plaintiff's permission. Relying on his right to the land, the plaintiff argued that no one else is lawfully able to grant permission to the fifth defendant to enter onto the land except himself or his tribe who are direct descendants of Qulamali.

The fifth defendant did not dispute that it had laid cables from Noro to Ziata pumping station and it intended to do so to Munda. In response to the plaintiff's allegation of trespass, the fifth defendant relied on the verbal permission given to it by one Rex Biku whom the fifth defendant recognises as having authority in custom to give such permission to enter KLHL. It will be for the plaintiff to show that the fifth defendant is a trespasser.

No doubt the right to grant permission to enter the land in question stems from the right of ownership of the land. The fifth defendant's reliance on Mr Biku's authority is a direct challenge to the plaintiff's right in KLHL. That must surely present a serious issue to be tried.

The sixth defendant is a company incorporated in Solomon Islands pursuant to a Joint Venture Agreement between the Solomon Islands Government and Taiyo Gyogyo Kabushiki Kaisha of Japan and it is located at Noro in the Western Province. Since its relocation at Noro, the sixth defendant has been operating a cannery for canning and other processing of tuna since 1989.

In order to assist the development of the industry at Noro as well as to support the development of the new township and the international port at Noro, the government secured multi-lateral and bilateral financial assistance from aid donors. Following the securing of funds, the Government commissioned the construction of roads, the installation of water pumps and laying of pipes for supply of water to the sixth defendant's cannery. In this regard and following arrangement with the fourth defendant, the sixth defendant agreed to assist the fourth defendant by providing fuel, transport, spare parts and materials as well as repair and maintenance services which were required to keep the Noro Water Pumping Station fully operational.

It is further argued by Mr. Moti of Counsel for the sixth defendant, that in so far as the complaint against his client is concerned, the plaintiff has not shown what the nature of the trespassory act is. Counsel argued that the sixth defendant is only a consumer of water and that the plaintiff was unable to show how his legal interest in the land has been affected because of that.

Mr. Moti further argued that the subject matter in dispute is land, yet the plaintiff is seeking to restrain the sixth defendant from the use of the water from the Ziata River for its operation at Noro. To this Counsel argued that the plaintiff has no absolute right over the water itself and so the sixth defendant could not be restrained as to the use of the water.

As a matter of consideration in the balancing exercise, the Court, counsel argued, must bear in mind the hardship which the sixth defendant would suffer disproportionately by the grant of an injunction in this case. It would result in laying off all of the sixth defendant's 2,219 employees and a loss of $400,000.00 per day due to the cessation of production activity.

The plaintiff insisted that the supply of water to the sixth defendant should ceased immediately and that the sixth defendant can close down its operation temporarily until a water source is found in the crown's land in

Noro and that the residents of Noro township can all go home. I do not say, at this stage, that the plaintiff is entitled or not entitled to shut off the flow of water through to the sixth defendant or the residents of the Noro township. But he has raised an issue which ought to be considered, that is, whether his legal interest in the land includes a legal interest in the water to which he said he was entitled. Further even if he has any such legal interest in the water does it give him the right to refuse to supply the same to the sixth defendant and the township of Noro? Again these are issues which are to be considered at a later stage.

As far as the first, second and third defendants are concerned, the plaintiff says that they are supporters of the fourth, fifth and sixth defendants. The plaintiff concedes that no injunction can be issued against the crown and that it was not the crown who committed the acts complained of. However, the injunction can be issued against the fourth and fifth defendants who are public authorities established by the government under statutes.

The question of interlocutory injunction has been the subject of judicial discussions in numerous cases both in our jurisdiction and other common law jurisdictions. The now leading case on this issue is the *American Cyanamid Co. -v- Ethicon Ltd* [1975] 1 All E.R. 504. It is worth however reminding oneself the object of an interim injunction as stated in *The Eastern Trust Company -v- MacKenzie Mann & Co. Ltd* [1915] AC 750. At page 760 the Court explained the reason for the existence of Court's jurisdiction to grant interlocutory injunction. The court stated:

> *"The existence of such a jurisdiction has been part of the equitable jurisdiction of our Courts for centuries, and is necessary in a case like the present for the safe preservation of the subject - matter of the action until hte rights of the parties can be finally determined."*

What the Court is being asked here is basically that: to preserve the subject matter until the issues relating to the rights of the parties have been tried and determined.

The approach to dealing with the question of whether or not interlocutory injunction should be granted in a particular case has been dealt with in the *American Cyanamid Co. -v- Ethicon Ltd* case. It will not be necessary to repeat at length what the House of Lords, particularly the speech of Lord Diplock, said in that case. Suffice it to say that the summary of the principles as laid down by Lord Diplock and applied in *Nelson Meke -v- Solmac construction Company Ltd* CC44 & 45/82, *SIG -V- SIPEU* (1991) CC No.102/91 and *Beti & ors -v- Allardyce Lumber Company & Ors* (1992) CC No. 45/92 is as follows:

1. *There must be shown to be a serious issue to be tried. This means a triable issue beyond a vexatious or frivolous matter.*

2. *Once satisfied there is a triable issue, the Judge should apply his mind to the question of the balance of convenience. This falls into three parts.*

(a) Could the Plaintiff, if denied an interim injunction and supposing he wins his case, he adequately compensated in damages for his loss?

If he would, usually no interim injunction will be granted, if he would not, then,

(b) If the interim injunction issues, carrying, as it would, an undertaking that the Plaintiff will abide by any order for damages the Court may make, will the Defendant thus be adequately compensated for any loss he may suffer?

If he would, then the interim injunction should be granted.

(c) If doubt remains, all the other factors should be taken into account, the Court bearing in mind all the time the 'heart' of the matter, that is the desirability of preserving intact the state of affairs which existed at the time when the Defendant embarked upon the activity complained of in the substantive action.

3. If, after all these steps have been taken, the question remains in doubt, then the relative strength of the parties cases, as put in evidence orally or, as is the usual case if not the invariable rule, upon affidavit, should be enquired into and, upon consideration of the merits, a decision taken.

On the principles as set out, I ask myself whether there is a serious issue to be tried, that is to say, whether or not the applicant's case is vexatious or frivolous. On the allegations raised by the plaintiff against each of the fourth, fifth and sixth defendants, I have already intimated that the plaintiff has raised issues which should be considered by the Court, although, not at this stage. They are issues which affect the rights of the plaintiff as well as those of the defendants. Those issues are serious and must be tried.

The test in *Beecham Group Ltd -v- Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 that the plaintiff has to show that there is a probability that at the end of the trial of the action he will be held entitled to a relief inapplicable to the circumstances of Solomon Islands and should not be applied as a test in this kind of interlocutory application.

In the Beecham Group Ltd case the High Court of Australia said, (at page 622):

"Whether the plaintiff has made out a prima facie case in the sense that if the evidence remains as it is there is a probability that at a trial of the action the plaintiff will be held entitled to relief ... How strong the probability needs to be, depends, no doubt, upon the nature of the rights he asserts and the practical consequences likely to flow from the order he seeks"

In the *American Cyanamid* case, Lord Diplock rejected the use of such expressions as 'a probability', 'a strong prima facie case' since such expression would lead to confusion. With His Lordship's view, I respectfully agree. No doubt the Court must be satisfied that the plaintiff's claim is not vexatious or frivolous which means

that there is a serious issue to be tried. But where a party is seeking only an interlocutory injunction which is a form of temporary relief the igours of having to show 'probability of success' or 'a prima facie case' or 'a strong prima facie case' may very well thwart the need to prevent a threatened violation of the applicant's legal right to which he appears to be entitled. This is particularly so in Solomon Islands where a party to an action sometimes has to present his own case because he is unable to secure the services of a legally qualified practitioner.

In both *Beti & ors -v- Allardyce Lumber Company Ltd & ors (above) and Hitukera -v- Hyundai Timber Company Limited & another* (1992) CC132/92) the plaintiffs had shown on the materials before the Court that their cases were not vexatious or frivolous, that there were serious issues to be tried relating to their legal rights which they appeared to be entitled based on the materials before the Court.

The two cases just mentioned were considered in *Aqorau -v- Talasasa* (1994) CC90 of 1994 (Judgment given on 22 June 1994) where the Court refused an application to grant interim injunction against the defendants since on the material before the Court it had not been shown that the plaintiff had any basis for her claim of ownership of Sisiata Land. She had to show the existence of her legal right to which she appeared to be entitled in the land. That she must do so on the material furnished to the Court. She failed to do so and the Court rejected her application for interim injunction.

In the present case there is a volume of material before the Court which at the very least show the existence of the plaintiff's legal right to which he appears to be entitled in the land in question. That right has been challenged and must be tried.

Having now found that there is a triable issue here, the next question to be considered is the balance of convenience which in turn calls for three considerations which I have set out earlier in this judgement. I have apply my mind in this balancing exercise bearing in mind the need to protect the plaintiff's right from being violated against the corresponding need of the defendants to be protected from injury suffered from being prevented from exercising their legal rights for which they could not be adequately compensated.

The plaintiff argued that the defendants, that is, the fourth, fifth and sixth defendants could not show the basis of their rights to do what they had done on the land. I cannot agree to that assertion. On the material before the Court, the three defendants have at least shown that they have statutory and/or contractual rights to which they appear to be entitled and on which they could rely in his case. Of course, whether or not they can succeed in relying on those rights is another matter.

There can be no doubt that the granting of an injunction would affect the operation of the fourth, fifth and sixth defendants. It would not be too difficult to imagine what effect a restraining order would have on the project under taken by the fourth defendant in the area for the supply of water to the sixth defendant and township of Noro. Equally a restraining order on the fifth defendant would cause drastic effect on the fifth defendant's operation of the sixth defendant. The fifth defendant is currently laying cables to enable power to be adequately supplied to the Noro township and its residents. As to the sixth defendant, it has 2.219

employees and producing approximately $400,000 per day by way of income from its tuna cannery. A restraining order would no doubt greatly affect that operation. There is a possibility that the sixth defendant would have to lay off most, if not all, of its 2,219 employees as well as incur a loss of $400,000.00 per day.

I ask myself whether irreparable harm would be done to the applicant/plaintiff in this case if the interim injunction is not granted. It must be noted that the plaintiff has not objected to the acquisition of the site where the Ziata River Water source is. His objection is to the defendants entering onto the area when the acquisition proceedings have not been completed. Paragraph 31 of the plaintiff's affidavit sworn on 21 February 1995 confirms this. Its says:

> *"31. My firm stand on the issue since 1984 has always been that the above named Defendants have no right to do in the said land area what they have been doing unless and until the acquisition process is fully completed. Annexed hereto and filed herewith are copies of some of my letters on the issue marked Exh. "JWT 14". All this correspondence is ignored by the abovenamed Defendants."*

One of his letters dated 4 January 1994 was addressed to the Commissioner of Lands, the second defendant, in which the plaintiff said that he looked forward to "the appointment of the acquisition officer and the issuing of the notice of hearing as soon as possible with a minimum of any further delay."

I am of the firm view that balancing the interest of the plaintiff against those of the defendants here, no irreparable harm would be caused to the plaintiff if the injunction is not granted. On the other hand, I agree with Counsel for the sixth defendant that the harm which the defendants, particularly the sixth defendant, would suffer would be so disproportionate if an injunction is to be issued against the defendants. In such situation injunction ought to be refused. *see Elwes -v- Payne (1879-80)* 12 ch.D 468.

From the material before the Court, the solution to this matter seems to lie in the completion of the acquisition process during which the rights of the plaintiff and any other persons claiming interest in the Ziata River area are to be determined. It does not lie in a restraining order.

The second defendant has given an undertaking to proceed with the acquisition proceeding as a matter of priority. I urge that this undertaking be seriously pursued.

Thus although I find that there is a triable issue here, when applying the second test, I am clearly of the firm view that the balance of convenience lies in favour of the defendants. For that reason and the other reasons given in this judgement, I must refused he plaintiff's application for an interim injunction in this case.

The Fifth Defendant's application

In view of what has already been said earlier in the plaintiff's application, I think the fifth defendant's application can be disposed of very briefly.

As I have mentioned he fifth defendant's application is to have the plaintiff's action struck out on the ground that it discloses no reasonable cause of action and that the plaintiff has no *locus standi* to bring the case. Counsel for the 1st, 2nd, 3rd, 4th & 6th defendants do not support the 5th defendant's application.

In short, Counsel for the fifth defendant argued that the plaintiff has not particularised the alleged trespass against the fifth defendant. Counsel further argued that the plaintiff has to show that the fifth defendant has been trespassing in the particular areas concerned. It has been argued that the fifth defendant had obtained permission from Mr. Biku and so the plaintiff cannot be said to have a cause of action against the fifth defendant.

The power of the Court to stay or dismiss actions and to strike out pleading on the ground that it discloses no reasonable cause of action or that it is frivolous or vexatious is discretionary both under the High Court (Civil Procedure) Rules and the inherent jurisdiction of the Court. See *Christopher Columbus. Abe -v- Minister of Finance &, Attorney General* (1994) CC197/94 (Judgement given on 12 August 1994). The purpose of conferring such jurisdiction on the Court is to enable the Court to stop cases being launched which are obviously frivolous or vexatious or obviously cannot be sustained.

From what I have already said in relation to the plaintiff's application, I feel the plaintiff's case cannot be said to be obviously frivolous or vexatious. In a nutshell Counsel for the fifth defendant is really saying that the plaintiff's case is so weak as against the fifth defendant that it ought not to be permitted to be pursued any further. The fifth defendant may well have a defence to the action but that is a matter to be dealt with when the plaintiff's substantive claim is considered. As I pointed out in *Christopher Columbus Abe -v- Minister of Finance & Attorney General* that so long as the pleadings disclose some cause of action or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed, is no ground for striking out.

In this case I am not persuaded that I should strike out the plaintiff's action as disclosing no reasonable cause of action and I refuse to do so.

The second argument advanced by the Counsel for the fifth defendant is that the plaintiff has no *locus standi* to bring the action. Counsel submitted that although the plaintiff has interest in the KLHL, he is simply a "mere-busy body", and has been shown to be a vexatious litigant. It is further argued that the plaintiff would suffer no damage at all by what the fifth defendant has done

I do not think I need to deal with this matter in so many words, as I am clearly of the view that the plaintiff possesses the *locus standi* in this case. He is undoubtedly one of the parties whose rights and interest will be affected by the acquisition process over the land where Ziata River is situated. The persons with whom the defendants, including the fifth defendant, may find that they have to deal with after the acquisition

proceedings are those whose rights are determined following that acquisition proceedings. One of those contestants is the plaintiff.

The plaintiff does have a clear interest in the matter now before the Court. I do not think he is a 'mere busy-body" meddling officiously in other people's affairs, to use the phrase of Lord Denning MR in *Federation of Self-Employed case* [1980] 2 W.L.R. 579 nor do I think he is a vexatious litigant.

In the circumstances the fifth defendant's application must also be refused.

The result is that both the plaintiff's and fifth defendant's applications are refused.

Just before I leave this matter, a point has been raised by Counsel for the sixth defendant that nobody has absolute right over flowing water, citing the cases of *Williams -v- Morland* (1824) 107 E.R. 620, and *Liggins -v- Inge* (1831) 131 E.R. 263. This is the common law position and it is basically saying that no body can claim right of ownership in the flowing water itself. This common law principle is best described by D.E. Fisher in NATURAL RESOURCES LAW in Australia, A Macro-Legal System in Operation, The Law Book Company Limited (1987) pp. 383 - 384 where it is stated that:

> *First there is water that simply collects or gathers either naturally or artificially on the surface of the land. Generally it belongs to the owner of the land. Then there is water that flows in a known and defined channel on the surface of the land or underground. Finally water may flow underground in an unknown channel or merely percolate through the soil and lower strata. All of these forms of water are important. The last two categories moreover are similar. According to the common law there can be no ownership of flowing water. Such water is* ***publici iuris****. It is a matter of public not private right. The legal system affords access to such water for use by abstraction and the right is lost as soon as possession is abandoned. The use of water is thus related to but nevertheless separate from the ownership of land."*

In the light of that principle, counsel for the sixth defendant said that the plaintiff can claim no right of ownership in the flowing water of Ziata River. In response the plaintiff asserted that he has such right and asked the question that if nobody has right of ownership over flowing water, then why was it that SIWA (fourth defendant) charged consumers for use of the water? I feel the answer to that question can wait until the plaintiff's rights over the land where Ziata River is situated is considered.

The plaintiff is obviously claiming the right over the flowing water in the Ziata River. As such I shall say no more on the issue at this stage, save to emphasise that when it comes to be considered, the court will have to bear in mind the guiding principles declared under the Constitution, one of which is that:

> *"the natural resources of our country are vested in the people and the government of Solomon Islands."*
> *(see Preamble to the Constitution).*

The common law principle that flowing water is *publici juris* must therefore be considered in the light of the guiding Constitutional principle that I have just mentioned.

The other point is that raised by the plaintiff who argued that the defendant are not "Solomon Islanders" within the definition provided under section 2 of the LTA (Cap. 93). As such the restrictions constrained in section 221 of that Act apply to them and if that was so, argued the plaintiff, then the defendants have committed an offence under section 222(2) of the Act. Upon reading the provisions mentioned and other relevant provisions of the Act, I think this is an unsound point to pursue and I need not deal with it.

The result of the two applications as I have said is that they are both refused.

(G.J.B. Muria)
CHIEF JUSTICE