

TUNG SHING DEVELOPMENT LIMITED

v.

**YIM KWOK, JOHN GARO AND JUSTIN AGOFI TRADING
AS JAY WILLIAMS EXPORTERS**

And

AFEALA MILLING LIMITED

High Court of Solomon Islands

(Palmer J.)

Civil Case No: 66 of 1995

Hearing: 5/4/95

Judgment: 7/4/95

A. Radclyffe for Plaintiff

Ms. J. Corrin for Defendants

PALMER J: The Plaintiff is a limited Company incorporated in Hong Kong. On the 25th of June 1993, it signed a joint venture contract (J V Contract) with the First Defendants, in which it was agreed by the parties to set up a joint venture company, to be locally incorporated and to be known as Tung Shing J W (Solomons) Company Ltd (J V Company). It was agreed that the Plaintiff was to hold 60% of the shares, and the First Defendants 40%.

At paragraph 5 of the Statement of Claim filed on the 3rd of March 1995, together with the Writ of Summons, it was stated that the J V Company was to carry on logging and milling of timber and the export of round logs and milled timber. The J V Company however, does not hold a licence from the Ministry of Forestry, Environment and Conservation to do any of the above. Instead it relied on the MILLING LICENCE held by AFEALA SAWMILLING, numbered TIM. 3/117, dated the 9th March 1993, as varied by a letter dated 22nd June 1993 from the Commissioner of Forests.

That variation enabled Afeala Sawmilling to export logs on a quota basis. By letter dated the 6th of September 1993, the First defendants, who were the owners of Afeala Sawmilling, assigned all their rights and interest in the said licence, as varied by the said letter of the 22nd June, 1993 to J V Company (see Exhibit "K.C.4" attached to the affidavit of Kevin Chui filed on the 3rd of March, 1995).

The J V Company then commenced logging operations but a dispute has flared up involving the First and Second Defendants in which it was claimed that the proceeds of the sale of the logs felled by the J V Company do not belong to it or the Plaintiff.

There were a number of provisions in the J V Contract referred to in paragraph 9 of the said Statement of Claim, in which it has been alleged by the Plaintiff that the First Defendant had been in breach of, having been wrongfully induced and procured by the Second Defendants to do so. The Plaintiff's claim in essence therefore is founded on a breach of terms of the J V Contract, and consequential orders.

By summons ex parte filed on the 3rd March, 1995, an interim injunction was sought against the First and Second Defendants inter alia, from carrying on business contrary to the terms of the J V Contract and the Assignment of the licence.

By order dated the 6th March, 1995, the orders sought under the ex parte summons filed on the 3rd March, 1995 were granted.

The Defendants now apply by way of summons filed on the 17th of March, 1995 for orders inter alia, that the Order made on the 6th March, 1995 be discharged.

A number of grounds have been advanced in support of that summons.

The first matter raised is that there is no serious issue to be tried, as a precondition to ground the issue of an injunction as set out in the authoritative case, of *American Cyanamid Co.-v-Ethicon Ltd. [1975] A.C. 396*.

Ms Corrin, of Counsel for the defendants submits that neither the Plaintiff, nor J V Company hold a licence to fell, extract and export logs under the Forest Resources and Timber Utilisation Act. She also pointed out that the Plaintiff and J V Company do not have Foreign Investment Board approval to export logs. In her submissions, Ms. Corrin seeks to suggest that these factors alone are sufficient to show to the Court that there is no serious issue to be tried.

With respect, that is an over-simplistic approach to the claim of the Plaintiff. In the Statement of Claim at paragraph 4 and in the affidavit of Kevin Chui filed on the 3rd of March, 1995, at paragraph 2, there is mention of a joint venture contract (J V Contract) dated the 25th June, 1993 having been made between the Plaintiff and the First defendants. Article 10 (a) (i), (ii) and (iv) of the J V Contract stated as follows:

"J W. (that is the First Defendants) shall:-

- (i) complete and submit the application for Foreign Investment Board's approval and other necessary permits for the establishment of the J V Company;***
- (ii) Ensure that the provisions of the Forests and Timbers legislation regarding logging licences and logging agreements with customary land owners are fully complied with;***
- (iii) To ensure that Afeala Sawmill's concession held under Licence Number TIM 3/117 of 5157 hectares in Wards 34 and 35 in Malaita Province is immediately assigned to the J V Company's name and any further extensions of the concession shall be in the name of the J V Company."***

Under Article 10(a)(i) and (ii), the responsibility for the matters raised by Ms. Corrin actually lies with her clients, the First Defendants. It would be material therefore, to ascertain the part to be played by the First Defendants, the extent of their responsibility, and whether they are at fault or not, that the J V Company has not been issued with Foreign Investment Board approval, and the reasons why the Company has been allowed to commence operations, bearing in mind that the First Defendants are closely involved in its activities. These are matters which should be canvassed proper in my view on trial.

Under Article 10(a)(iv), it is stipulated that Afeala Sawmill's concession held in Licence Number TIM 3/117 was to be assigned to J V Company.

In the said affidavit of Kevin Chui, at paragraph 5, he stated that the First defendants had assigned all their rights and interest in the said licence, by letter of assignment dated the 6th of September 1993. In paragraph 3 of the said affidavit, Kevin Chui stated that Afeala Sawmill had a milling licence, and by letter of the 22nd June, 1993, an export quota was granted.

By reason of that assignment, the J V Company commenced operations in the said concession area. The authority of J V Company to commence operations therefore is based on Afeala Sawmill's licence and on the assignment made by letter of the 6th September, 1993.

Ms. Corrin has sought to argue that the assignment of that licence is invalid as it is contrary to what the Commissioner of Forests had stipulated in the terms of the licence. Mr. Radclyffe on the other hand argues that what was assigned was the benefits of that licence. Contrary to what Ms. Corrin has said, it is my view that the question as to the validity and legality of that assignment is a serious issue to be tried. It is a matter on which proper and full submissions should be made to the Court before a decision is given. It is no part of the Court's function at this stage of the litigation to decide difficult questions of law which call for detailed argument and mature considerations (*American Cyanamid at p.407 G-H*).

The question as to the effect of a lack of approval by the Foreign Investment Board to the activities of the J V Company and its inter-relationship with the question of the validity of the assignment are serious issues for consideration before this court.

Further, evidence has been adduced from the affidavit of William Arthur Dyer filed on the 17th of March, 1995, at paragraph 4(ii) that the letter of assignment had been signed for the limited purpose of appeasing Chui's superiors in Hong Kong, as otherwise they would not continue with their investment in Solomon Islands. Mr Dyer deposed that that document would only be used for that limited purpose. The problem with accepting this evidence on its face at this point of litigation is that it is possible that it may be subjected to challenge at trial. As on points of law, it is not part of the court's function at this stage to try and resolve conflicts of evidence on affidavit as to facts which they may at a later stage rely on. What this court ultimately needs to determine at this point of time is that it must be satisfied that the claim of the Plaintiff is not frivolous or vexatious.

Another issue raised by Ms. Corrin is that the Agreement had been frustrated by reason of the fact that neither the Plaintiff nor J V Company had Foreign Investment Board approval to carry out any logging operations and accordingly, she submits that the contract had been brought to an end. This issue with respect raises the doctrine in law, of frustration, and which in my view can only be properly addressed after both parties have been given an opportunity to make full and fair representations as to its application in the facts of this case. In other words, this also raises a serious question to be tried.

Another matter raised by Ms. Corrin relates to the claim of a breach of the agreement by the Plaintiff and J V company in not establishing a timber mill pursuant to the Milling Licence that was assigned to it. This issue, with respect, can only be properly adjudicated upon after all relevant issues and evidence had been thoroughly canvassed. That is not the function of the Court at this stage as has been repeated.

As to the question therefore whether there are serious issues, the answer in my view must be in the affirmative.

The second criteria raised in the American Cyanamid case, is the question of adequacy of damages. Ms. Corrin submits that damages will be an adequate remedy. To a certain extent that is correct because the Plaintiff's interest ultimately is his share in the sale proceeds of the timber exported, as contained in Article (12) being, at 60% of the profit.

On the other hand, the Plaintiff's right or entitlement to that proportion of the profit as claimed would have been breached had the interim injunction been not imposed. If the injunction is to be discharged, then that right will be breached and continue to be breached.

One of the purposes of an injunction is to try and maintain the status quo as far as is possible, pending the determination of the serious issues raised in the action, so that at the end of the day, the Court could do justice to either party in as far as it is possible, after a trial proper.

The concern of the Plaintiff is that with no injunction, the fruits of the current operations at the concession area, from which the entitlements of the Plaintiff is derived, could be dissipated beyond the control of this Court.

There is no evidence before this Court to show that the Defendants will be able to front up with the money that the Plaintiff is claiming if the Plaintiff wins its case at the end of the day. There is also a loan agreement which has been exhibited to the affidavit of Kevin Chui filed on the 3rd of March, 1995, marked "KC2", in which it stipulates at clause (3)(i) and (ii) that three quarters of the 40% share of the net proceeds of the First defendants from each shipment of logs will be paid to the Plaintiff as repayment instalments of a loan of USD400,000. Whether that loan had been dispensed or not is not clear at this stage, but that is sufficient evidence that the Plaintiff's claim at this point of time as against the defendants is not frivolous or vexatious and will or could involve substantial sums of money.

It is my view therefore when assessing the question of adequacy of damages that some sort of restraining order should be maintained, in particular with reference to the proceeds of sale of the logs.

Another matter raised by Ms. Corrin relates to the question of unstamped documents being inadmissible in a court of law, under the Stamp Duties Act. She submits that because the J V Contract and the loan agreement were not duly stamped, that they are inadmissible and should not be taken cognisant of by this Court.

With respect, that is a matter again which can be determined after it had been properly canvassed. That can be done by way of a summons seeking the Court to determine a

preliminary question of law as to the effect of section 6 of the Stamp Duties Act, or it can be argued at trial. There is however, section 11 of the Stamp Duties Act, which makes provision for late stamping of documents.

Another matter raised relates to an allegation of a failure on the part of the Plaintiff to make frank and full disclosure to the Court. First, she referred specifically to a failure on Kevin Chui to inform the Court of the fact that an application dated the 28th of May 1993 was submitted to the Foreign Investment Board for approval of the joint venture but was rejected.

The only application approved was limited to sawmilling for local and export markets. The approval was made on the 9th of August, 1994.

With respect, I am unable to accept that the non-disclosure about the rejection was relevant, when weighed against the claim of the Plaintiff, which was based squarely on the milling licence that had been assigned, together with the variation granted, in the letter of the 22nd June, 1993, which allowed logs to be exported on a quota basis. That factor it seems would not have affected the weighing operation of the Court as to whether an injunction should be granted or not in this case.

The second allegation relates to a matter of evidence which at this point of time should be best left till trial before any determination should be made.

The third allegation contained in paragraph 6 of the affidavit of William Dyer however is relevant. It stated that the Malaita Investment Board had revoked its approval of the Company's foreign investment. Exhibit "WDI" attached to William Dyer's affidavit makes this point very clear. The effect of this means that any further operations within Ward 28, West Kwaio could no longer be proceeded with and the Company may have to consider winding down its operations.

It is immaterial that there is no intention on the part of the Plaintiff or Kevin Chui to positively mislead or unfairly influence the Court by suppression of the material facts. I am satisfied that there has been a breach of this requirement and that accordingly the Plaintiff must bear the consequences of that breach.

Finally, Ms Corrin points out that the Plaintiff had not provided the usual undertaking for damages. Mr Radclyffe on the other hand submits that the Courts had not required such an undertaking in a number of cases. However, it needs to be made clear that that requirement had only been dispensed with in a number of exceptional circumstances. The Plaintiff's case does not with respect fall within those category of cases and accordingly, an undertaking should have been given in this instance.

At the end of the day, the Court should seek to ensure that the interests of the parties are preserved pending the final determination of the issues raised before this Court.

Weighing all the above factors raised before me, the proper order to make is to have the Order of the 6th March, 1995 discharged save paragraph (a). An undertaking for damages to be filed in 7 days.

As to the order sought in paragraph 2 of the Summons, it is my view that it is not proper in the circumstances of this case to so grant an award of damages for loss caused or arising from the said injunction.

On paragraph 3 of the Summons, in view of the way this Court has ruled, it would not be necessary to grant those orders.

Costs in the cause.

ALBERT R. PALMER

A.R. PALMER

JUDGE