[HIGH COURT OF SOLOMON ISLANDS]

ALU LUMBER COMPANY LIMITED –v- FAMOA DEVELOPMENT ASSOCIATION LIMITEDY, ATTORNEY GENERAL, SIR GEORGE LEPPING AND ALBERT LAORE

Civil Case No. 263 of 2002

Hearing: Brown PJ

Summons – injunctive relief – principles upon which granted – whether damages adequate remedy – balance of convenience – neither principle satisfied by applicant – injunction not available.

On a summons for injunctive relief to stop moneys made up of log sales from being disbursed, the applicant sought to rely on a sub-contractors logging agreement with the 1st respondent. The applicant had not embarked on logging, for it appeared another sub-contractor was doing the work. The applicants originating Statement of Claim curiously sought declarations that the sub-contractor's agreement with the 1st respondent was subsisting, yet also claimed damages "for costs in procurement and preparation of plant etc", pleadings which were clearly erroneous.

Held: 1. *Before an injunctive order can be granted the applicant must satisfy the court that:*

   a) *damages are not an adequate remedy; and*
   b) *that the balance of convenience favours the order of the injunction*

2. *The applicant had failed on both questions.*
3. *(obiter) The further principle that "a serious question to be tried" should be shown by the applicant, had been satisfied.*
4. *The orders sought cannot avail the applicant for they do not name any person who shall be stopped from dealing with the money.*

Cases Cited. 1. *Joseph Aleve Malanga & Others –v- Omex Ltd (Civil Appeal 2/2001)* Court of Appeal, 25th October 2001.

Date of Hearing: 11th December 2002
Date of Ruling: 12th December 2002

SUMMONS

The applicant sought injunctive relief.

Suri for applicant/plaintiff
Radclyffe for 1st Respondent
Afaeo for Attorney General
Apaniai for 3rd Respondent

This matter comes to court by way of interlocutory application following upon a Writ of Summons and Statement of Claim. The Statement of Claim curiously seeks declaratory orders that a logging contractors' agreement dated 30th March 1999 is subsisting but goes on to claim damages "for costs in procurement and preparation of plant etc".

The interlocutory application by the Plaintiff is in the following terms:-

> "1. That the sum of $4,411,853.40 out of the export proceeds from the logs exported from Alu and Lagama Forest Plantations be restrained until further orders of this court, or alternatively 20% of the export proceeds.
>
> 2. That the First, Second and Third Respondents by themselves or their contractor, Dalgro Limited, file an affidavit of account of the volume and specie of logs standing out of those already felled and sold.
>
> 3. "
>
> 4. "

In the hearing before me, all parties were represented. Mr. Suri appeared for the applicant/plaintiff and very helpfully handed up the applicant's outline of submissions in support of this application.

FACTS

For the purposes of reasons, the short facts were, that the plaintiff, a logging contractor (a local company) had executed a document headed "Alu and Lagama Forest Plantation Harvesting Sub-Contract (the "sub-contract document") with the Famoa Development Association Ltd (Famoa) on the 30th March 1999 relating to the Alu & Langama forest plantation areas.

Whilst not a party to another document referred to by Mr. Suri, he spoke of this earlier document annexed to the affidavit of one Steve Laore, for the plaintiff, a document in similar form to that of the "subcontract document" where the Solomon Islands Government, as principal, had purported to appoint Famoa Development Association Ltd to harvest the plantation areas. The Attorney General has been sued as the appropriate officer of the State, Mr. Suri says, and the third respondents/defendants have also been sued by the plaintiff for reasons not immediately clear on the pleadings to date, but which need not concern me, in this interlocutory application.

The plaintiff claims, today because the "sub-contract agreement" is subsisting yet breached by the 1st defendant, the moneys representing a value of timber possibly logged by another sub-contractor, should be the subject of this court restraining order. The Statement of Claim does not say this.

PLAINTIFF'S ARGUMENT

The plaintiff says that the company was always ready and willing to embark on the harvesting of timber. If there was to be argument about the fact that it had not commenced logging operations in the designated areas, the plaintiff had good reasons and in any event Famoa had never given notice based on delay in commencement or any other reasons, to terminate the contract. As pleaded in the statement of claim and inferred from the declaratory relief sought the "sub-contract document" was still valid and enforceable.

Mr. Suri referred me to the principles, which should be applied which principles are shortly;

a) whether there are serious triable issues
b) whether damages would be an adequate remedy and
c) the balance of convenience

Now I should say, (and there was never any serious argument from other respondents counsel) that on the bare facts there would seem to be issues to be tried between the plaintiff and Famoa.

Mr. Suri says that the remedy of damages, which he also seeks in his statement of claim, would not be adequate because the actual moneys representing the proceeds of sale for harvested logs may be dissipated by the 1st respondent, Famoa.

So far as the balance of convenience issue is concerned, he reiterated his argument that the money the subject of the log sale may be dissipated and Famoa may be an empty shell, as it were, when the substantive argument was decided.

He also strenuously argued that 20% of the proceeds should be dealt with, as the Court, in Isabel Timber Company -v- Huhurangi Enterprises (unreported 19/2001 dated 21st March 2001) had seen fit. He spoke of the need to preserve the status quo until trial.

THE 1ST RESPONDENTS REPLY

Mr. Radclyffe for the 1st Respondent, Famoa, would have none of it. He read the affidavit of Albert Laore, a director of Famoa, in his case.

Mr. Laore (without objection) asserted as a matter of law, in his affidavit that the "sub-contractor agreement" (which here he must be deemed to have admitted in these proceedings) was "automatically terminated as the plaintiff failed to commence operations within 180 days of the 30th March 1999. Mr. Radclyffe pointed to the statement of claim and the subcontractors agreement and stated that the only remedy, available to the plaintiff, was damages for breach of contract.

While no argument was addressed on the issue, it appeared to be accepted by the applicant that the logging work had been and is being carried out by another contractor, hence there is a sum of money which can be arrived at, for the value of the harvested logs, a sum which can be broken down, as it were, into components which fall to the respective 1 & 2 respondents as well as some part to the subcontractor doing the logging. Thus the applicant has sought this exact sum of $4,411,853.40 in his application today.

1st RESPONDENTS ARGUMENT

Mr. Radclyffe argued that it was not open to the plaintiff to say that these particular moneys, should be treated as falling within the type of thing capable of "preservation", rather it was money and the plaintiff should take the 1st respondent as he finds him. What Mr. Suri was really seeking was an order securing or insuring as it were, any subsequent award of damages and such an order cannot be given.

On that point, on the authority of the Court of Appeal in Joseph Aleve Malanga –v- Omex Ltd (25th October 2001) I am bound to agree.

REASONS

I find that this application is of such a nature that it falls with in the facts found by the Court of Appeal as pertinant when faced with such an application as this. Mr. Suri's assertion that Famoa may dissipate the proceeds may be correct but there is no evidence to support his implication that such dissipation is wrong for that it may be carried out to defeat this applicant or that in any event Famoa will not meet any future obligations at law.

I need not deal further with Mr. Radclyffe's submissions in relation to the nature and extent of the plaintiffs remedy for breach, if any, of this particular contract. The Statement of Claim is badly worded and will need to be reworded before the hearing on the substantive issues.

He shortly stated that the subcontractors claim may be quantified by reference to paragraph 10 of the "subcontractors agreement" and that, impliedly since the paragraph deals with fees due to the subcontractor on performance, a claim to the whole value of the logs harvested is not available.

BALANCE OF CONVENIENCE

On the question of the balance of convenience, since it is clear that the logs belonged to the State and have been sold, another subcontractor has done and is presumably still doing work and the 1st respondent is the commercial arm of the Famoa Trust Board (representing the landowners), to purport to freeze moneys already presumably received and disbursed would be inconvenient. Money in these circumstances cannot be categorized as falling within those types of things deserving of "preservation".

Lastly, I should say that the manner in which the orders sought have been drawn up, could not avail the plaintiff, in any event, for they do not name any person who shall be stopped from dealing with the money.

The plaintiff may feel aggrieved that he sees himself loosing the benefit of his agreement. He says the agreement is on foot and he should be carrying out his side of the bargain. But this ignores the realities. Another contractor Dalgro Limited appears to be doing the work. So be it. I am minded of the maxim *"quod fiere non debit factum valet"* (what ought never to have been done at all, if it has been done, may be valid), when I hear Mr. Suri's explanation of events surrounding the supplanting of the plaintiff as contractor. Let damages fall where they belong, if at all.

WHAT OF THE OTHER DEFENDANTS?

The Plaintiff has cast his net widely, but in this application, I see no justification at all in the plaintiff seeking orders for costs against the 2nd and 3rd defendants. On the face of the statement of claim there is no relief of any nature sought against these two defendants. Apart from costs, they are not objects in the application for interim orders. The Attorney General has been brought to court unnecessarily in these circumstances. I told Mr. Suri that, on the plaintiff's recitals, the plaintiff may consider framing his claim differently if he was to seek redress against these other two defendants but as it stands, there is absolutely no redress claimed.

In law, the plaintiff cannot claim a declaration that the subcontract agreement is subsisting and damages for its breach.

Order: The summons of the plaintiff of 29th November 2002 is struck out. I award the summons costs against the plaintiff in favor of all respondents.

J. R. BROWN
JUDGE