HIGH COURT OF SOLOMON ISLANDS

ESTHER FERAH AND MUNRO RARAVA (Plaintiff) -V- MIGA INTEGRATED DEVELOPMENT COMPANY (First Defendant) and ORION LIMITED (Second Defendant)

Civil Case No. 188 of 2003

Honiara: Brown PJ

Date of Hearing: 26 August 2003
Date of Judgment: 3 September 2003

Mrs. A. Tongarutu for the plaintiff
Mr. A Radclyffe for the defendants

Injunction - *interlocutory – forestry agreement – assertion by persons claiming Interest as landowners that wrong land logged – courts jurisdiction to grant interlocutory injunction – discretionary principles – appropriateness of undertaking as to damages.*
053 rr 6,7
American Cyanamid –v- Ethicon Ltd (1975) *A.C.396*

Forestry - *plaintiffs assert ownership as customary landowners to parcel of land claimed to be distinct from that of forestry agreement – 1st defendant party to forestry agreement having the timber rights – 2nd defendant logging contractor – customary owners entitled to royalties for timber taken not joined in proceedings – necessity to join parties likely to have an interest in the proceedings.*

The plaintiffs assert ownership of customary land known as Zorauru, which is distinct from but falls within the boundary of Miga/Javarava land which is the subject of a forestry agreement and is being logged by the contractor, the 2nd defendant. The plaintiff seeks injunction to stop logging and to control the proceeds of sale of timber logged on such land, as well as other ancillary orders. No undertaking as to damages has been offered. Customary landowners whose royalty payments will be affected have not been made party to the proceedings. Facts appear from the judgment.

Held: 1. It is necessary to join persons as parties to proceedings which will have the effect of denying their paramount right to royalty payments under the forestry agreement.

2. The assertion of ownership is not a question for the High Court but the plaintiff's claim may be conceded by the other landowners so that the plaintiff may remain pending joinder of other affected persons.

3. The phrase, "the balance of convenience", while discretionary, must be considered on principles, which, through accretion, have become relatively well settled. Of particular importance is the question of the plaintiff's absence of an undertaking as to damages.

4. The absence of an undertaking coupled with the precarious "standing" of the plaintiff does not allow the court discretion to grant injunctive relief.

(Obiter) observations on the principles affecting the discretion to grant injunctions made.

Cases cited

American Cyanamid Co. -v- Ethicon Ltd (1975) A.C. 396
International General Electric Company of New York -v- Commissioners of Customs & Excise (1962) Ch.784
Nelson Lauringi Anors -v- Lagivaeano Saw milling and Logging Ltd, anors (unreported CC131/1997)
Yandley Simbe -v- East Choiseul Area Council anors Appeal Case of 1997
Miga Corp Ltd -v- Nelson Kile anors (CC 1/1997)
Fenner -v- Wilson (1893) 2 Ch. 656
Allen -v- Jambo Holdings Ltd (1980) 1 W.L.R. 1952

Reasons for decision

Order 53 r.6 provides for the court to grant an injunction where it appears just or convenient to so do. Rule 7 allows the court a discretion in that an application may be either ex parte or on notice, at any time after the issue of the writ of summons. In this case, the 1st defendant has appeared which in my

opinion, is necessary in these forestry matters for the grant of an injunction stopping logging can have such serious commercial consequences that, in the absence of any undertaking as to damages, it is only fair that the defendant representing the owners of the timber rights have notice of such a claim.

This is just such a case. But the plaintiff has not seen fit to join the customary representatives of the Miga customary lands including Kaneporo, Nagei Soreyari (1), Nagei Soreyari (2) and Belobelo lands on Vella la Vella Island, Western Province who signed a standard Logging Agreement with the 1st defendant on the 15 February 2001, for these people will also be affected by any injunctive order stopping logging and seizing their royalty moneys.

The plaintiffs assert they are representatives of Luvarava Miga tribe entitled to Luvarava customary land which is included in Miga land but which the plaintiffs assert, should not form part of the land available for logging. Logging is taking place.

The plaintiffs accordingly seek injunctions to stop the harvesting, the payment of the Freight on Board value of the logs into a special bank account, and an account by the defendants of all logs taken from Zarauru and Miga customary land since commencement of operations.

053 r 6 has been the subject of many and varied decision of this court in previous forestry argument, but predominately the court has followed the principles enunciated by Lord Diplock in *American Cyanamid Co. -v- Ethicon Ltd* (1975) A.C. 396 when deciding whether to exercise its discretion to grant injunctive relief.

These principles are:

1. The plaintiff must establish that he has a good arguable claim to the right he seeks to protect.

2. The court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried.

3. If the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the courts discretion on the balance of convenience.

It can be supposed from the expression above, that I am particularly struck by the failure of this applicant to join, as defendants, the other tribal representatives who will be materially affected by these proceedings.

It strikes me as tantamount to an abuse of process, to choose the logging company and contractor, but ignore fellow tribal representatives who have the paramount right to royalties under the forestry agreement which is impugned. These representative's interests cannot be ignored by the court in this fashion.

Mr. Radclyffe sought earlier to strike out the summons for injunctive relief. He argued that the plaintiffs had nothing in their pleadings to support their assertion, that they are members of the Juvarava Miga tribe and representatives of that tribe who own Zorauru customary land (in fact the issue is raised in the pleadings, for the plaintiffs, in para 3 of the statement of claim, say "the plaintiffs are descendants of Chief Giti of the Miga tribe who owns Zorauru customary land and by birth right inherit the land and forest resources thereon").

And consequently the application was premature, for their right to represent "Luvarava Miga" tribe must firstly be settled by the customary chiefs. I ruled against the 1st defendants argument, for the landowners affected were not joined and I did not wish to "close the door" on the plaintiffs in this forum.

The question of the balance of convenience, remains, however, and that is discretionary.

On that, Mrs. Tongarutu said merely that the royalty proceeds should be injuncted and a permanent injunction granted to stop logging. She stated the plaintiffs do not have funds to support damages and that the basis of their representative capacity flowed from the plaintiff's mother's side. Consequently there is a serious question to be tried. I accept that latter proposition, but where the plaintiff impliedly acknowledges a right, in any event, in her statement of claim, to receive royalty payments (as descendants or Chief Giti of the Miga tribe who owns Zorauru customary land) there is clearly a source of funds which may be attached, were these proceedings to fail and cause loss to all the others affected. It is, as I say, a commercial enterprise, and the hidden costs written into these logging arrangements with exporters must be enormous, when the risk of interruption or cessation of supply is capricious or discretionary. Of course, there is no evidence of this, rather it is anecdotal but common sense suggests the paucity of return to the

landowners for their logs may, in some way, be related to the risk that logging operations will be stopped through argument amongst those customary owners, entitled, as in this case, or by discretionary order. The cost of that risk, then, is borne by the landowners, by smaller returns.

These considerations are beyond the matters that I need consider, however but should be matters which landowners bear in mind before they contract sale of their timber rights. The history of these agreements is one of discord, and that discord lessens the price offered by buyers of timber, for reliability of supply is always at risk.

What should be done in this case? Will damages be a sufficient remedy?

The plaintiffs are clearly motivated by the wish to freeze the whole logging proceeds. In these circumstances, money is a result sought by the plaintiffs and I am satisfied damages (money) is a sufficient remedy. The injunction ought not be granted for this reason. But damages may not be sufficient where the damage caused by allowing continued logging is irreparable, or outside the scope of pecuniary compensation. These issues are clearly raised on the statement of claim for monetary damages are claimed for trespass on and damage to, *tambu* sites. Loss of the growing trees may be said to be irreparable. This issue is one which causes me the most concern. Of course the trees belong to the landowners, though and fall to be considered according to that issue.

Should these plaintiffs be allowed to interfere with the forestry agreement and logging agreement entered into by others not a party to these proceedings, for it seems this land, Zorauru, falls within that land, of the forestry agreement.

Will more harm be done, by granting or refusing the application for injunction?

The first issue that I must consider is that of standing to bring these proceedings. As I found previously, the plaintiff is entitled to argue her case but the other representatives need be joined.

If I grant this application for injunction, the grant is tantamount to a finding on *"standing"* or a declaration of the plaintiff's rights to bring the action. A declaration of a right of this party (to bring proceedings) must, by its nature, be a finding after argument of all interested parties. Here, other interested parties, the actual signatories as representative landowners, to the forestry

agreement, have not had an opportunity to be heard. To grant an injunctive order, then is tantamount to recognition of the plaintiff's *standing*, and that is far from settled.

A hearing on that issue must be a pre-requisite to any further consideration of the injunction application. I adopt the reasoning of Upjohn, LJ (*International General Electric Company of New York –v- Commissioners of Customs & Excise* (1962) Ch.784) where he disparaged the idea of an interim declaratory order which does not finally declare the rights of the parties

> "for by granting this plaintiff relief by way of injunction in the absence of others entitled to be heard on the question, I have impliedly declared the plaintiff's entitlement to bring these proceedings, a declaration not open to the court at this time."

The second issue is whether Zorauru is customary land, distinct from Miga/Luvarava customary land over which the 1st defendants hold timber rights under the forestry agreement. Is this a triable issue in this court, for the plaintiff says the defendants are trespassing on Zorauru land. Putting it another way, the plaintiff is seeking this courts declaration that:

a) they are representatives of a tribal entity, Juvarava Miga

b) they are customary owners of Zorauru customary land and

c) that Zorauru land is distinct from Miga/Juvarava land

Lungole – Awich J dealt with a similar issue in *Nelson Lauringi Anors -v- Lagivaeano Sawmilling and Logging Ltd, anors* (unreported CC131/1997) where plaintiffs sought;

1. "An order declaring that Sagivaeano is the same land as Siubongi customary land situated in Falaleka Constituency, North West Malaita, Malaita Province

2. An order declaring that the plaintiffs are the true and primary customary owners of Lagwaeano or Siubongi customary lands"

which is the obverse, to the claim of the plaintiffs, here.

The judge said:

> "Reliefs (1) and (2) are misconceived, they are in the exclusive original jurisdiction of the Local Court; and substantive appeal lies to the Customary Land Appeal Court. Appeal to the High Court is limited to questions of, "point of law other than customary law or "failure to comply with written requirement for procedural law" see Ss254 and 256 of the Land and Titles Act. The High Court may also decide at first instance, the question as to whether the land is customary land or not, and so it may also decide the question on appeal from CLAC – See S.254 (b) of the Land & Titles Act."

The judges elucidative exposition of the laws is helpful, for it may seem, only where the other customary landowner representatives concede the right in the plaintiffs to this land, will the cause remain in this court. But that is argument for another occasion, the fact remains the plaintiffs have a tenuous right to remain in this court. This clearly falls within the judgment of the Appeal Court *(Yandly Simbe -v- East Choiseul Area Council anors* Appeal Case of 1997) given by McPherson J A at 22:

> Function of Court injunction. The jurisdiction of the High Court to grant an injunction in a case like this is, however, not unlimited. To the extent that a local court or customary land appeal court has, and the High Court has not, jurisdiction over questions of disputed ownership of customary land, the power of the High Court to grant relief by injunction is restricted to injunctions aiding the exercise by a local or customary appeal court of its jurisdiction to decide such disputes. An injunction of that kind is designed not to facilitate determination of that ownership dispute by trial in the High Court, where there is no jurisdiction, but to enable it to be determined in the local or customary appeal court specifically invested by Parliament with the power to decide it. Pending decision of that dispute in the local or customary land court, proceedings in the High Court would ordinarily be stayed on appropriate terms. Whether or not the Court would be prepared, pending the decision of the local court, also to grant an interlocutory injunction to restrain entry on, and felling and removal of timber from, the land in question depends on the circumstances, including in part the Court's assessment of the plausibility of the plaintiff's claim to ownership of that customary land and the prospects of its succeeding in the local court. Making such an assessment for the purpose of deciding whether to grant or withhold such relief involves no usurpation by the High Court of the exclusive jurisdiction of a local

> court under s.231 (1) of the Land and Titles Act. Jurisdiction means the power to hear and determine a matter or proceeding, which is not the function that the High Court would be performing in deciding whether or not to grant any interlocutory injunction according to general principles of law and equity. Section 231(2) of the Land and Titles Act, it may be noticed, contains an express power to refer a matter direct to a local court; but, standing on its own, the provision has been said to be of doubtful efficacy. See *Teteha -v- Registrar of Titles* [1980/81] SILR 209 at 216."

The third issue was that absence in the plaintiffs of her undertaking as to damages. The Court of Appeal had reason to consider this aspect in *(Miga Corp Ltd –v- Nelson Kile anors) (c.c. 1/1997)* where the court, in allowing an appeal against an interlocutory order granted by the High Court (Muria CJ) restraining the 1st & 2nd appellants from logging, said at 4.

> "We also note that no undertaking was required of the present respondent. This situation was referred to in *"Allardyce -v- Anjo* and all this court wishes to say in this regard is that whilst in many instances it may not be appropriate to require an undertaking from a successful litigant, the question should be decided in each individual case. There is no principle of law that an undertaking should not and cannot be required in cases involving a dispute to natural resources concerning a Solomon Islander".

It is somewhat of a pity that the court of appeal did not take the opportunity to set out matters for this court's consideration when deciding the appropriateness or that of the need for undertakings, for the dichotomy between customary obligations (involving mutuality of reciprocation) and commercial enterprise, (involving Western forms of agreement and damages for breach of contract) is no-where more apparent than here.

The English White Book, (which could be said to be the precursor to our High Court (Civil Procedure) Rules 1964) and which set out the law, developing over time, appertaining, has much to say about undertakings.

To begin with, it recites that an undertaking by the plaintiff as to damages ought to be given on every interlocutory injunction (though not where the order is in the nature of a final order) *Fenner –v- Wilson* (1893) 2 Ch. 656.

This then is a long-standing principle of law, which, in the content of injunctions, should not be departed from except in exceptional circumstances.

Where a plaintiff is impecunious, and his undertaking as to damages would be of limited value, the court will not deny a plaintiff the remedy to which he would otherwise be entitled, simply on that ground, since questions of financial stability ought not to affect the position in regard to what is the essential justice of the case. (*Allen –v- Jambo Holdings Ltd* (1980) 1 W.L.R. 1252). It has been argued before in this court that such an approach favours the avoidance of undertakings where they would be normally expected, if the applicant is a customary landowner, for instance, seeking orders against a commercial enterprise, and approach which finds favour, despite, as was the case here, any reasoned argument to support the departure from principle.

In these logging cases, the question of impecuniousness, or otherwise, of a party is just as difficult to ascertain in the first instant, often on ex parte application, as the facts upon which the case will turn. Landowners, per se, cannot be said to be impecunious. Foreign contractors cannot readily be categorized, one way or the other.

Caution should be exercised, however when addressing the issue, not to presume the Solomon Islander landowner is "impecunious" in the sense of without resources, when they come to court to protect, what they say, are very valuable timber resources. As I touched on earlier, the risk apparent with these forestry agreements, attract a cost which is passed onto the forest resource owner, and to automatically allow, as it were, a "free kick" at the logging companies or contractors, (by not taking an undertaking as to damages) will only compound these costs. It must also be remembered that the *American Cyanamid* was decided on the basis that such an undertaking was understood as proper, to balance the defendants right to be protected against loss resulting from "his having been prevented from exercising this own legal rights for which he could not be adequately be compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendants favour at the trial (*American Cynamid ibid, Lord Diplock, K, 321).*

In these logging cases, there seems to be an equilibrium, perhaps, to some extent, between the value of the growing timber in issue, and the price in the loggers hands, so that refusal to proffer an undertaking, should be a material matter for the courts consideration when it comes to the exercise of its discretion. Timber rights have a value to the landowners and consequently it

is not to be ignored when landowners plead, as is the case here that they should not have to proffer any undertaking.

An undertaking, in form similar to the Australian Federal Court undertaking (which reflects other jurisdictions "usual undertaking") would, be appropriate in this jurisdiction.

The "usual undertaking as to damages" if given to the Court in relation to any interlocutory order made by it or any interlocutory undertaking given to it, is an undertaking:

(a) to submit to such order (if any) as the Court may consider to be just for the payment of compensation, to be assessed by the Court or as it may direct, to any person, whether or not a party, adversely affected by the operation of the interlocutory order or undertaking or any continuation (with or without variation) thereof; and

(b) to pay the compensation referred to in (a) to the person there referred to.

For all these reasons, in the interests of justice, as between these parties, I refuse the injunctive orders sought and strike out the exparte summons. The costs, (since the 1st defendant has appeared) shall be awarded to the 1st defendant.

There shall be joinder of other persons affected by these proceedings, as defendants before the plaintiff can proceed.

J R BROWN
PUISNE JUDGE