HIGH COURT OF SOLOMON ISLANDS

GEORGE POU, DAVID KERU & NOEL SALINI, APPLICANTS V- TROPICAL FOREST PRODUCTS, 1ST RESPONDENT; COMMISSIONER OF FORESTS 2ND RESPONDENT AND JIMMY HANAHUNU 3RD RESPONDENT.

Summons for declarations.

Date of Hearing: **31 March 2004**
Date of Judgment: **4 August 2004**

G. Suri for applicant
J. Sullivan for 1st respondent
Attorney- General for 2nd respondent.

Brown J: These plaintiffs' seek declarations that a particular logging license is null and void *ab initio* for that it issued on a false premise. That false premise was the absence of an appeal to the Customary Land Appeal Court required by provisions of the Forest Resources and Timber Utilizations Act (cap. 40) at the time the Commissioner of Forests granted such logging license, for that such certificate of no appeal was a prerequisite before the grant of the Commissioner. The applicant says that a Certificate of No Appeal in this case was no proper Certificate, or, in the alternative was issued erroneously in the circumstances, for the applicants had in fact appealed.
The 1st respondent now seeks to strike these proceedings out for the action discloses no reasonable cause of action; is frivolous and vexations or in the alternative, the applicants have no *locus standi.*

It is appropriate to deal with the question of standing first.

Mr Sullivan for Tropical Forest Products says, despite no identification, it appears common ground the Timber Licence sought to be attacked is that issued on 3 December 2003 No. TIM A10308.

He says this court is bound, in cases such as this, by clear principles enunciated in *Gandly Simbe –v- East Choiseul Area Council* (unreported CA 8/97), where the plaintiff is not a party to any logging agreement but relies on his claim (in the High Court) as a customary owner of the subject land.

The principle is that before recognizing standing, this High Court must be satisfied the plaintiff has shown to have a decision in his favor or have had taken positive steps to assert his title to the land and not be relying on a "more assertion of

ownership". The principle has been applied in this court since. It springs from the judgment of the Court of Appeal given by McPherson J at 25 –

"For the purpose of assessing its status as an interest in land capable of supporting a claim to impugn the timber rights agreement and attracting an injunction restraining entry on, and felling and removal of timber from, customary land, it is not altogether easy, nor even necessary, to identify it with any corresponding interest in land at common law; but on any view of it, the claim or interest now asserted by the plaintiff is contingent and remote, and not of a direct or present kind that would readily call for an injunction to restrain trespass or even waste at common law. The fact that, whatever its true character, its existence has not yet been recognized in proceedings before any tribunal or court is a cogent reason for saying that the question of ownership ought first to have been passed upon in a customary court before it was made the basis of the plaintiff's claim for an injunction in the High Court".
Further the Court of Appeal upheld Palmer J's (as he then was) conclusion that, without a favorable determination in the customary court there was no serious question to be tried concerning the validity of the timber rights agreement to which he was not a party.

Of course the Court of Appeal was there dealing with matters of injunctive relief, but in the first instance, the trial judge must satisfy himself of the plaintiffs standing, before this court can countenance a claim to interfere in established rights of others.

I should also say I find the phrase "*usufructuary rights*" useful when describing those interests which the Court of Appeal touched on when speaking of "*an interest in land capable of supporting a claim...on ... customary land ...and (not one) necessary to identify .. with any corresponding interest in land at common law*". (Usufruct, n., & v.t. Right of enjoying the use and advantages of another's property short of destruction or waste of its substance; -Concise Oxford Dictionary.) So that the nature of the usufruct may still be a matter for evidence, but the fact of a usufruct in this applicant rests solely on his own assertion.

For Mr Sullivan says, on a reading of the plaintiffs material, there is no assertion whatsoever of ownership of the subject land let alone evidence that these plaintiffs have taken or are taking steps to assert title in the land the subject of the license. To use my phraseology, no usufructuary rights are claimed for instance, which by their nature may subsist with those rights of land ownership but which clothe the applicant with something better than a mere assertion.

Clearly, in the absence of any evidence by Keru or Salini, that is the case for they have filed no affidavits to show the basis or nature of their ownership, nor is it apparent on any of the other material. The plaintiff George Pou does not assert ownership in his affidavit. He says –

"3. I was informed of a meeting at Bethsida village on or about 23 September 2003 by George Sasi, Samuel Kerekololo and Charles Taholangana. Following the said oral report, the applicants and I lodges an appeal to CLAC (Central) by our letter dated 20 October 2003. Now produced and shown to me as exhibit "GP 1" is a copy of the said document.

4. After we have lodged the appeal, we received copies of the Form IIs dated 25 October issued by the Central Islands Provincial Government. The Form IIs were not published in common villages or places in Ngella. We collected the Form IIs from the Forestry Department. Now produced to and shown to me is a copy of the said Form II marked as exhibit "GP 2"

Also annexed to the affidavit of George Pou was a copy Form 11 –
Certificate of Customary ownership – of land held by the "*Arulanga*" landowning group naming "Granis Malana, Robert Geki, Moses Rikea and Vutu" as persons lawfully able and entitled to grant timber rights to that area shown in red on an attached map. (No map was annexed).

The Form 11 – Certificate of Customary ownership – showed those entitled to grant timber rights over "Tavanare" land to be "Mark Mumuku, Mark Susuna, Mark Susuna (jar) and B. Mumuku."

Both of these lands were claimed by the plaintiff as his. Neither lands are named in the Licence No.A10308 annexed to George Pou's affidavit so that, Mr. Sullivan says, it is evident neither land claimed by George Pou is affected by the license. It also follows that there has been no mistake in relation to the certificate of no appeal for the lands claimed by George Pou do not form part of the license.

No reasonable cause of action

Mr. Sullivan says ownership is an essential element (although on the strength of *Gandly Simbe's* case I must say usufructuary right to fell timber rather should be shown, (evidenced by the form of words in the proforma Form II). He also says to attack the grant of the license is to attack the Commissioners discretion under provisions of s.5 (2) of the Act. No material is before the court showing the Commissioner has been mistaken in the exercise of his discretion.

Frivolous & vexations proceedings

The 1st Respondent points to the absence of the land claimed by the plaintiff in the detailed license. The proceedings, Mr. Sullivan says, are bound to fail for there is no issue for determination. They consequently fall to be decided on the basis of the principles espoused in *Law v-Dearnley*(1950) I All ER 124 (CA) and *Reef Pacific Trading v-Kama* (unreported HC. cc56/96 pr Kabui J).

HC Rules O.58 r 2 not enlivened.

Rule 2- *"Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of any provision of a written law may apply by origination summons for the determination of such question of construction and for declaration as to the right claimed".*

The 1st Respondent says the plaintiff does not asset any legal or equitable right which is dependent upon the construction of any written law. With that I must agree for the issue is a question of fact about usufructuary rights to customary land. This is question of fact and is not enlivened by reference to the Rule.

The respondent/plaintiffs argument

Locus Standi

Mr. Suri submitted that a "right of appeal" is a recognized legal right which gives locus standi to applicant.
S.10(1) of the Forestry Act says
"Any person who is aggrieved ... may appeal to the customary land appeal court."

In support, he referred to decisions in various overseas jurisdictions on *locus standi.*

His submission rather left me to elicit their relevance although he did argue that the passage,
"The Plaintiff society, which had given notice of opposition to the council's proposed district scheme under the town & County Planning Act 1953, was held to be a party to proceedings of a judicial nature and for that reason entitled to seek the courts assistance in regard to the remedies claimed in the proceedings."
(per Aitkin of – *Australian.Conservation Foundation* v-*The Commonwealth* (1900) 146 CLR 493 at para 16, describing briefly the *ratio decidendi of* the decision of Perry J. in *New Zealand Institute of Agricultural Science v-Paparua County* (1969) NZLR 653), supported his case.
He also spoke of the essential elements of 0. 58 of the HC Rules, but there is no doubt, the discretionary powers of this Court are very wide to encompass the material on which the plaint6iff seeks to rely, subject to established principles.

Facts

The plaintiff says in his affidavit that many resource owners in Ngella were not aware of any timber rights hearing being convened by the Central Islands Provincial

Government because public notices were not published in the main villages or common places.

It would seem, after a meeting at Bethsida Village on or about the 23 September 2003 he was told about it by three other persons who presumably attended or had heard of it. He then lodged, he says, an appeal to CLAC (Central) by letter of 20 October 2003.

According to the exhibited Form II, (in relation to customary land "Arulonga" claimed by the plaintiff), five persons certified having particular knowledge of the customary land rights of the "Arulonga", those four named persons **"lawfully able and entitled to grant timber rights"**. (What I would describe as usufructuary rights to timber) The plaintiff was not named amongst those entitled. So far as "Tavanare" is concerned, separate persons were named as entitled to grant timber rights. Again the plaintiff was not included.

These findings or certifications were dated 24 October, some 4 days after the applicants' letter of appeal addressed to the Chief Magistrate Central Magistrates Court and copied to the Provincial Secretary, Central Provincial Assembly. The letter asserted in (d); "insufficient public notice given in the manner set out in section 9(2)(b) and section 8(2) of the Forest Resources and Timber Utilisation Act..."

There is, then no public acceptance on the face of the various certificates of customary ownership that the plaintiff is a person "lawfully able and entitled to grant timber right" in those landowning group areas.

Applying principles of locus standi

Aitkin J. said (above) at para. 25.

"In my view the authorities to which I have referred above establish that it is an essential requirement for locus standi that it must be related to the relief claimed. The "interest" of a plaintiff in the subject matter of an action must be such as to warrant the grant of the relief claimed.

I do not mean that, where the relief is discretionary, locus sandi depends on showing that the discretion must be exercised favourably. What is required is that the plaintiff's interest should be one related to the relief claimed in the statement of claim. Here the primary relief is a declaration that whatever decision was made was unlawful and invalid."

In my opinion, the relief claimed really relates to an argument about what, if any, usufructuary rights the applicant has in customary land not named in the logging license.

Alleged failure to comply with the administrative procedures does not of itself, give a person rights to interfere in the decision-making process unless that person can be shown to have "standing" to complain.

"It would be one thing to say that a person requesting information is entitled under s.10 to receive a prompt reply and that there is a corresponding obligation on the Minister to reply promptly, an obligation which might be enforced by mandamus. It is quite another thing to say where there is a failure to reply promptly, the inquirer may obtain from the court a declaration that the decision or decisions made by that Minister, some other Minister or some statutory authority, whether before or after the decision, are thereby null and void. Such a proposition is plainly insupportable." (per Aitkin J at para. 27)

The plaintiffs claim is wholly predicated on his asserted rights as owner of customary land. There is no evidence to support that assertion. It is not clear from the affidavit what usufructuary right he claims or how it came about or whether he disputes the rights of those others as unable to stand jointly with his asserted rights. Consequently at this time, the plaintiff cannot expect this courts help for –

a) The relief claimed is far removed from a right to question the administrative process of the grant of the logging licence when;

b) No proper tribunal has denied the rights of those named in the Form II to deal with timber rights. (*Gandley Simbe's* case at 25).

From the earlier passage relied upon by the plaintiff, it is clear the NZ Court accepted, in the introductory part of its findings, *locus standi* for "held to be a party" presumes the fact. No such presumption can be made here.

That is not to say the plaintiff cannot make a case for some species of usufructuary right to particular land before the Council of Chiefs or the CLAC but until such usufructuary rights are recognized by his peers on the authority of the Chiefs, (and clearly deals with the apparent conflicting rights in those named owners in the various Form II,) this plaintiff cannot claim standing in this court.

The declarations and orders sought are refused. The summons must be dismissed for the plaintiff's have not been shown to have standing.

The plaintiff shall pay the 1st respondents costs