

DANIEL BEKELE AND EASTERN DEVELOPMENT ENTERPRISES LIMITED -v- BULACAN INTEGRATED WOOD INDUSTRIES (SI) LIMITED, JOHN SELWYN POROSI AND ATTORNEY-GENERAL

HIGH COURT OF SOLOMON ISLANDS.
(KABUI, J.).

Civil Case No.109 of 2004.

Date of Hearing: 27th May 2004.

Date of Judgment: 04th June 2004.

G. Suri for the 1st and 2nd Applicants.

A. Nori for the 1st Respondent.

No appearance for the 2nd Respondent.

N. A. Moshinsky, Q.C. and J. A.

& J. A. Gordon (Mrs) for the 3rd Respondent.

JUDGMENT

Kabui, J: This is an application by Originating Summons filed by the Applicants on 24th March 2004 seeking the determination of the following questions, namely-

- (1) whether the lawful manner in granting timber rights affecting registered land is in pursuant to the provisions of section 181(1) of the Land and Titles Act?
- (2) whether a registered grant of profit is protected by section 110 of the Land and Titles Act?
- (3) If the answers to questions 1 and 2, are in the affirmative, whether the Logging Licence granted by the Commissioner of Forest to First Defendant/Respondent is contrary to section 181(1) of the Land and Titles Act?

The Facts.

Kokodghi land is the local name for LR 682 situated on the Island of Santa Ysabel. The Parcel Number is 072-002-1, registered in the names of James Sau, Daniel Masura Bekele, John Selwyn Porosi and Hugo Hebala as joint owners. A logging licence No. A10245 had been issued by the Commissioner of Forest on 10th April 2003 to the 1st Respondent to harvest timber on the land designated as LR 682 in Parcel Number 072-002-1 above. This licence was issued following an agreement

between the 1st Respondent and one of the joint owners, John Selwyn Porosi. In the meantime, Daniel Bekele and John Selwyn Porosi by instrument, granted to the 2nd Applicant, a profit over the same land for a period of 5 years effective from 5th August 2003 under section 181(1) of the Land and Titles Act (Cap.133) (LTA). By a joint letter dated 13th October 2003, Daniel Bekele and John Selwyn Porosi requested the 1st Respondent to relinquish its licence over that same land in view of the existence of the grant of profit signed and registered in favour of the 2nd Applicant by themselves on 1st October 2003, following legal advice that John Selwyn Porosi had acted alone without the other joint owners. The result is that the 2nd Plaintiff is currently in possession of a grant of profit under section 181(1) of the LTA whilst the 1st Respondent is in possession of a licence granted under section 5 of the Forests and timber Utilization Act (Cap. 40) (FTUA) both instruments covering the same piece of land described above.

The issues to be determined.

The issues put to this Court for determination are really self-serving for the Applicants in that granting profit under section 181(1) of the LTA is the correct way to grant timber rights and having done so in this case, the timber rights do receive protection under section 110 of the same Act, assuming that being the correct position in law, thus making the granting of the 1st Respondent's licence under section 5 of the FTUA being contrary to sections 181(1) and 110 of the LTA. The first issue is therefore to decide whether or not timber rights can be granted under section 181(1) of the LTA. The second issue is whether or not the grant of timber rights under the above section having been registered is protected by section 110 of the same Act. The third issue is that in the event this Court answers issues 1 and 2 above in the affirmative, whether the licence granting timber rights under section 5 of the FTUA is contrary to these two sections of the LTA cited above and is therefore null and void.

Section 181(1) of the LTA.

These section states-

“... (1) The owner of an estate or a registered lease may, by an instrument in the prescribed form, grant a profit.

(2) The instrument shall indicate clearly the nature of the profit, the period for which it is to be enjoyed, and whether it is to be enjoyed-

(a) in gross, or as appurtenant to their land; and

(b) by the grantee exclusively, or by him in common with the grantor.

(3) The grant of a profit shall be completed-

- (c) by its registration as an encumbrance in the register of the interest which it burdens;
- (d) where it is appurtenant to land comprised in an estate or registered lease, by its registration in the property section of the register in respect to that estate or lease; and
- (e) by filing the instrument.

(4) A profit which is not appurtenant to land may be dealt with as though it were an estate.

(5) A profit granted by the owner of a fixed term estate or lease shall be capable of subsisting only during the subsistence of the estate or lease..."

Profit.

Section 2 of the LTA, defines the words "a profit" as meaning a "right to go on the land of another to take a particular substance from that land, whether the soil or the product of the soil, and includes the taking of wild animals"

The same section defines the word, "interest" as where used in relation to land, includes, unless the context otherwise requires, an estate, a lease, a profit, an easement and a charge; and "person interested" has a corresponding meaning" So, a profit is an interest in land registerable as an encumbrance in the register of the interest which it burdens. Stephen's Commentaries on the Laws of England, Nineteenth Edition, Volume 2 by G C Cheshire, D. C. L. M.A., 1928, at 83 describes a profit as-

"...A right which authorizes a person to take, in a definite and prescribed manner, some substance that is capable of ownership from another's land, such as grass, stones, turves, or loppings of wood..."

Counsel for the 3rd Respondent, Mr. Moshinsky, Q. C. cited various definitions of the word "profit" which are useful. One such definition is found at page 1045 in Elements of Land Law, Second Edition, by Kevin Gray which says-

"... A profit comprises a right to take either some part of the servient land itself (eg gravel or turf) or something which grows on the land (eg grass, crops or fruit) or indeed fish or wild animals which are found on the servient owner's land or in his water..."

I find that this definition is very similar to the one provided by section 2 of the LTA. However, this definition and the statutory one in section 2 of the LTA do not say that a profit includes the right to fell trees and to remove them (timber rights) from registered land for gain though that conclusion may well be implied or inferred as argued by Counsel for the 2nd Applicant, Mr. Suri, on the strength of *Isabel Timber Company Limited v. Huhurangi Enterprises and MavinBros Timber Company Limited and Attorney-General*, Civil Case No. 19 of 2001.

Isabel Timber Company Limited v. Huhurangi Enterprises and MavinBros Timber Company Limited and Attorney-General, Civil Case No. 19 of 2001.

One of the issues discussed briefly in the above case by Palmer, J. (as he then was) was profit arising under section 181(1) of the LTA. There had been two competing felling licences issued under section 5 of the FTUA covering the same area of registered land being LR 689 also situated on Santa Ysabel. His Lordship held the view that a grant of profit would have been sufficient as the first step before applying for a licence under the provisions of the FTUA. Counsel for the Applicant, Mr. Suri, relied on the view expressed by Palmer, J. referred to above in support of his client's case in that timber rights can be a subject matter of a grant under section 181(1) of LTA. At page 2 of His Lordship's judgment, Palmer, J. (as he then was) said-

"... A grant of timber rights comes under a grant of a profit and any person wishing to acquire timber rights over LR 689 would have to obtain a profit under the LTA before applying for a timber licence from the Commissioner..."

As pointed out by Counsel for the 3rd Respondent, Mr. Moshinsky, QC, there is no conflict between granting a profit under section 181(1) of the LTA and section 5 of the FTUA. Counsel for the 1st Respondent, Mr. Nori, is of the view that the point should be properly argued. So the view held by His Lordship, Palmer, J. (as he then was) in the case cited above by Mr. Suri is not critical to the determination of the questions posed in the Applicants' Originating Summons because section 181(1) of the LTA and section 5 of the FTUA are complementary rather than being in conflict with each other. The granting of timber rights under section 181(1) of the LTA is no bar to the need for a licence under section 5 of the FTUA. I need not canvass whether or not Palmer, J. (as he then was) was correct in His Lordship's view as regards timber rights being a subject of a grant of profit under section 181(1) of the LTA because His Lordship's view does not really remove the need to apply and obtain a licence as a pre-condition under the FTUA. The Applicants' case however goes further than that in that compliance with section 181(1) of the LTA as read with section 110 of that same Act defeats any existing licence issued under section 5

of the FTUA because absolute title with the grant of a profit cannot sit well with any licence issued under section 5 of the FTUA.

Does a grant of profit under section 181(1) of the LTA include a grant of licence?

On this issue, I refer to page 1045 in Elements of Land Law by Kevin Gray cited above where the author states-

“...A profit is usually granted in conjunction with a licence to enter the servient land, in which case the licence is an incident of the grant of profit and is revocable during the term of the profit...”

That is to say that no separate application for a licence to enter the servient land is necessary once a profit has been granted because the grant of profit is in itself a licence to enter the servient land. That is the argument by Counsel for the Applicants, Mr. Suri, because the Applicants, he said, would need no further action to enable them to harvest timber on Parcel Number 072-002-1 having complied with section 181(1) of the LTA which gives them the right to take from the land such as by logging as an incident of a profit in the definition of Black's Law Dictionary cited by Palmer, J (as he then was) in the case cited above by him. The definition cited by Palmer, J. (as he then was) came from a case decided by a Californian Court in the United States. However, Mr. Suri, took the point one step further by saying that in this case the grant of a profit duly registered and protected under section 181(1) of the LTA, would seem to suggest that the licence acquired by the 1st Respondent had no legal basis for its existence. In the old days in England, there had only been royal forests for the use of the English royalty administered under an independent system of administration and courts. Since 1829 state forests and timber production had become the creature of statutes than anything else (See **Halsbury Laws of England, 4th Edition, Volume 19 at 2**). One obvious conclusion from that is that a grant of profit was never intended to encompass the commercial harvesting of timber on royal forests and later state forests in England. There appeared to have been two regimes in England, one being the land tenure system and the other being royal forests later becoming state forests governed by two separate laws. The same appeared to have been adopted in Solomon Islands in the early days by the British Colonial Government. (See **the Forests and Timber Ordinance Cap.90 in 1969 and the Land and Titles Ordinance Cap.93 in 1968**). Section 5 of the Forests and Timber Utilization Act makes it very clear that felling of trees and their removal from Government land must be authorized by the grant of a licence by the Commissioner of Forests Resources. The same applies to land that is not customary land. Even where felling and removal of logs is a result of a grant of profit by negotiation to the Government to fell and take away trees, a grant of a licence is still necessary. That provision was the subject of an amendment in 1972 to avoid Government having to purchase or lease land before it could grant any licence to fell

and remove trees as was the case before. (See **Hansard, 1972**) It is really a case of negotiating timber rights (profit) on someone else's land by the Government and then allowing a logging operator to apply for a licence to fell and remove the trees on that land for gain. It is not a case of granting a profit under section 181(1) of the LTA. As regards private land which is not customary, the procedure for obtaining a licence is the same as for public or land in which the Government has an interest. Any one wishing to fell and remove trees from private land which is not customary must apply for a licence under section 5 of the FTUA. A grant of profit under section 181(1) of the LTA is not sufficient to authorize the felling and removal of trees from the servient land for gain. The reason is that section 5 of the FTUA is the law that governs the granting of licence for commercial logging in Solomon Islands and not section 181(1) of the LTA. In fact, as pointed out by Counsel for the Applicant, Mr. Nori, it is an offence under section 4 of the FTUA for anyone to fell trees and remove them for gain without a licence under section 5 of the FTUA. The fact that the Applicants had been able to secure a grant of profit under section 181(1) cited above is no bar to applying for a licence under section 5 of the FTUA. The said grant is no substitute for a licence under section 5 cited above. It cannot defeat a licence granted under section 4 of the FTUA.

Answering the questions posed in the Originating Summons.

The answer to question 1 is no. There is no conflict between section 181(1) of the LTA and section 5 of the FTUA. Both sections are independent of each other and one does not override the other. If the motive to secure a grant of profit under section 181(1) cited above was to avoid obtaining a licence under section 5 of the FTUA, then it not correct to do that because to do so would amount to the usurpation of section 5 of the FTUA.

The answer to question 2 is yes but section 181(1) of the LTA does not apply to the licence currently held by the 1st Respondent. It is therefore not necessary to answer question 3 in full except to say that the licence granted to the 1st Respondent is not contrary to or violate section 181(1) of the LTA. This is enough to reassure the 1st Respondent that its licence has not been invalidated by the Court by any means. The relief sought in (a), (b), (c), (d) and (e) in the Originating Summons being conditional upon affirmative answers to questions 1, 2, and 3, need not be addressed in view of the answers already given in respect of each of them. The parties will meet their own costs. This is a dispute between two logging Companies with Solomon Islanders sandwiched in the middle. They will have to sort themselves out.

F.O. Kabui, J.
Puisne Judge