IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Jurisdiction

Between:	STEPHEN SEKOVOLOMO (as representative of his tribe)	Claimant
And:	EAGON FOREST RESOURCES DEVELOPMENT COMPANY (SI) LTD	1st Defendant
And:	OZOBATU	2nd Defendant
And:	TEBURUKANA	3rd Defendant.
And:	REREBATU	4th Defendant
And:	ATTORNEY GENERAL (representing Commissioner of Forests)	5th Defendant

M. Pitakaka for the Claimant.

C. Hapa for the 1st Defendant.

No appearance by the 2nd to 5th Defendants.

Date of hearing: 24 January and 4 February 2014.
Date of Judgment: 27 March 2014.

JUDGMENT

Apaniai, PJ:

Introduction.

1. This is an application by the Claimant for assessment of damages for trespass to Kogoatovo customary land and for conversion of logs from that land.

2. The application follows a judgment delivered in favour of the Claimant on 2 December 1999 in which it was adjudged that the 1st Defendant ("Defendant") had trespassed in that land and had converted logs therein.

3. Following the judgment, the Defendant has paid the Claimant the sum of $162,191.06 in the year 2000. This amount is said by the Claimant to represent the outstanding royalties ordered to be paid under paragraph 2 [2] [b] of the judgment. Since then, no further payment has been made to the Claimant.

4. Nothing further was done to progress the case until 4 April 2012 when this application was filed seeking leave to enforce the judgment and to allow the parties to "undertake proper assessments of damages".

5. The application was heard by the Registrar who made a ruling on 9 July 2012 rejecting the application on the ground, it seems, that the application was misconceived in that assessment of damages was part of the main claim and required no leave to proceed with it despite the long delay in progressing the case since December 1999. He ruled that it is not necessary to seek leave to progress the case. In the light of that ruling, the Claimant now comes to court for assessment of damages.

6. Unfortunately, the Claimant, Stephen Sekovolomo ("Stephen"), had died and the case is now handled on behalf of the Koqoatovo tribe by Moses Virivolomo ("Moses") who is Stephen's first cousin and a member of the Kogoatovo tribe.

7. Mr. Pitakaka, of counsel for the Claimant, did not appear at the hearing of this application at 1.30pm on 4 February 2014. However, he has filed a written submission which I have also considered.

The evidence.

8. In seeking the quantum of damages in this application, Moses relies on two documents to show the extent of damage caused and the quantum of damages relative to the damage caused and the logs converted. They are a report by John Schenke[1] ("Schenke Report") and a letter from the Commissioner of Forests to Eagon dated 19 November 2004[2] which contains an assessment of the royalties and penalties payable for logs left lying in the bush ("Commissioner's 2004 Assessment").

9. The Defendant has objected to the relevance and adequacy of these two documents in assessing damages. In relation to the Schenke Report, the Defendant submits that the document is too old and unreliable because Mr. Schenke was not available for cross examination in relation to the contents of the Report as well as his qualification to make the Report. In relation to the Commissioner's 2004 Assessment, the Defendant submits that the assessment was in relation to Mavara land and not Kogoatovo land.

10. The Schenke Report and the Commissioner's 2004 Assessment were tendered into evidence through Moses' sworn statement filed on 19 August 2013 as exhibits "MV5" and "MV6" respectively. While reading Moses' sworn statement, it occurred to me that if the intention of producing the two documents through Moses' sworn statement is to use them as evidence of the truth of their contents, then the two documents might be hearsay evidence and, therefore, inadmissible.

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[1] Exhibit "MV5", sworn statement by Moses Virivolomo filed on 19/08/13.
[2] Exhibit "MV6", sworn statement by Moses Virivolomo filed on 19/08/13.

11. I therefore asked Mr. Hapa during verbal submissions whether he objects to the admissibility of the two documents on the ground of hearsay. His response was that his objection to the Schenke Report was on the basis of its relevance due to the length of time that has passed since the making of the Report and the unavailability of Mr. Schenke for cross examination and, in respect of the Commissioner's 2004 Assessment, his objection was on the basis that the assessment relates to Mavara land, not Kogoatovo land. I took it that Mr. Hapa had no objections to the two documents on the ground of hearsay. In that regard, though the two documents were, in my view, hearsay, I have decided to treat them as admissible under the general rule that hearsay evidence, if introduced without objection, will be treated as evidence and not as a nullity[3].

Issues.

12. Having admitted the two documents, the issues then are:-

[a] whether the Schenke Report is too old and irrelevant;

[b] if the Report is relevant, whether the Schenke Report contains sufficient material upon which quantum for trespass and environmental damage can be assessed;

[c] whether the Commissioner's 2004 Assessment relates to Kogoatovo land or Mavara land;

[d] if the assessment relates to Kogoatovo land, whether the assessment contains sufficient material upon which the quantum for conversion can be assessed.

Whether the Schenke Report is too old and irrelevant.

13. Mr. Hapa submits that the Report was prepared sometime in 1992 or 1993 and as such the contents have become irrelevant and out of date and therefore no reliance should be placed on the Report.

14. I do not agree with this submission. In my view, a report prepared at the time of the trespass would be more accurate than a report prepared years later. Passage of time does not change the facts as found and stated in the Report. There is nothing in the judgment delivered on 2 December 1999 to indicate the exact date of trespass, but what is clear is that the claim was filed on 24 July 1992, which means that the trespass must have occurred on or before July 1992. If the Report was prepared in 1992 or 1993 then the chances are that its contents are accurate. I reject Mr. Hapa's contention.

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[3] Re Lilley, deceased [1953] VLR 98; McGregor-Lowdes v Collector of Customs (Q) (1968) 11 FLR 349.

15. It has also been submitted by Mr. Hapa that Mr. Schenke was not available for cross examination on the contents of the Report and therefore the contents should not be relied on as an accurate basis for calculation of damages. He also submits that Mr. Schenke's qualifications have not been indicated and therefore the Report should not be accepted at its face value.

16. While there is some merit in that argument, I cannot accept that Mr. Schenke's unavailability for cross examination is fatal to placing reliance on the Report. The Defendant has conceded that no notice has been given to cross examine Mr. Schenke. However, he argues that Moses has conceded in his sworn statement that it would be difficult to bring back Mr. Schenke to testify and therefore issuing notice to cross examine would serve no purpose.

17. While that may be so, it is not an excuse for failing to issue the necessary notice for cross examination on the Report. Having failed to issue the notice for cross examination, the Defendant is not entitled to raise the unavailability of Mr. Schenke as a ground for objection to the admissibility of the Report. This submission fails.

18. Mr. Hapa has also raised other issues regarding the Report which he submits should be taken into account in considering the reliability of the Report. Those issues relate to the incorrect spelling of Mr. Scheke's name and the fact that Moses has conceded that the Report may have been made in 1992 or 1993 and not 1994 as previously claimed by Moses.

19. In my view, those are minor issues which do not affect the contents of the Report in any substantial manner that would justify rejecting the Report. The Schenke Report is admitted into evidence.

<u>Whether the Schenke Report contains sufficient material upon which quantum for trespass and environmental damage can be assessed</u>.

20. In relation to this issue, Mr. Hapa has raised the possibility that the area of trespass as stated in the Report may have been reduced due to a consent order made on 2 August 1994 whereby certain portions of land said to be part of Kogoatovo land, which portions the Schenke Report may have included as part of the trespassed area, have been severed from Kogoatovo land. These are Lengadao, Vanakalu, Buturu Volaqana and Buturu Bolugarara.

21. I accept that there was a consent order dated 2 August 1994 which had severed the plots of land known as Lengadao, Vanakalu, Buturu Volaqana and Buturu Bolugarara from Kogoatovo land. Since the Schenke Report was made in 1992 or 1993, it is likely that the areas of land covered by the Lengadao, Vanakalu, Buturu Volaqana and Buturu Bolugarara which, in 1994, were severed from Kogoatovo, may have

been included in calculating the total area of trespass in Kogoatovo land which the Report has put at 630 hectares of land[4].

22. Unfortunately, there is no evidence to indicate what the total area of those plots of land is. Moses said that those areas are ridges which do not have commercial logs but only nut trees. I am not convinced by that assertion. There is no evidence to prove what Moses said. It is therefore difficult to say how much of the 630 hectares is covered by the Lengadao, Vanakalu, Buturu Volaqana and Buturu Bolugarara plots of land and how much of it is Kogoatovo land. In these circumstances, I am minded to divide the 630 hectares equally between the five plots of land, namely, Kogoatovo, Lengadao, Vanakalu, Buturu Volaqana and Buturu Bolugarara. This comes to 126 hectares each. I determine that the area of trespass in Kogoatovo land (for this case only) is 126 hectares.

23. That, however, is not the end of the matter. Logging involves damage to land which is normally caused through construction of roads, skidding tracts and bridges as well as destruction of fauna and environment and damage to rivers through felling of trees. Food gardens, houses, fruit or nut trees and tabu sites might also be destroyed or damaged. The burden is on the Claimant to satisfy the court as to the fact of damage within that 126 hectares and as to the quantum of the damage[5]. If he does not satisfy the court on both, his action will fail or else only nominal damage will be awarded. Similarly, if he only satisfies the court as to the damage but fails to satisfy the court as to the quantum, he also stands the risk of being awarded only nominal damages.

Quantum of damages for trespass.

24. It is clear the Schenke Report did not specify the kind of damage caused. If roads and skidding tracts have been constructed and rivers polluted and the environment damaged, the Report should have said so. It did not say how much of the land has been covered by roads and skidding tracts. It did not say what damage has been caused to the fauna or the land. It did not say whether rivers have been polluted. It did not say whether any houses, tabu sites, gardens or nut trees were destroyed. In short, the Report has failed to specifically state the kind of damage caused and the value of any such damage.

25. That being so, I can only award nominal damages for the trespass to Kogoatovo land. Nominal damages does not necessarily mean small amount nor does it mean large amount. It simply means an amount below what might be considered as likely to be the actual quantum had evidence been produced to prove the actual amount of damages. I award nominal damages for trespass to Kogoatovo land in the sum of $15,000.00.

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[4] See page 23 of the Report attached to the sworn statement of Moses Virivolomo filed 19 August 2013.

[5] McGregor on Damages, 13th Edition, p. 181, para. 252.

Whether the Commissioner's 2004 Assessment relates to Kogoatovo land or to Mavara land.

26. In regards to the claim for damages for conversion of logs, the first issue to determine is whether the Commissioner's 2004 Assessment relates to an assessment carried out in Kogoatovo land or whether it is an assessment carried out in Mavara.

27. Mr. Hapa argues that the assessment relates to Mavara land. He refers to the heading of the Commissioner's 2004 Assessment which states that the assessment was in relation to Mavara land. He also refers to the claim in CC. 459 of 2005 ("CC. 459/05") which Luke Gaverevolomo had filed on behalf of the Mavara tribe against Eagon claiming USD47,442.96 as royalties for 599 pieces of logs left by Eagon in the Mavara land. In fact the Commissioner's 2004 Assessment had mentioned only 583 pieces of logs. On the basis of those evidence, Mr. Hapa argues that the Commissioner's 2004 Assessment relating to those 583 logs were logs felled inside Mavara land and not Kogoatovo land.

28. Mr. Pitakaka, of counsel for the Claimant, on the other hand, does not dispute that the Commissioner's 2004 Assessment was headed as an assessment relating to Mavara land. His argument, however, is that the said Mavara land is in fact Kogoatovo land and that the reference to Mavara land in the Commissioner's 2004 Assessment was a mistake.

29. Mr. Pitakaka's argument, as I understand it, is based on a claim against the Kogoatovo tribe by Mavara tribe, through Mr. Bernard Kasi, in Land Appeal Case No. 10 of 1996 ("CC. 10/96") which relates to the land claimed by Mavara tribe to be South Mavara land. This is the land in which the said 583 logs were felled. The Mavara tribe lost that case to the Kogoatovo tribe starting at the chiefs hearing and right up to the High Court. That land, which the Mavara tribe claims as South Mavara, is not South Mavara but Kogoatovo land owned by the Kogoatovo tribe.

30. Mr. Pitakaka submits that, despite losing CC. 10/96, the Mavara tribe continues to claim ownership of the land thus resulting in their request for the assessment of the value of the 599 logs claimed to have been felled in the Mavara land. Mr. Pitakaka submits that this is the reason why the Commissioner's 2004 Assessment has titled the Assessment as relating to Mavara land and the subsequent filing of Civil Case No. 459 of 2005 ("CC. 459/05") by Luke Gaverevolomo on behalf of the Mavara tribe against Eagon claiming damages for trespass and for illegally felling 599 trees (or, the 583 logs as stated in the Commissioner's 2004 Assessment) in "Mavara land". (I pause to say here that I have, as a matter of interest, searched the court file on CC. 459/05 to ascertain what stage the case has reached, but found that the claim was struck out on 13 June 2012 for failure to progress the case further and that no application has been made to re-instate it).

31. Mr. Pitakaka further submits that, on realising that the reference to "Mavara land" in the Commissioner's 2004 Assessment was a mistake, the Commissioner had requested another assessment to be made to correct the mistake, but that the request was never attended to. Despite that, Mr. Pitakaka submits that it is clear that the land in respect of which the Commissioner's 2004 Assessment was made in 2004 was in fact Kogoatovo land and not Mavara land.

32. Having heard the above submissions, and in the light of the material before the court in support of the submissions, I am satisfied that the explanations given by Mr. Pitakaka are more credible. I find on the balance of probabilities that the assessment contained in the Commissioner's 2004 Assessment was in relation to Kogoatovo land and therefore the 583 trees felled and left lying in the bush were trees felled by Eagon inside Kogoatovo land.

Quantum of damages for conversion.

33. Having found that the assessment in the Commissioner's 2004 Assessment relates to Kogoatovo land, the question now is whether the information contained in that Assessment is sufficient to calculate the quantum of damages for conversion.

34. Unfortunately, there is no evidence of how many logs were exported or felled from Kogoatovo land apart from the 583 trees mentioned in the Commissioner's 2004 Assessment. That Assessment had merely calculated the royalties (and tax) payable on the penalty payable for logs left lying in the bush. The penalty is imposed under clause 17 of the prescribed Form of Agreement for Timber Rights (Form 4). That clause provides that where saleable logs are felled but not remove for sale, a penalty of 200% of the value of those logs shall be paid by the logging company responsible for felling the logs. According to the Commissioner's 2004 Assessment, royalty of 12% of the 200% penalty is payable to the land owners. The royalty for the 583 logs was assessed at USD47,442.96 while the actual value of the 583 logs found in the bush was assessed at USD197,678.98.

35. In the absence of any evidence in regards to the total volume of logs felled or extracted from the Kogoatovo land, I find that the total number of logs felled from Kogoatovo land was the 583 logs. This does not include those logs already exported which has resulted in the payment to the Claimant of the royalty of SBD162,191.06 referred to in paragraph 3 above.

36. Unfortunately, there is no evidence of how much log was exported or the volume of logs exported. It is therefore not possible to take those logs into account in calculating the actual damages for all the logs felled or exported from Kogoatovo land.

37. In respect of the 583 logs referred to in the Commissioner's 2004 Assessment, however, the Commissioner had instructed the Defendant to pay the royalties (ie, the USD47,442.96) to the Claimant's party. Whether the Commissioner was right in issuing those instructions is an issue which would be worth debating on another occasion. I make no order for the payment of that sum. For now, the important issue is to determine the damages payable for conversion of trees on the Claimant's tribal land.

38. As to that issue, the Commissioner's 2004 Assessment has placed the value of the 583 logs at USD197,678.96. I accept that valuation as an accurate sum to be awarded as damages for converting the 583 logs.

39. Unfortunately, the volume of logs which have already been exported, and in relation to which the sum of SBD162,191.06 was paid as royalty to the Claimant in 2000, is not known. As such, I cannot take those logs into account in assessing damages for conversion. The total amount of damages I award for conversion is USD197,678.96.

40. This amount needs to be converted into Solomon dollars. Unfortunately, it is now not possible to determine what the exchange rate between the US dollar and the Solomon dollar (SBD) was in 1992 when the conversion occurred. In the circumstances, I am inclined to use the Bank of South Pacific exchange rate as of today's date (26 March 2014) to determine the equivalent of the USD197,678.96 in Solomon dollar (SBD). The rate is .1292. This means the SBD equivalent of USD197,678.96 is SBD1,530,022.91. I award SBD1,530,022.91 as damages for conversion of 583 logs from Kogoatovo land.

41. The total damages awarded for both trespass and conversion in this case is SBD1,545,022.91.

42. I have considered whether I should deduct from the SBD1,530,022.91 the sum of SBD162,191.06 paid to the Claimant as royalty in the year 2000 as stated in paragraph 3 above. I have decided not to deduct that sum for the reason that the SBD162,191.06 represents royalties payable on logs which have been exported. As stated earlier, there is no evidence of how much logs were exported on that occasion. Despite that, the fact is, logs were exported. In the circumstances, it is my view that the sum of SBD162,191.06 is sufficient damages for those exported logs.

Compensation orders.

43. The orders of the court are as follows:-

[1] Nominal damages for trespass are awarded against the Defendant in the sum of SBD15,000.00.

[2] Damages for conversion are awarded against the Defendant in the sum of SBD1,530,022.91.

[3] The Defendant shall pay the costs of the Claimant on standard basis to be assessed if not agreed.

THE COURT

James Apaniai
Puisne Judge