IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 131 of 2006

BETWEEN: **TROPICAL RAINFOREST AROMATICS LIMITED**
Claimant

AND: **THE MINISTER FOR AGRICULTURE, QUARANTINE, FORESTRY & FISHERIES**
First Defendant

AND: **WATSON JOHN, THE ACTING DIRECTOR OF FORESTS**
Second Defendant

AND: **THE ATTORNEY GENERAL**
Third Defendant

AND: **JEFFREY LAHVA & TOM SAUTE T/AS LAHSAUT**
Fourth Defendants

Coram: Justice C. N. Tuohy

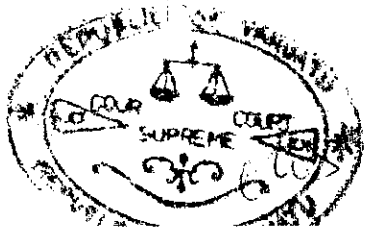
Mr. Rosewarne & Mr. Kalmet for Claimant
No appearance of First and Third Defendants
Mr. Yawha for Second Defendant
Mr. Malcolm for Fourth Defendants

Dates of Hearing: 25 August 2006

Date of Decision: 25 August 2006

JUDGMENT

1. The Claimant has filed a claim for judicial review of the decision of the Second Defendant to grant to the Fourth Defendants a licence to harvest sandalwood. In conjunction with that application, the



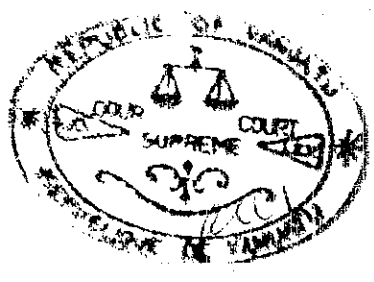
Claimant made an application for urgent injunctive relief to suspend the operation of the licence pending the hearing of the substantive claim.

2. The reason for urgency is that the licence is for a period of years and each year the sandalwood harvesting season is short. This year it extends from the 15 July 2006 to 15 September 2006 so there is only about three weeks of the season left. If the application for injunctive relief is not heard and decided urgently then this year's season will have passed entirely with what the Claimant says is consequential irreparable damage to the resource due to excessive harvesting resulting from the harvesting under the additional licence.

3. The Claimant is the existing holder of a licence to harvest sandalwood. There is no argument that he has standing as a result of that to bring his claim.

4. He is one of two existing licence holders. His licence this year allows unrestricted harvesting but the combined quota of 80 tonnes for the entire country is not to be exceeded. It is a fair assumption at this interim hearing, although the evidence is not clear, that the other existing licence holder's licence is in similar terms. So apart from the Fourth Defendants' new licence which is for 10 tonnes, the harvest pursuant to the licences of the existing licence holders is limited to 80 tonnes for the country.

5. The assumption of the parties on both sides is that the licence will allow a total of 90 tonnes to be harvested through out the country although, as I have pointed out to counsel during argument, one could read the existing licences in a different way. I will assume,



however, that the parties' understanding of the position is correct for the purposes of the present application.

6. On any application for an interim injunction, it is accepted in countries deriving their systems of law from the English common law that the principles to be applied are set out in ***American Cyanamid v Ethicon Limited*** [1975] 1 All ER 504; AC 136 a decision of the House of Lords. This decision has been accepted and applied in the Supreme Court of Vanuatu in the case of ***Port Vila Municipal Council*** v ***Attorney General*** 2003 VUSC 25 and more recently in Civil Case 205 of 2005, ***Telecom Vanuatu Limited*** v ***Minister of Infrastructure & ors*** by Judge Treston.

7. There are always two broad questions arising under those principles. The first is whether there is a serious question to be tried. Here the attack on the decision is based on two broad grounds. First that the Second Defendant failed to have proper regard to the provisions of the Forestry Act, in particular the guiding principle in section 4 (a) which provides under "Division 1 - General Principles" that in performing their functions and powers under this Act the Minister, the Board and the Director must have regard to the following principles:

> ***"(a) the forests of Vanuatu must be sustainably managed, developed and protected so as to achieve greater social, environmental and economic benefits for current and future generation".***

So sustainable management is the very first principle of forestry management according to the Act.

8. It is also submitted that the Second Defendant failed to consider properly section 33 (2) of the Act which provides as follows:-

> ***"Subject to subsection (4), it is a condition of each licence that the annual volume of timber allowed to be harvested under the licence must not exceed the annual sustainable yield set out in the Forestry Sector Plan, or, until that Plan is approved, the National Forest Policy, for the relevant island or such areas as are prescribed"***

9. In contrast to the existing licence holders, there is no reference in the Fourth Defendants' licence to any total to be taken in the country or any annual sustainable yield. The National Forestry Policy is annexed to Mr. Naupa's first sworn statement and it appears that it indicates that 70 tonnes is the maximum sustainable yield for sandalwood. I say "it appears" to indicate that because it would be obvious from what I have already said that the two existing licences allow up to 80 tonnes to be taken and that is even before the licence in question here was issued. Also put before the Court in annexure "JN9" of Mr. Naupa's sworn statement were a number of reports which in general terms indicate that even 70 tonnes may be in some opinions beyond sustainable levels.

10. The second ground of attack which is specifically stated in ground 7 of the claim is that, in granting the licence, the Second Defendant purported to exercise powers which were reserved to the Director of Forestry under section 47 of the Act without proper delegation of authority. I interpret here that the Second Defendant is not the Director of Forestry. The Director of Forestry at the relevant time was Mr. Mele.

11. I have no doubt that there is a question to be tried on both grounds and indeed that was conceded on behalf of the Defendants.

12. As to having regard to provisions regarding sustainable management, the Defendants have filed sworn statements which are to the effect the Second Defendant did indeed take into account those aspects. It is not necessary for the Court to come to any finite view on that issue for the purpose of the present application. It is clear that there is sufficient in the sworn statement filed for the Claimant to argue reasonably that no or insufficient consideration has been given to the relevant principles or the relevant provisions of the Forestry Act and in particular that section 33 (4) has not been given effect.

13. As to the other major ground of the claim, the strength of the Claimant's case is not as clear as it first seemed this morning during argument. Section 60 of the Constitution Act provides that the Public Service Commission alone has the power to appoint public servants and section 18 of the Public Service Act repeats in effect that constitutional provision in respect of Directors General and Directors. But section 19 of the Public Service Act gives to any Director the power to delegate in writing his powers under any Act generally or particularly.

14. Thus raises a question as to how section 19 fits with section 60 of the Constitution Act given the apparent breadth of section 19, but I simply mention that in passing. The Defendants rely on a letter of 30 May 2006 from the Director to the Second Defendant as constituting a delegation under section 19 of the Public Service Act. There is a question in my view whether that letter is clear enough in its terms to effectively delegate to the Second Defendant the power to grant this

licence. For the purposes of the present application it is only necessary to confirm what has in effect been conceded: that the Claimant has an arguable case and that there is a serious question to be tried on this ground as well.

15. The next matter to be considered is whether damages would be a sufficient remedy for the Claimant. The factual position here is that as at three weeks ago, the Fourth Defendants have deposed that in fact 5 of the 10 tonnes permitted under the licence have already been harvested. The Claimant questions the correctness of that statement. Nevertheless, that is the sworn evidence at the present time. There is no evidence as to how much has been harvested in the three weeks since that sworn statement was made but no reason to think that the Fourth Defendants have not continued to operate under the licence. It may be therefore that in practical terms not very much hangs on the outcome of this application. However, on the state of the Court's knowledge at the present time, at least something hangs on it, the balance if any of the sandalwood to be harvested under the 10 tonnes licence.

16. I consider whether damages would be an adequate remedy in this case to the Claimant and I come to the conclusion that they would not. This is not a claim for damages, this is a claim for judicial review and it is the action of the Second Defendant which is attacked not any action of the licensee, the Fourth Defendants. There is no basis for the Claimant to obtain damages from the Fourth Defendants for the grant to the licence to the Fourth Defendants by the Second Defendant even if the licence should not have been granted. Furthermore, once the sandalwood has been harvested, if indeed, that is unsustainable ecologically, the physical ecological damage will have been done and cannot be adequately repaired.

17. So I conclude that it is no answer to say to the Claimant in this case: "Well in some way you can be financially recompensed in the event that you are right and this licence is invalid or should never have been issued".

18. On the other hand, if the Claimant was granted an injunction but failed to succeed at trial, it has to be considered whether its undertaking as to damages would adequately compensate the Fourth Defendants for any loss that the Fourth Defendants might suffer by reason of the injunction. In my view any loss that the Fourth Defendants might suffer by way of an injunction will be a purely monetary one.

19. The result of an injunction to the Fourth Defendants will be that they will be unable to themselves harvest the balance of any of the 10 tonnes or themselves process that balance. As far as one can establish from the evidence, their practical alternatives would be to either leave the sandalwood in the ground for next year or some later time or sell it at a lower financial return to one or other existing licence holders. Either way it appears to me that any loss suffered by the Fourth Defendants by virtue of the making of an injunction would be a financial loss and would be capable of being compensated by money.

20. Here the Claimant has given an undertaking as to damages under seal. It is in the usual full terms. There has been no suggestion that the Claimant's undertaking lacks substance.

21. Otherwise considerations relating to the balance of convenience are relatively evenly weighted because so much of the season has

passed already and it seems more than half and probably well over half of the amount permitted under the licence has been harvested already. The downside either way of making or refusing an injunction is relatively limited for that reason.

22. As to issues related to status quo, that also lies on the side of the Claimant. The status quo in this regard means the position as it was before the act complained of, in other words, before the granting of the licence. Obviously, to make an injunction would be to return the position of the parties to that as it existed immediately before the licence was granted to the Fourth Defendants and in that sense would be a restoration of the status quo.

23. Applying these principles relating to injunctive remedies, the balance comes down in favour of granting an injunction because, to summarise: there is a serious question to be tried. Indeed on the material before the Court at this stage it could be said that the Claimants have a strong case on one or both of the grounds that I have referred to.

24. It is particularly so when it seems at least possible that the Second Defendant might lack any strong backing from his own superior in relation to this decision, although again that is something which not clear at this early stage.

25. Secondly because damages are not available and not capable of remedying any potential damage to the Claimant's interest if an injunction is not made. While on the other hand any damage to the Fourth Defendants can be remedied by damages and the undertaking which has been given.

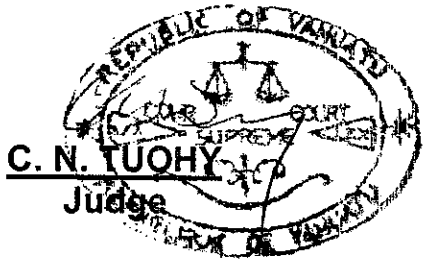
26. In this regard it would be obvious the Fourth Defendants should quantify any damages which they might suffer by virtue of the injunction I am about to make so in the event that the Claimant does not succeed at full trial, the Fourth Defendants are in a position to ask for the undertaking to be given practical effect. I simply mention that. Further as I have said the status quo favours the Claimant in this case.

27. An injunction is a discretionary remedy. In my view, it is in the interests of justice that the discretion be exercised in favour of making an order. The order however, will not be precisely in the terms in which it is sought.

28. There will be an order restraining the Fourth Defendants from conducting sandalwood operations (which is the wording used in the licence) under the Authority of Licence No. SL/JT/LASO05-06 until further order of the Court. Any of the parties has leave to apply on three days notice. Costs in relation to this application are reserved until the substantive hearing of this case. A trial preparation conference is set at 8am on 13 November 2006.

Dated AT PORT VILA on 25 August 2006

BY THE COURT



C. N. TUOHY
Judge