BETI, BISILI & PAIA (As Representatives of the Voramali Tribe) -v- ALLARDYCE LUMBER CO. LTD and ATTORNEY GENERAL and BISILI, RONI, SAKIRI, HIELE, SASAE, POZA, HITE, DAGA & PATO

In the Court of Appeal of Solomon Islands

(Connolly, P.; Los and Goldsbrough JJA)

Civil Appeal Case No. 5 of 1992

Hearing: 19 and 20 August 1992

Judgment: 15 September 1992

J. C. Corrin for the Appellants

J. Sullivan and D. Campbell for the First and Third Respondents

P. Afeau for Second Respondent

JUDGMENT OF THE COURT: In 1987 the first respondent, Allardyce Lumber Company Limited ("**Allardyce**") wished to conduct logging operations on customary land on New Georgia known as Kazukuru Right Hand Land ("KRHL"). By virtue of section 5(1)(c) and (1A) proviso (b) a licence authorising felling of trees upon and the removal of timber of customary land may not be granted unless the Commissioner of Forest Resources is satisfied that the applicant has obtained an approved agreement referred to in Part IIA of the **Forest Resources and Timber Utilisation Act.** A licence was necessary because, by virtue of section 4 of the Act, the felling of a tree and the removal of timber is an offence unless, with exceptions which are not presently material, these acts are done under and in accordance with the terms and conditions of a valid licence issued under section 5.

With a view to obtaining an approved agreement, Allardyce therefore opened negotiations with tribal representatives of the land owners and application was made to the Commissioner of Forest Resources under section 5B(1)(b) of the Act for consent to negotiate with the "**appropriate Government**" which was the Government of Western Province and the Area Council, in this case Roviana Area Council ("RAC") on behalf of the owners of the customary land in question. Plainly enough, copies of the application were sent to Western Province Government and to RAC as was required by section 5B(2). The steps required to be taken thereafter were prescribed in great detail

by the following provisions of Part IIA as it then stood. We set out the material parts of those provisions in full:

> *"5C (1) After receiving a copy of an application forwarded to it under section 5B an area committee whose membership shall include persons having particular knowledge of customary land rights in the area affected by the application shall -*
>
> *(a) fix a place within the area of its authority, and days, not being earlier than two months, or later than three months, after the day on which such copy is received -*
>
> *(i) for a meeting with the appropriate Government and the applicant in consultation with them, and settle at that meeting the quantum of share in the profits of the venture of the applicant, and the terms of the representation of the appropriate Government in the management of that venture: and*
>
> *(ii) for a meeting of the area council to consider such application and to determine the matters specified in sub-section (4);*
>
> *Provided that where the area council fails to secure the settlement referred to in sub-paragraph (i), no further action prescribed in this section shall be taken and the area council shall recommend to the Commissioner of Forest Resources the rejection of the application, and the application shall be rejected by him accordingly;*
>
> *(b) if it secures such settlement forthwith give in such manner as it shall consider most adequate and effective to the public within the area of its authority and, in particular, to persons who reside within such area and appear to it to have an interest in the land, trees or timber in question, notice of -*
>
> *(i) such application;*
>
> *(ii) the parties to, and terms of, the proposed agreement; and*
>
> *(iii) the time and place fixed for the relevant meeting under paragraph a(ii).*
>
> *(2) Any notice given under sub-section (1)(b) shall require any person who has reason to believe that the persons intending to grant timber rights under the proposed agreement*

are not the persons, or all the persons, as the case may be, lawfully able and entitled to grant such rights to attend the meeting referred to in the notice and at such meeting to state to the area committee the particulars of such belief and the reasons for it.

(3) At the time and place referred to in any notice under sub-section (1)(b) the area committee shall meet and consider the application to which the notice relates. In considering the application, the area committee shall hear any representations made to it in response to the requirement provided for in sub-section (2) and shall take into account those representations and all other matters relevant to the application known or believed by the area committee to be true.

(4) Upon the conclusion of its considerations under sub-section (3), an area council shall issue a certificate setting out -

(a) the quantum of share in the profits of the venture of the applicant for payment to the owners of the customary land, and the terms of representation of the appropriate Government in the management of that venture on behalf of those owners, as settled with the appropriate Government and the applicant; and

(b) its determination as to -

(i) whether the persons proposing to grant the timber rights in question are the persons, and are all the persons, lawfully able and entitled to grant such rights, and if not, who such persons are; and

(ii) whether such timber rights in any modified form, may be granted, giving particulars of such modification, if any.

.....

5D (1) Any person who is aggrieved by any act or determination of an area council under section 5C may, within one month from the date of the determination, appeal to the customary land appeal court having jurisdiction for the area in which the customary land concerned is situated and such court shall hear and determine the appeal.

.....

5E When the Commissioner of Natural Resources has received a certificate issued under section 5C and has satisfied himself that -

(a) at least one month has elapsed since such certificate was issued; and

(b) no appeal under section 5I has been lodged against the issuing of such certificate or, if an appeal has been lodged, it has been finally disposed of; and

(c) an agreement for the granting of the timber rights referred to in such certificate has been duly completed in the prescribed form and manner and that the parties to, and the terms and provisions of, such agreement accord with such certificate or, where there has been an appeal under section 5I, relating thereto, the order of the Court determining such appeal,

the Commissioner of Natural Resources shall recommend to the Minister that approval under this Part be given to such agreement.

5F (1) Upon receipt of a recommendation made under section 5E, and the relevant agreement, duly stamped, the Minister may complete a certificate in the prescribed form approving the agreement.

....."

What was required by Part IIA, as it then stood, once the RAC was notified of an application for approval to negotiate, was that an area committee (obviously a committee of the Council) -

(i) call a meeting with the Provincial Government and Allardyce to settle the quantum of profits payable to the customary land owners and that government's participation in the management of the venture (*section 5C(1)(a)(i)*); and

(ii) if it secured such settlement call a meeting of the area council on notice to the public and in particular residents with an apparent interest in the land, trees and timber in question, to consider the application, the parties to and the terms of the proposed agreement and any allegation that the proposed grantors were not the persons and all the persons entitled to grant such rights (*section 5C(1)(b), (2) and (3)*).

Meeting (ii) was not to be called if settlement was not secured at meeting (i).

On the conclusion of meeting (ii) the area council was to issue a certificate setting out the share of profits and Provincial Government

representation and its determination as to whether the proposed grantors were the persons and all the persons lawfully entitled to grant the timber rights (section 5C(4)). The certificate could not issue unless meeting (ii) took place and meeting (ii) could not take place unless settlement was reached at meeting (i). What in fact occurred was that meeting (i) never took place, meeting (ii) therefore could not validly be called and the certificate which in fact was issued by RAC on 18 March 1988 naming twelve persons as those entitled to grant timber rights had no statutory force.

The consequences were serious. Section 5D(1) entitled any person aggrieved by any act or determination of the area council under section 5C to appeal to the Customary Land Appeal Court. The determination of 18 March 1988 was not such a determination and the right to appeal did not arise. Moreover, the council could not certify within the meaning of section 5C(4) the quantum of share in profits and the terms of representation of the Provincial Government. A certificate was nonetheless given by the chairman of RAC, purporting to be under section 5C, setting out the names of the twelve persons entitled to grant timber rights and further certifying that there had been no appeal from the determination of 18 March. This was not and could not be a certificate under section 5C(4).

The next step, if the provisions of Part IIA had been duly followed to this point, would have been for the Commissioner of Natural Resources, under section 5E, to recommend to the Minister approval of the agreement. But as is set out in section 5E this could only occur when he had "**received a certificate issued under section 5C**". As has been seen, no such certificate ever came into existence and his recommendation which seems in fact to have been made by the Commissioner for Forest Resources on his behalf to the Western Province Minister of Land and Natural Resources on 21 November 1988 was not a recommendation authorised by section 5E and that Minister's approval on 23 November 1988 was not an approval authorised by Part IIA.

In point of law, that is really sufficient to dispose of the argument that an agreement for the purposes of Part IIA was duly approved on 23 November 1988. In order to understand the subsequent events, however, it should be mentioned that the Voramali line claimed to be the traditional land owners of KRHL. The 18 March 1988 determination by RAC of the persons entitled to grant timber rights included W.L. Paia (obviously an error for W.G. Paia) and A. Bisili, who were representatives of the Voramali. Negotiations led to the signing of an agreement between Allardyce and four only of the twelve, W.G. Paia, Bisili, Sasae and Daga, allegedly on behalf of all. However the

Kalikogu, another group or tribe, who had five of the twelve representatives nominated by RAC, complained that they were not parties to the agreement and later in the year, on 11 November 1988, a new or, as some would say, additional agreement was signed between Allardyce and ten of the twelve so nominated. Those missing were W.G. Paia, who had died on 7 July 1988, and R. Ege, who was already deceased when the area council made its nomination of the persons entitled to grant timber rights on 18 March.

Before us there was much debate as to whether Allardyce ever made an agreement with the persons determined by the area council as lawfully entitled to grant the timber rights. In the light of what has already been set out, this is really of little importance. It should, however, be mentioned that on the death of W.G. Paia his son, Hugh Paia, and Bisili were appointed by the Voramali as their representatives.

A licence would not seem to have issued immediately in reliance on the alleged approved agreement of 23 November 1988. This was probably because Hugh Paia strongly insisted that the Voramali alone had the right to grant timber rights over KRHL. What followed was that in the first half of 1989 Allardyce and the surviving ten of the twelve who were declared to have the right to grant timber rights on 18 March 1988 brought an action (**Civil Case No. 93 of 1989**) against the Attorney-General, the Commissioner for Forest Resources and the Premier of the Western Province (joining Hugh Paia as fourth defendant) for declarations to the effect that -

(a) the ten were at all material times the persons then living entitled to grant timber rights in respect of KRHL;

(b) a valid agreement or agreements were constituted by either the agreement of 11 November 1988 or that agreement and the agreement of 8 June 1988;

(c) the Commissioner's letter of 21 November 1988 on behalf of the Permanent Secretary for Natural Resources validly recommended the approval of the agreement under section 5E;

(d) the Premier of Western Province had validly approved the agreement pursuant to section 5F; and

(e) Allardyce was entitled to a grant of a timber licence (subject to the proper exercise of the discretion of the Commissioner)

and for consequential orders of mandamus. In giving judgment in the action on 18 August 1989, Ward C.J. observed of the proposed declarations (b), (c) and (d) that they all related to the validity of the agreement on Form IV (a description which is answered by both the agreements) or to the acts of the Commissioner and the area council under sections 5E and 5F. His Lordship refused these three declarations because the agreement or agreements should not have been considered until settlement was reached under section 5C(1)(a)(i). As to proposed declaration (e), that depended on the making of declarations (b), (c) and (d) and it also was refused. As to proposed declaration (a), His Lordship observed that there was no guarantee that the position as at 11 November 1988 (plainly enough as to the persons entitled to grant the timber rights) would be preserved and that declaration also was refused, His Lordship saying -

> *"By the time of any possible future application under section 5B, the area council may for good customary reasons consider some other person has the right to represent the people presently represented by the people who have died."*

The ratio of the decision, so far as Allardyce's case was concerned was that the agreement or agreements were invalid for failure to observe the then Part IIA provisions and that the steps which purported to be taken under sections 5E and 5F were invalid for the same reasons. This view accords entirely with that which we have expressed above.

Hugh Paia had counterclaimed in that action for declarations to the effect that -

(a) he was the representative of his father, the late W.G. Paia and the Voramali tribe; and

(b) the ten (other than Bisili) were not customary land owners,

and for consequential relief. Hugh Paia's proposed declaration (a) was refused for the same reason as the plaintiffs' proposed declaration (a); and his proposed declaration (b) was refused as being irrelevant, His Lordship having earlier emphasised that the customary land owners were not necessarily the persons entitled to grant timber rights. With all respect, that consideration does not make the identification of the customary owners irrelevant. The customary land owners would ordinarily have the interest in the timber growing on the land and the right to grant timber rights to others unless, for some reason such as a grant by the customary land owners, the relevant rights had passed to others. Identification of the customary land owners would

seem to be relevant if only as identifying the prima facie source of the rights in question.

Accordingly, Ward C.J. granted no relief in Civil Case No. 93 of 1989 either to the plaintiffs or to Hugh Paia as a defendant bringing a counterclaim.

The next event was that Parliament by Act No. 7 of 1990 provided that any agreement for timber rights in the prescribed form in respect of which a certificate of approval had issued under section 5F prior to the coming into operation of the Act of 1990 should be deemed to have been validly properly and lawfully granted under the corresponding provisions of the Act of 1990 notwithstanding that section 5B and section 5C of Part IIA in force at that time might not have been complied with in every particular or requirement. Act No. 7 of 1990 came into operation, by virtue of Act no. 5 of 1991, on 5 July 1990. Apart from the provision to which reference has already been made, referred to in this appeal as the saving provisions, Act No. 7 of 1990 also inserted a new Part IIA.

Faced with this legislation, the Voramali, by their representatives, Gorden Beti, Donald Bisili and Patrick Paia, brought an action (**No. 45 of 1992 in the High Court**) against Allardyce, the Attorney-General, and the remaining nine of the original twelve, J. Zinihite having apparently died in the meantime. By their Statement of Claim the plaintiffs pleaded non-compliance with Part IIA by Allardyce (though in fairness to that company it must be said that most of the non-compliance was by RAC) and alleged that the amending legislation of 1990 did not remedy the non-compliance in question. By paragraph 10(i) of the Statement of Claim, it was alleged that a certificate of approval issued by the Government Agencies on or about 26 July 1990 (obviously in reliance on the 1990 legislation) is invalid and that a timber licence which appears to have issued on 2 October 1991 is also invalid. It is not suggested that the Part IIA procedure was recommenced and the appeal before us was argued on the basis that the Part IIA procedure initiated in 1987 by Allardyce was the only such procedure upon which Allardyce could rely, coupled with the amending legislation of 1990. The plaintiffs' attack the legality of the Certificate of Approval of 26 July 1990 on the further ground that the **Foreign Investment Act** was not complied with and will if necessary contend that the amending legislation of 1990 to which reference has already been made is contrary to section 8 of the Constitution. If their contention that the amending Act did not remedy the non-compliance is correct, it will be unnecessary for the High Court to determine the other attacks made on the validity of the Certificate of Approval and the Licence.

This bring us to the subject matter of this appeal. The three plaintiffs brought an application in the High Court to strike out paragraphs 12 and/or 13 of the counterclaim of the defendants. Paragraph 12 alleges that the nine third defendants "**as representatives of their respective lines, tribes, clans and families are the customary owners of Kazukuru Right Hand Land together with the true successors of the three deceased representatives Paia, Ege and Zinihite as representatives of their respective lines, tribes, clans and families**". Paragraph 13 alleges that in the premises the third defendants are customary co-owners of the land.

The plaintiffs' application was based on the view that by virtue of the decision of the Customary Land Appeal Court in ***W. Paia and O. Bisili -v- I. Talasasa*** *(CLAC No. 6 of 1979)* affirmed by the High Court in ***Paia -v- Talasasa*** *[1980/81] S.I.L.R. 93* it was res judicata that Kazukuru land east of the customary boundary running from Ludokoma to and up the Hoedeo Valley and thence northward to Baeroko was the customary property of the descendants of Voramali led by their chiefs W. Paia and O. Bisili. Muria A.C.J. declined to strike out paragraph 12 and 13 on the ground that those decisions were confined to the customary ownership of Mamamisi Hill, a relatively small area. In this he followed the opinion of Ward C.J. in the first Allardyce case which is discussed above. Examination of **CLAC No. 6 of 1979** and the judgment of Daly C.J. in ***Talasasa -v- Paia*** makes it clear that those decisions were not so limited and the ratio of both of them was as set out above. It is noteworthy that the CLAC judgment referred to earlier litigation in which Jacob Zinihite and Milton Talasasa successfully restrained incursion by E. Biku from the east into Left Hand Land. The decisions relied on by the appellants do indeed establish that Kazukuru land east of the customary boundary was, in custom the property of the descendants of Voramali led by their chiefs and the decisions are not confined to the ownership of Mamamisi Hill. Of course, the decisions are res judicata only as between the descendants of Voramali and the descendants of Qulamali. The twelve persons nominated as entitled to grant timber rights fell into the following groups: **Dunde 5, including Paia and Bisili; Kalikogu 5; Bebea 1; and Munda 1.** Whether the decisions in question are res judicata in relation to all of them is something we are not in a position to determine. The claim by the third defendants to be customary owners certainly seems strange having regard to the fact that many of their names appear in the cases as customary owners of Left Hand Land, Jacob Zinihite being a convenient example. The evidence, however, does not enable us to say that some of them at least are not entitled by custom to be regarded as descendants of Voramali in a way which would give them customary ownership with those who have replaced W.G. Paia

and O. Eisili as leaders of the Voramali. Such a question is best resolved in the customary courts. We are therefore not in a position to say that the refusal of Muria A.C.J. to strike out these paragraphs on this ground is erroneous.

The paragraphs in question however raise difficult questions which must in the long run depend upon the application of customary law and probably an elaborate examination of the history of the Kazukuru people. Assuming for the moment that such questions are within the jurisdiction of the High Court, the trial of the issue is likely to be time consuming and expensive and above all it would be quite inconsistent with the provisions of Part IIA, both in its present form and in the form in which it stood at the relevant time. The former section 5D provided and the current section 5E still provides for appeal to the Customary Land Appeal Court from a determination on this point by the area council and further provided and now provides that the decision of the Customary Land Appeal Court shall be final and conclusive and shall not be questioned in any proceedings whatsoever.

Now the issues raised by paragraphs 12 and 13, the trial of which will involve such difficulties, time and expense, may well be wholly irrelevant to the case which the respondents seek to make out in this action. We say this because it is clear that the defendants must rely on the amending legislation. If that legislation is effectual, it is immaterial whether the third defendants and the three deceased were or were not the customary owners in fact or, more relevantly, the only persons entitled to grant timber rights in relation to KRHL. The irregularities committed by the RAC and the Commissioner of Forest Resources and the Minister denied the plaintiffs and their line the right, under Part IIA, to appeal to the CLAC. The procedure prescribed by Part IIA, which is the only way timber rights could be granted over customary land, was either ignored or misapplied. The agreements of June and November 1988 were not, as has been seen, agreements for the purposes of Part IIA. But they have, if the amending legislation is effectual, been put beyond challenge.

This makes it necessary for us to consider, as a matter of law, the effect of the amending legislation. Fortunately, no contested question of fact is involved.

Section 3 of the Forest Resources and Timber Utilisation Act Amendment Act (No. 7 of 1990) provided:

> *"3. For the purposes of this Act it is hereby declared that -*

(a) any licence granted under Part II of the Principal Act prior to coming into operation of this amending Act shall be deemed to have been validly, properly and lawfully granted notwithstanding that the provisions of that Part in force at the time of such grant may not have been complied with in every particular or requirement;

(b) any agreement for timber rights in the prescribed form in respect of which a Certificate of Approval has been issued under section 5F of the Principal Act prior to coming into operation of this amending Act shall be deemed to be an approved agreement validly, properly and lawfully granted under the corresponding provisions of this Act, notwithstanding that the provisions of sections 5B and 5C of Part IIA of the Principal Act in force at that time may not have been complied with in every particular or requirement;

....."

The amending Act came into operation on 5 July 1990 by virtue of section 2 of a further amending Act (**No. 5 of 1991**). The licence referred to in the pleadings is said to have issued on or about 26 July 1990. It is therefore not within the deeming provision of paragraph (a).

However, the agreements for timber rights relied on by the respondents were ones in respect of which a Certificate of Approval under section 5F purported to issue on 23 November 1988, long before Act no. 7 of 1990 came into operation. They are therefore deemed to be approved agreements granted under the corresponding provisions of Part IIA as inserted by that Act, "***notwithstanding that the provisions of sections 5B and 5C as in force at that time may not have been complied with in every particular or requirement.***" We take that to mean that the various non-compliance with sections 5B and 5C discussed above are no impediment to the validity of the agreements and the approval thereof. This is how such provisions have been read for a very long time. ***See e.g. Stroud's Judicial Dictionary (5th Ed.) "Notwithstanding" citing Dwarris on Statutes 683 and Chenie's Case, 7 Co. Rep. 20.***

The draftsman however would seem to have overlooked the fact that as has been seen, section 5E required a certificate under section 5C before the Commissioner could lawfully make a recommendation to the Minister and section 5F required a recommendation lawfully made under section 5E before the Minister might lawfully complete a certificate approving the agreement. Neither

condition was satisfied. If the agreements in question were to be treated as validly approved, what was required really was a provision deeming such agreements to be approved agreements notwithstanding that none of the provisions of Part IIA had been complied with.

It follows that the allegations in paragraphs 12 and 13 serve only to raise an issue or issues which can have no conceivable effect on the ultimate outcome of this litigation. They are therefore embarrassing and vexatious and calculated to do no more than cause great and needless cost. In a sense, the outcome of this appeal resembles the outcome of the first Allardyce case. From a strict point of law, the correct order to make on this appeal is to grant leave to appeal, allow the appeal, set aside the order of Muria A.C.J. and in lieu order that paragraphs 12 and 13 of the counterclaim be struck out. As the ground on which we consider this should be done was not raised before Muria A.C.J. there will be no costs of the application before him.

In practical terms however, as in the case of Allardyce No. 1, it must surely be clear that Allardyce has no prospect of obtaining a valid timber licence over KRHL unless there is a strict compliance with Part IIA by all involved. This, as Ward C.J. expected would occur after the first Allardyce Case, entails a fresh application. If this is inconvenient either to the Provincial Government or to Allardyce, it will at least ensure that customary rights are not overridden for economic reasons.

The judgment of the Court is as indicated above. The respondents must pay the costs of the appeal to be taxed.

BY THE COURT

(P. D. Connolly P.)