ORIGINAL SICOA CAC NO 43 OF 2014

IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	**Appeal from Judgment of the High Court of Solomon Islands (Maina J.)**
COURT FILE NUMBER:	**Civil Appeal Case No. 43 of 2014 (On Appeal from High Court Civil Case No. 248 of 2014)**
DATE OF HEARING:	**THURSDAY 16 APRIL 2015**
DATE OF JUDGMENT:	**FRIDAY 24 APRIL 2015**
THE COURT:	**GOLDSBROUGH P, WARD JA, WILSON JA**
PARTIES:	**Samlimsan (SI) Limited** Appellant **-V-** **Isles Tropical Timber's Limited** Respondent
Advocates: **Appellants:** **Respondent:**	**Michael Pitakaka** Appellant **DNS & Partners** Respondent
Key words	**INTERIM RELIEF – BALANCE OF CONVENIENCE – DAMAGES ADEQUATE REMEDY**
EX TEMPORE/RESERVED :	**RESERVED**
ALLOWED/DISMISSD	**ALLOWED**
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JUDGMENT OF THE COURT

1. This is an appeal against an order setting aside *ex parte* interim injunctive relief. The interim relief was first granted *ex parte* on 15 August 2014 and thereafter set aside following an *inter partes* hearing resulting in a decision of 10 November 2014. The appeal is of right pursuant to section 11 (2) (f) (ii) of the Court of Appeal Act [Cap 6]. It is of note that at the *inter partes* hearing an order was made joining the 2nd Respondent. There is no appeal against that part of the order.

2. In brief the First Respondent to this appeal purported to terminate an agreement with the Appellant and thereafter entered into a similar agreement with the 2nd Respondent. The issue for trial is whether the purported termination was effective and whether specific performance and/or damages flowing from that purported termination should be ordered. Both agreements referred to are what could be termed logging and marketing agreements.

3. The injunctive relief effectively stopped logging operations by the First Respondent or any of their contractors pending determination of the issue in the High Court. Both the Appellants and the 2nd respondents have logged within the relevant area and both have made substantial payments to the First Respondents by way of advances on royalties and expended funds in the course of logging operations.

4. The principles on which relief can be and was sought on this occasion are well established and there is no complaint within this appeal it was those principles which were sought to be applied. This court set out the relevant test in *Majoria v Jino & Ors.* [2009] SBCA 4, confirming the application of *American Cyanamid Co v Ethicon* [1975] All E.R. 396 UK H of L.

5. For convenience we set out the relevant passage from American Cyanamid and the words of Lord Diplock:-

> As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent

> injunction, he would be adequately compensated by an award of damages for the the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

6. It is common ground that there are serious issues to be tried. On the question as to the balance of convenience and whether damages are an adequate remedy there are two issues. There was and remains a claim for specific performance which may or not become otiose by the time of trial. There is also the question whether the 1st Respondents have the ability to pay damages in the event that they are awarded.

7. On behalf of the Appellants it is submitted that the 1st Respondents do not have the necessary resources to settle any order for damages. Although that submission fails to acknowledge the obvious, that the 1st Respondents control a most valuable asset being the timber now subject of these proceedings, it is a point which was raised and considered by the learned judge at first instance. In the court below it is clear that the judge believed that the 2nd Respondent through its manager had given an undertaking to indemnify the 1st Respondent for any damages awarded. That, with respect, was not the case on the material before the judge. There was material suggesting that the 2nd Respondent would assist the 1st in that regard but it did not amount to an undertaking as described in the judgment. Such material is, however, now available on this appeal.

8. Reliance in the court below on the 2nd Respondent's offer to indemnify the 1st Respondent suggests that the learned judge accepted that the 1st Respondent required that support to meet any potential claim for damages. We agree with that assessment. It follows, therefore, that if that support is lacking in any way then the 1st Respondents would not be in a position to meet damages.

9. Balancing requires the court to consider the effect of interim relief on the parties. Here the 1st Respondent would be obliged to wait for further advances and royalties, and the 2nd Respondent would not be able to continue (or resume) logging operations. The potential in that regard for losses is covered by the undertaking as to damages which has already been provided to the Court. The Appellant, on the other hand, risks a trial at the end of which it may not recover damages awarded.

10. There are similarities between the issues here and those presented to this Court in *Galego Resources Ltd v Kalena Foundation Resources Development* [2014] SBCA 23. In that case the Respondents had entered into an equivalent logging agreement, then a second and finally reverted to the original logging contractor. The same arguments were rehearsed before this Court on that appeal.

11. In the absence of interim relief the claim for specific performance is clearly defeated. In the absence of interim relief the Appellant in this matter will be obliged to rely solely on damages as a remedy. By the time of trial, given the well documented propensity of the Respondents to take advances on their royalties, what will remain to satisfy any future judgment? In this case the Respondents say that reliance can be had on the undertaking now given from the Second Respondent.

12. We do not agree with that proposal. In the absence of any offer to set aside in a separate place available only by order of the court a sum at least equivalent to the likely damages or irrevocably to guarantee the availability of such funds through a bank, we conclude that the balance of convenience lies with the Appellants.

13. As in *Galego* we consider the passage of time may have altered the specific requirements of the interlocutory relief and so the Appellants were required to file and serve on the Respondents a draft to cover the possibility that the appeal might succeed. Given that we now publish the reasons and indicate that the appeal is successful we will proceed to make the orders as drafted and filed. given no contrary submissions having been received from the Respondent, with liberty to apply to the High Court in the event that any other matter arises.

14. The appeal is allowed, the interlocutory relief is restored, logs presently felled and awaiting shipment may be sold with proceeds paid into a joint account established for that purpose and accounts be filed. Costs of the appeal are awarded to the Appellants as are the costs below, to be agreed or taxed including certification for overseas Queen's Counsel.

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Goldsbrough P

President of the Court of Appeal

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Ward JA

Member of the Court of Appeal

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Wilson JA

Member of the Court of Appeal