MARK QURUSU AND ANOTHER -v- ATTORNEY GENERAL & OTHERS

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 4 of 1993
Hearing: 24 February 1993
Judgment: 4 June 1993

J. Sullivan for Appellant
P. Lavery for the Respondent

PALMER J: This is an application by Notice of Motion filed on the 16th March 1993 by the Fourth Defendant (Eagon Resources Development (SI) Limited) for determination of a number of preliminary points of law. As amended they are listed as follows:

1. "Whether the Forest Resources and Timber Utilisation (Amendment) Act 1990 as amended by the Forest Resources and Timber Utilisation (Variation of the Date of Commencement) (Amendment) Act 1991 and in particular s.3(a) thereof is a law for the compulsory possession of property or the compulsory acquisition of an interest in or right over property, inconsistent with s.8 of the Constitution and therefore void to the extent of such inconsistency?"

2. "Whether, on the assumption that Eagon's licence would otherwise have been invalid (denied), s.3(a) is effective to validate such licence?"

3. "Whether Eagon is entitled to enter into further timber rights agreements pursuant to the present Part IIA or is restricted by its licence to its present agreements?"

I will deal first with question 2.

The argument of learned counsel for the Plaintiffs, Mr Lavery, is that the validation provision, section 3(a) of the Forest Resources and Utilisation (Amendment) Act 1990 as amended by the Forest Resources and Utilisation (Amendment) Act 1991 COULD NOT have been intended to validate a licence that had not complied for instance with the requirements of Part IIA of the Forest Resource and Utilisation Act.

He argues that under Part II, at section 5 (1A)(b) the Commissioner of Forest Resources must be satisfied and I quote:

> "that the applicant has obtained the approved agreement referred to in Part IIA, when such felling and removal are the subject of rights granted under that agreement, from any customary land."

Where the requirements of Part IIA have not been complied with, then no agreement could possibly be made and approved. The Commissioner of Forest Resources could not be satisfied that an approved agreement had been obtained under section 5(1A)(b). He therefore could not validly issue a licence under section 5(1A). And any licence issued will be invalid. Section 3(a) he argues could not have been intended to validate such a licence. He argues that section 3 can only cure minor or procedural defects. A non-compliance with the provisions of Part IIA is so serious or fundamental a defect as to be curable by section 3(a).

That section reads and I quote:

> "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;"

The key words picked out by Mr Lavery are "every particular". He argues that these words refer to minor or procedural defects only and that they should not be read to include serious or fundamental defects as in the case of a non-compliance with Part IIA of the Forest Resources and Utilisation (Amendment) Act of 1990.

Mr Sullivan on behalf of the Fourth Defendant however argues otherwise. He says that section 3(a) validates licences granted under Part II notwithstanding that the Provisions of Part II of the Act "may not have been complied with in every particular or requirement." The words 'every particular or requirement' he submits include both procedural (particulars) and substantive (requirements) matters.

So, even if we were to assume (and this is denied, but I am not required at this stage to delve into disputes of facts) those requirements come under the Proviso set out in section 5(1A) of the Act, which require that the Commissioner of Forest Resources must be satisfied about that amongst other things. And so even if that part para. 5(1A)(b) has

not been complied with, section 3(a) says "not withstanding", that licence issued "shall be validly, properly and lawfully granted".

Mr Sullivan relies on an authoritative decision of the Court of Appeal of Solomon Islands to support his interpretations. This is the case of **Beti and others -v- Allardyce Lumber Company Ltd and The Attorney General and Bisili and others**, Civil Case No. 5 of 1992, judgement delivered on the 15th of September 1992.

One of the matters considered by the Court of Appeal was the claim by the Plaintiffs in that case that there had been a non-compliance with Part IIA by Allardyce Lumber Company(the company) and that the amending legislation of 1990 (section 3)(b) did not remedy the non-compliance.

A purported certificate of approval of a timber rights agreement had been issued by the Minister on the 23rd of November 1988. The Plaintiffs however claimed that the requirements set out in Part IIA which specifically referred to the meeting to be held by the Roviana Area Councils had not been complied with. Section 3(b) read:

> "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 coming into operation of this amending act shall be deemed to be an approved agreement validly, lawfully and properly 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 particulars or requirements;"

The Plaintiffs argued that section 3(b) could not cure the above defects. The Court of Appeal analysed in detail the procedures set out under Part IIA in pages 5 and 6 of its judgement and then made the following findings. At page 6 it stated:

> "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 Roviana Area Council on 18th November 1988 naming twelve persons as those entitled to grant timber rights had no statutory force".

It continued:

> "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 Roviana Area Council, 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".

The Court of Appeal in that case found that:

(i) there was no valid first meeting as required under section 5C(1)(a)(i);

(ii) accordingly no valid second meeting could be called under Section 5C(1)(a)(ii);

(iii) no valid certificate was therefore issued under section 5C(4);

(iv) no valid recommendation was made under section 5E; and (v) no valid approval therefore was made under section 5F.

The result therefore is that the Court of Appeal found that there was no valid agreement for the purposes of Part IIA approved on the 23rd November 1988. This meant that there was no grant of timber rights to the company, Allardyce Lumber Company Limited.

Despite this the company argued that the purported certificate of approval issued under section 5F inrespect of the timber rights agreement was deemed valid by section 3(b). The Court of Appeal had the following to say:

> "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-compliances with sub-section 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 various non-compliances with ss.5B and 5C referred to in that statement were the absence of a first and second meeting by the Roviana Area Council and the absence of a certificate required to be issued under section 5C. These non-compliances clearly could not be regarded as procedural or minor defects. They are substantive requirements. However, the Court of Appeal stated, 'notwithstanding' these non-compliances they are no legal impediment or obstacle 'to the validity of the agreements and the approval thereof'.

In one stroke of its pen, the Court of Appeal in my view made it quite clear that the impact of section 3(b) would validate a timber rights agreement notwithstanding there had been serious defects or omissions in ss.5B and 5C.

The Court of Appeal however, ruled in favour of the Plaintiffs but on the different basis, that section 5E and section 5F were not included in the validation section. Accordingly the defect in ss. 5B and 5C resurfaced under section 5E and section 5F.

Section 5F required that a certificate be issued to the Commissioner of Forest Resources under section 5C. Section 5F in turn required a lawful recommendation to be made before the Minister could lawfully complete a certificate. Neither requirements were satisfied. Section 3(b) only validated the non-compliances with ss. 5B and 5C. It however, did not include ss. 5E and 5F. Accordingly the Court of Appeal ruled that the timber rights agreement were not validly approved.

At the bottom of page 17, the Court of Appeal made the following statements:

> "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 compiled with."

Mr Sullivan's submission in essence is that section 3(a) fell within such all embracing deeming provision. The words in section 3(a), 'provisions of that part' refer to the provisions in Part II that are in force at the time of the grant of the licence.

The relevant provision which is relied on as not being complied with is section 5(1A)(b). That provision with due respects to Mr Lavery's submission comes within the deeming provision of section 3(a) in my view.

That section inserted with the above relevant provisions would read as follows:

> "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 section 5(1A)(b) may not have been complied with in every particular or requirement."

The effect of section 3(a) is therefore to validate the licence issued notwithstanding that the requirements in section 5(1A)(b) may not have been complied with.

In the words of the Court of Appeal, such 'non-compliances' with section 5(1A)(b) [which comes under Part II] 'are no impediment to the validity' of the licences in this case.

The timber licence therefore issued on the 10th September 1987 numbered TIM 2/14 is deemed valid by section 3(a) notwithstanding the non-compliances with section 5(1A)(b).

On the submissions of the presumption against retrospective operation by Mr Lavery, I find that they do not apply here. Mr Lavery did refer to the works of **Francis Bennions on 'Statutory Interpretation', a code, second edition, Butterworths 1992 at page 215.** I will quote that passage because it does point out the exception that applies in this case:

> "So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always, the power of Parliament to produce such an effect where it wishes to do so is nevertheless undoubted (sovereignty of Parliament). The general presumption, which therefore applies only unless the contrary intention appears, is stated in **'Maxwell on the Interpretation of Statutes'** in the following terms: 'It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation

unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implications?

There are several important points to note from this quotation. First, the presumption against retrospective operation is a general one. Secondly, it does not deny the power of Parliament to enact legislation that will have that effect. And thirdly, where the construction of the terms of one Act make it clear and distinct.

The words of section 3(a) in my view are so clear and obvious, and also bearing in mind the interpretations already given by the Court of Appeal to section 3(b).

The above reasons would also dispose of the eloquent submissions of Mr Lavery on the application of the various rules, principles, presumptions, causes of construction and legal maxims to be applied in statutory interpretation. Where the plain and ordinary meaning of the words in the statute are clear then it must be applied in its literal sense.

I now turn to the question of breach of section 8 of the Constitution. The relevant provisions read:

8.-(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following condition are satisfied that is to say --

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section ---

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;

Mr Lavery argues firstly, and I quote "that the timber itself, the interest in or right over that timber, the right to negotiate for its disposal with any person other than the fourth Defendant, and the right to exploit or not to exploit it all fall within the definition of 'Property of any description'";
and secondly, that the operation of section 3(a) in validating the fourth Defendant's licence deprived the Plaintiffs of those rights, and accordingly they have been compulsorily acquired by operation of statute contrary to section 8 of the Constitution.

The property or right or interest in property over customary land that is in issue is the right to fell trees and remove timber. That right can only be granted to the fourth Defendant by those entitled to do so.

It is important to consider first the effect and extent of the licence that has been deemed valid, proper and lawful. For the purposes of this application I am assuming that the provisions of Part IIA of the Forest Resources and Timber Utilisation (Amendment) Act of 1990 have not been complied with.

The relevant provisions in Part II under which the license is issued are:
(i) Section 5(c) and it reads:

> "Upon an application made to the Commissioner of Forest Resources for the grant of a licence authorising the felling of trees upon and the removal of timber from ---
> (a) - not relevant
> (b) - not relevant
> (c) - any customary land, when such felling and removal are the subject of rights granted under an agreement duly approved by the Minister under Part IIA,
> and upon payment of the prescribed fees for the grant of such licence, the Commissioner of Forest Resources may either accept the application or reject it."

And (ii) Section 5 (1A) reads:

> " Where the Commissioner of Forest accepts the application, he may grant to the applicant such licence on such terms and conditions as he may specify therein:
> Provided that no such licence shall be granted unless the Commissioner of Forest Resources is satisfied--
> (a) - not relevant for this application
> (b) - that the applicant has obtained the approved agreement referred to in Part IIA, when such felling and removal are the subject of rights granted under that agreement, from any customary land;"

The licence that the Commissioner of Forest Resources seeks to issue pursuant to the provisions of Part II of the Forest Resources and Timber Utilisation Act is a licence that purports to authorise the felling of trees and removal of timber, for our purposes, over customary land. What section 3(a) purports to do is to validate such licences despite the fact that the provisions of Part IIA have not been complied with. This would mean in effect that section 3(a) is validating a licence so that it is effective to authorise the felling of trees and removal of timber from customary land.

Mr Lavery submits that this is the legal effect of a grant of a licence under Part II of the Forest Resources and Timber Utilisation Act. The package of the licence necessarily includes the authority to fell trees and remove timber. This he submits

amounts to compulsory acquisition and is contrary to section 8 of the Constitution. The types of licence referred to in Part II as Mr Lavery would put it is one coupled with an interest. The interest is the right to fell trees and remove timber.

I agree with him to that extent, that such a licence should necessarily include an authority to fell trees and remove timber. However, section 29 of the Act in my view qualifies the true effect of such a licence.

Section 29 of the Forest Resources and Timber Utilisation Act read:

> "No licence or permit issued under this Act shall convey or be construed to convey any right which the Government does not have and in particular no such licence shall convey any right or authority to enter any private land nor take any action with respect to anything without the authority of the owner of that land or thing,"

The word 'private land' is not defined but in my view it includes customary land. Customary land is not Government land and any rights over customary land can only be granted by those entitled to do so. The word 'private' in my view should be interpreted liberally to include all types of land other than Government land or land over which Government has a right or interest that can be conveyed. The word 'private land' is not in issue and for the purpose of the Act I take it to also include customary land.

Section 29 is not covered by section 3(a) and therefore must apply to all valid licences. The result in this case is simple and straightforward.

The licence cannot convey (notice the words 'in particular', giving an emphasis to the words that immediately come after) 'any right or authority to enter' that land nor take any action inrespect to anything 'without the authority of the owner of that land or thing'.

Section 29 in my view is a very important section which seeks to ensure the true purposes, intents and objects for which such licences are issued are achieved.

In respect of customary land, the true purpose or intent of such a licence is that it must be coupled with a grant of timber rights. If no timber rights are obtained, then no licence should be issued. And if a licence is issued then it is merely a bare licence.

The words used in section 29 are so clear and emphatic. "No licence or permit issued under this Act shall.....".

But for the effect of section 29, the submission of Mr Lavery that the licence issued under Part II and deemed valid necessarily includes the interest or right to acquire or take possession of the trees would be correct.

The net result therefore of the effect of section 3(a) in the assumed circumstances of this application is to produce a bare licence inrespect of those customary land. i.e. a licence without the proprietary right or interest in the trees over that customary land.

There are certain important points that need to be highlighted.

First, the legislative intention of the act is that when a licence is issued under Part II of the act it is issued on the understanding that that licence will authorise the felling of trees and removal of timber. Inrespect of Government land, this would not appear to cause any problems, because the Commissioner of Forest Resources in consultation with the Commissioner of Lands will have the power and the right to incorporate within that licence the grant of the right to the trees in that land. So that when the licence is issued it will have annexed to it the right to fell trees and remover timber.

With regards to customary land, it is much more difficult. The enactment of Part IIA of the Act therefore is to enable (i) the identification of the customary landowners or those entitled and able to grant the timber rights and (ii) to facilitate the granting or conveyance of those rights. So where a grant has been made of those timber rights then the subsequent issue of the licence by the Commissioner of Forest will naturally include or incorporate those rights in the licence issued to the logging company.

Where there is no grant of timber rights then there should be no licence issued inrespect of that customary land. This would seem to be the way Parliament intended. This is both logical and sensible. The Commissioner of Forest Resources cannot grant timber rights over customary land. This is done by the customary land owners or those having the rights to do so.

It is important to note the distinction between the persons who can grant the timber rights over customary land and the power of the Commissioner of Forest Resources to issue a licence under the Act.

Any customary landowner can enter into a timber rights agreement with a logging company but will be committing an offence if it does so without first obtaining a licence from the Commissioner of Forest Resources. In like manner, a logging company may perhaps (and this is the illustration cited by Mr Lavery) over a cup of coffee issue a licence to the logging company, and that licence he submits pursuant to section 3(a) would entitle the logging company to enter and fell trees and remover timber. However,

that company would not and cannot enter the customary land over which that licence covers unless it has obtained the consent or authority of the land owners.

Perhaps it would be appropriate at this point to divert a bit and look at some definitions of the word 'licence'. Quoting first the learned author, **D W Mcmorland in the textbook titled 'Introduction to LAND LAW' co-authored by G W Sim, Butterwoths, Wellington, at paragraph 7.001,** he referred to the definition given in **Thomas -v- Sorrel 124 E R 1098 at 110g per Vaughan CJ.** The learned Chief Justice stated:

> "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful."

The learned author then states:

> Fundamentally, a licence is a permission given by one person to another allowing the other to do some act which would otherwise be unlawful. Such permission, if given in respect of entry on to land or other acts contrary to a landholder's rights, does not create any interest in the land or proprietary right which is binding on third parties taking from or under the licensor. It creates only personal rights against the licensor, the extent and nature of these rights being determined by the particular circumstances.

The learned author then referred to various types of licence, one of which is a licence coupled with an interest. This type of licence in my view correctly describes the type of licence issued by the Commissioner of Forest Resources under Part II of the Act.

In the text **'Land Law cases and materials' by R.H. Mandsley and E.H. Burn, second Edition, London Butterwoths, 1970, page 315,** the learned authors state:

> "In the present context, a licence is a permission to enter upon land. It works lawful what would otherwise be a trespass. It is not a proprietary interest and is not the subject matter of a grant."

The above statement are consistent with Commissioner Crome's statement in his judgement in **Fugui's case 1982 SILR 100, at page 106** where he says:

> "All a licence amounts to, it seems, is a defence to a prosecution under section 4(1) and the possibility that the true customary owners of timber rights and any persons by whose consent the exploitation of those rights can be sold or dealt in, have been traced as a result of the lengthy procedures under the Act."

A licence therefore does not convey any proprietary right or interest. Neither is it a piece of property or property that can be made the subject matter of a grant. A licence in that respect is non-exclusive, and Mr Sullivan would be correct in saying that. However, when a licence coupled with an interest or a proprietary right is issued, then provided, that interest or proprietary right is good, that licence would have the effect of being exclusive in its operation. The reason is that there has been a grant of a proprietary right or a piece of property or property, and that must necessarily be to the exclusion of others. So if the customary landowners grant their timber rights to the fourth Defendant then no one else is entitled to usurp that authority. The fourth Defendant would have a proprietary right which he can enforce against a third party. Mr Lavery therefore would be correct in that submission.

By now it should be obvious, that this court holds that the rights to timber are 'property' within the definition of that word in section 8 of the Constitution. They are very similar to the 'rights to crop' in the case of **Fugui and Another -v- Solomon Construction Company Limited and others 1982, SILR 100** in which Commissioner Crome held at page 113 and I quite:

> "I have no hesitation in finding that the right to crop the coconuts is 'property' within section 8(1) of the Constitution. It is a right which is granted in custom capable of inheritance as I have found and enforceable against the rest of the world."

The rights to timber once granted are enforceable against the rest of the world or are exclusive.

There is one final point to note. The licence issued in favour of the fourth Defendant dated 10th September 1987 and marked TIM 2/14 in the operative clause stated:

> "To cut, fell and take away timber from:-
> WARDS 16, 17, 18, Part of 19, 13, 14, 15, the rest of 19 Subject to Footnote Clauses."

At page 6 of the licence at the bottom of the page the 'footnote' reads:

> "No felling is permitted on areas where no timber rights agreements have been signed in accordance with provisions of the Forests and Timber Act."

Also at the bottom of that page there is a 'Note' which reads:

"Section 29 of the Act makes it clear that this licence does not and cannot convey any right to enter non government land areas, or to cut, fell and take away timber or construct roads or other works in or on those areas without timber rights agreements with the owners."

The way the licence is worded is consistent with the whole legislative intention of the Forest Resources and Timber Utilisation Act and also makes it very clear that the licence will not authorise the right to fell trees and remove timber where there is no valid timber rights agreement.

The fourth Defendant does not in any way claim a statutory right under the licence to cut, fell and take away timber from customary land where no timber rights agreement exist. The timber rights of the Plaintiff therefore have not been acquired or taken possession of. The title is not destroyed. The rights to the trees and the trees themselves remain intact. The rights of appeal have not been destroyed.

Accordingly, the answer to the first question must be a no.

I now turn to the third question. This question raises the issue of whether the fourth Defendant can enter into timber rights agreement with landowners over which a licence (bare) has already been issued. From the way the two previous questions have been dealt with, the answer is yes.

The provisions of Part IIA of the Forest Resources and Timber Utilisation Act were enacted for the purposes of facilitating the acquisition of timber rights on customary land. The legislators know that the right to grant timber rights in such situations are inextricably linked to ownership of the land. The procedures set out therefore sought to identify the correct persons and to facilitate the conveyance of those rights.

In such circumstances it is both logical, proper, and within the confines of the Forest Resources and Timber Utilisation Act for the fourth Defendant to apply for a timber rights agreement under the provisions of Part IIA of the Act. The various meetings to be held by the respective Area Councils under that part are for the purposes of determining inter alia the correct persons who can grant such rights. In the normal course of events, a timber rights agreement is first obtained before a licence is issued. But where a licence has been issued first without a timber rights agreement, then there is nothing illegal, unconstitutional or improper about applying for a timber rights agreement under Part IIA.

The licence on its own as I have stated is not exclusive. In its present form any other logging company can apply to negotiate a timber rights agreement with the customary

landowners. Only when a timber rights agreement has been obtained, then such licence coupled with that interest becomes an exclusive licence.

I order that the costs of the fourth Defendants are to be paid by the Plaintiff to be taxed.

(A.R. Palmer)
JUDGE