SOMMA LIMITED -v- GOODWILL INDUSTIES LIMITED

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.)
Civil Case No. 178 of 2000

Date of Hearing: 12th August 2000
Date of Ruling: 14th August 2002

Mrs. Tongarutu for the Plaintiff
Mr D. McGuire for the Defendant

RULING

Kabui, J. By Originating Summons filed on 7th June 2000 as amended on 23rd August 2000, the Plaintiff seeks the following declarations-

1. **Whether the Applicant and the Respondent are contractually bound by the Technology Transfer Agreements duly signed or otherwise by themselves and or their representatives.**
2. **That the Applicant is the legal owner of the plants, equipments and machineries used for the purposes of and in connection with the logging operation or,**
3. **That the Applicant is the equitable owner of the plants, equipments and machineries used for the purposes and in connection with the logging operation**
4. **That the Respondent overpaid itself by 5% under the auspices of market fee.**
5. **The Respondent be restrained from removing, tampering with, selling, or otherwise dealing with the Machineries, equipments and plants used connection with the logging operation.**

The Background

Motis Pacific Lawyers were the first Solicitors for the Defendant. They filed a Memorandum of Appearance on 14th June 2000. The Originating Summons was heard on 12th July 2000 but was adjourned to a date to be fixed by the Registrar not later than 4 weeks. However, the order did not stop the parties resorting to arbitration in the meantime. By Summons filed on 6th July 2000, the Defendant sought a number of orders, one of which was to refer the matters in respect of which the action was brought to arbitration. The Summons was heard on 18th August 2000 but again was adjourned for 40 days after which either party could apply for relisting. In the meantime, Motis Pacific Lawyers withdrew as Solicitors for the Defendant. I granted leave to do that on 24th November 2000. By notice filed on 29th August 2000, Sol-Law became the new Solicitors for the Defendant as amended by a notice filed on 24th October 2000.

Relief Sought

The High Court (Civil Procedure) Rules, 1964 **"the Rules"** say very little about Originating Summons other than Order 13, rule10 and Order 58 of the Rules. Rule 10 of Order 13 of the Rules is about what happens if there is default in appearance to an Originating Summons. Order 58 of the Rules permits applications by an Originating Summons to be made under the Rules. Order 71 of the Rules however permits gaps in the Rules to be filled in by the rules of procedure, practice and forms in force for the time being in the High Court of Justice in England as may be conveniently applied by this Court. Guidance can therefore be obtained from the Rules of the Supreme Court 1965 published in **The Supreme Court Practice**, 1973, Volume 1. The procedure concerning Originating Summons is

contained in Order 28 at page 442. Order 28; rule 2(1) is about the fixing of time for attendance of the parties before the Court. Rule 2 (1) above states-

...Where, in the case of an originating summons to which appearance is required to be entered, any defendant served with the summons has entered, or has within the time limited for appearing failed to enter, an appearance, the plaintiff may obtain an appointment for the attendance of the parties before the Court for the hearing of the summons, and a day and time for their attendance shall be fixed by a notice...

Then rule 2(3) states-

...Where a plaintiff fails to apply for an appointment under paragraph (1), any defendant may, with the leave of the Court, obtain an appointment in accordance with that paragraph provided that he has entered an appearance...

But rule 10(1) states-

...If the plaintiff in a cause or matter begun by originating summons makes default in complying with any order or direction of the Court as to the conduct of the proceedings, or if the Court is satisfied that the plaintiff in a cause or matter so begun is not prosecuting the proceedings with due dispatch, the Court may order the cause or matter to be dismissed or may make such other order as may be just...

In this case, nothing has been done by the Plaintiff to relist the matter or by the Defendant doing the same as directed by Awich, J. on 18th August 2000. Both parties are guilty of this omission. Both parties have not also resorted to arbitration as envisaged by Awich, J. on 12th July 2000. Again, both parties are to share the blame, if any. Apparently, the direction order that Awich J. made on 18th August 2000 was in line with the intent and spirit of rule 2(1) and (3) above. That is to say, if the Plaintiff should fail to act in fixing a hearing for the summons, the Defendant may do so with the leave of the Court. Awich, J. gave that leave on 18th August 2000. In fact, what Awich, J. did was well within rule 4 of Order 28 above which gives the Court the power, amongst other things, to make orders for directions. The Defendant, however, took a different turn. By letter dated 4th March 2002, Mr. McGuire, a Sol-Law Solicitor, told the Solicitor for the Plaintiff of a letter by the late Mr. Mamaloni, then the Managing Director of the Plaintiff, wherein Mr. Mamaloni admitted that the plant, equipment and machinery used for the purpose of logging were the property of the Defendant. A copy of that letter was attached. In his letter, Mr. McGuire asked the Solicitor for the Plaintiff to seek instructions from her client with the view to withdrawing the action and to pay the Defendant's costs of USD700.00. He said that failing to do that would result in the Defendant pursuing its rights at law. The Solicitor for the Plaintiff did not respond to Mr. McGuire's letter. It would appear that the Solicitor for the Plaintiff had not obtained any instructions on the matter raised in Mr. McGuire's letter dated 4th March 2002 for at the hearing, Mrs. Tongarutu confirmed that fact. She said that there were other points in the Originating Summons. The stance she took was to oppose this application.

The solution in this case

The problem in this case is that both parties have omitted to act in accordance with the direction that Awich, J. made on 18th August 2000. The direction was that **"Either party may apply for re-listing after 40 days"**. This has not been done. The period of 40 days had long lapsed. It lapsed about 2 years ago. I will not grant the Defendant's application. The application is dismissed. I will however make further directions to ensure that justice is done. I will give each party a time limit within which it must comply with Awich, J.'s direction. I will give either party liberty to apply for re-listing within 14 days from today. Failing this, the Plaintiff's action will automatically be struck out. Costs will be in the cause. I order accordingly.

F.O. Kabui
Judge