

**DANIEL BEKELE (AS REGISTERED JOINT OWNER OF THE PERPETUAL ESTATE IN PARCEL NO. 072-002-1) V. BULACAN INTEGRATED WOOD INDUSTRIES (SI) LTD AND JOHN SELWYN POROSI (AS REGISTERED JOINT OWNER OF THE PERPETUAL ESTATE IN PARCEL NO. 072-002-1) AND THE ATTORNEY GENERAL**

High Court of Solomon Islands  
(Palmer CJ)

Civil Case Number 241-04

Date of Hearing: 23<sup>rd</sup> August 2004  
Date of Judgment: 9<sup>th</sup> December 2004

**G. Suri for the Applicant**  
**A. Nori for the first and Second Respondents**  
**N. Moshinsky Q.C. and Mrs J. Gordon for the Attorney General**

**Palmer CJ:** The Applicant Daniel Bekele ("**Bekele**") is one of two surviving registered joint owners of the Perpetual Estate in Parcel Number 072-0021 also known locally as Kokodoghi land (hereinafter referred to as "**LR 682**"). The other joint owner is John Selwyn Porosi, ("**Porosi**") the Second Respondent.

A dispute has arisen over the question of validity of the timber rights agreement dated 18<sup>th</sup> December 2002 (hereinafter referred to as "**the Agreement**") executed between Bulacan Integrated Wood Industries (S.I.) Company Ltd ("**Bulacan**") and inter alia the Second Respondent, but excluding the Applicant. The Applicant seeks relief by posing a number of questions and consequential declaratory orders as follows:

- (1) Whether the Standard Logging Agreement executed between the First Respondent and Second Respondent dated 18<sup>th</sup> December 2002 validly disposed of an interest in parcel number 072-002-1 situated in Isabel Province to the First Respondent pursuant to section 200(2)(a) and (b) of the Land and Titles Act [Cap. 133] for purposes of constructing log ponds, logging wharfs, log yards, logging roads, logging bridges and logging camps or houses on the said land?
- (2) Whether the First Respondent's Logging Licence number A10245 issued on 10 April 2003 is ineffectual by virtue of section 40 of the Forest Resources and Timber Utilisation Act [Cap. 40] for the reason that the Applicant did not sign the Standard Logging Agreement executed between the First Respondent and Second Respondent dated 18<sup>th</sup> December 2002?

And if the answers to questions 1 and 2 or either of them is in the affirmative, the Applicant pray for the following reliefs:

- (a) A declaration that the First Respondent is not entitled to construct log ponds, logging wharfs, log yards, logging roads, logging bridges and logging camps or houses on parcel number 072-002-1 situated in Isabel Province.
- (b) A declaration that the First Respondent is not entitled to undertake logging activities on parcel number 072-002-1 situated in Isabel Province pursuant to its logging licence number A10245 granted by the Commissioner of Forest to the First Respondent without the valid authority of the surviving registered owners.
- (c) Further and/or other orders as the Court deems meet.
- (d) Costs of and incidental to this application be paid by the First and Second Respondents.

**Background information:**

The dispute between the parties had previously come before this Court in Civil Case Number 109-04<sup>1</sup> by Originating Summons as well and in the form of three questions:

- (1) Whether the lawful manner in granting timber rights affecting registered land is in pursuant to the provisions of section 181(1) of the Land and Titles Act?
- (2) Whether a registered grant of profit is protected by section 110 of the Land and Titles Act?
- (3) If the answers to questions 1 and 2, are in the affirmative, whether the Logging Licence granted by the Commissioner of Forests to First Defendant/Respondent is contrary to section 181(1) of the Land and Titles Act?

These were answered by his Lordship Kabui J. as follows:

*"The answer to question 1 is no. There is no conflict between section 181(1) of the LTA and section 5 of the FTUA. Both sections are independent of each other and one does not override the other. If the motive to secure a grant of profit under section 181(1) cited above was to avoid obtaining a licence under section 5 of the FTUA, then it is not correct to do that because to do so would amount to the usurpation of section 5 of the FTUA.*

*The answer to question 2 is yes but section 181(1) of the LTA does not apply to the licence currently held by the 1<sup>st</sup> Respondent. It is therefore not necessary to answer question 3 in full except to say that the licence granted to the 1<sup>st</sup> Respondent is not contrary to or violate section 181(1) of the LTA. This is enough to reassure the 1<sup>st</sup> Respondent that its licence has not been invalidated by the Court by any means. The relief sought in (a), (b), (c) (d) and (e) in the Originating Summons being conditional upon affirmative answers to questions 1, 2, and 3 need not be addressed in view of the answers already given in respect of each of them."*

**Issues raised in this case**

The first issue raised questions the legal effect of the Agreement under section 200(2)(a) and (b) of the Land and Titles Act [cap. 133] ("LTA").

The second issue questions the validity of the Timber Licence No. A10245 issued on 10<sup>th</sup> April 2003 to convey a right to carry out logging activities on LR 682 where the Agreement was executed only by one of the joint owners.

**Submissions of the first and second Respondents**

(1) Mr. Nori for the first and second Respondents submits that the issues now raised by the Applicant in this case had been raised in a previous case (Civil Case 109-03) and finally determined. Learned Counsel submits that the Applicant is seeking to re-litigate concluded issues; that the doctrine of res judicata applies to this case.

(2) Learned Counsel submits that the construction of paragraph 200(2)(a) of the LTA should be confined to the disposition of the interest as a whole (the entire interest) and not to a part of the interest. Learned Counsel submits that the right acquired under the Agreement pertains to a right to engage in a development-related undertaking. It did not create any interest in the land and therefore any dealings arising from that

<sup>1</sup> Daniel Bekele and Eastern Development Enterprises Limited v. Bulacan Integrated Wood Industries (S.I.) Limited, John Selwyn Porosi and the Attorney General. HCSI-CC 109-04, 04-Jun-04

Agreement could not be construed as amounting to any disposition of an interest in the land. Learned Counsel submits that this argument is supported by the test whether such disposition can be registered or not. If it is required to be registered then it supports his argument that it amounts to a disposition of an interest. In this case it is not necessary to have it registered and so it should not be regarded as effecting a disposition under the LTA.

### **Submissions of the third Respondent**

Learned Counsels Mr. Moshinsky and Mrs. Gordon argue on the other hand that the Agreement is capable of being construed as a valid disposition in that the consent of the Applicant can be inferred from previous correspondence and dealings. In the alternative they argue that the Agreement had effected a severance in equity resulting in the conveyance of an interest to the first Respondent.

### **Section 200(2)(a) of the LTA**

Section 200(2)(a) of the LTA requires in the case of joint tenants that any disposition can only be effected by all the joint owners. I quote:

*"200.-(1) Where a registered interest in land is owned jointly the joint owners shall hold on the statutory trusts.*

*(2) Where two or more persons are joint owners of a registered interest in land-*

*(a) a disposition of the interest shall be made only by all the joint owners; and*

*(b) on the death of a joint owner the interest shall vest in the surviving owner or owners."*

The starting point must be that LR 682 being registered land is governed by the LTA. It is not in dispute that the surviving joint owners are Bekele and Porosi. For any disposition to be effective under paragraph 200(2)(a) therefore, must have the concurrence and endorsement of all the joint owners. In the case of LR 682, both joint owners must sign that Agreement.

### **Does the Agreement effect a disposition within the meaning of the LTA?**

Section 2 of the LTA defines "disposition" as:

*"means any act inter vivos by an owner whereby his rights in or over the land comprised in his interest are affected, but does not include an agreement to transfer, lease or charge;"*

The word "interest" is defined as:

*"where used in relation to land, includes, unless the context otherwise requires, an estate, a lease, a profit, an easement and a charge; and "person interested" has a corresponding meaning;"*

The definition of the word "disposition" in my respectful view cannot be confined strictly to any dealings, which affects only the entire registered interest. A proper construction of the term as defined does not permit such restrictive interpretation to be applied even under paragraph 200(2)(a). A disposition includes any act inter vivos whereby the rights of an owner **in or over the land comprised in the interest** may be affected. An interest in turn includes a profit.

The definition of a "profit" under section 2 of the LTA is quite broad and in my view capable of including the right to enter and remove trees from land. I quote:

*"means a right to go on the land of another to take a particular substance from that land, whether the soil or the products of the soil, and includes the taking of wild animals."*

The trees form part of the land and therefore cannot be separated from being part of the interest in the land. Any dealings accordingly which affect the trees affect the land and would amount to a disposition of an interest under section 200(2)(a) of the LTA. The said section therefore applies to the Agreement in this case.

A timber rights agreement coupled with a licence, entails the right to enter the land fell and remove trees. If no valid timber rights agreement is executed, no proprietary interest in the property or land can be acquired or conveyed. Where a licence is issued in such circumstances, it can only amount to a bare licence, and vice versa, where a valid timber rights agreement is executed but no licence issued; an offence would be committed if the logging operator seeks to enter the land to fell and remove trees under section 4 of the Forest Resources and Timber Utilisation Act [cap. 40] ("**FRTUA**"). A timber rights agreement creates the proprietary interest in the land, if completed by registration it creates a legal profit under section 181 of the LTA, whilst the licence enables the logger under section 5 of the FRTUA to enter fell and remove the trees for sale.

A validly executed timber rights agreement therefore is capable of amounting to a disposition and if registered, a legal profit is created under section 181 of the LTA, if not, an equitable profit may be created.

#### **The effect of the Agreement**

The FRTUA governs the issue of a licence authorizing the felling of trees upon and the removal of timber from –

- (a) any public land, land in which the Government holds a freehold interest in land or leasehold interest in land, land leased by or on behalf of the Government, land in respect of which the Government has a profit to fell and take away trees, and any land contiguous or island adjacent to such land; or
- (b) **any land, not being customary land**, or land to which paragraph (a) applies; and
- (c) any customary land, when such felling and removal are the subjects of rights granted under an agreement duly approved by the Minister under Part III.

LR 682 falls within category (b) above, being land registered under the LTA. As such any dealings<sup>2</sup> affecting such land is governed by the provisions of the LTA. Any acquisition of timber rights therefore amounts to a profit and should be registered as an encumbrance on the register<sup>3</sup>. I cannot see how such a huge commercial undertaking directly affecting registered land can simply be overlooked and not required to be registered under the LTA. The effect and advantage of course of registration is that it protects the right of the person in whose favour that profit has been registered as against others. It operates as an encumbrance on the property.

I fail to see any conflict in the requirements of the LTA affecting registered land with that of the FRTUA as they relate to the issue of a timber licence. Both Acts impose separate requirements and which should be complied with.

The Agreement in this instance however was never registered under section 181 of the LTA. But even if there was an attempt to do so, it was signed only by one of the surviving trustees and therefore incapable of being registered under paragraph

<sup>2</sup> defined in section 2 of the LTA as "includes disposition and transmission"

<sup>3</sup> s. 116 of the LTA.

200(2)(a). Not only that, but section 181 requires that for a profit to be registered it will have to be in the prescribed form.

The Agreement therefore insofar as it purports to create a proprietary interest under statute law in LR682 through the conveyance of timber rights in favour of Bulacan, is defective and unenforceable.

### **Was there consent?**

The third Respondent says that whilst express consent was not made it should be inferred by the Court. They rely on the following evidentiary material to support their submission on this point:

- (i) letter of 18<sup>th</sup> November 2002 to Bulacan; and
- (ii) Appointment Hopkins Uzziah as Chairman of the lands committee dated 18<sup>th</sup> November 2002.

Unfortunately the letter of 18<sup>th</sup> November 2002 in my respectful view cannot be construed as giving consent to Bulacan to conduct logging operations or be considered as amounting to ostensible authority. It was merely a letter inviting Bulacan to enter into negotiations for acquisition of timber rights and logging operations. Whether the negotiations will turn out successful at the end of the day or not cannot be presumed or inferred from the circumstances without clear evidentiary material. That was not the case here.

I am not satisfied the existence of such letter can be construed as giving such consent. It is but a normal letter of invitation applicable in every situation when commencing process for negotiation of timber rights with any landowners. It is but the first step in any application for timber rights.

As to the appointment of Hopkins Uzziah that also cannot be read as amounting to consent or amounting to any ostensible authority to the transfer of timber rights. That appointment document expressly stated that it was to carry out all administration matters on behalf of the land committee. If powers of attorney were intended to be conveyed, that procedure is provided for under section 207 of the LTA.

I am not satisfied therefore that it can be inferred by this court that Bekele had consented to the conduct of logging operations by Bulacan.

### **Alternative argument on Severance**

As an alternative argument, the third Respondent submits that in the event the Agreement is not a "disposition" within section 200(2)(a) then it would be effective in equity to convey an interest to the first Respondent. Learned Counsel submits that the rule at equity, which recognizes the right of a joint tenant to dispose of his or her interest without consent of other tenants was preserved by the Law of Property Act<sup>4</sup> 1925 (UK) (being a statute of general application pursuant to Schedule 3 of the Constitution) and therefore would be effective in equity to convey an interest to Bulacan in any event. In such circumstances, the consent of the Applicant would not be necessary because the joint tenancy would be severed in equity and the interests gained by Bulacan would be held in common with other joint tenants.

The retention of this rule in equity recognizes that whilst the right of survivorship precludes any joint tenant from disposing of his interest by will, any joint tenant has

<sup>4</sup> Law of Property Act 1925, ss. 1(6), 34(1), 36(2), Megarry & Wade 3<sup>rd</sup> Edition (1966) at 139, 420.

the power in his lifetime to determine the joint tenancy by severance<sup>5</sup>. It preserves his right to sever his interest and thus avoid the danger of his premature death and the consequent operation of the *jus accrescendi*<sup>6</sup>. It also recognizes that whilst no joint tenant has any defined share in the land each has a potential equal share which he may sever in his lifetime<sup>7</sup>.

One of the ways severance of the joint tenancy may be severed is by contract of sale. A contract of sale which can be specifically enforced will itself sever the joint tenancy in equity though not in law. The original joint tenants then hold the legal estate subject to the purchaser's equitable right to the share taken as tenant in common<sup>8</sup>.

start pointing here ← **Application**

The real issue for determination in this case is whether the Agreement had conveyed any interest over timber rights. The answer is both no and yes. Under section 200(2)(a) no valid disposition can be said to have taken place without the consent of both joint owners. That Agreement therefore is unenforceable. In equity however, the Agreement is capable of being construed as conveying an equitable interest over a half share of the rights over the trees to Bulacan. To that extent, Bulacan had acquired an equitable interest (a ½ share) in the timber rights. Bekele and Porosi as joint tenants hold their legal interest subject to that equitable interest of Bulacan over the timber rights.

The ultimate result in all these is that although a licence had been issued in favour of Bulacan, it merely holds an unenforceable Agreement and so cannot enter the land under section 40 of the FRTUA for purposes of commercial logging. No proprietary interest in the land had been conveyed under the Agreement apart from the equitable interest acquired over the timber rights. Until that Agreement is executed by both joint tenants or a new agreement entered into or some other suitable arrangement made, no interest can be conveyed in law.

Further, a valid agreement (duly executed) should be registered as a profit under section 181 of the LTA. It is important to appreciate that a timber rights agreement or logging agreement seeks to create a proprietary interest in the land and whilst that would be sufficient for purposes of a customary land, it should be registered as a profit under section 181 of the LTA in the case of registered land.

I do not think it is in dispute that the requirement to register an agreement as a profit under the LTA is separate to the requirement for a licence under the FRTUA. Both complement each other. The requirement to register a profit is one imposed under section 181 of the LTA whilst the requirement for a timber licence to issue before any commercial felling can be undertaken is one imposed under the FRTUA. A profit without a timber licence, does not authorize the commercial felling, removal and export of logs on registered land, in the same way a mere logging agreement without a licence can authorize the commercial felling and harvesting of logs. On the same token, a licence without a profit or a logging agreement will amount to a bare licence and cannot authorize a licence holder to enter such land for logging purposes. The logging agreement or profit creates the proprietary interest in the land whilst the licence makes the act of felling and harvesting logs lawful which otherwise would be unlawful under section 4 of the FRTUA.

### Res Judicata

<sup>5</sup> Introduction to Land Law by G W Hinde, D W McMorland and P B A Sim Published by Butterworths NZ 1979 at para. 9.047

<sup>6</sup> The Modern Law of Real Property 10<sup>th</sup> edn. G.C. Cheshire 317.

<sup>7</sup> (ibid).

<sup>8</sup> (ibid). see also Halsbury's Laws of Australia para. (355-11675).

For the doctrine of *res judicata* to apply, three essential ingredients are required<sup>9</sup>:

- (a) an earlier case in which the cause of action or point in dispute was really the same;
- (b) a final determination by a court of that cause of action or point on its merits;
- (c) the raising of the same cause of action, or the same point which has been distinctly put in issue by a party who has had the action or point solemnly and with certainty decided against him.

In Civil Case 109-04, the court was asked specific questions pertaining to the application of section 181(1) of the LTA as it applied to the issue of grant of timber rights. The issue raised was whether a grant of a profit was sufficient to confer timber rights without the need for a timber licence to be issued under section 4 of the FRTUA. This question arose from a subsequent profit registered by the joint tenants following the issue of a timber licence. This was answered by the Court in the negative.

In comparison the first issue raised before this court was directed to the effect of the Agreement as it pertained to the requirements under section 200(2)(a) of the LTA, whether it was capable of disposing of any interest on the land? This is a more specific question which was not canvassed thoroughly in Civil Case 109-04. For instance, issues pertaining to severance, joint tenancy and the position in statute law were not covered in detail in that case.

The second question raised in Civil Case 109-04 again pertains to the effect of section 110 of the LTA as it affected a legal profit. The obvious answer was yes in that it acted as an encumbrance on the land but that the equitable interest acquired by Bulacan under the Agreement had to be borne in mind under the doctrine of severance now raised in this case. The issue of severance was never raised in the earlier case.

In comparison the second issue raised in this case is similar to the first issue but raised in the light of section 40 of the FRTUA; whether the Agreement coupled with the timber licence was capable of authorizing entry into LR 682 for the commercial felling and harvesting of logs. That section actually makes clear that proper authority must be obtained before any land can be entered under authority of any timber licence. It also re-emphasized the point that any timber licence without a validly executed timber rights agreement, or a grant of profit, cannot authorize any felling and harvesting of trees on such land. In the context of this case it seeks determination of this court on whether such Agreement was sufficient to authorize such entry.

I am satisfied the issues raised for determination in this case are sufficiently distinct and do not fall within the scope and ambit of the doctrine of *res judicata*.

### **Conclusion.**

The questions posed for determination can now be answered as follows:

- (i) In so far as the Agreement sought to convey timber rights etc., that is, dispose of an interest under section 200(2)(a) of the LTA, this must be answered in the negative. That Agreement did not comply with the statutory requirements set out in section 200(2)(a) and therefore was defective. It is unenforceable as an agreement for purposes of conveying any proprietary interest in the land over the trees. To that extent it is incapable of sustaining a valid agreement for purposes of permitting Bulacan to enter and remove trees from LR 682 despite the existence of a licence. In equity however, as pointed out in this judgement, such agreement would have been capable of conferring on Bulacan an immediate equitable interest in  $\frac{1}{2}$  share of the trees.

<sup>9</sup> *Talsasa v. Paia and Another* (SILR 93 at 100-104)

- (ii) On the question whether the Agreement coupled with the licence (A10245) is capable of authorizing Bulacan to enter LR 682 for the purpose of felling and removing trees for export under section 40 of the FRTUA this must also be answered in the negative.

On the prayer for declaratory relief, it is my respectful view that it would be premature to issue any declarations at this point, following the specific answers made by this court. The legal position between the parties hopefully should now be clearer and that it would be open to them to decide what they should do hereafter.

Costs of the Applicant to be paid by the first and second Respondents.

**The Court.**