

**IN THE HIGH COURT
OF SOLOMON ISLANDS**

Civil Case Number: 386 of 2007

Civil Jurisdiction

BETWEEN: **SMM SOLOMON LIMITED**
R. W. Gotterson Q.C. with T. J. Bradley and A. Nori
Claimant

AND: **ATTORNEY GENERAL** representing the Mines and Minerals Board
S. Woods, Deputy Solicitor General
1st Defendant

AND: **ATTORNEY GENERAL** representing the Minister for Mines and
Energy
S. Woods, Deputy Solicitor General
2nd Defendant

AND: **ELLISON BAKO AND OTHERS**
T. Matthews with W. Rano
3rd Defendants

AND: **JOHN FRANCIS AND OTHERS**
J. D. Johnson with P. Lavery
4th Defendants

**ORDERS AND REASONS FOR DECISION ON APPLICATION
STRIKE OUT**

Date of Decision: 12 December 2008

Judge: Goldsbrough J

THE COURT ORDERS THAT:

1. The claim is struck out (Rule 9.75 of the Solomon Islands Courts (Civil Procedure) Rules 2007)
2. The claimant pays the costs of the 1st 2nd 3rd and 4th defendants, of an incidental to the proceeding, including reserved costs.
3. Certification for Counsel, including Queen's Counsel for all parties under Rule 24.30 including interlocutory proceedings
4. Paragraph 8 of the Order made 25 October 2007 be discharged forthwith.

1. This is an application brought by the 4th defendants in this action for strike out. In their application the 4th defendants seek such an order under various alternate grounds. The application states:
 - 1) That pursuant to the provisions of Rule 9.75 of the Solomon Islands Courts (Civil Procedure) Rules 2007 the claim commenced by the Claimant be struck out of the grounds that;
 - (a) the claim is frivolous and vexatious, and/or
 - (b) no reasonable cause of action has been shown to exist, and/or
 - (c) the claim amounts to an abuse of process. Or alternatively that;
 - 2) the court hear legal argument on preliminary issues of fact and law pursuant to the provisions of Rule 12.11 CPR
 - 3) the claim be dismissed pursuant to the provisions of Rule 12.11 CPR on the grounds that no reasonable cause of action has been shown to exist upon which this Honourable Court can overturn the decision of the Minerals Board not to extend the letter of intent based upon evidence of the claimant not in dispute and the law and/or alternatively an order that
 - 4) the claim be dismissed on the basis that the Claimant failed to comply with the provisions of the Mines and Minerals Act and regulations in that it held meetings with alleged landowners at hotels in Honiara in lieu of Principal Villages and failed to submit draft surface access agreements to the Director of the Mines and Minerals Board for referral to the Attorney General as required by regulation 9(2) of the Mines and Minerals Regulations.
 - 5) That the claimant pay the costs of the Applicant with respect to this application and the substantive proceedings on a standard basis as prescribed by CPR.
2. Whilst the fourth defendants are applicants in this matter, for clarity in this judgment they will be referred to as the fourth defendants and the other parties will be given nomenclature respective to that.

BACKGROUND

3. These proceedings began by writ of summons filed 18 October 2007 seeking an order of certiorari with respect to a decision of the 22 August 2007 wherein the claimant was refused an extension of a Letter of Intent. Leave to seek certiorari and consequential orders was granted on 25 October 2007 at the request of the then counsel for the claimant. Under the new CPR certiorari is now known as a quashing order
4. The Mines and Minerals Act [Cap 42] provides for the development of mining within Solomon Islands by prescribing appropriate procedures for the grant of licences, permits or leases. It establishes the Minerals Board to regulate and control mining.
5. A Letter of Intent under section 21 [Cap 42] was issued to the claimant on 17 May 2005, having been recommended by the Board on 25 April 2007. This development came after litigation. Section 21 sets out what a successful holder of a Letter of Intent must do prior to proceedings to the next prescribed step. It

provides for applicants for a prospecting licence to identify and negotiate with landowners surface access agreements. It provides that a Letter of Intent can be limited in time and can include conditions. In this instance the Letter of Intent provided that surface access agreements were to be negotiated in the first instance within a period of three months expiring 17 August 2007. The Letter of Intent was expressed to make provision for two particular areas known as Area H and Area I in Isabel Province. For the purposes of this application it is not necessary further to describe the land areas.

6. 17 August 2007 arrived and the view of the claimant was that not all necessary surface access agreements had been negotiated with landowners. It is submitted on behalf of the claimant that surface access agreements (SAA) had been negotiated with respect to 41% of Area H and 81% of Area I.
7. Subsection 6, 7 and 8 of section 21 appear to deal with the various situations that may exist at the end of a Letter of Intent period. They provide for:-

~~“(6) Where no agreement is reached between the applicant and the landowners at the end of the period specified in the letter of intent, the Board may—~~

- ~~(a) where it is satisfied that bona fide attempts have been made by the applicant to negotiate with the landowners or land holding groups, extend the said period; or~~
- ~~(b) where it is satisfied that sufficient attempts to negotiate have not been made, inform the applicant that his application is unsuccessful.~~

~~(7) Where, at the end of the period specified in the letter of intent, the applicant has reached agreement with landowners in respect of part of the proposed prospecting area and there is no agreement in respect of the remainder of the area, the Board may, after consultation with the applicant—~~

- ~~(a) extend the said period; or~~
- ~~(b) request the applicant to amend and subdivide his application to cover —~~
 - ~~(i) areas in respect of which agreement has been reached; or~~
 - ~~(ii) areas in respect of which agreement has not been reached.~~

~~(8) Where there is no dispute and the applicant reaches agreement with the landowners, such agreement shall be reduced to writing and the contents of the agreement shall be prima facie evidence of—~~

- ~~(a) the names of the landowners or land holding groups having rights over the land in the prospecting area; and~~
- ~~(b) the amount of surface access fees or compensation for damage.”~~

8. ~~Because the claimant was of the view that not all necessary SAAs had been concluded, by letter dated 10 August 2007 written by Mr. McGuire (then counsel for the claimant) a request was submitted to the Minerals Board through the Acting Director of Mines for extension of the Letter of Intent three month period "pursuant to section 21(6)" and making an offer to appear before the Board "to provide further details of this submission as provided for by section 21 (7) if required."~~
9. Mr. McGuire and others did appear on behalf of the claimant before the Minerals Board and did present the further details of submissions.
10. The decision of the Minerals Board was communicated to the claimant by letter dated 22 August 2007 from the Director of Mines (Supervising) and by letter dated 24 August 2007 from the relevant Minister. Both letters indicated that the application for extension of time had been rejected, the latter indicating a rejection under section 21 (6) (b). That letter continued:- "the Board was . . . ~~unsatisfied on the number of signatories in place~~ with reference to the meetings held and as well as objection pressures mounting from land owning groups, the Bogutu Landowners Association, Bogutu House of Chiefs and Isabel Provincial Government."
11. It is within this background that the claimant began these proceedings and which the 4th defendant now seeks to strike out. The application for strike out is supported by the remaining defendants. It is opposed by the claimant.

STATEMENT OF CLAIM

12. It is necessary to set out some details the statement of claim. In addition to the setting aside of the decision not to grant an extension of time for the negotiation of SAAs or a decision to subdivide, the claimant seeks orders declaring that the SAAs already negotiated are valid and declarations that the claimant made bona fide attempts to negotiate SAAs as required in section 21 (6) (a). Since the claim was filed a number of parties have been joined. Others await an opportunity to be joined as well.
13. Prior to the availability of minutes of the Mines and Minerals Board setting out ~~the decision of the Board and the recommendations to the Minister~~ there was challenge to the decision on the grounds that the decision was not that of the Board but that of the Minister. This was supported by the language used in the letter from the Minister which was unfortunate. Given that the minutes are now available, the challenge to the decision on that ground falls away. There then remains, it is conceded in submissions on behalf of the claimant, no decision of the Minister that requires consideration in these proceedings.
14. Again earlier in these proceedings there was a suggestion that the Board voted in favour of the application for an extension of a letter of intent, but that the decision which was communicated to the claimant provided otherwise. This suggestion ~~was forcefully made at the application for leave. Since it is conceded that the Minister made no decision himself on this application, but merely communicated~~

the decision of the Board, that cannot be the case now. The claimant, in submissions, relies upon the decision being ultra vires, not that the decision itself was never made.

BASIS FOR THE DECISION OF THE BOARD

15. The Board, through an application letter received from the claimant's agent, the former legal practitioners to the claimant, was asked to extend the Letter of Intent. The application was made prior to the expiry of the three month period given. The letter of request demonstrated a misunderstanding of the law. It sought an extension of the letter of intent 'pursuant to section 21 (6)' and contained an offer to appear before the Board "to provide further details of this submission as provided for under section 21 (7) if required."
16. Perusal of the relevant section, in particular the provisions of subsections (6) and (7) shows that subsection (6) addresses the situation 'where no agreement is reached' and subsection (7) 'where . . . the applicant has reached agreement with landowners in respect of part of the proposed prospecting area and there is no agreement in respect of the remainder of the area. . ."
17. It is not the contention, now, of the claimant that subsection (6) applied. It is the present contention of the claimant that a decision was required under subsection (7) since the factual circumstance was that there were some agreements but not all areas were covered by agreements. Whilst there were submissions that the two subsections could overlap from the 1st and 2nd defendants, I will for the purposes of this application accept for a moment the submission of the claimant, for it is his claim, that they are mutually exclusive. In any event, I saw no force in the contrary argument.
18. In judicial review proceedings the Court has the benefit of observing what took place from an historical perspective, and can identify what took place and the circumstances in which the events took place from a safe distance. Setting aside for a moment the contention that the SAAs were not valid for lack of compliance, it is clear that some landowners had signified their agreement and some had not. There were agreements with landowners in respect of part of the proposed prospecting area but not in others.
19. In those circumstances, and accepting at this stage the construction of the legislative provisions as the claimant submits, the Board was required to determine the application before them under subsection (7) and not under subsection (6). This is the exercise that the Board in law was required in the circumstances to embark upon. That the legal practitioner for the claimant misstated the position to the Board in its application did not assist the Board in this regard.

THE DECISION OF THE BOARD

20. The decision now challenged was reached by the Mines and Minerals Board following the reference to it by the claimant. The Board met and heard from the claimant. The minutes of the meeting are extensive and were confirmed at a subsequent meeting of the Board as an accurate record. They are exhibited to the sworn statement of Peter Auga. It is not in issue that the claimant was afforded an opportunity to be heard by the Mines and Minerals Board. The minutes are not a verbatim transcript, and therefore there remains scope for argument as to what was actually said by the claimant to the Board.
21. The minutes record the topics discussed within the meeting evidenced by the summaries of submissions and questions asked within the proceedings. They must, in my view, form a significant body of evidence when consideration of what the Board took into account in arriving at its decision, as indeed must the communication of the decision itself.
22. Communicated through the Director of Mines (Supervising) Mr. Peter Auga on 22 August 2007 the decision of the Board was expressed thus:-

"Your application for extension of Letter of Intent over Areas H and I (Takata and San Jorge) was submitted before the Minerals Board in its sitting on the 22nd August 2007 for its deliberation.

As required under Section 3 subsection 7 of the Mines and Minerals Regulation 1996, I hereby regret to advise you of the Mineral Board's decision that your application for extension of Letter of Intent over Areas H and I (Takata and San Jorge) was rejected by the Board.

Your application for extension of Letters of Intent was rejected prior to the very strong opposition from Landowners of Bugota and Isabel Provincial Government."

23. Communicated through the Minister on 24 August 2007 the decision was thus expressed:-

"In accordance to section 21 subsection 6 (b) of the Mines and Minerals Act 1990, I hereby regret to advise you of the Mineral Board's decision that your application for the extension of your Letters of Intent for the above said areas has been rejected.

The Board resolves to this decision because it was duly unsatisfied on the number of signatories in place with reference to the meetings held and as well as an objection pressures mounting from land owning groups, the Bogutu Landowners Association House of Chiefs and Isabel Provincial Government."

24. The exhibited minutes of the Board meeting contain the following resolution:-

"Under the Mines and Minerals Act 1990 section 4 subsection (1) the Mineral Board is to advise the Honorable Minister on the following reasons for the moratorium;

- There is strong opposition from BLA which could be a potential threat to create disharmony among communities on San Jorge and Takata areas if LOI extension is granted to SMM
- The Board views that there was inconsistency in the signing of both surface access agreement and the letters of objection received by Ministry of Mines and Energy.
- Although the company claimed that bona fide attempts were made, the actual number of signatories on the SAA does not reflect it.
- The Board views that most signing of SAA agreement by Landowners were not done in accordance with the Mines and Mineral Regulation (1996) at the principle villages, instead were done in Honiara in a series of meetings held in various hotels.
- Given the duration of time SMM under section 6 (b) the board was duly unsatisfied with the signatories in place with reference to the meeting held in principal villages and the objections raised.
- A legal instrument be drawn by AG chambers for a moratorium be in place to protect the Ministry from receiving applications from other companies (section 4 of Mines and Minerals Act).
- This to come into effect as of date to the time this paper is gazetted accordingly.

It was anonymously supported by the Board that the following resolution is adhered to:

- The extension of SMM will not be granted
- Put a moratorium on the area (section 4 subsection (1) Mines Mineral Act (1990))
- A strategic Development Plan be put in place for lateritic nickel project.
- MME has to have further consultations with Los
- To allow for immediate Land Acquisition for the areas
- After the moratorium is lifted the Board May Call for (open) International tender.

JUDICIAL REVIEW AND STRIKE OUT

25. There is no provision for appeal against a decision of the Board over extension of a Letter of Intent. However, no party to these proceedings contends that such a decision is not amenable to judicial review. It is contended in submissions that judicial review cannot amount to an appeal against such a decision and must be confined within the already identified areas where review of a decision may take place. Those areas of law are well known and since no dispute arises in this case there is no value in setting them out here. By responding to this application in the way that has been done, the claimant clearly raises this matter as a judicial review and by inference accepts that the claim would not succeed if it were indeed an attempt to appeal the decision on merit rather than on review.

26. The jurisdiction to end proceedings early by way of strike out must be exercised sparingly and only in the clearest of cases where no cause of action is made out or where the claimant simply cannot succeed for clear reasons apparent prior to the testing of evidence in trial. This is the basis in law on which I approach this application. Where there exists relevant disputes as to the factual situation, a decision prior to the parties having an opportunity to test the evidence of the other party a strike out will not be indicated. There exist alternative routes to end proceedings early. One route is to determine a preliminary question of law that substantially determines the issue, but again that is not likely to be of value where there are relevant factual disputes.

POWER OF THE BOARD

27. Given that the Board was faced with a decision in circumstances where there was agreement in part (on agreed facts), and according to the claimant's view of the law, which I accept, the Board was obliged to make a determination of the application in accordance with section 21 (7) Mines and Minerals Act [Cap 42]. They were not initially asked to do this by the claimant, for the claimant sought an extension under subsection (6), probably in error, but that nevertheless was the Board's obligation once they had decided to consider the application.
28. Subsection 7 provides that the Board may, after consultation with the applicant, extend the period or request the applicant to amend and subdivide his application to the areas where agreement has been reached and the areas where it has not. They cannot do other than request the applicant to subdivide. It is not within the power of the Board to require subdivision unilaterally.
29. There is no formal procedure to be found as to how the attention of the Board is to be drawn to the expiration of the time limit for a Letter of Intent. That the claimant took the trouble to make application and that the Board was prepared to hear from the claimant is to be commended.
30. The question of law which arises in these circumstances is whether the Board is limited to these two options. It is submitted on behalf of the claimant that this is the correct position in law. It is submitted for the 4th defendant that the Board, in deciding whether to choose either extension or request amendment and subdivision has the option of choosing not to adopt either course. On behalf of the 4th defendant it is submitted that the Board, in the exercise of their discretion given by the verb 'may' immediately preceding the two options contained in the subsection, may choose neither.
31. Submissions contain the arguments for and against in each case. For the claimant the argument that subsection 6 contains an express power to refuse whereas subsection 7 does not is a powerful one. For the 4th defendant the powerful argument lies in the potentially crippling effect of a subsection 7 interpreted in a way that excludes refusal. Given that the power of the Board is limited to requesting an applicant to amend and subdivide, the Board is left, absent agreement of the applicant to subdivide, to unlimited extensions.

32. It must be said that this legislation might have been expressed in clearer terms. Given that, there perhaps falls on the court an obligation to apply one of the various rules of statutory interpretation. The claimant contends that in this subsection 'may' should be interpreted as 'shall either'. The 4th defendant contends that 'may' should be interpreted as permitting the discretion to adopt either alternative or not to adopt either alternative, which course merely confirms that the time within which the Letter of Intent expires does not change from its original.

33. This determination of statutory interpretation is not dependent upon disputed facts but amounts to a question of law. I am of the view, after submissions, that in order to avoid the absurd position described in the paragraph above of extension of time without limit, that 'may' permits a discretion as to whether to adopt either alternative, or not to adopt either.

34. This view, I would suggest, is supported in that the situations envisaged in subsection 6, that the Board may refuse extensions in circumstances where the applicant for extension has not made sufficient efforts will not be available again to the Board where there are some agreements. It may result in stalemate. More significantly, it transfers power from the Board to an applicant. That is an untenable position for the Board, which has obligations under the Act clearly set out in the earlier sections.

IRRELEVANT CONSIDERATIONS

35. Given that I have formed the view expressed above, that on its proper construction the legislation permits the Board to exercise its discretion, when considering a subsection 7 application, to refuse it a substantial part of the case for the claimant is determined against them. Yet that discretion itself must be properly exercised and this cannot be said to have been properly exercised if the Board has failed to take into account relevant considerations or has taken into account irrelevant considerations.

36. Submissions were made on behalf of the claimant that the Board took into account irrelevant factors. Amongst these irrelevant factors are the views said to have been expressed in opposition by Landowning groups, as opposed to landowners individually. It is clear that the status of a group referred to as the BLA is not entirely clear. Yet, whilst this group appears to have expressed opposition, it was not a lone voice, according to the minutes. Whether or not there was realistic prospect of agreement such that the claimant would reach the step described in subsection 8 of section 21 must be a relevant consideration in determining whether to extend the Letter of Intent. It certainly cannot be described as an irrelevant consideration. There is evidence that also canvassed before the meeting, although there may be residual factual dispute about this, was the question of subdivision. Since the power of the Board is limited to requesting rather than requiring an applicant to subdivide, this in not, in my view, a relevant factual dispute requiring resolution prior to determining a strike out. For even if the claimant applicant made an offer to the Board to amend and subdivide, that subdivision offered would still have permitted the Board to exercise its discretion

to refuse the application if the subdivision presented a less than ideal position having regard to the Boards wider responsibilities under the Act.

37. Evidence that the Board took into account irrelevant considerations is not found in the letter written by the Minister. Whilst he says that the Board made a determination under subsection 6, this is not indicted in the resolution nor in the letter from the Director, who is Chairman of the Board and was present at the meeting, unlike the Minister who merely received the resolution. I am not of the view that either of the letters communicating the decision demonstrate that irrelevant matters were taken into consideration.
38. Nor do I consider that by, perhaps, adopting words and phrases not appearing in subsection 7, but themselves appearing in subsection 6 that the Board misdirected itself. A relevant consideration must be the *bona fides* of the claimant applicant whether expressly referred to in the section or not. Could the Board, properly convinced that the applicant for an extension of a letter of intent was not acting *bona fides* be obliged to extend? Could the Board, properly convinced of lack of effort to negotiate agreements, be obliged to extend. Whilst it must be accepted that there is scope to submit that the Board did not know what it was doing as a result of the inappropriate use of language, this is not, in my view, made out in submissions.

FACTUAL MATTER IN DISPUTE

39. It is clear that there a factual matter still in dispute were this matter to proceed to trial. Those disputed factual matter remain in what the claimant applicant may have said to the Board, particularly regarding subdivision, and on the negotiations leading to the SAA's. Negotiations leading to the SAAs and the effect of the submission of draft agreements will fall to be determined for the claimant to have any decision on a declaration that SAAs already arrived at are valid.
40. I have discussed the question of subdivision above and will not repeat myself here. On the validity of SAAs, since it is not an issue that some agreement was reached with some landowners prior to the expiration of the Letter of Intent thereby enlivening the subsection 7 powers, to succeed in that respect is not going to assist the claimant in obtaining review of the decision of the Board. For the Board was not under any misapprehension that there were no agreements. The Board expressed some concern over procedure and the question over the submitted draft may have been necessary to be answered if a subsection 8 step was to be taken, as the claimant submits, yet that position will not be reached unless and until the decision of the Board not to extend is overturned.
41. In summary, it does not appear to me that what factual disputes that remain are relevant to this issue of a quashing order. The basis of the challenge to the decision of the Board is lack of jurisdiction and thereafter lack of power through incorrect exercise of discretion. It is not the case that the decision of the Board was arrived at because of disputed factual matter.

GENERAL DISCUSSION

42. It only takes a further look at the writ of summons and the orders sought in the first instance to see that this claim seeks to remove all of the power of the Board into this court. By seeking orders as extensive as were sought, every decision that the Board might make, every step in every subsection was sought to be brought before this court and answered. If successful in every respect the claimant would leave court armed with orders that they acted in good faith, that all the surface access agreements are valid, that the Board shall grant an extension where no agreements have been made when a subdivision is requested and agreed to by the claimant, with further extension on demand (adopting the interpretation of the claimant to subsection 7 powers). Little was left to be determined by the Board.
43. I make reference to this because it, in my view, supports the contention that this claim amounts to an appeal against the decision of the Board. It represents a statement that the Board, in all respects, is not capable of making the decisions it is empowered and obliged to make. In the first instance, of course, it was alleged that it was not the decision of the Board at all and thereafter that it was a decision arrived at contrary to the expressed views of Board members in votes for the extension. Yet it was a decision of the Board and it was a decision that the Board was entitled to make and in considering the matter the Board, on the face of the record, took into account all of those matters that it should have taken into account. Judicial review is not provided so that a court can substitute its view of the decision for that of the lawful decision maker, absent procedural and jurisdictional error.
44. There is no suggestion that the claimant was not permitted to put all material that was considered by the claimant to be relevant to the Board. There is no merit in the claimant submitting that the Board by use of inappropriate terminology misdirected itself, particularly in circumstances where the claimant approached the Board in the first instance on a wrong footing. It is regrettably the case that the resolution of the Board was expressed to have 'anonymously' supported by the Board when, perhaps, the Board wished to express the fact the every Board member supported the decision. Maybe, as far as voting is concerned, the Board members should be entitled to anonymity?
45. The claimant may naturally be disappointed that it did not obtain that which it required from the Board. That is not a valid reason justifying judicial review. A Board must consider matters properly before it and determine those matters properly in accordance with natural and substantive justice within the limits of its own power. The Board is not mandated to give because a requesting party believes in some entitlement nor does any one party hold the right to be sole arbiter of Board powers.
46. Cognitive dissonance is in evidence on the part of the claimant which now asserts that the Board acted without power under subsection 6, which I do not accept to be the case given the whole circumstances, and its original request for their application to be considered by the Board under that very subsection. Acknowledging as it did in its resolution that there were agreements, albeit in the expressed view of the Board not a sufficient number of agreements given the time already expired, the Board clearly appreciated the factual situation in which the

application arose. That is to say the Board understood it was addressing a subsection 7 situation even if that was not articulated in their resolution.

CONCLUSIONS

47. An appeal against a decision brought in the guise of judicial review represents an abuse of process. On law, a substantial part of the claim fails. The Board does, in my view, have the discretion that was exercised. On remaining disputed facts, ~~even on the assumption that the claimant establishes all that it is now sought to establish~~, the claimant will fare no better. These proceedings should be brought to an end at this stage, for the claimant will not succeed at a hearing given the circumstances alleged and the law as I find it to be.

48. Whilst a number of routes are available to determine this application, given that a preliminary point of law disposes of a significant aspect of the case, it is my view that as an appeal brought by way of judicial review, the claim amounts to an abuse of process and therefore I strike it out under CPR 9.75.

EPG Adams

