HIGH COURT OF SOLOMON ISLANDS

SMM SOLOMON LIMITED AND ALFRED JOLO *(Representing the trustees and members of the Anika Thai Clan)* **AND WILLIE DENIMANA AND HUGO BUGORO** *(representing the trustees and members of the Thavia clan)* **AND HENRY VASULA RAOGA** *(representing the trustees and members of the Vihuvanagi tribe)* **AND BEN SALUSU** *(representing the trustees and members of the Vihuvunagi tribe in respect of the Chogea and Beajong land areas within Takata)* **AND MAFA PAGU** *(representing the trustees and members of the Thogokama tribe)* **AND PAUL FOTAMANA** *(representing the trustees and members of the Veronica Lona Clan)* **–V- THE ATTORNEY GENERAL** *(representing The Minerals Board* **AND THE ATTORNEY GENERAL** *(representing the Minister for Mines, Energy and Rural Electrification* **AND THE COMMISSIONER OF LANDS AND THE REGISTRAR OF TITLES AND PACIFIC INVESTMENT AND DEVELOPMENT LIMITED AND AXIOM KB LIMITED AND ROBERT MALO, FRANCIS SELO, LEONARD BAVA, REV. WILSON MAPURU AND ELLIOT CORTEZ AND THE ATTORNEY GENERAL AND BY ORIGINAL ACTION AND BUGOTU MINERALS LIMITED AND THE ATTORNEY GENERAL** *(representing the Director of Mines)* **AND THE ATTORNEY GENERAL**

IN THE HIGH COURT OF SOLOMON ISLANDS

(Brown J)

Civil Case No. 258 of 2011

Date of Hearing: 5, 6, 9, 10, 11 December 2013

Date of Ruling: 13 December 2013

1st - 7th Claimant – Mr J Sullivan QC

- Mr R Kingmele

1st – 4th & 8th Defendant – Mr S. Banuve

-The Solicitor General

5th Defendant – No Appearance

6th Defendant – Mr R. Lilley QC

- *Mr J. Carter*
- *Mr D. Keane*
- *Mr M. Pitakaka*

7th Defendant – Mr F. Waleilia

- *Mr D. Nimepo*

For the Cross Claimants, Bugotu Minerals Ltd – Mr T. Matthews

- Mr W. Togamae

CATCHWORDS.

EVIDENCE–witness yet to be called-right to approach in relation to matters raised in cross-examination of earlier witness– leave- principles.

RULING ON CLAIMANT APPLICATION RELATING TO WITNESS PREPARATION

Commissioner Brown.

The Claimant's wish to approach its new witnesses in the light of responses in reply to cross-examination of its earlier witnesses.

During the course of the cross-examination of Mr. Bugoro on 5 December, Day 29 Mr. Lilley QC in the absence of the witness raised his concern about the conduct of the case, conduct which sprang from discussions [and an exchange of letters] he had had earlier with Mr. Sullivan QC. Mr. Sullivan then went on to recount that following answers in cross-examination of an earlier witness, Mr.

would, a likely line of cross-examination. He in fact had done that with Mr. Bugoro [whose witness statement he had put into evidence] [for he was the next witness of that group called] and was, in Mr. Sullivan's words, "given a particular answer". Mr. Sullivan says he is entitled to identify possible lines of cross-examination and tell the witness that, without anything further. So one line of cross-examination has already arisen from answers of the first witness of the group and had been put to Mr. Bugoro, and that relates to the circumstances in which he had made his sworn statement. What other possible lines, which Mr. Sullivan may seek to put, will await the completion of the earlier witness' cross-examination and Mr. Sullivans' discretionary choice it seems.

In Mr. Sullivan's letter in response to Mr. Lilley's instructing solicitors, Norton Rose Fulbright, Mr. Sullivan made plain that he would be talking to Mr. Ochi, Mr. Mason and possibly Mr. Kudo of that other group about matters arising out of the cross-examination of Mr. Abe to date . Mr. Abe is still subject to the right of counsel to further cross-examine him. In this case, Mr. Sullivan says the questioning by Mr. Lilley of Mr. Abe "goes far beyond the single particular given [sic] paragraph 30 [ca] of the Axiom defence and has sought to suggest that landowners were misled about land acquisition and like matters that have not been pleaded". In his letter he earlier had said the cross-examination had been designed to elicit answers to show that the claimant and particular individuals had been engaged in improper conduct akin to bribery and that the SMMS Tender was misleading and contained promises of conduct that SMMS did not intend to keep, conduct tantamount to fraud.

He said that conduct was required to be pleaded and referred to Rule 5.3 at para.5 of his letter of 1 December 2013.

Rule 5.3 *Each statement of case must: [e] state specifically any fact that is relied upon to support any allegation of fraud, breach of trust or other improper conduct;*

I propose to detail the relevant parts of the Claim and Defence. [Both require a statement of case]

The Claim pleaded;

30. *On 11 February 2011, SMMS lodged the Takata SAA with the Director together with a Form 1 application for a prospecting licence for Takata. Particulars of the Takata SAA are contained in Annexure 4 Part B.*

Axiom's Defence.

30. *[ca] says that the signatures obtained by the first claimant to their purported Takata SAA do not bind the true owners of the Kolosori Land and were further induced by misrepresentations regarding the nature and scope of the proposed mining of the first claimant on Isabel and in particular the construction of the HPAL refinery, such that their purported Takata SAA is vitiated in any event and rescinded* ab initio *at the election of the signatories: and*

[d] does not know and cannot reasonably find out about the balance of the allegations made in paragraph 30 and does not plead to the Particulars in Annexure 4 as they do not contain a pleaded allegation. [Annexure 4 –Particulars of landowner meetings and surface access agreements]

The Legal Practitioners [Professional Conduct] Rules at r.16 [9] states that a pleading shall not allege fraud without express instructions. No fraud has been pleaded in para. 30 of the Defence. At sub-rule [6] a cross-examiner dealing with a matter going to a matter in issue, misrepresentations, for

instance, may put questions suggesting fraud, etc provided the matters are part of his client's case. The questions of Mr. Abe go to his credit and he remains under cross-examination. *Onassis -v Vergottis* [1968] 2 Lloyds Rep 403 is an accepted authority on the assessment of credibility and I shall come back to this case. Suffice to say at this juncture, cross-examination is designed so as to enable a cross-examiner to test the credibility of a witness and enable the trial judge to properly assess it in the light of all his evidence.

Mr. Sullivan says that he may approach these persons yet to be called and raise these matters . I shall deal with Mr. Sullivan's assertion to a right to approach these separate groups together in my reasons. I see it, as Mr. Lilley says as a generic problem.

The arguments were put in these terms. I have truncated parts of the transcript to avoid repetition and to help make sense of it.

The Claimants arguments.

Mr. Sullivan QC
It is my respectful submission that that [the right to approach]is within the first part of his Honour Mr Justice Young's proposition set out in the Equiticorp Finance case. There has been no discussion of Mr Bugoro's evidence, no leading or prompting of answers, simply this is likely to arise and I can't remember whether I said, "What do you say to that?" or whether it was volunteered but in any event I was told what – another witness's version of how the statement was made was and that's it, your Lordship. Nothing further and, with respect, that must be a permissible communication to a witness who has not been called.

He'll have his own recollections of events and if he's asked he'll have to give them, but it doesn't fall foul in my respective submission of any of the limitations in respect to dealing with a witness prior to his being called. So we say that doesn't cross the line, and we accept there is a line, but as – I'll let Mr Lilley speak for himself but as I understand the proposition that he would stand for and that is that you cannot raise with a prospective witness any topic or any matter that has come up in cross-examination whether or not you deal with another witness's evidence.

Now, we say that must be wrong, your Lordship. We are entitled to identify possible lines of cross-examination and to let the witness know. We're not entitled to school him or train him as, I think, the word was used in the cases cited the other day, but we are entitled to say, "This is a possible line of cross-examination." And as long as we don't tell that witness what Mr Bugoro's evidence was or indeed the evidence of any other witness and this is the same – it was raised first the other day in respect of Mr Kudo, your Lordship, in that if you took Mr Abe's evidence we're entitled to tell Mr Kudo that a particular topic may be addressed in cross-examination and no more or no less. We're not entitled to take Mr Kudo to Mr Abe's evidence, we wouldn't dream of doing that.

So I guess – I don't guess – the question that my friend has asked to raise and which I meet squarely is which side of the line – which side of the line does that conduct fall within. Now,

we say it falls on the correct side of the line, that is it's permissible. So I think that's what my friend is getting at and I hope I've addressed it. We're not in any way trying to tailor one witness's evidence to another. We're not in any way trying to prompt a witness to say anything other than what is in his own personally recollection and that we say is a permissible contact with a prospective witness.

Now, I apprehend that Mr Lilley says it falls on the other side of the line and with respect we don't see how that can be because it doesn't offend any of the prohibitions and restrictions which were put to your Lordship the other day. Now, we do understand that he got a clear answer from this witness and he can make what use he can of that in due course, but this is not about this witness. This is about fairly alerting another witness to a potential line of cross-examination and that Mr Justice Young quite clearly said was okay.

Now, for it to fall on the other side of the line that would mean there would have to be some temporal limitation. It would mean that in effect once you've got your witness statement you could hardly talk to the witness again and that, with respect, can't be right. So I'm hoping that I've understood my friend's concern and I'll hear further from him, your Lordship, and if there's anything else I need to say in response I'll do so.

The 6th Defendants'argument.

MR LILLEY QC.

Your Lordship, we see little difference in what my learned friend has just described and allowing a witness to remain in Court to hear the cross-examination of other witnesses. If a witness remains in Court and hears the cross-examination of a witness giving similar evidence he is alerted to questions that might be asked in cross-examination and that, we understand, is the vice, the vice to which the rule is addressed.

If you take that potential or future witness out of Court, but then someone from within the Court, goes to him or her and says, "These are questions you may be asked in cross-examination, what are your answers?" or even without asking, "What are your answers?" it completely ruins the purpose of the convention that witnesses shouldn't be in Court.

More to the point it must compromise the witness because when I do go to cross-examine that witness I will ask them if they have spoken about the cross-examination to anyone and the fact that it's second-hand from the first witness who is cross-examined makes no difference. Meaning that if a witness is cross-examined they're directed not to go and talk to other people about their evidence. If they do and it comes to the attention of the Court that a subsequent witness has been told about the cross-examination that compromises that witness. The second-hand point is that here the witness hasn't passed it on, the person who is in Court and has heard it, has passed it on to the witness who is yet to evidence.

Now, can I take your Lordship to the reference to which my learned friend referred; the seven steps of Justice Young.

It is the second one that my learned friend relies on and that is directing the witness's mind to the point about which questions may be asked.
So in a nutshell it's a device which gets round the problem of having your witness in Court, the witness isn't in Court, someone just goes out and tells them what's happened in Court. What we say is there's a clear chronology to Justice Young's comments and he talks about preparing a witness and the general comment is;

> "It is clear that a witness might confer with his or her solicitor or counsel or the solicitor or counsel for the party calling the witness and that, during the conference, the solicitor or counsel concerned may give the witness advice. That advice may certainly include..." and then there are seven items.

Now we say that there's a clear chronology to those seven items. We're talking about a witness before they give evidence and while they're being prepared to give evidence and, in a case like this, where their statement is being taken.

What you can do in respect of cross-examination is really in paragraph 6 of the chronology.

Paragraph 2 is part of the preparation of the statement. We say they're questions that the examiner-in-chief might ask and there's no doubt that, at this point in time, you can test the witness by asking questions that might be asked in cross-examination. What you can't do is tell the witness questions that have been asked in cross-examination, particularly when those questions go directly to the same subject matter about which the intended witness might be cross-examined. What would be the point of the rule that witnesses shouldn't remain in Court?

It's accepted practice that if you cross-examine a witness about a matter of credit, you can't call a witness to prove that matter. So, for instance, if I ask a question of a witness, "Were you convicted of stealing money?" The witness, "No." I can't then go and get a Certificate of Conviction and put that into evidence to show that he was lying because all of these rules, those sorts of rules, deal with cases going forever.

Now what is the purpose, one has to ask rhetorically, in my learned friend asking a question or putting to a future witness a question that might be asked in cross-examination, other than to prepare the witness for that cross-examination - sorry, I should have said not might be, was asked in cross-examination - is either to prepare that witness for cross-examination or to put in further evidence. Putting in further evidence, if it was because there was a different answer, impugns the first witness. The question is one for the cross-examiner. The cross-examiner has to take the risk that he gets the same answer or he doesn't get the same answer. It's not one for the lawyer who calls the witness to go outside and prepare the witness for cross-examination by telling him what questions were asked in cross-examination or even putting it in terms of "you may be asked" because he knows very well at that point that those questions were asked, and that's the problem which we will face and, every time I cross-examine, I will cross-examine about what discussions they've had. It won't look good on the transcript if they say, "I've had a discussion with Mr Sullivan and he told me that I might be

asked certain questions" and I am just trying to stop what I see as a significant problem of compromising witnesses. There can be no point in it because he can't put on further evidence. All the evidence has been put on statements and further evidence is only admissible in special circumstances, so the only point is to prepare the witness for cross-examination in circumstances where they've heard the cross-examination in Court and they're going out of Court and repeating it.

Mr. Sullivan QC's reply.

I think, my friend is quite right to seek a ruling now so that we know what the limits are. It's not an unimportant question, but what we say is if you look at point 2, we don't say that that is merely in relation to the preparation of a witness statement; it's witness preparation generally and it's permissible to point to a witness a topic of possible cross-examination, say, "You might get asked about this" or that, whatever it might be, because I agree with my friend that the issue is a generic one. It's not a question of one witness in Court having said something and then relaying what his evidence was. You can do that very well in the Solomon Star, as we have found out, your Lordship. But we say that it comes within paragraph 2 on – as set out at our friend's submission, your Lordship. Mr Justice Young says there may be other permitted areas but doesn't in fact say what they may be. So it's not, with respect, a question of telling any other witness what a prior witness' evidence was. That hasn't happened and we don't intend that that should happen. But we say it's a permissible part of witness preparation and there can be no suggestion that the witness who gave his statement three months ago, and perhaps four or five months before his evidence, can't be seen again by counsel or solicitor in respect of his evidence-in-chief. So why should it be any different to at the same time saying this is a possible line of cross-examination? That is, again, without referring to anybody else's answers or anybody else's evidence. You would do that at the time of the making of the statement in any event, as best you can foreshadow what questions might be asked, and put that to a witness – a prospective witness – and ask him what his recollection is about it or – so my friend is taking it a step too far to suggest – 'cause there is no intention on our part to delve into the actual evidence.

Now, the generic issue here is where is the line to be drawn? We say the line – if you take Justice Young's decision on page 3, you draw the line under the sentence, "There may be other permitted areas."

We say this is an above-the-line case and not a below-the-line case. It seems to us that we're entitled to do that, and there shouldn't be any temporal limitation on that. It would be unfair to say, "Oh, you can do it back in August, but you can't do it three days or a week, or whenever it is, before the witness is actually called. And I repeat again, it's not a case of putting to the prospective witness, precise questions or any answers, and we say that's permissible.

Mr. Sullivan's undertaking.

Mr. Sullivan gave an undertaking not to approach witnesses yet to be called pending my ruling, [so that another witness could be called], in these terms.

COMMISSIONER: Unless you'll undertake not to approach any other witnesses at this point in time on that issue.
MR SULLIVAN: Until your Lordship makes the ruling?
COMMISSIONER: Until I've handed a ruling down.
MR SULLIVAN: Yes. I'm happy to do that, your Lordship

Consideration of Mr. Sullivan's argument.
Later on day 30 Mr. Sullivan addressed the cases which had been given me as authorities by Mr. Lilley. He also handed up a written submission to which he spoke. Addressing the Hong Kong case he said, I must be confident that the "real recollection of events" has not been replaced by evidence from a different source. That ultimately is the test. Where Mr. Sullivan seeks to speak to a witness yet to be called [one I will call a "new witness"] by drawing the new witnesses attention to a possible topic in cross-examination, he says no new evidence from a different source may be attributed to such an approach.

The quoted passage does not address any nuance of understanding in the new witness who is spoken to by counsel in this fashion.

Dealing with Momodou's case Mr. Sullivan quoted from page 587 ; " The witness should give his or her own evidence so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations." The test, he says is whether the court is "getting the witness' own uncontaminated evidence."

To my mind that highlights the problem were the court to permit an approach of this nature. It cannot be said to be "evidence from a different source". But does the fact of the approach in some way "contaminate" the evidence? For it may give a nuanced understanding to that part of the new witnesses approach to his answers in cross-examination, a nuance inaudible to the cross-examiner and possibly unnoticed by the witness. How is the court to know whether "contamination" has occurred? Or in terms of Lord Pearce's reasoning, has the new witness' recollection been subsequently altered by unconscious bias [or overmuch discussion of it] by Mr. Sullivan's mere approach?

In the *Equiticorp* case, Justice Young set out the principles dealing with witness preparation relied upon by Mr. Sullivan as justifying his approach; he said at 395,396

> " In ordinary litigation there are very severe limits, in the interests of justice, in preparing a witness to give evidence. Some matters of preparation are clearly in order, and some are clearly out of order, but it is not always possible to state general rules as to where the line should be drawn. It is clear that a witness might confer with his or her solicitor or counsel, or the

solicitor or counsel for the party calling the witness, and that during such conference the solicitor or counsel concerned may give the witness advice. That advice may certainly include:

(1) advice that the witness should refresh his or her memory from contemporaneous documents;

(2) directing the witness' mind to the point about which questions may be asked;

(3) giving the witness a sketch of court procedure;

(4) directing the witness' attention to points in his or her evidence which appear to be contradictory or fantastic;

(5) reminding the witness to bring to court all relevant documents;

(6) advising the witness as to the manner of answering questions (for example,"In cross-examination listen to the question, just answer the question asked with as concise an answer as possible"); and

(7) giving advice as to appropriate dress and grooming.
There may be other permitted areas.

On the other side of the line, a solicitor or counsel does not advise the witness as to how to answer the question. Also we do not in Australia do what apparently happens in some parts of the United States, rehearse the witness before a team of lawyers, psychologists and public relations people to maximise the impact of the evidence. We do not encourage witnesses to discuss their evidence with others who are potential witnesses. Indeed, the rules of the Bar Association, in the interests of justice, forbid counsel conferring with a witness in the presence of other witnesses or potential witnesses."

RE EQUITICORP FINANCE LTD; EX PARTE BROCK [NO 2] - (1992) 27 NSWLR 391 - 23 March 1992

Mr. Sullivan said, "Now bearing in mind that we're talking about a witness yet to be called, and a witness who has either given evidence or is still giving evidence. So we say it's permissible to talk to the witness yet to be called, about a topic raised in cross-examination of another witness, and to ask that witness, the one yet to be called, what is his personal recollection, if any, of that topic. Now, provided that the discussion then keeps within the confines of what we've set out in a, b and c,[of his written submissions] then we say it falls above the line.

After touching on the three cases earlier referred to by Mr. Lilley and the principles listed by Justice Young, Mr. Sullivan set out in a, b, and c his proposed manner of addressing "a topic raised in cross-examination of an earlier witness" to avoid falling "on the other side of the line" spoken of by Justice Young.

a. The witness is merely told that it is a topic about which he may be asked questions;
b. The witness is not told-
   i. The source from which the topic arose;
   ii. The name of the other witness;
   iii. The evidence of the other witness;or
   iv. The questions to which that evidence is given in answer.
c. Counsel or solicitor raising the topic does not in any way try to shape the witness' recollection of events.

The Temporal Restriction.

Mr. Sullivan rejected the suggestion that Justice Young's *dicta* should be read with a temporal restriction [limited by time].Later the difficulty of arguing the proposition about the temporal restriction became apparent.

When dealing with the "topic" raised in cross-examination, Mr. Sullivan went on to say of the new witness' statement of evidence on the "topic" which now appears to be contradictory as a consequence of the cross-examination, that it is permissible to address the new witness and say "that appears to be in contradiction to your witness statement; you may well be asked to explain it" , and that would be above the line advice. He immediately said, "We're not, and I think we had this discussion the other day in respect to the other matter, your Lordship, that we're not dealing about contradiction between one witness and another witness; we're talking about contradiction within the particular witness' evidence, or what he says now.

If we analyse the above, contradictory matters in the witness statement would be apparent at the time of the making of the statement. They may be addressed then. Justice Young's 4 deals with it. The internal contradiction falls above the line and may be dealt with by restating the evidence in the witness statement.

The fact of cross- examination of a witness can sound no warning about a subsequent witness' statement unless that cross-examination results in a contradiction with the new witness statement, or touches on matters not dealt with in that statement. The external contradiction arises, at the time of the conclusion of the cross-examination, when the new witness' evidence has not been formally put into evidence through his witness statement.

It must be remembered this trial is conducted by statements of evidence as part of the court management technique.

The Rationale for the Prohibition against discussion of an earlier witnesses evidence.

The prohibition against the discussion of a witness'evidence with another witness is directed to ensuring that the second witness evidence is given so far as is practicable, from the memory of that witness uncontaminated [consciously or unconsciously] by evidence on the same matter from any other source.

R v- Momodou [2005]EWCA Crim 177 [para., 61,62]

> "There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. (See Richardson [1971] CAR 244; Arif, unreported,
>
> The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.
>
> This principle does not preclude pre-trial arrangements to familiarise witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process.

> Nevertheless the evidence remains the witness's own uncontaminated evidence. Equally, the principle does not prohibit training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury, both during evidence-in-chief and in cross-examination, and, another example, developing the ability to resist the inevitable pressure of going further in evidence than matters covered by the witnesses' specific expertise. The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it. "

The following case has also been relied upon by Mr. Lilley. For he says Mr. Sullivan's approach, if allowed would circumvent the rule about keeping witnesses out of court [during the evidence of an earlier witness]

DAY v PERISHER BLUE PTY LTD [2005] NSWCA 110 JUDGMENT OF: Sheller JA McColl JA Windeyer J

> It has long been regarded as proper practice for legal practitioners to take proofs of evidence from lay witnesses separately and to encourage such witnesses not to discuss their evidence with others and particularly not with other potential witnesses. For various reasons, witnesses do not always abide by those instructions and their credibility suffers accordingly. In the present case, it is hard to see that the intention of the teleconference with witnesses discussing amongst themselves the evidence that they would give was for any reason other than to ensure, so far as possible, that in giving evidence the defendant's witnesses would all speak with one voice about the events that occurred. Thus, the evidence of one about a particular matter which was in fact true might be overborne by what that witness heard several others say which, as it happened, was not true. This seriously undermines the process by which evidence is taken. What was done was improper. The process adopted was more concerned with ensuring that all the witnesses gave evidence which would best serve their employer's case. This realisation makes particularly sinister the precept in the Witness Protocols for Court Cases and Arbitration Hearings, "Not about facts about credibility".

Mr. Lilley says the Court is concerned to hear evidence of the witness' "real recollection of events" and must guard against that recollection being replaced by "evidence from a different source". *HKSAR v- Tse Tat Fung* [2010] HKCA 156 [79]

He accepts that there is clearly a line above which conduct in the preparation of a witness is permissible, and below which it is not. *Re Equiticorp Finance Ltd; Ex. Part Brock* [1992] 27 NSWLR 391.

The Cross-claimants case.

Mr T Matthews QC for the cross-claimant accepts the relevance of the various authorities brought to the courts notice. He goes on to say that, given the difficulties in language evidenced to date in the trial, it would not be unreasonable for counsel to confer with a witness after cross-examination and before re-examination and further for topics raised with

witnesses in cross-examination to be canvassed with other witnesses yet to be called in the trial. He also referred to the judgment of Justice Kenny of the Federal Court of Australia in *International Relief and Development Inc. –v Ladu* [2013] FCA 1216 [*Ladau's case*] as an example of a pragmatic and practical approach to the dilemma facing counsel in circumstances where there is an attack as to credit of a witness in cross-examination which may well be met in re-examination in the interests of justice by the adducing of, in effect, further evidence in chief and/ or the tendering of documents. Mr. Matthews says that *Ladu* stands for the proposition that where a witness' evidence may leave the court with an erroneous impression of either the witness' credit or the substance of that evidence, that the interests of justice dictate that where leave is sought to effectively confer with the witness concerning the cross-examination to elicit specific topics as to which further evidence ought be given, that leave ought be granted in such circumstance.

The additional step envisaged by the Cross-claimant.

This suggested procedure which Mr. Matthews seeks to elicit from the judgment of *Ladu* is beyond that suggested by Mr. Sullivan and offends the rules in the earlier line of cases touched on above, Mr. Lilley says which seek to reduce or avoid any possibility that one witness may tailor his evidence in light of what anyone else said, and equally avoids any unfounded perception that he may have done so. [*R –v Momodu supra*]

Mr. Lilley says that the position advanced by the cross-claimants is difficult to reconcile with a fundamental aspect of the judicial function. If counsel is at liberty to direct the attention of intended witnesses to such matters as they contend, it opens the prospect of lengthy cross-examination as to the witness' out-of-court discussions with counsel. While this occasionally happens, in reality, it is rare. It is rare because such preparation of witnesses is unacceptable. Such a practice usurps the central function of the court itself in ascertaining and resolving the different versions of evidence.

The Queensland Barrister's Rules are not the Rules in force in the Solomon Islands and while illuminative, are not those which have force here.

I propose to deal with *Ladu's case* where the matter came to trial on affidavit without pleadings, particulars or discovery. In the case before me the court book [last printed] goes to 249 pages including the pleadings, the defences and the requests for further and better particulars in relation to all the amended claims, further amended claims and further amended defences. The statement of case of the claim, defence and cross-claim has been made in terms of our Rules of Court and in relation to the 1st claimant, for instance, extends for some 27 pages [without including the annexures].

Ladu's case.

The application for leave to confer with the respondent witness before re-examination was dealt with in the reasons at 7: "It may be inferred that counsel for Mr. Ladu considers that Mr. Ladu has given evidence in cross-examination on topics mentioned in his submissions that may disadvantage his case. Counsel evidently considers that he has insufficient knowledge

about these topics to re-examine without first conferring with Mr. Ladu. This is, it seems to me, implicit in his submission that he may wish to adduce "further evidence" from Mr. Ladu in re-examination. 8. The occasion for the leave application is informed by reference to the rules that govern the conduct of barristers in court."

The Rules referred to were the Victorian Bar Practice Rules. Our Rule 16 [11] deals with the need for leave before communicating with a witness under cross-examination.
The need to communicate arose from the fact the claimant, IRD Inc. had by late foreshadowing reliance on fresh evidence including documents not disclosed before trial, created a situation where the trial judge, relying on the exceptions to the Victorian Practice Rules, and for other reasons, decided that fairness considerations called for the grant of leave to confer.

Those particular circumstances are set out in length, the circumstances are different here. This is not an approach before re-examination; it is an approach to a new witness. There has been disclosure and that issue does not arise. The statements of the witness have been prepared over a great length of time and the parties cannot be said to have been disadvantaged by late disclosure; in fact although the 7th defendants' most recent statements are late the other parties have been able to address matters in them without complaint so far. The leave to confer which Mr. Sullivan seeks, relates to a witness yet to give evidence about matters which have arisen from the oral responses in the trail left by the cross-examination of an earlier witness. The factual circumstances in the two cases are wholly different and it would be a mistake to confuse this case by confluence of principles relating to credibility.

The underlying responsibility of the court to assess credibility
Lord Pearce, in *Vergottis* [*infra*] said;

> "Credibility covers the following problems. First, is the witness a truthful or untruthful person?
> Secondly, is he, although a truthful person, telling something less than the truth on this issue or though an untruthful person, telling the truth on this issue?
> Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and if so, had his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance.
> And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is

essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their part."

Rationale of Approach.

I must be very careful not to compound the difficulty of assessment by somehow affecting the evidence through process, rather than allowing the evidence to come, unaffected. Here an approach envisaged by Mr. Sullivan runs the risk of affecting the witnesses since motive is one of those issues relevant to the "representative" aspect. Since recollections fade over time, an approach innocuous as it seems, may have the effect through unconscious bias, of colouring his recollection and a judge would have little chance of appreciating this without an exhaustive interrogation relating to the nature of the approach. Such interrogation of forthcoming witnesses goes to delay, and expense. Such an interrogation may well have the effect of undermining the value of the witness' evidence where, had he been allowed to give his evidence without such an approach about topics before-hand, the value to the court may have been so much greater.

Where the first group are concerned, Mr. Abe's cross-examination may give rise to topics which Mr. Sullivan would wish to pursue, but again, delay and expense must be incurred by counsel seeking to elicit the nature and extent of Mr. Sullivan's approach. Findings of credibility should be made thoughtfully, and should as far as practicable, be on evidence unaltered by emphasis suggested perhaps, through such an approach, however innocuous.

There is no part of the Rules of the Court in Chapter 13 which directly deals with the question of leave to confer. Schedule 3 to the Constitution relates to the adoption of the UK Evidence Act although no argument has been advanced in that regard. The principles to be found in the cases relied upon by all counsel then should guide the court. Fairness does not necessarily follow the wish to pursue seemingly contradictions in one's own witnesses evidence.

The Hearing Must Be Conducted With Minimum Delay and Expense.

The overriding objective of [the Solomon Islands Courts [Civil Procedure] Rules 2008] is to enable the courts to deal with cases justly with minimum delay and expense.[r. 1.3]
This includes ensuring that the case is dealt with speedily and fairly. [r. 1.4 [d]].

There are upwards of nine witnesses for the claimants. If this approach is adopted in relation to them all the examination and cross-examination, notwithstanding the existence of witness statements filed in accordance with the Rules to facilitate case management, will extend the trial into the indeterminate future. Such a course is inimical to the administration of justice and fairness to these parties in this trial. Mr. Lilley is correct to point this out.

This is not a case dealing strictly with re-examination. It is directed towards seeking to put on notice to a new witness topics or points which have arisen in cross-examination of an earlier witness, topics which in counsel's opinion need to be brought to the attention of the new witness for further thought. I see no basis for unfairness in the sense of *Ladu's case* were leave to be refused.

Leave to confer does not relate to matters in the keeping of the 6th defendant but not disclosed until cross-examination, rather to the subjective view of counsel who has formed an opinion that evidence in cross-examination is prejudicial to his case and that knowledge of the new witnesses response to the topic may assist him going forward. Mr. Sullivan has listed the matters which would not be told the new witness. If put, these are matters which may cause the new witness to reconsider his evidence in the light of counsel's approach. Consciously or subconsciously, the witness, of the "overmuch discussion" class envisaged in the criticism of Lord Pearce, may imperceptibly change his evidence to suit the new circumstance suggested by counsel. So if we say nothing but ask "you may be asked in cross-examination this or that" an astute witness may well realise why he has been asked and the court has the risk of an altered response through unconscious bias or wishful thinking not to mention the likelihood of delay I have spoken about. A witness not so astute may seek to question the counsel further to make sense of the conversation and no response may alert him to the need to reconsider. All of this conjecture may be avoided by treating this type of approach as below the line. The topic or point which the claimants seek to put to the new witness may be seen as going to his credit [since it is the credit of the earlier witness which has been impugned by the cross-examination and which has raised the possibility of external inconsistency] and it would, to an impartial observer, suggest that the usefulness of the new witness' evidence to the court, on the point, be difficult to gauge, for the witness has notice of the point of attack and may guard against it. If leave were not granted, the new witness' evidence may be tested without concern about the possible effect of such an approach. I am not persuaded that such course would be unfair to the new witness while it may well be seen as unfair to the 6th defendant's.
The approach to a new witness in this fashion may be seen as similar to an approach to a witness under cross-examination in terms of Rule 16[11] Legal Practitioners Act. Leave is required. Mr. Matthews does not allow that but implies that counsel acting in accordance with the professional guidelines and ethics may approach a witness in this fashion in any event. That frankly does not reflect the tenor of the authorities or Justice Youngs' seven points. Leave is required and leave equates to the exercise of a discretion. Discretion must be exercised judicially. I have had regard to the line of reasoning in the precedents argued and have made my comments about their relevance and help in resolving this.

Orders.
Leave is refused to raise with a witness yet to be called, a topic raised in earlier cross-examination of another witness. I also direct counsel for the claimants not to communicate with that group of witnesses [Mr. Ochi, Mr. Mason & Mr. Kudo] in terms of his expressed intention in paragraphs 4, 5 & 6 of the letter dated 1 December 2013 addressed to Norton

Rose Fulbright for all of the above reasons. I make this direction in exercise of my power to control proceedings in my court, including the power to control the wish of barristers to confer with or question particular witnesses. [Court Rules 1.5; 1.6 & 1.7[l]].

Costs are reserved.

The Court.