

IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Jurisdiction

KOLOMBANGARA ISLAND BIODIVERSITY CONSERVATION ASSOCIATION TRUST BOARD
& BULEHITE -v- VIURU FOREST ENTERPRISE & XIANG LIN (SI) TIMBER LTD.

M. Manaka for the 1st and 2nd Applicants.

N. Tongarutu for the 1st Respondent.

No appearance for the 2nd Respondent.

Date of hearing: 20th August 2013

Date of Judgment: 23rd August 2013

RULING

Apaniai, PJ:

Introduction.

1. This is an application seeking interim orders to restrain the respondents from carrying out logging operations on Viuru customary land on Kolombangara Island.
2. The applicants are Kolombangara Island Biodiversity Conservation Association Trust Board ("association") (represented by Ferguson Vaghi) and David Bulehite (representing the Viuru people). The basis of the association's involvement in this case is not as landowner but as an organisation whose objects relate to the promotion of conservation and sustainability on Kolombangara Island.
3. The respondents, initially, were Viuru Forest Enterprises Ltd ("VFEL") and Xiang Lin (SI) Timber Ltd ("Xiang"). Xiang is the logging contractor under a Timber Marketing and Management agreement signed with the licence holder.
4. When the application came before me on 9 August 2013, Mrs. Tongarutu sought leave to be heard on behalf of an interested party, namely, Viuru Forest Enterprise ("VFE"). She said that VFE, not VFEL, is the holder of the timber licence under which the logging operations are being carried out and therefore it wants to be heard. I granted her leave.
5. As it turned out, VFE is the licence holder and so Mrs. Manaka sought leave to amend the application by substituting VFE for VFEL as first respondent. I also granted her leave to do so.
6. Directions were then issued for the amended application to be filed and served by 12 August 2013. Directions were also issued for the filing and service of sworn statements and written submissions by the parties. The application was then adjourned to today for hearing.

Purpose of the application.

7. As stated earlier, the purpose of the application is to seek interim orders to restrain the respondents from carrying out logging operations in Viuru customary land. No

claim has yet been filed so this is an application under Rule 7.9 of the Solomon Island Courts (Civil Procedure) Rules 2007 ("Rules"). Rule 7.9 permits applications to be made before the filing of a claim where it is urgent and appropriate to do so.

8. The applicants say they intend to file a claim for judicial review challenging the validity of the grant of VFE's timber licence on the ground of irregularities surrounding the grant of the licence as well as on the ground that no development consent had been issued for the logging operations. They say this application is necessary and urgent since the respondents have already landed logging machines on the disputed land on 30 July 2013 and are in the process of clearing roads and trees in readiness for the logging operations.

The Rules.

9. Rule 7.10 requires that, where an application is made under Rule 7.9, the applicant must set out the substance of his application and provide a brief statement of the evidence upon which he will rely. Rule 7.10 also requires the applicant to set out the reasons why it is appropriate that an order should be made before proceedings are started and to file a sworn statement in support of the application.
10. Under Rule 7.11, the court may make the order if it is satisfied that the applicant has a serious question to be tried and, if the evidence upon which he intends to rely remains as it is, there is a likelihood that the applicant will succeed and the balance of convenience favours the making of the order. In a nutshell, the applicant must show that there is a serious issue to be tried, that there is a likelihood that he will succeed, and that the balance of convenience favours the granting of the interim orders.

Serious issue.

11. The first question is whether or not a serious issue has been disclosed. If no serious issue is disclosed, the application must be dismissed and the court need not consider the issue of the balance of convenience or the likelihood of the applicant succeeding in his claim. The issue must be a real or live issue and not one which is frivolous or vexatious.
12. There is a serious issue if some legal or equitable rights of the applicant have been, or are threatened to be, invaded. The sworn statement in support of the application must show what those rights are and that the defendant has invaded, or is threatening to invade, those rights. The existence or otherwise of those rights is a matter to be determined at trial.
13. Do the materials before the court in this matter disclose any serious issue?
14. In their application, the applicants allege that the 1st respondent's timber licence number TIM 2/34A is invalid. The question, therefore, is whether or not there is material before the court to show that the licence may be invalid.
15. The material before this court shows the following. First, a timber rights hearing was conducted in relation to Viuru Land in April 1996 by the Gizo/Kolombangara Area Council ("1996 timber rights hearing") and that Nao Rovu, George Pina Lilo, Gordon Darcy, David Bulehite and Joseph Lilokevu ("1996 trustees") were the

persons determined as being entitled to grant timber rights over Viuru land¹. It appears that a logging licence, TIM 2/34, was previously issued to Kololeana Development Company Ltd ("Kololeana") on 23 August 1993². That licence expired on 23 August 1998. It also appears that a timber rights agreement was entered into by the 1996 trustees (except George Pina Lilo) with Kololeana Development Company Ltd on the 17 May 2002³. There is no evidence to show that a logging licence had been issued pursuant to that agreement. However, in 2005, a Logging Completion Certificate was issued by Delta Timber Ltd certifying that logging in Viuru customary land had been completed⁴.

16. Second, there is no evidence before the court that a further timber rights hearing was conducted after the 1996 timber rights hearing until now. There is also no material before this court, apart from TIM 2/34A, that a logging licence was issued to anyone after the expiry of TIM 2/34 on 23 August 1998.
17. It appears that TIM 2/34A⁵ was issued following a Form 3 Certificate issued by the Western Provincial Secretary dated 12 February 2013. In that Form 3 Certificate, Hilly Lilo, Gordon D. Lilo, Steven Silas, Robert Soloni and Jeffrey Rence were referred to as representatives of the Viuru tribe⁶. Strangely, the Form 3 Certificate was issued after these representatives signed a standard logging agreement ("2013 logging agreement") in respect of Viuru land on 28 January 2013⁷. The agreement was signed at Vavanga by some unidentified persons on behalf of Viuru tribe. The representatives have also signed the agreement but it is very unclear who they represent in that agreement⁸.
18. It is agreed by Mrs. Tongarutu on behalf of the 1st respondent that TIM 2/34A is only an extension of TIM 2/34. She also admitted that TIM 2/34A was issued after the expiry of TIM 2/34. There is no dispute that TIM 2/34 expired on 23 August 1998, which means that TIM 2/34A was issued approximately 14 years and 5 months after the expiry of TIM 2/34. So the basic question is whether or not a timber rights hearing was held at all to justify the issuing of TIM 2/34A.
19. In the light of these evidence, there can be no doubt whatsoever that substantial issues do exist which must be agitated at trial. They include questions whether or not the Form 3 certificate dated 12 February 2013 confirming the representatives as new trustees in the place of the 1996 trustees is valid despite the absence of a fresh timber rights hearing; whether or not TIM 2/34A is an extension of TIM 2/34 or whether it is a completely new licence; if it is an extension, whether such extension is valid having regard to the fact that TIM 2/34 had already expired more than 14 years ago; if TIM 2/34A is invalid, whether or not the fact that David Bulehite did not sign the 2013 logging agreement has made that agreement invalid. Apart from these, there are many more issues that arise in relation to the manner in which the licence was obtained or renewed. I need not dwell on them further. Suffice to say that these are serious issues which need to be investigated at

¹ See annexure "OL5" to Oda Lilo's sworn statement filed on 14 August 2013 ("Oda sworn statement").

² See annexure "MM10" to Martha Manaka's sworn statement filed on 5 August 2013 ("Manaka sworn statement").

³ See annexure "DB1" to David Pulehite's sworn statement filed on 5 August 2013 ("Bulehite sworn statement").

⁴ See annexure "MM11" to Manaka sworn statement.

⁵ See annexure "MM4" to Manaka sworn statement.

⁶ See annexure "OL6" to Oda sworn statement.

⁷ See annexure "OL8" to Oda sworn statement.

⁸ See page 146 of annexure "OL8" of Oda sworn statement.

trial and David Bulehite, being a member of the Viuru tribe and one of the 1996 trustees who did not sign the 2013 logging agreement, has standing to question the validity of the 2013 logging agreement as well as the validity of TIM 2/34A.

20. However, that is not the end of the matter. The applicants also assert that no development consent was issued by the Director of Environment in respect of the proposed logging operations. The material before the court shows that a development consent was issued to Earthmovers (Solomons) Ltd on 15 February 2013 to undertake logging on Viuru land, Kolombangara Island⁹. Then in a letter to the Commissioner dated 5 March 2013, the Deputy Director of Environment advised that the name of the company in the Development Consent should have been Kalena Timber Company Ltd and not Earthmovers (Solomons) Ltd¹⁰. That, unfortunately, did not solve the issue because the entity which has purportedly been issued with the logging licence is VFE, the 1st respondent herein, and the entity with whom a technology & marketing agreement was signed to carry out the logging operations is Xiang Lin Timber (SI) Ltd, the 2nd respondent herein. Furthermore, on 3 August 2013, the Director of Environment wrote a letter¹¹ to Jenny Radford stating that he had issued a Development Consent in respect of logging operations in Varu/Quai customary land pursuant to an application by Earthmovers but had no documents in relation to the Vavanga operations. Further documents have been exhibited by the parties in relation to the Development Consent but these documents only confirm that serious triable issues do exist in regards to the Development Consent purportedly issued in relation to the proposed logging on Viuru customary land. These are issues for investigation at trial.

Likelihood of success.

21. Having held that there are serious issues to be tried, the next issue is to consider the strength of applicants' claim.
22. This issue can be dealt with shortly. The evidence in this case is clear as discussed above. I am satisfied that if the evidence remains as it is, the chances of the applicants succeeding in their claim is quite high.

Balance of convenience.

23. The final issue is whether the balance of convenience lies in granting the restraining orders or in refusing them. This is an exercise that involves balancing the risk of doing injustice to the parties if a restraining order is, or is not, granted.
24. In deciding this issue, certain considerations must be taken into account. They include whether, if injunction is denied but the applicants win their case in the end, the respondents are in a position to compensate the applicants for any damages or losses that they may incur as a result of the refusal to grant the orders. On the other hand, if injunction is granted, but the applicants lose their case in the end, are the applicants in a position to compensate the respondents? It is for this reason that undertakings as to damages are normally required.

⁹ See annexure "ST2" to Shakespeare Teu filed 15 August 2013 ("Teu sworn statement").

¹⁰ Ibid.

¹¹ See exhibit "MM22" to the sworn statement by Martha Manaka filed on 12 August 2013 (Manaka 2nd sworn statement").

25. It is now generally recognised, however, that failure to give an undertaking as to damages by ordinary village people wanting to protect their land and environment from long term and irreparable damage that often accompany logging operations is not fatal to granting interim injunctions¹² and the question whether or not undertaking as to damages is, or is not, required will depend on the circumstances of each case. Hence, to make a proper decision as to whether or not to require undertaking as to damages, the parties must provide sufficient information to the court, including information as to their financial positions¹³.
26. In the present case, it is clear that the applicants are not capable of satisfying any undertaking as to damages should the court grant the application. Nevertheless, I am not convinced that an undertaking is necessary in this case. The reasons are, first, the case against the respondents is quite strong in the light of the evidence now before the court. It is obvious from the evidence that the manner in which the licence (TIM 2/34A) was obtained needs to be investigated at trial. The concern of the applicants is the protection of the environment and the land on which their people depend for their livelihood. Financial considerations must not be allowed to over ride the need to preserve the environment, especially when there is strong evidence to show that the process which led to the granting of the logging licence is tainted with irregularities.
27. It has been argued on behalf of the respondents that the logging operations have not yet commenced and that the present activities only involve clearing of old roads which have been constructed during the past logging operations on the land. In my view, construction or clearing of roads is part and parcel of the logging operations for there can be no logging operation without roads.
28. I am satisfied, the balance of convenience favours the granting of the orders sought.

Locus Standi.

29. It has been submitted that the 1st applicant has no standing to be part of these proceedings. That same issue has been raised in Kolombangara Island Bio-Diversity Conservation Trust Board (Incorporated) v Success Company Ltd & Others ("Success")¹⁴. In that case, Kolombangara Island Bio-Diversity Conservation Trust Board (Incorporated) ("claimant") had applied for interim orders to restrain Success from carrying out logging in Kolombangara Island especially on land which is 400 meters above sea level as well as further orders restraining the defendants from logging until a Development Consent had been issued under the Environment Act 1998. The defendants in that case raised objections to the application alleging that the claimant had no standing to bring the application.
30. In his ruling on 27 August 2010, Justice Chetwynd held that the applicant had standing. At paragraph 3 of the ruling, he said:

¹² Kalena Timber Company Ltd v Labere [2004] SBCA 10; CA-CAC 012 of 2001 (10 November 2004); Bako v Rozo [2012] SBCA 15; CA-CAC 42 of 2012 (30 March 2012).

¹³ Bako v Rozo [2012] SBCA 15; CA-CAC 42 of 2012 (30 March 2012).

¹⁴ [2010] SBHC 54; HCSI-CC 282 of 2010 (27 August 2010).

"3. The objects of the Kolombangara Bio-Diversity Conservation Association (Association) are set out in Article 2 of that document (constitution). ... Clearly as the Association name implies, they relate, amongst other things, to the promotion of conservation and sustainability on the island of Kolombangara."


31. At paragraph 5, His lordship further said:

"5. The preliminary question then is simply this, does an organisation whose avowed aims include the promotion of conservation have sufficient standing to apply to this court for orders concerning alleged breaches of the code of practice designed to protect the environment and alleged breaches of an act which is designed to do the same thing? ... In the present case, the claimant is an organisation which was specifically set up to promote conservation on the island of Kolombangara. I have no hesitation in finding the claimant has sufficient interest, can establish it has locus standi, to make the application now before the court."

32. In my view, those remarks apply equally to the present application. It follows therefore that Kolombangara Island Bio-Diversity Conservation Trust Board (Incorporated) has standing to bring this application.

33. This application is then allowed and the following orders:-

- [1] Until trial or further order, the 1st and 2nd respondents, their servants, agents and those claiming through them, are restrained from entering Viuru land and carrying out logging operations therein (including clearing land, constructing roads, bridges, wharves, logging camps and log ponds and/or felling trees and removing timber).
- [2] That the 1st and 2nd respondents remove their logging machines, vehicles and equipments from Viuru customary land within 14 days from the date this order is served on them.
- [3] A penal notice be attached to orders [1] and [2].
- [4] That the 1st and 2nd applicants file and serve their substantive claim within 14 days from the date hereof and for this purpose, service on ANT Lawyers shall be deemed to be sufficient service on the 1st respondent.
- [5] Costs in this application shall be costs in the main case.

THE COURT

James Apaniai
Puisne Judge

