

IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION: Appeal from Judgment of the High Court of Solomon Islands (Mwanasalua J.)

COURT FILE NUMBER: Civil Appeal Case No. 12 of 2009 (On Appeal from High Court Civil Case No.387 of 2004)

DATE OF HEARING: 10 October 2010

DATE OF JUDGMENT: ~~December 2010~~ Reserved Judgment delivered by Registrar @ 2pm Thursday 20 January 2011

THE COURT: Auld, PA
Adams JA.
Hansen JA.

[Signature]
GAVIN WITHERS

PARTIES: Brian Bird First Appellant
(representing his Buleani Community)
and
Alistair Aleve Second Appellant
(representing his Cheara Community)

-v-

Valahoana Company Integrated Development Respondent

ADVOCATES:

Appellant: Maelyn Bird

Respondent: Michael Pitakaka

KEY WORDS: Contract in form of Standard Logging Agreement, claim by two of 12 trustees and representatives of Landowners' Group, on behalf of their two non-landholding communities resident in the Group's

area against logging company for damages for breach of contract in not paying royalties to the communities

RESERVED: |

DISMISSED:

PAGES: 1 - 11

JUDGMENT OF THE COURT

Introduction

1. The issues raised by this appeal are: 1) whether there is a contract between the Appellants, Brian Bird and Alistair Aleve, in right of themselves and/or their respective Buleani and Cheara Communities, with the Respondent, Valahoana Company Integrated Development ("Valahoana"), a logging company; and 2) if so, whether Valahoana is in breach of that contract.

2. The issues stem from a written contract made on 3rd September 2003 (the 2003 Contract) between Valahoana and twelve Trustees and Representatives, including the two Appellants, of Tinete, Borama, Kojonga and Sasano Lavato customary lands, a customary land holding group ("the Landowners' Group") on Vangunu Island, Western Province. The Appellants are members of two non-landowning communities, the Buleani and the Cheara respectively, resident in or in the vicinity of the Group's customary lands. Their two communities were not part of the Landowners' Group, and had no right of ownership to those lands. But, under the Contract, they, with their fellow ten Trustees of, and representing, the Landowners'

Group, granted logging rights to Valahoana in return for payment of 10% of royalties on timber that it felled on and shipped from the Group's land

3. The 2003 Contract had its origin in:

1) a Determination on 18th May 2003 and Certification by the Western Provincial Executive to the Commissioner of Forests, pursuant to the *Forest Resources and Timber Utilisation [(Amendment)] Act 2000*, that the 12 persons, including the Appellants, who were to become Trustees for the Landholders' Group were "lawfully able and entitled to grant [Valahoana] timber rights" of their Landholdings as specified, and the Executive's authorisation on 22nd October 2003 to the Commissioner of Forests to issue a Felling Licence to Valahoana in respect of those lands; and

2) a Felling Licence granted by the Commissioner to Valahoana, to cut, fell and take away timber from the Customary Lands. The Licence provided that "any disputes relating to the ownership, boundaries or use" of the Lands were to be "determined in accordance with the law of Solomon Islands" (paragraph (4)), and in accordance with Valahoana's agreement with the Landowners (paragraph (7)).

4. The evidence before the Judge, Mwanosalua J, indicated that a tribe or other grouping known as the Kalikosoani had established a project on Vangunu Island, known as the Kalikosoani Project, for the development of landholdings for the benefit of the Island's people, including landowners and non-landowners who resided in the vicinity. The Project included the felling and export of logs and milled timbers, building roads, establishing community development funds and land trust boards and assisting non-land-owning communities within its area. The scheme envisaged was that all royalties derived from the felling and milling of timber on landowners' lands

within the Project area would be paid direct to land owners' groups for, among other things, distribution among their members.

5. The 2003 Contract was one of the mechanisms of the Kalikosoani Project. Its provisions included, in accordance with a standard form of agreement known as the *Standard Logging Agreement*:

- 1) clause 31 - payment by Valahoana to the Landowners Group of a net royalty for the export of logs and sawn timbers of at the rate 10% of the FOB selling price approved by the Forestry Division for each shipment; and
- 2) clause 32 - payment of all royalties to the "respective landholding group accounts or by any other means as instructed by the Landholders' Group in consultation with ... [Valahoana's] Board of Directors".

6. Before the Judge, the Appellants acknowledged that they were parties to the 2003 Contract as two of the twelve Trustees for and as representatives of the Landowners Group. However, their case was that in June 2004 they had become parties to an oral variation of the Contract. Their evidence was that Mr Aleve's son, Kokai Aleve, agreed on their behalf and of their respective communities with Valahoana that it would pay their communities one third of the 10% of the royalties otherwise payable to the Landowners under the 2003 Contract. Their claim against Valahoana for damages on the strength of that claimed variation was dismissed by the Judge on 24th July 2009, who held that they had not established it.

7. As will appear, the Appellants' shifting case on appeal is different from, or at any rate wider than, their case below of a claimed oral variation. Valahoana maintains, as it has done throughout, that the original 2003 Contract is the governing contractual mechanism for payment of royalties to the Landowners' Group.

The evidence before and findings of the Judge

8. Mr Bird's evidence was as follows. He and Mr Aleve instituted the claim as representatives of their respective communities. Valahoana's logging contractor commenced logging and exporting timber towards the end of 2003. In early 2004, and following several shipments by Valahoana from Vangunu of timber felled on the Landowners' Group's lands, he became concerned about lack of receipt of royalties. He prepared a paper for discussion with Valahoana, detailing his concerns and calling for their resolution. He passed the paper to Kokai Aleve, at that time a working Director of Valahoana, to discuss the matter with his colleagues in the Company. Shortly afterwards Kokai Aleve reported that he had discussed it in Honiara with Joseph Aleve, his cousin and the Secretary of Valahoana, and Samuel Hape, its Chairman, and they had agreed that payment would be made to the Buleani and Cheara communities of one third of the 10% royalties payable to the Landowners' Group under the 2003 Contract. In mid June 2004 the Appellants received a payment of \$105,000.00 from Valahoana "on account of royalties", a payment that Valahoana accepts it made.

9. Kokai Aleve's evidence was that In June 2004 he had discussed Mr Bird's paper in Honiara with Mr Joseph Aleve and Mr Hape and they had orally agreed that one third of the 10% royalties would be paid to the Buleani and Cheara communities. According to Kokai Aleve, Joseph Aleve was charged by Mr Hape with producing minutes of the discussion. He reported all that to Mr Bird when he next met him. If Mr Joseph Aleve did prepare such minutes, there was no evidence from the Appellants or Kokai Aleve of having seen copies of them, and none was put in evidence before the Judge.

10. Joseph Aleve and Mr Hape gave evidence for Valahoana. They acknowledged that Kokai Aleve had shown them the discussion paper, but denied having discussed it with him or that there had been any oral agreement as described by him in

evidence.

11. The Judge identified the issue before him as whether the Appellants had made the alleged oral agreement with Valahoana in June 2004, and found that they had not established it on a balance of probabilities, giving the following reasons:

“... It is necessary to bear in mind that at the time this oral contract was purportedly made, the logging operation was merely concentrated on Kalikosoani customary land. Why would members of that tribe with many commitments have equal share of the 10% royalty with non-landowners whose trees were not harvested like Mr Bird and Aleve. This Court is unable to accept Mr [Kokai] Aleve's evidence regarding the alleged oral agreement advanced by himself and Mr Bird to support their claim. It lacks realism and ring of truth. Because of that, this Court is unable to come to a conclusion as to the balance of probability in favour of Mr Bird and Mr. Aleve.”

12. The Judge, in the light of that conclusion, did not need to consider what, if any, legal effect the claimed oral variation might have had.

The competing contentions on appeal

13. Ms Maelyn Bird, counsel instructed on behalf of the Appellants on the appeal but not below, made two main and alternative submissions, namely that:

- 1) the Judge's rejection of their case based on the claimed 2004 oral variation was against the weight of the evidence; or
- 2) Independently of the claimed variation, the Appellants were “Landowners” within the meaning of the 2003 Contract, and such legal status entitled them to general damages for breach of it in failing to pay them and/or account to them for royalties – a contention not advanced below

The claimed 2004 variation

14. Ms Bird sought first to overcome the Judge's finding against them by submitting that it was against the weight of the evidence taken as a whole, but in particular that of Kokai Aleve as to the meeting in Honiara, and the payment of \$105,300. The remedies sought by trial counsel before the Judge and in Miss Bird's original written submissions on the appeal were damages in the form of one third of the royalties paid and payable by Valahoana to the Landowners Group and an account to determine the total amount due to the Appellants' communities.

15. Mr Michael Pitakaka, for Valahoana, submitted that the Judge's finding against the Appellants' claimed, 2004 oral variation, based largely, as it was on his rejection of the credibility of Kokai Aleve's evidence, cannot properly be interfered with by this Court. He pointed to the firm contradiction of that evidence by that of Joseph Aleve and Mr Hape, the absence of any confirmation of Kokai Aleve's account in the form of minutes or other documentation or of action by Valahoana or the Landowners' Group. He discounted Ms Bird's reliance on the payment of \$1,500,300, submitting that it was more consistent with an exercise by the Landowners' Group of its distributory function under clause 32 of the 2003 Contract, and in the spirit of the Kalikosoani Project, to include non-landowning communities in the area in some of the benefits of the logging.

16. To the extent, if at all, that the Appellants still maintain this part of their appeal, it must fail. First, the Court could only interfere with the Judge's findings of fact and inference if it were of the view that they were clearly wrong, here, clearly contrary to the weight of the evidence. The only direct evidence in support of Appellant's claim of an oral variation was that of Kokai Aleve, which, having seen and heard him give evidence, he rejected as lacking credibility. That finding went to the heart of this part of the Appellants' case. And, matched against his evidence were, not only the firm denials on the part of Valahoana's witnesses of any such variation, but also the Judge's understandable disbelief that they could conceivably have contemplated granting the Appellants' non-landowning communities so disparate a benefit in

royalties over that which it would have left for all the Landowners from whose land the timber had been removed,

17. We add that criticisms made by Ms Bird about substantial payments of advance royalties to some of the Landholders do not support the Appellants' contractual claim against Valahoana. They are grievances or grounds for potential dispute between individual Trustees and their respective communities' interests in respect of distribution of royalties instructed on behalf of the Landowners' Group under clause 32 of the 2003 Contract.

18. Finally and, in any event, the claim of an oral variation is one of partial novation rather than variation. It would, if it had been evidentially supported, amount to a purported substitution for part of the original contract between the twelve Trustees and Valahoana of a new agreement between the Appellants and Valahoana - an agreement to which the other ten Trustees were not alleged to be parties. And the claimed variation - whether properly characterised as novation or variation - would have been a transaction where there was no readily identifiable consideration passing from the Appellants to Valahoana, or indeed to the other ten Trustees. In short, the Appellants had no contractual entitlement as Trustees for the Landowners Group, as identified in the 2003 Contract, to carve out a discrete return for themselves or their communities at the expense of the Group as a whole.

The claimed entitlement as "Landholders" under the 2003 Contract

19. Ms Bird's second and wider argument, to which she gave prominence in her oral submissions to the Court, was that the Judge should have determined on the documentary evidence before him that the Appellants were themselves "Landowners" within the meaning of the 2003 Contract and, as such, were entitled in 2004 to look to Valahoana for a discrete, albeit undefined, share of the royalties in their own right and/or that of their communities. She sought to rely on the undoubted facts that the

Appellants had been parties with the other Trustees for the Landowners to the initial negotiations with Valahoana, their inclusion in the Determination of 18th May 2003 and its certification with the others as persons “lawfully able and entitled to grant timber rights”, and their role as co-signatories with them to the 2003 Contract.

20. Mr Pitakaka submitted that the Appellants, neither in their own right nor as representatives of their communities, had any contractual entitlement under the 2003 Contract as “Landholders”. He suggested that they were included among the twelve named Trustees and Representatives acting as signatories for the Group only because, true to the objectives of the Kalikosoani Project, they lived in or in the vicinity of the Group’s customary lands and were part of the general community there. He could have added that such distribution of royalties as might be called for outside the Landowners’ Group was provided for in clause 32 of the 2003 Contract by way of “instruction” “by the Landowners in consultation with” Valahoana. No instruction had been given on which the Appellants could rely to support such a claim, and in any event failure to abide by it would be a matter for enforcement between the Landowners, not against Valahoana.

21. Mr Pitakaka also submitted that the Appellants could not rely on the 2003 Contract as unamended (any more than on the claim of a 2004 oral variation) to fashion a new contractual entitlement in their own right or for their respective communities for that purpose. Their only contractual role was as representatives, with the other ten Trustees, for the Landowners as defined in the Contract.

22. We agree with Mr Pitakaka’s submissions. Neither the Determination nor its certification that the Appellants were “lawfully able and entitled to grant timber rights”, nor the fact that they were co-signatories with the other Trustees to the 2003 Contract, assists this part of their case. None of those instruments, contractually or otherwise, rendered them “Landowners” as identified in the 2003 Contract so as to authorise them to arrogate to themselves or their communities part of the royalties to

which the Landowners were entitled as a whole, subject to distribution as provided in clause 32. Ms Bird's reliance on the following observations of Gordon Ward CJ in *Tovua v Meki* [1989] SBHC 22; [1988-1989] SILR (3rd November 2009) to suggest that the Appellants' role "as Trustees and Representing" the Landholders under the 2003 Contract is severable in the manner she suggested, is misconceived, as is apparent from the passage in it that we italicise:

"The Forest Resources and Timber Utilisation Act, as amended, sets up the procedure whereby anybody wishing to acquire timber rights over customary land can identify the people with whom to deal. The procedure identifies persons *to represent the group as a whole*. Once the procedure has been followed, the people named by the Area Council are the only people entitled to sign an agreement to transfer those rights and they are clearly, as parties to the agreement, the people to whom the royalties should be paid. ..."

23. There is a further difficulty for the Appellants that their claimed entitlement to an undefined share of the royalties under this head is too uncertain to be capable of being a contractual entitlement. She suggested no formula by reference to which the measure of general damages sought might be determined – an uncertainty that would not be removed by the taking of an account, the remedy to which she gave particular prominence in her closing submissions.

24. We add that the outcome of this case does not turn, as also contended by Ms Bird, on whether the Appellants may challenge or Valahoana may rely "on issues of Customary Land Ownership before the High Court". It is, as the Judge said, a contractual issue. It does not assist the Appellants' case in this or any other respect to argue, as she did, that the Kalikosoani tribe or other grouping giving its name to the Kalikosoani Project, was not itself a "Landowner" within the meaning of that term in the 2003 Contract, or that Valahoana, as a corporate body, could not own customary land. The Judge did not, when referring to the Project or otherwise, found his judgment on any such issue or hold that the Project overrode the 2003 Contract. True, he mentioned the Project when, in paragraph 7 of his judgment, he dealt with

the advance of \$150,300. But, as we have noted, he could equally have considered that as within the power of distribution conferred by clause 32 of the 2003 Contract.

25. Accordingly, and for the above reasons, we dismiss the Appeal.

26. We are minded, subject to any submissions on behalf of the Parties (which may be made orally or in writing), to order the Appellants to pay Valahoana's costs of the appeal.

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Robin Auld
President

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Michael Adams JA

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John Hansen JA
Member