JACK ALONGOLIA -v- PATRICK MAEKIRA
JOE GWAUNAILA -v- EZEKIEL TELEFANAGENI
DEAN KOTO -v- CASPER BUAROBO

High Court of Solomon Islands
(Before Mr. Registrar Chetwynd)
Land Appeal Cases No. 1, 2 and 3 of 1991,
Hearing: 8th November 1991
Judgement: 12th November 1991

Mr A. Nori for the Appellants
Mr. P. Tegavota for Casper Buarobo
Mr. Patrick Maekira in person
Mr. Ezekiel Telefonageni in person

Mr Registrar Chetwynd: These are hearings to show cause why the Appeals should not be truck out pursuant to order 60A rule 2(3) of The Western Pacific High Court (Civil Procedure) Rules.

Although all three matters were heard separately, all involve the effect of Section 8 D of Local Court Amendment Act 1985 and can conveniently be dealt with in one judgement.

The facts in all these cases are relatively straightforward:-

1) Oterade Land (1 of 1991). This dispute about Customary land was referred to the Chiefs of Ward 4 on Malaita by the present Appellant. The Respondent says the land is in Ward 3 and that it should have been Chiefs from that area who heard the dispute. He wrote to the Chiefs in Ward 4 and informed them of this but did not attend the hearing. The Chiefs heard the dispute anyway and said the land belonged to the Appellant. The Respondent then commenced a hearing in Local Court. The Local Court decided the Land belonged to the Respondent and that decision was upheld by the Customary Land Appeal Court. The Appellant now seeks to have the CLAC decision quashed on the basis that the initial hearing before the chiefs was not heard by Chiefs or traditional leaders from within the locality. The Appellant further claims that as the Respondent did not attend the hearing then he has no right to have referred the matter to the Local Court.

2) **Rota Land (2 of 1991).** This dispute was initially heard by the Chiefs but it is not clear from the Local Court Record at whose instigation. The matter then was dealt with by the Local Court who found that the land belonged to the Respondent. The Customary Land Appeal Court upheld that decision. The Appellant now says that the case should not have been dealt with because the original Chiefs who heard the case were not from the locality, and that the matter was not exhaustively dealt with by the Chiefs.

3) **Fa'alu/Faibusia Land (Case 3 of 1991).** Again, it is not clear on whose instigation this dispute went to the Chiefs. The Local Court held that both parties were equal owners of the Land in question. The matter was appealed to the CLAC. They quashed the Local Court decision and said the land belonged to the Respondent. The Appellant says that the case should not have gone to the local Court as the Chiefs who originally heard it were not from the locality, and that the Chiefs had not exhaustively dealt with the dispute.

The Local Court Amendment Act of 1985 amended section 8 of the Local Courts Act. A new section, 8C defines Chiefs as "Chiefs or other traditional Leaders residing within the locality of the land in dispute and who are recognized as such by both parties to the dispute". Section 8D(1) says that the Local Court does not have jurisdiction "to hear and determine" a dispute" unless it is satisfied that:-

a) The parties had referred the dispute to the Chiefs
b) All traditional means of solving the dispute have been exhausted; and
c) No decision wholly acceptable to both parties has been made .....".

I do not think it is controversial to say that the whole ethos of the 1985 Acts was to try and ensure that disputes about customary land were decided by those best versed in customary law. It has long been accepted that a formal legal framework is not the best forum for deciding questions based on custom. I feel the 1985 Acts clearly demonstrates the difficulties of setting up an informal system by formal means.

There should, in reality, be no such difficulty. After all, the Common Law of England is simply another way of saying the customary law of England. Over a long period of time the Common Law has been adopted, modified and assimilated into a formal legal framework. Given time I have no doubts that a "formal" body of law would have developed in Solomon Islands based on custom. The Difficulties have arisen because the present formal legal framework of Solomon Islands has been transplanted

from a different culture and has not grown naturally, as it did in England. Be that as it may, the function of the courts is to try and resolve these difficulties within the formal legal framework which now exists.

Mr Nori, who introduced the 1985 Act into Parliament and whose name it commonly bears, argues that a proper construction of the Act emphasises the requirement that the parties must adopt a cosentient approach at all stages. I believe he is correct in that argument. This is to recognize merely that in custom disputes are resolved by the use of discussion to reach a consensus, not by adversarial argument as in the Legal System.

Mr Nori also argues that therefore the parties must refer the dispute to the chiefs i.e that if one party does not take part in the proceedings before the Chiefs then that party is precluded from taking the case to the Local Court.

Mr Nori goes on to say that not only do the parties have to take the matter to the Chiefs but they have to exhaust all traditional means of resolving the dispute.

Dealing with this latter point, first, I cannot believe that the intention of Parliament was so rigid. From the little Customary practice I have heard about during my time in the Solomons I am aware that one ultimate way of resolving land disputes was to go to war. I cannot believe that Parliament wanted disputing parties to engage in open warfare. The provision in the Act at 8D(1)(b) must mean that the parties try and resolve the dispute in custom and exhaust all means of resolving the dispute involving the Chiefs and traditional leaders.

I turn now to the other points. They are closely related. What if the parties cannot agree who the Chiefs should be or even agree that the dispute should be brought up at all?

It is clear that the first problem does arise, it is apparent in all the cases now before the Court. What is meant by "Chiefs or traditional leaders residing within the locality .....". I do not think the Courts can lay down hard and fast rules. I do not, for example, feel that the definition should be interpreted by reference to Electoral Wards. Such areas are the creation of statute not custom. Inherent in the definition is the concept that the parties will know who, in custom, will be residing in their locality. In effect then the 1985 Act recognizes that custom is a matter of Common knowledge and that the parties themselves will, or should, know who the proper Chiefs are.

What to do then if no agreement is reached? Parliament must have envisaged this possibility because there is a clear provision in S8D(1) for the Local Courts to use

its discretion. The Local Court shall not have jurisdiction "unless it is satisfied that;...." A formal procedure is set up for filing "accepted" or "unaccepted" settlement forms. The Act provides that such form are sufficient evidence that requirements of subsection 1a and 1c have been fulfilled. (There is no such provision for section 1b which merely reinforces the view I expressed earlier about using all means before the chiefs).

This provision does not preclude the Local Court from receiving other evidence. It could then receive written (affidavit) or oral evidence that one party or the other does not agree to the Chiefs selected to hear the dispute. If the Local Court is satisfied that reasonable attempts have been made to resolve the problem (i.e by negotiation to invite other chiefs onto the tribunal) then it can proceed to hear a case. S8D(1)(c) becomes effective because no decision wholly acceptable to the parties has been made. This must be the case because one party has referred the matter to the Chiefs, the Chiefs have decided Mr X Y and Z shall hear the dispute and the other party does not agree to that decision. Both requirement's of the section have been complied with.

If that were not the case then one party would be at liberty to hold proceedings up indefinitely by refusing to accept the Chiefs selected. In that eventuality the parties would never resolve the dispute and Parliament could never have intended that situation to arise.

I turn now to the point raised by Mr nori that both parties must participate in the Chiefs proceedings before the Local Court can have jurisdiction. Again I do not think that that can be the case. There have been many instances where a party feels he has the right to bring up an old case, wrongly believing that the 1985 Act empowers the Chiefs to hear the matter a new. In those instances the "owner" quite often refuses to participate in the Chiefs proceedings. If the Chiefs proceed anyway and award the land to someone else why should the "owner" be precluded from asking the Local Court to rule on the matter.

To refuse him that right would be against the precepts of natural justice. This is especially so given the peculiar nature of the Chiefs decision. Such decisions are not enforceable at Law but quite often, when convenient, are treated as such by the parties involved. The result can be great confusion and tension and a party is entitled to have the matter resolved in a way which is supported by the force of law.

For these reasons I cannot accept that the Appeals disclose any reasonable ground claiming that the decisions of the Customary Land Appeal Court were erroneous in law or show that there was a failure to comply with the procedural requirements of a written law. I would also say that I accept the argument raised by Mr Tegavota when he says that an appeal from the CLAC is the wrong process, in any event, for deciding these points. The Appellants are not aggrieved by the order or decision of the CLAC

but, according to the Appeal notices, the decision of the Local Court, (to hear the case is the first place). That being so the Appellants should have raised these questions as a preliminary point before the Local Court. If they were then unhappy with the Local Courts decision on the Preliminary points then they could raise the matter before the CLAC or before the High Court by way of certiorari. The matters now raised by the Appellants were not raised in the CLAC proceedings and is not now the time to raise them.

Accordingly I strike out all the Appeal in accordance with my power under Order 60A rule 2(3). The Parties will know that they have the right to Appeal to the Judge against this decision and that they must do so within seven days.

(R.D. Chetwynd)
REGISTRAR OF HIGH COURT