BETI, BISILI AND GASIMATA (As Representatives of the Voramali Tribe) -v- ALLARDYCE LUMBER COMPANY LTD AND THE ATTORNEY GENERAL AND ALFRED BISILI, JOHN RONI, JUDAH SAKIRI, ESAU HIELE, SIMON SASAE, JONATHAN POZA, ZONGA HITE, EDWIN DAGA and SIMION PATO

High Court of Solomon Islands
(Muria ACJ)
Civil Case No. 45 of 1992
Hearing: 14 May 1992
Judgment: 22 May 1992

J. Corrin for the Plaintiffs
J. Sullivan and T. Kama for the First Defendant
P. Afeau for the Second Defendant

MURIA ACJ: The Plaintiffs commenced an action in this case by issuing a Writ of Summons against the First and Second Defendants claiming permanent injunction against the First Defendant and a number of declarations against both the First and Second Defendants. The Plaintiffs now apply for an interlocutory injunction against the First Defendant in the following terms:

> "1. *The First Defendant whether by itself or its servants or agents or otherwise be restrained until judgement in this action or further order from entering onto the customary land owned by the Plaintiffs and known as Kazukuru Right Hand Land;*"

As a result of an application brought by the First Defendant, the Court has allowed the Third Defendants to be joined as a party to the action.

The Plaintiffs are representatives of the Voramali Tribe which is a customary landowning tribe in Kazukuru Right Hand Land. There had been other cases that had come before the courts including this Court touching on the rights of the Plaintiffs' tribe over Kazukuru Right Hand Land. The First Defendant is a company incorporated in Solomon Islands and which has been granted timber rights over the said Kazukuru Right Hand Land. The Second Defendant represents the Solomon Islands Government through the Ministry of Commerce and Primary Industries and the Foreign Investment Board and the Ministry of Natural Resources and Commissioner of Forests. The Third Defendants are the persons who signed the Agreement for Timber Rights granting

timber rights to the First Defendant over Kazukuru Right Hand Land. The Third Defendants' right to grant timber rights to the First Defendant has now, undoubtedly, been in issue in the action and which the Court may have to deal with when it comes to consider the main action. It is sufficient for the purpose of this application for the Court to note that it is a live issue between the parties.

Briefly the facts in this case are that sometime between 1987 and 1989 the First Defendant applied for timber rights over the land in question. On 11 November 1988, the Third Defendants together with W. Paia, R. Ege and J. Zinigihite (all the three now deceased) signed the Timber Rights Agreement (Form 4) granting timber rights to the First Defendant over the land. On 18 August 1989, the High Court held in CC 93/89 that the First Defendant did not comply with the proper procedure under the Forest Resources and Timber Utilisation Act (Cap. 90) when acquiring timber rights over the said land. Subsequently, amendments to the Act were passed by Parliament in 1990 and 1991 validating the Certificate of Approval and subsequently the Licence to fell trees and remove timber was issued on 2 October 1991 to the First Defendant. Between the decision of the High Court in August 1989 and the issue of the Licence in 1991, the Third Defendants together with one Jacob Zinigihite (now deceased) formed themselves into a Board of Trustees. Further during that period also the members of the Voramali Tribe represented in this action by the Plaintiffs passed a Resolution on 15 March 1990 banning logging operation by foreign companies in Kazukuru Right Hand Land for 10 years. There have been a number of correspondences and other objections to the First Defendant coming onto the land to carry out its operation despite the Licence being issued.

In early this year 1992, the First Defendant acting upon its Licence secured the services of qualified surveyors from overseas to carry out survey of the land. The surveyors were met in Munda by members of the Plaintiffs' tribe. The First Defendant's surveyors were warned not to enter on Kazukuru Right Hand Land and that if they did, they would be 'stopped'. Eventually at about 10 a.m. on 8 April 1992 the representatives of the First Defendant, the surveyors and some employees boarded a tractor and proceeded and drove along the road to go and survey the land. They were met by a road block and a group of angry people who objected to the survey. There was then some conflict not only between the representatives of the Plaintiffs' tribes and First Defendant but also between the representatives of Plaintiffs' tribe and those who support the proposed logging operation especially those who signed the Timber Rights Agreement.

In the light of the existing conflict, the Plaintiffs have commenced an action against the First and Second Defendants. In addition the Plaintiffs now seek an interlocutory injunction against the First Defendant.

In support of their cases both parties relied on a number of Affidavits. In addition counsel relied on the celebrated principles enunciated by Lord Diplock in ***American Cyanamid Co. -v-Ethicon Ltd*** *[1975] A.C. 396.* Those principles are now widely applied in almost all applications for injunctive relief of interlocutory nature.

The first issue before the Court in any application for an interlocutory injunction is whether there is "**a serious issue to be tried**". (*See* ***American Cyanamid -v-Ethicon Ltd*** *[1975] AC 396;* ***Australian Coarse Grain Pool Pty Ltd -v- Barley Marketing Board of Queensland*** *(1982) 46 ALR 398; (1983) 57 ALJR 425;* ***Tableland Peanut Pty Ltd -v- Peanut Marketing Board*** *(1984) 52 ALR 651; (1984) 58 ALJR 283;* ***Castlemaine Tooheys Limited -v- The State of South Australia*** *(1986) 161 CLR 148;* ***Nelson Meke -v- Solmac Construction Company Limited and Others*** *(1982) Civil Cases No. 44 and 45 of 1982 H.C.).* Lord Diplock rejected the use of such expressions as '**a probability**', '**a prima facie case**', or '**a strong prima facie case**' as such expressions would lead to confusion. At page 407 the learned law Lord stated that:

> *"The use of such expression as* ***'a probability'****,* ***'a prima facie case'*** *or* ***'a strong prima facie case'*** *in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that thee is a serious question to be tried."*

That first criteria of the ***Cyanamid*** has not been followed consistently in Australia. In fact there are strings of cases in Australia that followed the test of '**a probability**' that at the end of the trial of the action the plaintiff will be held entitled to relief, as laid down in ***Beecham Group Ltd -v- Bristol Laboratories Pty Ltd*** *(1968) 118 CLR 618.* The High Court of Australia, in that case, said at page 622 that the first inquiry to which the court will address itself when an application is made for an interlocutory injunction is made is:

> *"Whether the plaintiff has made out a prima facie case in the sense that if the evidence remains as it is there is a probability that at a trial of the action the plaintiff will be held entitled to relief .....How strong the probability needs to be depends, no doubt, upon the nature of the rights he asserts and the practical consequences likely to flow from the order he seeks."*

The case of ***Beecham*** has been followed in ***The Administrative and Clerical Officers Association, Commonwealth Public Service and Another -v- The Commonwealth of Australia and Another*** *(1979) 53 ALJR 588;* ***Shercliff and Another -v-Engadine Acceptance Corporation Pty Ltd*** *[1978] 1 NSWLR 729;* ***Magna Alloys & Research Pty Ltd -v- Coffey and Ors*** *[1981] V.R. 23.* Thus a divergence between the High Court of Australia and House of Lords in this field of equity can be seen in this area of what the plaintiff

needs to show in order to be granted an interlocutory injunction. The High Court's decision in ***Beecham Group*** case has not been doubted despite the ***Cyanamid*** principles have been considered in a number of Australian cases. One thing that seems to be clear is that where there is a conflict between the reasoning of House of Lords in ***Cyanamid*** and that of the High Court in the ***Beecham Group*** case, the Australian Courts will follow the latter.

In Solomon Islands the ***Cyanamid*** case has been considered in ***Nelson Meke -v- Solmac Construction Company Limited*** *(supra)* and ***Solomon Islands Government -v- S.I.P.E.U*** *(1991) Civil Case No. 102 of 1991.* In both of those cases, this Court adopted the test laid down in the ***American Cyanamid*** case. In ***Nelson Meke*** case, the application for injunction was brought against the Respondent and was granted to restrain the Respondent's logging operation pending the determination of the applicant's action for constitutional redress under section 18(1) of the Constitution in respect of an alleged breach of their rights under section 8(1) of the Constitution, a somewhat similar situation to the case now before the Court.

In the present case, the Plaintiffs' case for the injunction rests on three considerations mainly. Firstly, the land over which the logging Licence had been issued to the First Defendant has been alleged to have been owned by the members of the Plaintiffs' tribe who did not agree to and did not sign the Timber Right Agreement allowing the First Defendant to enter and to carry out logging in their land. Secondly, the Licence issued to the First Defendant to log on the land in question is alleged to be invalid, and thirdly, the effect of the validating legislation which led to the issue of the Licence to the First Defendant is alleged to be a breach of the Plaintiffs' rights under section 8(1) of the Constitution. If those considerations are not frivolous or vexatious then no doubt there is a serious issue to be tried. It is not the function of the court at this stage to try and resolve conflicts of evidence on the affidavit nor to decide difficult questions of law which required detailed argument, as stated by Lord Diplock in ***American Cyanamid*** at page 407. In this case the three considerations upon which the Plaintiffs rest their application lead me to the inevitable answer that there is, in this case, a serious issue to be tried.

Having thus found that there is a serious issue to be tried, I must now consider the next criteria - the balance of convenience which under the ***American Cyanamid*** procedure is considered in three steps. First, the court must consider whether, if the Plaintiffs succeed at the trial, damages will be an adequate remedy for the loss sustained between the application and the trial. If so, no interlocutory injunction should normally be granted. This involves the consideration of both common law damages as well as the ability of the First Defendant to pay those damages. The second step is the court will consider whether, if the Plaintiffs fail, the Plaintiffs' undertaking

as to damages would entitle the First Defendant to adequate compensation. If so, then there would be no reason to refuse an interlocutory injunction.

If doubt, remains, the Court must consider all other matters relevant to the balance of convenience including the desirability of preserving the '**status quo**' of the parties.

Should there still be an even balance of the position between the parties, the Court would be required to consider the relative strength of each party's case.

I must now ascertain where the balance of convenience lies in this case at this stage and whether irreparable harm would be done to the Plaintiffs if I refuse the interim injunction.

The Plaintiffs relied on the affidavit of Donald Maepio Bisili which was filed at the time of the application for leave under Order 61 A as well as that which was filed on 31 March 1992. Further affidavits in support of the Plaintiffs were sworn by Gordon Beti on 14 April 1992 and another sworn by Patrick Paia on 12 May 1992. Those affidavits contain the assertions by the Plaintiffs that the land in question is owned by them and their tribe and that they did not agree to nor sign the Timber Right Agreement allowing the First Defendant to enter and carry out logging operation on their land. They question the validity of the Licence issued to the First Defendant and that they contain the assertion that the Plaintiffs' rights under section 8(1) of the Constitution have been infringed. The First Defendant on the other hand, has also filed affidavits from its General Manager, John Henry Howden Beverly, Rene Louis Weterings, Judah Sakiri and Fabiano Kalola in answer. The First Defendant relied on the statutory amendments to the Forest Resources and Timber Utilisation Act under which its Licence was granted and as such it has asserted the legal right to enter onto the land and carry out its preparatory work before it carries out the actual logging. The First Defendant further maintains that its Licence is validly granted. Further the First Defendant also alleges that the Plaintiffs have unlawfully interfered with and exerted threats of violence against the First Defendant causing loss and damages to it. The First Defendant denied infringing the Plaintiffs constitutional right under section 8(1) of the Constitution.

Whilst I accept that the First Defendant has now in its possession a Licence to log in Kazukuru Right Hand Land issued by the Commissioner of Forest Resources, I cannot accede to the argument that the First Defendant has the legal right to automatically do what it did, that is, to enter onto the customary land in question and to carry out the survey and other preparatory work before the actual logging operation begins, especially where the question of customary ownership over such land has been

put in issue. This must be so, in view of the state of the law at the present where distinction has been made between "**customary landowners**" and "**persons who are entitled to grant Timber Rights.**" I express no views on such distinction at this stage, save to say that the distinction has been held to exist under the present law relating to logging in Solomon Islands: *See **Allardyce Lumber Company Limited and Others -v- Attorney General and Ors** (1988/1989) SILR 78; **Tovua and Ors -v- Meki & Ors** (1988/89) SILR 74; **Fugui and Another -v- Solmac Construction Company Limited and Ors** (1982) SILR 100.*

As to the issue of the validity of the Licence, the Plaintiffs do not accept it was validly issued. No doubt the question of the validity of the Licence will also become important when the constitutional issue comes to be considered. The onus of proving the invalidity of the Licence is on the Plaintiffs.

The First Defendant suggested that if it is allowed to enter the land and cut trees, then royalties would be paid. That, the First Defendant said would be a loss which could be compensated in monetary terms. Unfortunately the Plaintiffs are not parties to the Agreement in this case and they certainly did not approve of its terms or the royalties offered in it. They are not bound by it. I cannot see how a satisfactory figure of compensation can be worked out unless the parties embark on a process whereby the Plaintiffs agree to the terms upon which they are to be compensated. Such a process may well be not an easy one and it may be as long as the trial itself.

The Plaintiffs have raised by their affidavit that they intend to keep the forest on the land as a permanent and sustainable resource, providing timber, fresh water, a stable environment and some areas of small-scale agricultural development that they can deal with themselves. They prefer to utilise their resource in such a manner rather than handing it over to the First Defendant or any other logging company for mere royalties. Such uses as stipulated by the Plaintiffs cannot be adequately compensated with money after the land has been desecrated. In ***Meke -v- Solmac*** *(supra)* this Court had commented that:

> *"In no way can financial compensation be considered recompense for desecration of such land; in my view, the very suggestion only adds insult to injury".*

I turn now to consider the issue of damages. I have already said that financial compensation cannot be considered recompense for desecration of the Plaintiffs' land. If damages is sufficient to compensate the Plaintiffs, then no interlocutory injunction need be issued against the First defendant. In this case I hold the view that the Plaintiffs' loss, if the First Defendant is not restrained, cannot be adequately compensated by an award of damages. On the other hand, the First Defendant, in my

view, can be. The question, "**Are damages an adequate remedy?**" can only be answered, "**No,**" in so far as the Plaintiffs are concerned.

Even, for the sake of completeness, if assuming all was equal when considering the balance of convenience, there is the desirability of preserving the "**status quo**". Even here, I feel that it would be plain common sense to take the necessary step to preserve that status quo. This is '**a counsel of prudence**', as Lord Diplock stated at page 408 in the ***American Cyanamid.***

Thus for the reasons I stated in this judgment there is undoubtedly a serious issue to be tried. In order to do that, the Court must keep things in status quo, preserving the subject matter of the action until the rights of the parties can be finally determined.

That I now do by granting an interlocutory injunction against the First Defendant in the terms prayed. This order shall not affect preparatory work which do not involve entering onto the land.

Having made that order, I must also bear in mind the matters disclosed in the Affidavit filed on behalf of the First Defendant, especially the affidavit of Mr Weterings which contains evidence of threats of violence from the Plaintiffs. I consider the threats as disclosed to be real and this Court by its powers under Order 53 rule 6(2) of the High Court (Civil Procedure) Rules 1964 must make orders which will protect the Defendants' rights and interests against such threat of violence.

Thus during the subsistence of the interim injunction, the Plaintiffs and all persons represented by them in this action, their servants and agents shall refrain from:

(i) **interfering with, assaulting or threatening to assault the servants or agents of the First Defendant or in any manner intimidating the same; and**

(ii) **interfering with or causing damage to the property of the First Defendant; and**

(iii) **interfering with, assaulting or threatening to assault the Third Defendants and all persons they represent in this action, their servants or agents or in any manner intimidating the same.**

Application granted with the usual undertaking as to damages by both the Plaintiffs and Defendants.

The costs of the application be costs in the cause.

(G.J.B. Muria)
ACTING CHIEF JUSTICE