SOTOVAE (As Representative of His Tribe) -v- EAGON RESOURCES DEVELOPMENT CO. (SI) LTD
First Defendant

VULEKANA
Second Defendant

PUTIVAE
Third Defendant

REREBATU
Fourth Defendant

GABUQETO
Fifth Defendant

ATTORNEY GENERAL
Sixth Defendant

CHOISEUL AREA COUNCIL
Seventh Defendant

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 207 of 1992
Hearing: 17 September 1992 at Gizo
Judgment: 19 October 1992 at Honiara

P. Lavery for the Plaintiff
A. H. Nori for First, Second, Third, Fourth and Fifth Defendants
P. Afeau for the Attorney General

PALMER J: This is an application by the Plaintiff, Simon Sotovae, for continuation of an interlocutory injunction obtained on the 24th of July 1992 and varied on the 21st of August 1992.

The injunction is directed against Eagon Resources Development Company (SI) Ltd, from entering into Qeqetovoru Land and carrying out any logging operations. The second part of the interim order is to direct payment of any royalties already obtained into a trust account of the First Defendant's solicitor and to be held in trust until trial.

The facts very briefly are that the Defendant Company has a timber licence number **TIM 2/14** and issued on the 10th of September 1987, to carry out logging in the customary land known as **QEQETOVORU LAND.**

The landowners identified in the agreement with the company as persons entitled to grant timber rights were the Second, Third and Fourth Defendants.

The Plaintiff is alleging in his Statement of Claim and Affidavit dated 29th June 1992 that he is the true customary landowner of the said land and not the Second, Third and Fourth Defendants. As the true customary landowner, at no time was he made aware of the meetings that were held by the Choiseul Area Council as required under the Forest and Timber Act. As a result of this he could not present his customary claims at the meeting and subsequently could not lodge any notice of appeal to the Customary Land Appeal Court within one month as required.

Further, as the true customary landowner, he alleges that there has been negligence involved in the way the Area Council conducted the hearings.

He alleges fraud on the part of the Second, Third and Fourth Defendants in claiming themselves to be true customary landowners and persons lawfully entitled to grant timber rights.

He also alleges that because the timber rights agreement had been made with the wrong persons that as a result there has been trespass, conversion and breaches of trust and contract and that the licence that was eventually issued in reliance on the timber rights agreement, was null and void and should be revoked.

It is now acceptable law in Solomon Islands that the general principles enunciated in ***American Cyanamid Co. -v- Ethicon Ltd*** *2 WLR 316* apply in cases where interlocutory injunctions are sought for. These have been quoted with approval in ***Nelson Meke -v- Solmac Construction Company Limited and Others*** *(1982) Civil Cases No. 44 and 45 of 1982 (H.C.), and* ***Beti & Others -v-Allardyce & Others*** *(1992) Civil Case 45 of 1992 (H.C).*

The first consideration is whether there is a serious issue to be tried.

I have had the opportunity to go through the various affidavits filed and hear submissions from learned counsels for the parties.

It is clear that the Choiseul Area Council's actions are being questioned. I have included them as a Defendant as well.

The affidavit of the Fifth Defendant, Cornelius Gabuqeto is of particular importance. He attached a genealogy form marked **CG1** to show his standing as a member of the Qeqetovoru tribe. In that genealogy he also showed the Plaintiff's standing as a member of the tribe. Although that genealogy is incomplete, it appears that the Qeqetovoru Tribe originated from three persons, namely, Malasa (m), Satobatu (m) and Vanedo (f).

The Second and Third Defendants originated it seems from Vanedo, whilst the Plaintiff from Malasa. The Fifth Defendant is from Satobatu.

In the affidavit of the Plaintiff dated the 29th of June 1992 at paragraph 1 there is a recognition of the two brothers and sister as the persons from whom the Qeqetovoru Tribe was formed. The Plaintiff identified himself as the Chief of the Qeqetovoru Tribe.

Lord Diplock explained in the ***American Cyanamid*** case on the question of seriousness, at page 323 (A) that:

> *"The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words there is a serious question to be tried."*

Clearly, as a member of the Clan of **MALASA**, he is a member of the Qeqetovoru Tribe. And as a member he is entitled to be informed of what is happening in terms of any notices of any meetings that may have been put out by the Choiseul Area Council.

What is of greater importance is his claim as a Chief, if not a Chief of the Qeqetovoru Tribe then as a Chief in his Clan, the Malasa Clan.

In the affidavit of Paul Telovae, dated the 8th of August 1992 and filed on the 10th of August 1992, at paragraph 7, the Plaintiff was named as a member of the tribal committee which was intended to be set up to deal with the logging application and negotiations of the applicant company.

In paragraph 8 he (the Plaintiff) was appointed as one of the Chiefs of the Qeqetovoru Tribe. The appointment, according to Paul Telovae's affidavit was made sometime in 1984 at a meeting he convened at Leva Leva village.

This recognition and admission by Paul Telovae (and would include the Second, Third, Fourth and Fifth Defendants) is quite significant.

This makes it all the more important that a proper enquiry should be entered into on the allegations raised by the Plaintiff that he was never made aware of any meetings held by the Area Council.

The affidavit evidence shows clearly that the claim of the Plaintiff is not frivolous or vexatious.

The very fact that the Plaintiff is recognised as a Chief or some one important enough to be included as a member of the tribal committee, raises a serious question as to how or why he was never informed or made aware of the hearings conducted by the Area Council, and why was not he included in the signing of the Timber Rights Agreement.

These are serious issues with serious implications that require proper and full enquiry into.

The answer therefore to the question of whether there is a serious issue to be tried would have to be **YES.**

Having satisfied myself of the serious issues involved, the next criterion to consider is whether the remedy in damages available to the parties would be adequate.

In this respect the dicta of Sachs LJ in ***Evans Marshall & Co. Ltd -v- Bertola S.A.*** *[1973] 1 WLR 349;* is relevant:

> *"The standard question in relation to the grant of an injunction - **'Are damages an adequate remedy?'** - might in the light of recent authorities, be rewritten - Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?" (p. 379 H).*

And in the case of ***Polaroid Corporation -v- Eastman Kodak Co.*** *[1977] RPC 379 at 395,* Buckley LJ said:

> *".....but in every case of an application for an interlocutory injunction until trial the court must, in my judgment, approach the case with the object of making whatever order will be likely best to enable the trial judge to do justice between the parties, whichever way the decision goes at the trial.*
>
> *Their freedom of action should only be interfered with to an extent necessary to this end. Accordingly, if the plaintiff can be compensated in damages for anything he may wrongfully suffer between the date of the application and the trial, the defendant should not be restrained, save in exceptional circumstances."*

The question to consider then is whether damages would be adequate to compensate any loss that the Plaintiff may suffer between now and the trial if he was to win this case.

I have heard adequate submissions from both parties on this point and it is not disputed by Mr Nori that the damages that may be caused to the land, forests, streams, rivers and wildlife could not be adequately compensated for in monetary terms. The Plaintiff has given the impression of someone that is opposed to any form of logging in his area. If the injunction is

not allowed to continue and he wins his case, then he would have achieved little, as his forests, land, wildlife and streams would have suffered irreparable damage.

On this first test therefore, the injunction should clearly be allowed to continue.

However, I will consider the other factors raised in the submissions for the sake of completeness.

BALANCE OF CONVENIENCE:

In ***Cayne -v-Global Natural Resources plc*** *[1984] 1 All ER 225 at 237 H* May LJ stated:

*"That (the **balance of convenience'**) is the phrase which, of course, is always used in this type of application. It is, if I may say so, a useful shorthand but in truth, ...the balance that one is seeking to make is more fundamental, more weighty, than mere **'convenience'**. I think that it is quite clear from both cases that, although the phrase may well be substantially less elegant, the **'balance of the risk of doing an injustice'** better describes the process involved."*

And in ***Francame -v- mirror Group Newspapers*** *[1984] 1 WLR 892 at 898 E;* Sir John Donaldson MR commented on the same phrase as follows:

"I stress once again, that we are not at this stage concerned to determine the final rights of the parties. Our duty is to make such orders, if any, as are appropriate pending the trial of the action. It is sometimes said that this involves a weighing of the balance of convenience. This is an unfortunate expression. Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience."

What is the course of action that will best ensure that at the end of the day justice will be done to either party without necessarily prejudicing their rights until then?

In this case it would favour the continuation of the injunction. If the injunction is lifted now and the Defendant company is allowed to log, and if the Plaintiff should win this case at the end of the trial then little justice could be done to him, because his customary land and forests would have been damaged and there is no way he would have been able to repair or correct the damage caused.

His rights to an untainted forest and land would have been heavily prejudiced by the continuation of the logging operations.

On the other hand, if the injunction is allowed to continue, and the company should win the case, his rights to log immediately would be affected. In this respect, Mr Nori, has submitted

that the company provide benefits to the people of Choiseul from the logging operations in terms of hospitals, clinics, roads, schools and scholarships. The continuing of such an injunction would affect the revenue of the company and directly affect the provisions of such benefits. There will be other innocent persons as well who could be affected by this.

However, in weighing the balance of convenience, I am satisfied that the injunction must be maintained. The allegations raised and the implications are so serious that to remove the injunction now would cause gross inconvenience to the Plaintiff should he win the case.

On the other hand, the loss that the Defendants may incur should they win the case can easily be compensated for in damages.

The question of the status quo does not feature here but if all other things are equal, it would lie in my view in preserving the status quo; that is ensuring that the customary land and forest are not interfered with until after trial.

NON-DISCLOSURE OF A MATERIAL FACT:

Mr Nori has also submitted in favour of his clients that the Plaintiff should not be allowed to extend the injunction obtained at the ex parte hearing because he did not disclose all the material facts of the case within his knowledge.

In ***Beese -v-Woodhouse*** *[1970] 1 WLR 586 at 590,* Lord Justice Davies said:

".....it is fundamental to any ex parte application for an injunction that the party applying for it should show the utmost good faith in making the application, and that the doctrine of uberrimai fidei in effect applies. There is no doubt that that is so."

In ***Bank of Mellat -v-Nikpan*** *[1985] FSR 87* Lord Justice Donaldson said:

"This principle that no injunction obtained ex parte shall stand if it has been obtained in circumstances in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know it; it is trite law."

And in ***R -v- Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac*** *[1917] 1KB 486, 509,* Lord Justice Warrington stated:

"It is perfectly well settled that a person also makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any

advantage he may have already obtained by means of the order which has thus wrongly been obtained by him."

The material referred to in Mr Nori's submission concerning non-disclosure is the receipt of $600 by the Plaintiff from the Second Defendant in November of 1990. He submitted that this should have been disclosed at the application made ex parte as a material factor to and for the Court to consider when assessing whether to grant the injunction or not.

He submitted that this has greatly tainted the hands of the Plaintiff and that the injunction therefore should be withdrawn immediately against him.

Learned counsel for the Plaintiff on the other hand has submitted that the non-disclosure was not deliberate. He explained that it was not easy for him to get the affidavits sorted out and get proper instructions, especially when he was new to this area of the law and had difficulties with the interpretation of the local languages of the people.

In his affidavit filed on the 17th of September 1992, the Plaintiff sought to explain that he did receive $600 cash in or about November of 1990 and that within a few days time he had called a meeting and had Daniel Vudukana appointed as his spokesman.

The affidavit of Daniel Vudukana however filed on the 10th of July 1992, stated at paragraph 2 that he first knew or heard about the granting of the timber rights in or about May of 1991. There is therefore an unexplained gap of about 6 months when nothing seems to have been done. Also this would seem to contradict what the Plaintiff had sworn in his affidavit that Mr Daniel Vudukana was appointed as early as November or December of 1990.

The non-disclosure of this receipt of $600.00 by the Plaintiff is in my view material to the question of whether the Court should grant the ex parte injunction or not. It would tend to show that the Plaintiff was aware of the situation as early as November of 1990 and yet did not do anything about it for almost an unexplained period of six months. The picture painted at the ex parte application was that the matter was first noticed in May of 1991, which is not true.

In the case of ***R -v- Kensington Income Tax Commissioner***, just quoted, Lord Justice Warrington makes it quite clear that where no full disclosure was made, then any advantage obtained will be withdrawn from such a person.

Lord Cozens-Hardy MR at p. 505 stated in the same case that where no full disclosure has been made:

*".....the Court ought not to go into the merits of the case, but simply say **'we will not listen to your application because of what you have done.**"*

I am aware that in this particular case I have had the opportunity to listen to full arguments from learned counsels on the merits of the injunction. This has been largely due to the fact that the issue of non-disclosure was not raised at the start of the hearing but in the middle of Mr Nori's submissions, and he did not raise it as a preliminary point that the Court should consider.

In the case of ***Thermax Ltd -v- Schott Industrial Glass Ltd*** *[1981] FSR 289 at page 298,* Mr Justice Browne-Wilkerson stated:

> *"I therefore think it is very important indeed that in making applications it should be in the forefront of everybody's mind that the Court must be fully informed of all the facts that are relevant to the weighing operation which the Court has to make in deciding whether or not to grant the order."*

And in the case of ***Wardle Fabrics Ltd -v-G. Maristis Ltd*** *[1984] 3 FSR 263,* Mr Justice Goulding followed the test in ***Thermax Ltd***, and made a further important point, that:

> *"the absence of any intention on the part of the Plaintiff or its advisers positively to mislead or unfairly influence the Court by suppression of material facts would not relieve the Plaintiff from the usual consequence of a breach of the duty of disclosure."*

Applying the above tests to this case, I am satisfied that there has been a breach of the duty of disclosure, although it appears this has not been intentional.

It definitely has been compounded by the problems and difficulties encountered by his solicitor.

In spite of this, the case authorities quoted are so clear about the consequence of such a breach.

I am satisfied that the injunction obtained on the 24th of July 1992 cannot be allowed to stand.

However, before I proceed any further to consider revoking it, I must reiterate that I have had the opportunity to hear counsels for the parties make submissions on the merits of the case. And I ruled that there are serious questions to be tried. I also note that even if I do revoke the injunction now it does not debar the Plaintiff from making a fresh application with all the relevant facts disclosed.

It appears to me that all the facts have now been disclosed. And in exercising my discretion, I am satisfied that an injunction is necessary to ensure that justice will be dispensed at the end of the trial.

Accordingly I will not revoke the injunction despite my finding of a non-disclosure in the material facts by the Plaintiff at the ex parte hearing. Instead the injunction will be extended until trial. However, the costs of this application must be borne by the Plaintiff.

I also do not consider it appropriate at this stage to order the Defendant company to pay the sale price cost of the logs already felled into a trust account. It is sufficient that the volume of logs removed has been quantified, which means that the final quantum of damages can be assessed at a later stage after the trial if the Plaintiff wins his case.

ORDERS MADE RESPECTIVELY.

(A. R. Palmer)
JUDGE