

**JOE KWAESIKO -v- PATTY KWAEGALIASI and MAVINGBROS TIMBER
COMPANY LIMITED**

High Court of Solomon Islands

(Palmer J.)

Civil Case No. 82 of 1993

Hearing: 21 September 1994

Judgement: 22 September 1994

T. Kama for Plaintiff

P. Tegavota for the First Defendant

F. Waleilia for the Second Defendant

PALMER J: By Writ of Summons and statement of claim filed on the 16th of March, 1993, the Plaintiff asserts that he is the owner in custom of the area of land known as Asanao Land, in the Ata'a District of East Malaita. Secondly, it is asserted that the First Defendant is a trespasser on the said land, and that the Plaintiff has been prevented from his right to freely use the said land by the First Defendant. The claim of ownership is based on a Local Court case No. 23 of 1964, which ruled in favour of the Plaintiff's father, as opposed to the First Defendant's father (Peter Kwaisaliasi).

By summons ex parte, filed on the 29th of July, 1994, the plaintiff sought inter alia, restraining orders against the Second Defendant from using the log pond area at Manaara and from paying rent to the First Defendant. Restraining orders as sought, were granted on the 24th of August, 1994.

The First and second Defendant now apply by summons filed on the 1st of September, 1994 to have the restraining orders discharged or varied to enable the Second Defendant to continue with its logging operations.

The first issue obviously for this Court to assess is whether there is or are serious issues to be tried - American Cyanamid Co. -v- Ethicon Ltd. [1975] A.C. 396. I do not think however, that there is any challenge to this issue.

The main submission of the Defendants in essence lies in what they contend had been acquiescence and delay on the part of the Plaintiff and that thereby they have come to this court with unclean hands. The injunction they say should not be allowed to continue on those grounds.

First, the question of acquiescence. The crucial submission of learned counsel for the Second Defendant, Mr Waleilia, is that the Plaintiff had been aware of the Second Defendant's activities and intentions, right from the inception of the company's operations over the said Asanao land. And he sought to show this by referring to various agreements which had been executed with the Plaintiff. I will therefore now consider these agreements.

In the affidavit of Robert Belo, filed on the 14th of September 1994, at paragraph 4, he stated that, "By letter dated 27th January 1992, Mr Joe Kwate and the plaintiff wrote a letter to the Managing Director of the second Defendant accepting their appointment to assist the company in dealing with the landowners such as arranging landowners meetings and providing other services as may be required by the second defendant from the plaintiff."

A copy of that letter is annexed to Mr Belo's affidavit and marked "Annexure MB1."

Paragraph 1 of that letter reads:

"Following our discussion on 23-1-1992, we write to confirm our acceptance of your appointment and the SBD1.00 per cubic metre commission of all logs exported from the lands in Ward 17 in East Malaita in consideration of our introduction,

arranging all the landowner's meetings and rendering services at your request to assist your company to do logging in Ward 17."

Ward 17 covers the land area over Asanao land, in particular the logpond at Manaara.

At the last paragraph, it reads: "We undertake to render our individual services in assisting your company to obtain the licence for logging in Ward 17 and to have smooth logging operation there at all times."

Little did the Second Defendant realise that some 12 months later, the very persons who had made such undertakings of assistance and co-operation would turn against them.

The Second document referred to is marked 'annexure MB2' and is also attached to the same affidavit of Robert Belo. That agreement is dated the 17th day of August 1992 and was made between the Second Defendant and the Araunaau tribe of Manaara, Ataa, Malaita. Paragraphs (b)(c)(d) and (e) of the Preamble to the Agreement, specify the purposes for which it had been drawn up. The rest of the agreement is very specific as to the rights of the Second Defendant and the rights of the landowners. I do not need to go through all the clauses, but will cite only a few. Clause 2 states: "So long as Mavingbros shall continue to pay the fees hereby agreed, the Representatives and each of them jointly and severally hereby covenant with Mavingbros that it shall peacefully enjoy the use of the land during the term of this agreement without interruption by the Representatives or any person lawfully claiming through or under or in trust for the Representatives."

Clause 4(a)(3): "If any person should make a claim against Mavingbros or dispute its right to use or occupy the land then all payments due to the Representatives shall be stopped,

suspended and at the option of Mavingbros, such payments may be made in the trust account to the Magistrate's court in Auki or the High Court in Honiara pending the final determination of such dispute."

Clause 5 is also interesting. It reads: "At all times during the term of this agreement the Representatives shall ensure that Mavingbros logging and export operations on the land shall not be interrupted by any person claiming through or by the tribe referred hereto."

Clause 6 contains an indemnity.

And finally, clause 10 states that the agreement "...shall become effective from the date on which it is signed and shall remain valid as long as Mavingbros shall continue its logging operation in Malaita Province."

There is no way that any person who has access to that document and who can read and understand its contents will ever be confused as to what specific area of land is being referred to, and the rights sought to be granted and protected in that agreement.

There is undisputed evidence that the person who signed on behalf of the Second Defendant was Joe Kwate, one of the signatories in the first document referred to, and who is also the nephew of the Plaintiff.

Mr Waleilia takes strong issue with the Plaintiff's submission that he was not aware of this particular agreement on the basis that, if him and Joe Kwate were the rightful owners over the said Manaara logpond, then why did they not point this out at that time. He submits that Joe Kwate's silence must go against the Plaintiff in the court's balancing exercise as to whether the injunction should be continued or discharged.

I must agree with Mr Walailia's submission. This court must accept as a necessary fact that land ownership rights are significant rights in custom which customary owners do not take for granted. It is therefore significant that Joe Kwate was silent about the agreement of the 17th August 1992, and instead took positive steps in endorsing its contents, by signing on behalf of the Second defendant. There is a strong inference which can be drawn through association, that as Joe Kwate was a joint negotiator with the Plaintiff, and also that he is an alleged land-owner over the said log-pond, that the Plaintiff would have been aware of what was being signed.

Finally, the last crucial document referred to is, the Agreement marked 'Annexure MB3' also attached to the same affidavit of Robert Belo. That Agreement is dated the 25th of April 1992, and was made between the Second Defendant and the Asanao Landholding Group of Ata'a. Clause 1 of the said Agreement provides:

"The landowners shall provide the company with an area or areas in Asanao land to be cleared and developed into a Logpond Camp site, Sawmill site, Living quarters site, Office, Stores and Workshop buildings, Sawn timber storage area and other infrastructure necessary for the company's operation such as Jetties or wharves and to store logs and do rafting of floater and sinker logs or other necessary activities for loading and unloading purposes free and without rental or payment of compensation for damages to the land caused in undertaking the necessary work for the purpose of constructing installation and completion of the facilities mentioned herein. The permission herein granted entitles or gives the company the exclusive right to use the area or areas for any such period as the company requires or for the period the company's logging operation remains in wards 17 & 18 of Malaita Province."

The agreement was then executed on behalf of the landowners by the Plaintiff himself. If there was any doubts or confusions as to whether the Plaintiff was aware of the Agreement executed in August of 1992 ('annexure MB2'), then the existence of this agreement with an earlier date, (April of 1992), clearly dissipated any such uncertainties. The Plaintiff clearly knew about the Second Defendants interests and intention's and voluntarily entered into a written agreement. There is no legal challenge as to the validity of this agreement and the other agreements, but even if there was, I am satisfied that they are clear evidence of acquiescence on the part of the Plaintiff. Perhaps acquiescence is not the right word to describe the actions of the Plaintiff because acquiescence has the connotation of passive conduct on the part of the Plaintiff. The Plaintiff in my view in terms of the agreements signed, cannot be said to be a passive participant, but an active participant in the negotiations leading to the granting of a timber licence, and the signing of a timber rights agreement with the landowners on the 8th of June, 1992, and the signing of the agreement of the 25th April 1992.

It is clear that the Second Defendant had laid out its money on the strength of such consent on those agreements and incurred large expenses in the constructions of the various campsites and other buildings, and the log pond itself, and to actually commence operations.

I am satisfied there has been acquiescence on the part of the Plaintiff. However, that does not as a matter of right mean that the injunction should not be granted. Sooner or later the court must consider whether the rights of the Plaintiff are being further prejudiced by the refusal of an interlocutory injunction before trial of the issues proper can be considered by the court. However, I am satisfied this is one of the factors that the court must weigh in the balancing

exercise as to whether to discharge the injunction or to allow it to continue.

I now turn to the question of delay.

On this issue, Mr Waleilia submits that had the matter been so urgent, then surely the Plaintiff would have applied for an interim injunction right from the beginning, as early as October of 1992 or early 1993. He had the assistance of legal counsels and yet did not seek to obtain one. With respect to the submissions of Mr Kama, I am not satisfied that there has been reasonable delay, or no delay on the Plaintiff's part in seeking orders for an interim injunction against the Second Defendant.

The second major question for the courts to assess in the balancing exercise is whether damages will be an adequate remedy. I am satisfied that in the case of the Plaintiff, damages will suffice. The log pond, which is the subject of this dispute had been in use since operations began in 1992, it seems. This is not the case where an injunction is sought to prevent the logging company from entering into virgin forests or land which is under dispute, and thereby causing irreparable damage, which could have been avoided by the imposition of an injunction.

Taking all the above factors, the acquiescence and delay on the part of the Plaintiff, the fact that damages will be an adequate remedy if the Plaintiff should win his case at the end of the day, and bearing in mind that the concern of the Plaintiff essentially is to assert his exclusive right as owner over the said disputed land so that he can enter separately into any further agreements with the second Defendant for rental of his land, I am satisfied that the balance of convenience lies in favour of discharging the injunction forthwith and I do so order.

However, I will direct that any further rents due for the use of the log pond and any other sites over Asanao land shall be paid into a Solicitor's trust account which should be on an interest bearing deposit basis (i.e. an IBD account at the National Bank of Solomon Islands Limited), and secondly that the Second defendant shall produce a statement of account on the rentals paid to date in respect of the use of the log pond and any other sites which are in Asanao land.

Costs in the cause.

(A.R. Palmer)
JUDGE