IN THE HIGH COURT OF SOLOMON ISLANDS
(Chetwynd J)

Civil Claim No. 426 of 2011

BETWEEN

LENNICK MA-ASH (As Representative of the Chacha-Kebenisibio clan of the Garavu tribe)
Claimant

And

SINO CAPITAL (SI) Ltd
First Defendant

And

THE ATTORNEY GENERAL (Representing The Commissioner of Forests)
Second Defendant

And

THE ATTORNEY GENERAL (Representing The Director of Environment)
Third Defendant

And

THE ATTORNEY GENERAL (Representing Guadalcanal Provincial Executive)
Fourth Defendant

Mr Suri for the Claimant
Mr Rano for the First Defendant
Mr Banuve and Mr Kii for the Second to Fourth Defendants

Date of Hearing: 9th March 2012
Date of Judgment: 27th April 2012

Ruling

1. This is an application for a continuation and/or enlargement of an interim order made 24th January 2012. The case started life as a Category A claim seeking declarations in respect of two logging licences. His Lordship Mwanesalua J granted leave for the claim to be amended and the case is proceeding as a judicial review. He gave directions to that effect on 1st December 2011. Although the original claim asked for injunctive relief that aspect was not dealt with until the Claimant made an application for interim orders filed 20th January 2012. The reason seems to be that the First Defendant did not start logging on "disputed" land until

the middle of January. The order of 24th January was made by me. It was made on the basis there was no Development Consent from the Director of Environment. The matter was adjourned to 8th February.

2. On the 8th February the defence of the First Defendant had been filed. The Attorney General had not and still has not filed any defence. Mr Rano was unfortunately ill and the Claimant agreed to a further adjournment. The matter returned to court on 9th March.

3. Between 8th February and 9th March there was a flurry of sworn statements. From them and from the pleadings to date the Claimant is saying he represents the true owners in custom of various lands in east Guadalcanal. He also says the licences issued to the First Defendant are defective. This is because there was no or inadequate notice of a hearing required under the Forest Resources and Timber Utilisation Act [Cap. 40] ("the Forest Act") and there was no Development Consent under the Environment Act 1998. The Claimant also prays in aid several decisions made by the Chiefs in his favour. The First Defendant replies that it went through all the proper procedures in order to obtain it's licences and that it did have Development Consent.

4. The matter now before the court is the inter-parties application for interim orders, that is the application filed on 20th January 2012. In this jurisdiction the principles that govern such applications are well known and have been set out in numerous cases and have been the issue in many, many more. They are known in shorthand form as the American Cyanamid principles. The first question that arises is whether there are serious issues to be tried.

5. The relief sought by the Claimant is, first, that the licences be set aside, that is licences numbered A10714 and A10762. One basis for that claim is the First Defendant's lack of any Development Consent issued under the Environment Act. A sworn statement by Garry Cheah filed on 5th March 2012 suggests that is not the case. He produces a copy of an Environmental Assessment Report dating from November 2009. In the sworn statement by Mr Pehu filed 8th February 2012 various documents emanating from the Director of Environment and Conservation's office are exhibited. The letter (AP 31) is dated January 7th 2009 but the Development Consent "attached" to the letter is dated January 7th 2010. There does not seem to be any suggestion the former is correct and the latter not. If that were not so it would mean the Development Consent was issued before the various studies required under the Environment Act. It is also noted that although the Development Consent refers only to license A10714 the letter makes it clear it is in respect of both A10714 and A10762. It has to be said, on the evidence so far produced, any challenge to the licences based on lack of proper process under the Environment Act is doomed to failure.

6. The licences are also challenged on the basis there were defects in the process which, under the Act, led to them being granted. Section 8(1) of the Act requires the Appropriate Government to fix a place, "within the area the customary land is situated" to hold a meeting. This is the meeting commonly called a Timber Rights Hearing. The Claimant says there was insufficient advertisement and publication as required by section 8(3)(b) of the Act. The section requires the Appropriate Government to give notice of the meeting in what it considers to be the most effective manner to those persons who reside within the area and appear to have an interest in the land, trees or timber. We know what notices were published and we know where some were published. This came from unchallenged evidence of John Stewart (who at the time was the Provincial Secretary (Ag)). He attended court and gave

evidence. He listed a number of places he could remember the notices being posted at. He added that arrangements had also been made for land co-ordinators (the Defendant's admittedly) to assist administration officers to post further notices, "in the interior". Whilst I accept that a detailed consideration of the evidence is not required at this stage the court should ask what it is the Claimant says about this aspect of his claim and what he says he has by way of evidence to support it. All the Claimant effectively says is I live a long way (21 kilometres) from the coast and I didn't see any notices. It is also relevant to bear in mind Mr Stewart attended court to give evidence because the Claimant issued a summons to attend. The clear implication being the Claimant does not know where any notices were published. His case is simply that he did not see any notices. There is a clear and marked difference between saying I did not see any notices because you did not adequately publicise and saying I did not see any notices. In my view the former would raise the probability a serious issue to be tried whereas the latter would not.

7. Unfortunately the matter is not clear cut. There are two licences. All the paperwork (apart from the Development Consent referred to in paragraph 5 above) seems to relate to licence A10762. Certainly the copy notices Mr Stewart was referred to related to that licence. There is copy documentation in Mr Pehu's sworn statement (filed 08/02/2012) which just might possibly refer to meetings touching on A10714 but no one has established any real nexus between that licence and the paperwork produced. The customary lands named as Ghorotina (or Horotina) and Kologhai (or Kolohai) do not appear as such in any of the paperwork. This raises the possibility that even though the Claimant may be saying no more about the notices in respect of any hearings dealing with A10714 then he does about those dealing with A10762, he may have a more viable case in connection with that licence. In other words, there may be a serious issue, or serious issues, in relation to licence A10714.

8. The Claimant also relies on very recent decisions of the Chiefs. He says they show he has an interest in the land. However, it does not seem to be disputed those named in the decisions he relies on have no connection with those persons determined by Guadalcanal Provincial Executive (that body being the Appropriate Government under the Act) as being properly entitled to enter into timber rights agreements. The Claimant acknowledges this by saying he intends to take those persons determined by Guadalcanal Provincial Executive to be entitled to enter into agreements, to the Chiefs. Of course, even if he succeeds before the Chiefs this will avail him nothing in reality in respect of this case because their decisions will not trump the Provincial Executive's determination. That is still valid. It has not been appealed to the appropriate Customary Land Appeal Court. According to the time limits set out in the Act, it is far too late to appeal it now. It is difficult to see how the Chiefs' decisions add any weight to the argument based on a claim for judicial review in respect of the licences except it goes to the Claimants ability or locus to bring these proceedings.

9. The end result is the Claimant has established, just barely, there are serious issues to be tried. He has done so only in respect of licence A10714.

10. The next considerations concern the adequacy of damages and the balance of convenience. It has been held in too many cases to mention that where it is sought to protect the forest and the land, damages may not be an adequate remedy. The rationale being once an area is logged the harm suffered is almost impossible to quantify in pure monetary terms. That is the argument raised here. This, on the face of it, is not a case involving two parties who both wish to carry out logging. In those circumstances it could be said damages would not be an adequate remedy. Having reached that conclusion one then goes on to consider the balance of

convenience. Where does that lie?

11. In order to answer that question it is necessary to look at what is being asked for in the application for interim relief. "The application" being the amended application filed 23rd January 2012. At clause 3 the Claimant asks for an interim declaration, "that the Claimant has locus standi". How locus can be a matter for an interim declaration was never explained to me. Someone either has the requisite interest or standing to bring a case or he has not. His locus is not an ephemeral thing which changes with the phases of the moon. That part of the application must be refused. Next the Claimant asks for an order restraining the First Defendant from entering certain named lands. An interim order was made on 25th January but as mentioned at paragraph 1 above, that was solely on the basis there was no Development Consent. The First Defendant has established it does have Development Consent covering both licences. Different considerations now apply when deciding whether the restraining order remains in place.

12. What is clear is any restraining order can only, for the reasons set out in paragraph 7, apply to Ghorotina and Kologhai land. There is no suggestion the Claimant wants to stop the First Defendant from logging those lands simply so he can do so instead. The Claimant wants to prevent further "physical destruction". The balance of convenience is in his favour. The Claimant is entitled to an interim order preventing the First Defendant, or anyone acting on its behalf or with its authority, from entering Ghorotina and/or Kologhai land and carrying out any work or activity connected with logging.

13. The Claimant, again for the reasons set out in paragraph 7, is not entitled to any interim orders in respect of any other land. The applications set out in clauses 5 and 6 are refused.

14. The question of costs is reserved. The costs of these interlocutory proceedings will fall to be considered in the substantive action. The Claimant has given the usual undertaking as to damages and, if it is held the defendants are entitled to rely on it, the question of the costs of the interlocutory proceedings can be dealt with at the same time as damages. Even if the defendants cannot resort to the undertaking, the question of costs of the interlocutory application can be considered separately.

Chetwynd J