TOVUA, LABU, ANISI, BOSALI and KONA -v- MEKI, ILALA, DIDI, JAMES, CHAKU, PASI, TAWIHA, OCHA and EARTHMOVERS SOLOMONS LTD.

High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 141 of 1989
Hearing: 4th, 20th October 1989 at Honiara
Judgment: 3th November 1989

J. Corrin for the applicants
P. Tegavota for the respondents

WARD CJ: This is an application by way of originating summons for an order that -

> "The royalty monies due to be payable, for logs extracted on Chaunadaho Land in the sum of $13,292.35, claimed to be payable to the respondents (1st to 8th) and withheld by the 9th respondent, be released and be paid to the applicants or to their Solicitor."

The ninth respondent, with the consent of the other parties, seeks to raise a point of law the resolution of which may settle the whole matter. The point is raised in the defence:

> "Further, and in the alternative the Ninth Respondent says that it is legally obliged to pay all royalty monies to the persons duly approved by the Area Council who are not the Applicants".

The dispute concerns Chaunadaho land. Earthmovers Solomons Ltd, the ninth respondent, entered into a number of agreements to acquire timber rights over that land. Chaunadaho land is, itself, divided into a number of areas and, although it is not specifically stated in any of the affidavits, it would appear from those of Paul Tovua and James Boyars that the royalties referred to in the originating summons relate to timber extracted from two such areas, Machevona and Tulagi.

The main thrust of the applicants' case is that, in 1984, the CLAC gave Francis Labu, and his clan the sole rights to Chaunadaho land. The applicants say, therefore, that their tribe, the Manukiki, are the sole owners of that land. The fifth respondent has filed an affidavit in which he says he is also a member of the Manukiki tribe. He points out that, within that tribe, he is a member of the Roha clan which has the rights to Machevona land. The applicants, who belong to the Garo/Buhu clan have the rights to another area called Bela land (or Bela I).

How then does the CLAC decision in 1984 relate to this?

It was an appeal by Peter Seti on behalf of the Uluna clan against one of the applicants in this case, Francis Labu, for the Garo/Buhu clan. It was not disputed that the Uluna had the rights to land called Barahau and that the Garo/Buhu people had rights to part of Chaunadaho. The point in issue was whether the boundary between these lands lay along the Tina river or whether, as the Uluna claimed, Barahau land extended across the river onto the western bank and up to a line between Emaema, the Betivatu river and Tetekado. The Respondent claimed the river was the boundary and all the land to the west was Chaunadaho land. Thus the case was limited to that area of land between the Tino river and the Emaema/Betivatu/Tetekado line.

That was the only point in issue. The local court found in favour of Labu saying the disputed area was part of Chaunadaho land. The CLAC upheld that decision, dismissed the appeal and that is where the matter should have rested. Unfortunately the court went further and recorded the following in its judgment:

> "So, we dismiss the appeal, but for the sake of clearness make the following decree. Francis Labu and his clans have the sole right to Chaunadaho Land."

The final 'decree' was totally outside their power in that case. Their decision was to dismiss the appeal. The area they had considered was a small part only of Chaunadaho land. The evidence was that Chaunadaho land as a whole included a large number of places differently named. The issue related entirely to where the boundary lay. No one suggested the Uluna had any right to this Chaunadaho land. The claim of the Uluna was that the area in dispute was Barahau land. No one challenged the right of Labu to speak on behalf of the owners of Chaunadaho land but there was absolutely nothing in the case on which it could be decided whether he had the sole rights to the land, either this specific area or the Chaunadaho land in general. In fact there is mention by both sides that the rights to Chaunadaho land were shared between tribes of the Manukiki and the Garavu. There was no mention of this in the judgment. During the case, understandably, neither side had called evidence of other claims to Chaunadaho land because that was not the matter in issue.

Thus the final so-called decree was not a binding part of the court decision; at best it was obiter and at worst it was totally without foundation and worthless.

I do not, by that, say the applicants in this case do not have sole or any other rights in Chaunadaho land. I simply do not know. The CLAC decision does not advance that point any further. If there is any dispute about that, it should be taken to the traditional leaders and the local court.

The point in issue in the present case does not relate to land ownership but to timber rights. The question before me now is whether the ninth respondent must pay royalties for any timber extracted from Machevona and Tulagi lands to the representatives

with whom it signed agreement to acquire timber rights in relation to those lands. The answer is clearly yes.

The Forest Resources and Timber Utilisation Act as amended, sets up a procedure whereby anybody wishing to acquire timber rights over customary land can identify the people with whom to deal. The procedure identifies persons to represent the group as a whole. Once the procedure has been followed, the people named by the Area Council are the only people entitled to sign an agreement to transfer those rights and they are clearly, as the parties to the agreement, the people to whom the royalties should be paid.

In this case, the Bolomona Area Council held a meeting over a number of days between 14th and 21st September 1988 and determined who were the people entitled to grant timber rights. Who they were is set out in a list that fills three pages of typescript. Each area of land is named, the landowning group identified and the persons entitled listed under the heading 'trustees'.

The persons listed as entitled in relation to Machevona land are the fifth to eighth respondents, in relation to Tulagi land are the first to fourth respondents whilst the first to fourth applicants are listed in relation to Belo land.

It has not been suggested the procedure under the Forest Resources and Timber Utilisation Act were not followed and it is accepted no appeal was made. That, as the law stands at present, is an end to the matter.

I have no way of knowing, on the evidence before me, whether the persons identified by the Area Council as entitled to grant timber rights have that entitlement because they are landowners or because they have some secondary rights over the land and neither can I question their decision on that.

Mr Tegavota, on behalf of the applicants, has argued with some force that, whilst he accepts timber rights and land ownership are not always the same, in virgin forest such as is apparently involved in much of this area, it is unrealistic to say that a tribe which has secondary rights over such land should be able to sell the timber rights.

Those secondary rights when they were granted or acquired gave rights to such things as harvesting and gathering food and cutting wood to build custom houses. To suggest that those secondary rights may now allow people who do not own the land to enter into agreements with large companies to extract the most valuable commodity on the land, take the royalties themselves and leave the landowners with a wasteland, is really taking the matter too far.

I could not be more in agreement with him but unfortunately that is not the way the law has been written. It stems largely, I think, from the fact that the purpose of the act was not so much

to protect the landowners and owners of the timber rights as to protect the investor so that he has someone tangible with whom to make the agreement. The procedure is to allow them to identify a limited number of representatives and to be thereafter protected from claims by others. That, of course, is a reasonable requirement for any company who is going to invest a great deal in the operation.

Unfortunately it leaves the way open for people who possibly have the most tenuous claims, or even no claims at all, to become the principal beneficiaries. Having been named as representatives and although the area councils frequently (as here) refer to them as 'trustees', there is nothing in the act to say how they should perform their duties or what they should do with the royalties. I have pointed out in the recent case of **Allardyce and Others v. Attorney General and Others** that they take that money under a constructive trust, they have a fiduciary duty, but there is no guidance under this act as to what those duties are or how they are to be performed. If a so-called trustee is a representative of only one of a number of tribes who have rights over the land in question, is he to share the royalties with his tribe only or with all the tribes who also have representatives named by the area council or with those that have no representatives or with both or does he, in fact, have to share it at all? Has he any responsibility, in a case where he has secondary rights only, to the owner of the land from which he is extracting the timber?

We are dealing with operations now that require and yield large sums of money and which can have permanent and often extremely damaging effects on large tracts of land on which many people may rely for their livelihood. As the law stands at present it would be possible for a relatively educated member of the tribe and one who may no longer intend to live on the land, to enter an agreement and take and use the royalties without consultation with, or the knowledge of, many people who live in isolated parts of the land in question and who, because of the way they live, depend entirely on the land. Because of their isolation, the first knowledge these people may have that the timber has been sold will be when the first heavy machinery moves in. By then they will have no remedies left under the Forest Resources and Timber Utilisation Act.

The Court can give no answers to these problems. It can only apply the law as it stands and within the limits of that law. Parliament alone can change the law and I mention these matters, raised so eloquently by Mr Tegavota, in the hope that Parliament will take steps to deal with this problem by new legislation. Commercial logging of an area is such a devastating event that the exercise of that single right may destroy many other rights. Thus the legitimate sale of those rights may restrict or totally destroy other rights, primary and secondary, held by people living on the same lands such as harvesting rights and the right to establish gardens or use the streams.

Parliament may feel that there is a need for legislation to ensure those matters are considered before any agreements are made in relation to timber and that, once the representatives are identified, their duties are clearly stated in relation to consultation with the people they represent over the actual terms of the agreement before they are settled and their continuing duties as trustees whilst the timber is being extracted.

(F.G.R. Ward)
CHIEF JUSTICE