

WAJILAM EXPORTS (SINGAPORE) PRIVATE LIMITED V. HUNN COMMERCIAL EXPEDITORIAL ENTERPRISES LIMITED AND OTHERS

**High Court of Solomon Islands
(Palmer ACJ)**

Civil Case Number 70 of 2002

Hearing: 19th March 2002

Judgment: 20th March 2002

Sol-Law for the Plaintiff

Crystal Lawyers for the 1st and 2nd Defendants

A Radcliffe for the 3rd Defendants

Palmer ACJ: On 14th March 2002 I made inter alia restraining orders against the Defendants from loading and exporting the logs particularized in exhibit "TCM17" annexed to the affidavit of Tarun Chamanlal Mehta ("Mehta") from Ano Ano log pond Malaita. On 18th March 2002, the third Defendant filed Summons seeking orders inter alia for those orders to be revoked or varied so as to permit the M.V. Yedar to clear customs and depart Solomons with those logs on board. Apparently, the logs had been loaded on board the ship despite the orders of the court.

Serious Issues

The first crucial issue is whether there are serious issues to be tried. I have listened carefully to submissions of learned Counsels and come to the conclusion that serious issues do exist. The dispute in essence centers on ownership of 403 pieces of logs loaded at Ano Ano by 1st & 2nd Defendants in favour of Tropical Forestries Pte Ltd. Plaintiff claims it has prior equitable rights over those logs. It claims its rights originate from an agreement it entered into with Cheng Yan Poh ("Cheng") as marketing agent for and on behalf of 1st and 2nd Defendants (see Exhibit "CYP7" annexed to affidavit of Cheng filed 14th March 2002). Despite the fact that the Sales and Purchase Contract is signed between Solomon Ventures Sdn Bhd or Pedac Enterprises and the Plaintiff, they say it was actually made with Cheng in his capacity as agent for 1st and 2nd Defendants. The volume agreed to be sold was 2,500 m3 at the price of USD140/m3.

Cheng had acquired marketing rights by assignment from Leslie Kwaiga (Exhibit "CYP2"), who in turn had been appointed by the 1st and 2nd Defendants as their marketing agent under a memorandum of agreement executed on 21st November 2001 (Exhibit "CYP1").

Following that agreement, the Plaintiff arranged for its graders to have the logs inspected, graded and appropriated for shipment [See Exhibits CYP11, affidavit of Tarun Chamanlal Mehta ("Mehta") filed 14/3/2002 paragraphs 4 – 7 and Exhibits "TCM6" - "TCM13"]. This was subsequently done [see affidavit of Mahomed Youssouf Mahomed Saalime ("Saalime") filed 19th March 2002 at paragraphs 6 – 10]. Arrangements were then made to have the logs exported under a specific authority with the Central Bank of Solomon Islands pursuant to the Exchange Control Act (Cap. 51) [see Exhibit 1 tendered in Court by Caroline Kanoko on behalf of Central Bank of Solomon Islands].

The third Defendants on the other hand rely on an agreement entered into with the second Defendant on 5th March 2002 (Exhibit "AN1" annexed to the affidavit of Anant Narayan filed 18th March 2002) for 2000 cubic metres of vitex logs. Those turned out to be the same logs which the Plaintiff claims.

I am satisfied there are obviously serious issues to be tried which stem from the competing claim of right of the Plaintiff and 3rd Defendant.

Damages an adequate remedy?

The parties also differ on this issue. Plaintiff claims damages would not afford adequate remedy for their losses. They say the vitex species of logs purchased by them is a rare type of log and commands a very high price. They say they have already entered into another contract for the sale of those logs at a price of USD280-00 per cubic metre. They stand to lose substantial sums of money for breach of that contract (see Exhibit "TCM15" annexed to the affidavit of Mehta filed 14th March 2002). They want the logs unloaded.

Third Defendant say on the other hand, that damages would be an adequate remedy. Whatever losses the Plaintiff will incur can be quantified in damages and therefore the Plaintiff should be confined to a damages only claim and not be given injunctory orders against them which is extremely prejudicial.

Whilst I agree with the third Defendant, I note it has not given any undertaking for damages in the event the Plaintiff should win its case at the end of the day. The Plaintiff has not been secretive about the losses it will face if the logs are allowed to be sold under the current arrangements with the third Defendant. What this means is that if the defendants are allowed to proceed with this arrangement and the Plaintiff wins its case at the end of the day, then the Defendants must be prepared to pay the losses it will incur as a result of the lost sale and purchase contract it has entered into with a third party (Lawrence Wood Industries Ltd).

I note the most the third Defendant has offered is to pay the proceeds of the sale of those 403 pieces of logs into court or an interest bearing deposit after deduction of custom duties and levies.

In my respectful view that is not sufficient. The third Defendant must be prepared to pay damages in the minimum to the value of USD280-00 per cubic metre for all those 403 logs less freight, insurance, custom duties and levies. Unless there is satisfactory evidence before this court that the third Defendant is able to meet this quantifiable loss the Plaintiff expects to face, damages would obviously not be sufficient and not adequate.

On the other hand, if the Defendant should win its case at the end of the day, the Plaintiff has given its undertaking for damages and accordingly, I am satisfied they would be in position to meet whatever losses the third Defendant may incur as a result of the injunction.

Balance of Convenience

Where does the balance of convenience lie? To a large extent the affidavit material placed before this court demonstrates that the balance of convenience must lie in favour of the Plaintiffs. They had demonstrated that they made all possible attempts to warn or give the third Defendants notice of their equitable claim or interest over the logs (see affidavit of Saalime filed 19th March 2002). Further there is evidence to show that Leslie Kwaiga and John Alai, the very persons who arranged to have the logs sold to the third Defendant were also aware of the equitable rights of the Plaintiff. In spite of this, the Defendants proceeded with the sale and purchase of those logs.

Further, even in spite of the fact that a court order had been obtained, the Defendants continued with loading, they could have stopped and or have the logs unloaded. They did not do that. Instead they loaded other logs on top of them and then come to court and say that it would be very difficult to have

those logs now unloaded to their prejudice. A court order is not to be taken lightly. It is the legitimate force of the law in the country and if one feels it is wrong then one must run to court to have it challenged.

On the issue of the status quo, it is my respectful view, this also falls in favour of the Plaintiff; preserving the status of the logs until the issues are finally determined at trial.

Specific authority to export

It is clear, the second Defendant does not have specific authority to export the current consignment of logs. The authority sought to be relied on pertains to the anticipated shipment of the second Defendant in favour of the Plaintiff. It has been suggested this court should not concern itself with the powers of the Central Bank of Solomon Islands to grant specific authority to export. Whilst that is conceded, it must also be borne in mind, that those powers can only be exercised according to the terms of the statute or regulation. Where it is clear, an offence is being committed by a party, this court cannot overlook such fact. Already the attempt to clear customs with this load of logs for purposes of export amounts to an offence. In the absence of a valid permit or authority, those logs cannot be exported. The sovereign laws of this nation must be complied with by all concerned.

I feel the Central Bank needs to be a bit more vigilant in the screening and checking of documents that pass through its office. In this particular case for instance, there were some obvious discrepancies picked up during cross-examination by Mr. Sullivan but which appears to have been glossed over. Hence they were not able to pick up that the current load of logs, were for shipment to a different buyer, on a different ship and for a volume which is much less than the one recorded in the application form. In fact the specific authority granted or purported to be used was for a different buyer and for different prices. I think the Officers responsible can do better screening of applications to ensure that details given are much more accurate and correctly reflect what is being done on the ground, or the procedures revised to pick up such discrepancies.

Discrepancies in volume

Learned Counsel Mr. Sullivan for the Plaintiff has pointed out glaring discrepancies in the measurements recorded by the buyers in respect of the logs currently under restraining orders. That must be a matter of concern for all those affected. What it implies if correct and true is that the landowners, the local seller and the Government may be losing out significant sums of money. The discrepancies in measurements picked up by learned Counsel in some instances go beyond the 10% range from the measurements taken by the buyer of the Plaintiff. If true, there is something very wrong or even fishy going on. But the only way to address this is for local sellers to be vigilant, honest but also wise and smart and not be swayed so easily by the temporary rustle of money. What this means also is that local logging companies must have their own log graders properly trained and well equipped to be able to pick up blatant falsifications in measurements by overseas graders.

The Commissioner of Forest and his Officers also should be vigilant to provide and recommend true and correct prices that local sellers could obtain in the open market in the logging industry. For instance, in this case, at least the Plaintiff is offering the price of USD140-00 per cubic metre for those logs compared to USD90 or USD100-00 per cubic metre fixed for these logs. That is quite a huge difference. Local sellers must be given opportunity to negotiate for the best price and if it is the work of the Commissioner of Forest and his Officers to provide that assistance then it must be given to our sellers so that they are aware of the range of prices they can get. I do appreciate though there may be preferences by the local sellers for certain buyers and so prefer simply to go for a lower price. But at least local sellers and landowners in my respectful view before negotiating for the sale of their logs to at least get some

information from the Commissioner of Forests and the Central Bank on current market prices. At least the Government has done its part in trying to safeguard the interests of Solomon Islanders in respect of getting best prices for their logs by way of legislation. All it requires is vigilance, honesty and integrity.

Local Sellers too need to be aware of the use of marketing agents and the use of so-called middlemen. There is always a price called a commission attached to such engagements. If direct negotiations can be made which would secure better prices, then these are options to be considered. I am sure the Commissioner of Forests or the Central Bank should be able to assist local sellers. These are institutions set up by Government for the very purpose of providing assistance to some extent perhaps regarding such matters.

Conclusion

Where does this leave this matter? Does it mean an outright dismissal of the third Defendant's summons? In my respectful view, the interests of justice or the balance of justice can still be fulfilled if certain conditions are met by the third Defendant. (1) Unless the third Defendant provides an undertaking for damages to the sum of the minimum quantifiable losses calculated by the Plaintiff; and (2) it obtains specific authority for the sale of those logs from the Central Bank of Solomon Islands, then and only then can the third Defendant be permitted to have the logs removed from the jurisdiction. Failing that, the logs must be unloaded at a port to be agreed by all the parties until trial or further orders.

ORDERS OF THE COURT:

1. Unless the third Defendants:

- (1) provide an undertaking for damages in the amount of the minimum quantifiable losses of the Plaintiff; and
- (2) obtain specific authority for the sale of those logs from Central Bank of Solomon Islands;

the application for revocation or variation of those orders shall be dismissed and the logs are to be unloaded at a port to be agreed by the parties.

2. The Plaintiffs to provide details of the amount of their quantifiable losses taking into account freight and insurance charges and custom duties and Government levies.

3. Reserve costs.

The Court.