

**JP ENTERPRISES LIMITED, OCEANIA TRADING COMPANY AND MIREWHITE
CHOKO ~V~ IVAN NGAI**

High Court of Solomon Islands
(Muria, CJ)

Civil Case No. 205 of 2002

Date of Hearing: 30th October 2002

Date of Judgment: 5th November 2002

J Apaniai for the Plaintiffs
R Ziza for the Defendant

MURIA CJ: By his summons filed in this Court, the defendant seeks an order for a stay of proceedings pending the determination of the validity of the logging licence issued to the first plaintiff by the Commissioner of Forests on 2nd July 2001 (Licence No. TIM A10102) and the Logging Agreement entered into between the first plaintiff and representatives of the owners of Nono Customary Land. The validity of the licence and the agreement have been disputed by the defendant under paragraphs 1 and 10 of his defence filed on 14th October 2002, and now seeks pursuant to Order 27 r.2 of the *High Court (Civil Procedure) Rules 1964* ("the High Court Rules") to have the issue of the validity of the licence and agreement determined by the Court.

Brief Background

The first plaintiff applied for and was granted a logging licence No. TIM A10102 on 2nd July 2001 over Lio, Nono and Podokana Customary Land in Marovo, Western Province. The said licence is for five years, expiring on 2nd July 2006. The first plaintiff and "trustees" of Nono land prior to the issue of licence executed a standard logging agreement. Following the issue of the logging licence, the first plaintiff and second plaintiff entered into a Marketing Agreement enabling the second plaintiff to carry out the rights and obligations of the first plaintiff with Nono land. The third plaintiff is the second plaintiff's Administration Manager.

On 29th August 2002, this Court issued an *ex parte* injunction order against the defendant and his group following threats of violence and harassment on the plaintiffs. The interim hearing of the plaintiffs' application fixed for 16th September 2002 was adjourned for 30 days to enable Counsel for defendant to take proper instructions from his client. Having taken instructions Counsel for the defendant entered a conditional appearance on 14th October 2002 and filed a defence, also on 14th October 2002.

The Defendant's Case

By summons filed on 28th October 2002, the defendant now seeks a stay of proceedings pending the determination of the validity of the logging licence and the timber agreement. Counsel for the defendants submitted that the validity of the licence and agreement is a legal issue which is central to the plaintiffs' case and which is challenged in the defence. This Court therefore has jurisdiction to determine these issues of law under O.27, r.2 of the High Court Rules. Further Counsel urged that once the licence is found to be invalid, the Court would have no jurisdiction to deal with the plaintiffs'

main action. Thus argued Counsel, the conditional appearance was filed on the basis that the defendant intended to challenge the validity of the licence and the jurisdiction of the Court.

The Plaintiffs Case

The plaintiffs, on the other hand, submitted that the defendant's application is an abuse of process of the Court. Counsel for the plaintiffs argued that conditional appearance cannot be used to challenge the legality of the licence as this is the very issue in dispute in the main action. Further Counsel submitted that by filing a defence the defendant is submitting to the jurisdiction of the Court and cannot now challenge the jurisdiction of the Court. As to the rules of practice, O.27 r.2 does not confer right on the defendant to bring such proceedings unless the consent of the plaintiffs is obtained. This has not been done and as such, Counsel submitted, the application has been improperly brought before the Court.

Whether a Stay Should Be Granted

The law on an application for a stay is well settled in other jurisdiction as well as in our jurisdiction. In our jurisdiction, O.27, r.4 of the High Court Rules grants the High Court inherent jurisdiction to stay proceedings "as may be just." This was recognized by Palmer J in *Islands Construction Management Limited -v- Air Transport Limited*.¹ Reiterating this inherent power of the Court, the case of *Edmeades -v- Thames Board Mills Ltd*² held that the Court has inherent jurisdiction to stay proceedings "whenever it is just and reasonable to do so." The question in this application is, not only whether it is just and reasonable to grant a stay, but whether or not it should be granted at all. The stay sought here is not pending an appeal following a judgment or order, but the defendant is seeking a stay pending the determination of legal issue, namely the validity of the licence and timber rights agreement which has been raised in his defence to the plaintiffs' action. Should a procedure such as a stay be used to determine the main contentious issue in an action at this stage of the case? Each case must be considered in its own circumstances. In the present case, I think it would not be proper to exercise the Court's inherent power in the manner requested. This is for two reasons, firstly, the challenge mounted by the defendant as to the Court's jurisdiction runs counter to the very object which he intends to achieve, namely for the Court to declare that the licence and the agreement invalid, and thereby determining the out come of the main action. Secondly, the procedure envisaged under O.27, r.2 would be more appropriate, that is, for the parties to consent to the determination by the Court, of the issue raised in the defence. The fact that the issue is now taken up in the defence does not prevent the application of O.27, r.2 as can be seen in *Pasmore v Oswaldtwistle Urban District Council*³ where the points of law raised in the defence were by consent of the parties, argued before the trial of the action. See also the case of *Wilkinson v Barking Corporation*⁴ where a similar procedure was adopted. Unfortunately, the parties in this case chose not follow this procedure. Instead they chose to invoke the inherent jurisdiction of the Court to deal with issues raised in the defence outside of O.27, r.2. In such a case the inherent jurisdiction of the Court cannot be invoked as shown in *T. C. Trustees Ltd -v- J.S. Darwin*⁵, which established that the inherent jurisdiction cannot be invoked to deal with issues or matters that are "properly matters of defence of law or relief in equity, for those must be raised in the action itself."⁶ Regrettably, this is exactly what the defendant has set out to do by his application in this case. As can be seen from the rules and cases referred to, that cannot be done.

¹ *Islands Construction Management Limited -v- Air Transport Limited* (12th March 1999) High Court, Civil Case No. 144 of 1996.

² *Edmeades -v- Thames Board Mills Ltd* [1969] 2 QB 67, 71.

³ *Pasmore v Oswaldtwistle Urban Council* [1898] A.C. 387.

⁴ *Wilkinson v Barking Corporation* [1947] 2 All ER 24.

⁵ *T. C. Trustees Ltd -v- J.S. Darwin* [1969] 2 QB 295, cited in *Islands Construction Management*.

⁶ *T. C. Trustees Ltd -v- J.S. Darwin* [1969] 2 QB 295, 302 per Lord Denning MR.

The other contention of the defendant is that he seeks a stay to challenge the jurisdiction of this Court to hear the plaintiffs' action should the licence and agreement be held to be invalid. I do not understand the sequence of the defendant's plan of attack on the plaintiffs' case here. On the one hand, the defendant acknowledges the Court's power to determine the validity of the licence and the agreement, while on the other hand, he challenges that very same jurisdiction upon which he relies a minute earlier, as not applicable to the main action should the Court find that the licence and the agreement are invalid. This is a bad point. The defendant cannot have his cake and eat it at the same time. Thus, the filing of a conditional appearance, followed by a defence and seeking a stay in order that the Court deals with the validity of the licence and the agreement, are factors demonstrating clear acceptance by the defendant of the Court's jurisdiction in this matter. In any case, leave of the Court is required to enter conditional appearance: *Slater and Gordon ("A Firm") and Ors v Ross Mining (Solomon Islands) Limited and Ors*.⁷ That has not been done in this case. The defendant's contention in support of his challenge to the jurisdiction of this Court is clearly not tenable.

In the circumstances and for the reasons set out in this judgment, the defendant's application for stay is refused.

Sir John Muria
CHIEF JUSTICE

⁷ *Slater and Gordon ("A Firm") and Ors v Ross Mining (Solomon Islands) Limited and Ors* (6 July 2000) Court of Appeal, Civil Appeal Case No 7/1999.