HIGH COURT OF SOLOMON ISLANDS

HAVEA MAJORIA (representing the Rodo Landowners of Vaguna Island) –v- OLIVER BIKOMONO JINO Anors

Civil Case No. 261 of 2002

Honiara: Brown PJ

Date of Hearing: 14th March 2003
Date of Judgment: 8th April 2003

Philip Tegavota Solicitor for the Applicant
Public Solicitors Office Solicitor for the Respondent

Practice and Procedure – High Court – Jurisdiction in declaratory summons proceedings – wide jurisdiction inherited by virtue of Schedule 3 to the Constitution and O.27 r5 of the High Court Rules.

Customary law - written record of customary forum known as Native Court – court not a "court of record" in the English historical sense – no requirement for written record for custom belongs to the system of chiefs to determine and administer – written record "best evidence" of adjudication involving competing customary interests.

Customary law – record by traditional leader in Roviana language – nature of record – diary record rather than record required under a duty – traditional chief carrying on work of customary adjudication of disputes – status and power apparent on the evidence – written record evidence of the matters therein set out – "best evidence".

Land Law – customary land law in 1914 – in absence of alienation, custom remains unaffected and the law as it affects land

Constitution Schedule 3
Pacific Islands Protection Act 1875 (Eng.)
Solomons Land Regulation 1914, no.111 of 1914 (Kings Regulations 1914)
High Court Rules 0.27 r.5

The applicant sought declarations affecting land in the Marovo area of the Western Province, to the effect that a written report by an established customary chief and Headman purporting to be a decision of a court held in 1914 over Rodo land was a decision according to law.

The Court held:

1. On the evidence the late traditional chief Ishmael Ngatu had power to adjudicate in customary disputes involving land.

2. The expression "native court" did not mean a court established by the Protectorate in 1914 but was terminology used by the Administration to delineate a traditional dispute resolution forum governed by custom.

3. The applicants had satisfied the factual onus of proving the existence of the customary power and status necessary in the late Ishmael Ngatu, and consequently the record reflects the matters in issue and their consequent determination.

4. The declarations would be made as sought.
No cases were cited.

Summons for declaratory orders

The first questions

The applicant claims rights, on behalf of Rodo Landowners of Vagunu Island, Marovo Lagoon, Western Province, to seek a declaratory order that a written report in an exercise book is a record of a court decision made in 1914, affects Rodo land, and further, that such decision is in accordance with law.

The book or Roselyn Exercise Book has been exhibited by the respondents and the book shall be returned to their custody. The book is, by handwriting, named *'Buka Kot Koa Ri tie Muho"* "This book is the record of court cases of native people") and is said to belong to the late Ishmael Ngatu of Patutiva Village, who was both a traditional chief and government representative. He was so described in *Tie-e Varane, stories about people of courage from Solomon Islands* by George G. Carter (Unichurch Publishing – Rabaul Auckland 1981), a history of the early Methodists in the Solomon Islands.

There is no dispute amongst the parties to this cause, that he stood high amongst his people. It is interesting that the author, *Carter,* credits the late Chief as one of his sources, reciting manuscripts collected during field work, including the diaries of Ishmael Ngatu, 1927 – 1954. Having perused the exhibited exercise book, I am left in no doubt that it is what it purports to be, a handwritten record of the matters set out, by the late Ishmael Ngatu.

It consequently is part of the written history of the Solomon Islands, and deserves to be treated as such.

Second Question

What laws affected land in 1914?

The Chief Justice Sir John Muria's monograph on "Customary Land Disputes in Solomon Islands, A Search for Solution" presented at the National Judicial Conference, November 2002 is a good starting point for this Court. The Chief Justice speaks of the Kings Regulations 1914 (page 7). They were cited as "Solomons Land Regulation, 1914"; no.111 of 1914. The Regulations dealt exclusively with the procedure for non-Solomon Islands who wished to take up land, by which a lease by the Protectorate could be obtained. The Regulations did not touch on nor affect customary land law, *inter parties* Solomon Islanders.

Counsel did not suggest that these Regulations affected native customary title then, but used the fact of such Regulations, to high-light the absence of foreign law affecting what was, customary land law.

This unfettered customary land law at that time was recognized by the *Report of the Special Lands Commission* (delivered by the appointed Special Lands Commissioner, Mr. Colin H. Allan on the 17th June 1957 to the Chief Secretary, Western Pacific High Commission of the British Solomon Islands Protectorate). Included in the terms of reference was the required need to *"study, record and as far as possible correlate, native custom relating to land".*

The Report was deemed necessary, for the reason that;

"The Solomon Land Regulation of 1914 provides for the alienation of native land in the form of leasehold and assumes that all land not actually alienated *is owned by natives of the protectorate by virtue of their customary rights".*

There has been nothing presented to me, or seen by me on my reading of the authorities tendered, which doubt the truth of the assumption.

The report is extremely valuable as a reference for any one interested in land law in the Solomon Islands for it exhaustively deals with the social system, tribal, clan, lineages and moieties and the land tenure interests of the line and land groups, throughout the disparate people of the islands. Reciting, in Chapter 5, the status of the Protectorate, as that affecting indigenous population, *Allan* sets out S.7 of the Pacific Islands Protection Act 1875.

"nothing herein or in any other Order in Council contained shall extend or be construed to extend to invest Her Majesty, her heirs and successors, with any claim or title whatsoever to dominion or sovereignty over any such islands or places as aforesaid or *to derogate from the rights of the tribes or people inhabiting such islands or places, or of chiefs or rulers thereof to such sovereignty or dominion".*

This specifically recognizes that land not alienated *"is owned by natives of the protectorate by virtue of their customary right"*

Notwithstanding, much land of value for plantations along the coastal plains had been by whatever means, alienated by foreigners and foreign interests, before 1914 when the Land Regulations were passed in an effort to regulate such alienation.

The earlier assertion, then, of unfettered customary land law should be read down, after 1914, to include only these disputes involving indigenous Solomon Islanders, for alienation of customary land after that time, (and to a lesser extent, before) was subject to the Kings Regulations.

But this decision did not involve alienated land, and consequently the effect of the Kings Regulations need not be considered.

The Decision (By certificate of translation of Ronald Bei Talasasa, Director of Public Prosecution office from Roviana language to English).

July 26 1914

This is a court case between Rikana, Huba on one side. Whereas Luze and Kilasa on the other. And the Court decided that the land at RODO belongs to Rikana. But you Kilasa you were only adopted said the court. And the Court asked Luze as to where is the source of your geneology.

And Luze said he came from Bareke. Alright, you baked 3,000 thousand and you repaid the money you got from Norman because the land belongs to Rikana from which you got money from Norman.

This is what the court said on this day and that is all.

Customary Land Disputes

Before the time of Report of 1957 disputes were settled in diverse ways. *Allan* recites 7, the most formal by the Judicial Commissioner by formal arbitration and reconciliation under S.34 of the Pacific Order in Council 1893 (rarely used) the least formal, by District Headmen, Chiefs, elders and land authorities arbitrating informally and without the use of formal findings.

Perhaps its best to let the Report elicit the difficulties surrounding the definition of "land chiefs" in the Roviana, from Saekile to Wana Wana in the period under review.

Authority and Succession

Analysis of the nature and basis of authority and succession in land is difficult. Four reasons account for this; first, societies and their customs are diverse; second, many of the early anthropologists and administrators were defeated by it, and in consequence knowledge of the past is limited; third, the nature and basis of authority has undergone much change, particularly since the war, and fourth, European concepts of more easily defined Pacific societies run in fixed grooves. Due to the work of the Professor Raymond Firth, knowledge of Tikopian authority is extensive.

It is proposed first of all to outline in some detail the position, as it appears to exist, both past and present in a particular society, namely, Roviana, from Saekile to the Wana Wana. This area is chosen because the complexities, which have arisen, and the solutions, which have been evolved, are in some measure typical of the rest of the Protectorate. Furthermore, matters of principle are raised in relation to the work of the first Lands Commission, which will be dealt with in a later section.

The following remarks about the nature of early authority are based partly on unpublished papers of the late Professor A.M. Hocart, partly on statements by Mr. H. Wickham of Hobupeka, Roviana, and partly on accounts by early Rovianas. The late Professor Hocart was a member of the Percy Sladen Trust Expedition to the Solomon Islands, 1908-09; he lived at Sisiata just west of Dide in 1908 and undertook considerable anthropological research in New Georgia. Mr. H. Wickham is an elderly gentleman, a part European, who apart from periods abroad for education, has lived all his life in Roviana. He knew Professor Hocart as a young man and his knowledge of the Roviana is extensive.

In former times the population of the Roviana was much greater than today. The people lived inland, on the coasts, or on small islands. Tribal communities, of which there were many, were settled in sprawled out villages consisting of many hamlets of two or three houses. In charge of each hamlet was a Palubatu or elder, who was head of a wider family group. The main function of the Palubatu was to listen to and do the bidding of the Bangara or chief. Each tribal community, and even each lineage might have one, two, or three Bangara. In 1908 Kokorapa had six, Vuragare two, Kalikoqu four and Kazukuru five.

The definition of the status of the Bangara is complex and even Professor Hocart appears to have been confused. Succession was both patrilineal and matrilineal. In each tribal community Bangara were usually all related, either by blood or marriage, and marriages were arranged to that end. There was some evidence that all of them, regardless of tribe, traced their ancestry to a common source.

In each tribe the Bangara appeared to work in perfect amity if one proposed, all would agree, much the same as at Tikopia. Suzerainty did not apply however. Authority was normally restricted to their own tribe or lineage, but their status was recognized elsewhere in New Georgia and even as far away as Kia in Ysabel. At the same time the Bangara of one tribe could seek and get the assistance of Bangara of another tribe. Sometimes two groups would be at enmity and a third Bangara would intervene and make peace. Occasionally women were made Bangara.

[Report of Special Land Commission 95]

I am satisfied, at the time Ngatu was noting his exercise book with records of his decisions in 1914, he was a "bangara". *Carter* says of Ngatu, that his father *"Ngapitu, had come from Choe but his mother, Teko was from Podokana. Teko came from an important family and her son, by right of birth, could take his place as a leader".* (Ti-e Varane 54)

With this historical background, it will be apparent why the Court accepts the local importance given Ngatu for his position of rank was recognized by the Protectorate Authority in 1914 when he was appointed government headman, a position he maintained until the post was abolished in the late 40's. *Carter* describes his authority thus *"Ngatu's role as government representative was combined with his position as a traditional leader. It is never clear from which he drew his greatest authority. He was involved in all kinds of disputes. There were quarrels about land, rights to fruit and nut trees, charges of stealing and problems of marriage and unfaithfulness. Wherever there were disputes, Ngatu sooner or later was called in and his judgment seems to have been accepted by all concerned".* (Ti-e Varane 61)

CUSTOMARY LAW

For the purposes of the argument here, I am satisfied there had been no legislation in effect at the time of this supposed decision, which in any way impinged on customary rights to enjoy property. Custom at that time was principally recorded in memory of those personally affected in the event of a dispute, for that is the *raison d'etre* of the system of *Palabatu* and *Bangara.* The ultimate source of knowledge of custom was to be found in this hierarchical system of chiefs, wise men and sorcerers.

I am further satisfied that Ismael Ngatu of Patutiva was a customary leader in Marovo for that was a prerequisite to his appointment as a District Headman during the administration of the British Solomon Islands by the High Commissioner Charles Morris Woodford. This is amply demonstrated by the annexed material reciting his awards and history in the affidavit of Havea Majoria sworn on the 28th February 2003 and the assertion by the applicant in his affidavit in support sworn 1st November 2002 wherein he recites, at para 4 *"The court decision was recorded by Chief Ishmael Ngatu BEM in the Roviana language in a Roslyn Exercise Book."*

The importance of this evidence is that the appointee, whilst a Headman under foreign regulations was in fact a traditional leader of his tribe (by whatever name) and must be presumed to know and express where necessary, customary knowledge of land rights, both as to clan or line's ownership and usufructuary rights (which need not concern us here.)

Does the Record deal with this issue?

Has he, where necessary, expressed his customary knowledge in this record? Well, the necessity is obvious, there was a dispute arising out of the proposed purchase of land by one, Norman Wheatley, thus allowing him to elucidate this dispute, and then he throws light on geneology and ownership, for both are interconnected. Chief Ismael Ngatu has recited that Rodo Land belongs to Rikana, as result Luze need repay money he received from Norman. In other words, Luze had no right to sell the land for it did not belong to him. There is an express finding of ownership, in proceedings which do not involve Wheatley, for the complaint was brought by Rikana. The order for repayment was an incidental result of the finding of ownership, the issue being competing customary interests.

Now this book is described on its cover, as a court case record. A record of proceedings goes a long way to satisfying his obligation as District Headman to see justice done in the Native Court. But the Native Court was not a court of record. There was no obligation to keep a written record, for leaders had no need for written records. They were the "recorders". But that record is nonetheless, a record of customary land rights, for the issue of ownership is clearly addressed. It would be wrong to ignore this written record of customary land ownership at that time, when that clearly is the best evidence.

Even more importantly, it illustrates why Chief Ishmale Ngatu was held in such high regard, both by his people and the Administration. The exercise book is not a "record of court proceedings" in the sense understood nowadays. It consequently is not a book of record which the Administration required to be kept, for instance, by the District Officer. But it is this Headmans' own record, for his own purposes, which makes it so valuable.

No page, for example, has been signed or initialed by higher authority, thus presuming some requirement in the District Headman's role. Annexed to the affidavit of Havea Majoria, sworn on the 28th February 2003 is an interesting page dealing with "Duties of District Officials".

This paper has been taken from the National Archives, and whilst it does not show when these duties evolved, on Headman, Assistants, Village Constable, Village Counci, Native Clerk and Dresser, it may be presumed they have been applied, in similar form, since 1893. It is instructive to reproduce the duties of District Headman.

Duties of District Officials

The District Headman, under the District Officer, is the representative of the Government in his sub-district. He is also the representative of the people to the Government. On him rests the chief responsibility for the good order of the sub-district and the execution of Government policy within it, though in these matters he should always take advice from his subordinate officials and the members of his Native Council.

The District Headman is President of the Native Court in his sub-district and must see that justice is done in the Court. He has the duty of advising the District Officer in all matters relating to the sub-district.

The District Headman's work is difficult and important, and he can be justly proud of his position. He should always do his work to the best of his ability, remembering that to do less than his best is to betray his people.

These instructions, (for they most probably were issued to District Officers for their assistance) clearly applied during the period of the 1939-1945 World War. They would have evolved from earlier instructions, but the gist of the responsibilities would clearly have carried on until more recent times, at least until Independence.

So this personal record is not a "judgment of a court of competent jurisdiction" (a western concept and not concordant with customary forum) spoken of by Mr. Hou in his submissions. Nor can it be a "statement or record of a person since deceased, in the course of his duty".

The reliance on evidentiary forms touched on by *"Cross on Evidence"*, for instance, to strike out the admissibility (or otherwise) of this record, on common law reasoning, ignores the fact that the record is not one required by duty but rather the written record of a Chief's deliberations and considerations, recorded for his own reasons.

It consequently falls outside the tenor of the Respondent's argument for rejection, an argument based on the formal reasoning of "Cross".

This record purportedly in the Chief's own hand, is, if one seeks common law analogy, "best evidence" of the matters therein set out. "Best evidence" is used in the sense that it is the best evidence that a party to the cause can produce. The applicant's copy of the book, on reasonable explanation for the inability to produce the original book (in custody of someone beyond the applicants control) would have been allowed into evidence. The book itself, quite properly has been produced by the respondents, and for that I am grateful, for it is a most valuable historical document in its own right.

It is, however, best evidence of the facts in the record and that is of a native court dealing with customary land rights over Rodo Land. "Native Court" is not used in the sense of one established by the Protectorate in 1914, but rather one recognized by the Protectorate as pre-existing under custom. The word "court" has been appended, for it is a foreign word. A court of record is a historical concept found in English law. That concept predicates to a large extent, *Cross's* dessitation relied upon by Mr. Hou. The concept has no application to customary forum in the Solomon Islands. Those forums "records" belong to the custodians of law, the hierachial system of chiefs.

Written Record of Customary forum known as Native Court

This High Court has no hesitation in recognising the right in the Chief to adjudicate the issue, a right unaffected by foreign adopted law, and the fact that fortunately, a written record has been made of the Chiefs deliberations and findings, in his own hand. A written record, such as this, lays to rest the risk inherent in the oral traditional story, from mouth to mouth, from generation to generation.

The Court is satisfied, notwithstanding the absence of regulations requiring a record of proceedings, the written notes of Chief Ishmael Ngatu evidence a decision of a customary forum, which became known as a Native Court. The Court was concerned with customary law. The adjudicator of the Court was the proper authority.

The record fortunately survives. The Chief was not ordained for the purposes of a Native Court, he presided as of right.

The decision of the 26th July 1914, then, is a valid decision in accordance with law, customary law which applied with full force and effect, over customary matters including land rights.

A reliable Record?

The respondent submitted the Court should not believe the record to be a true paper of the Chief, for it does not bear his signature, nor is it in chronological order.

I have reexamined the book. Many entries are out of chronological order and do not bear his signature. Some do. Since the book is not a record required by the Administration to be kept for particular purposes, but rather is in the form of a diary, I do not place any weight on the respondent's criticism. The Chief may use the book in his own fashion and has done so. The handwriting appears consistent, the types of ink change from time to time and I find the book to be a particularly valuable historical document, worthy of preservation.

Since it comes from the custody of the respondent who argues against the case, it is hardly likely they have forged the record, contrary to their interest.

Should I make a declaration?

By virtue of Schedule 3 to the *Constitution*, the Acts of the Parliament of the United Kingdom of general application and in force on 1st January 1961 shall have effect as part of the law of the Solomon Islands. As a result of the *Judicature Act* (U.K.) the rules of common law and equity, previously separately administered, were joined and our High Court (Civil Procedure). Rules 1964 reflect that fusion.

Under the previous *Chancery Procedure Act 1852* (UK) declaratory orders could only be made (in equity) if there was a right to some consequential relief which, if asked for, could be granted by the Court. That is no longer the law in the Solomon Islands. Order XXV, r.5 of the *Rules of the Supreme Court* 1883 (U.K), did away with the distinction between types of relief sought in law and equity.

Our 0.27 r.5 reproduces the material parts of the English rules, so that the High Court's powers are very wide and include the power to make binding declarations of rights whether or not any consequential relief is or could be claimed and whether or not the suit in which the declaration is sought in a suit for equitable relief or a suit which relates to equitable rights or titles.

The Court certainly has power to make a declaration of right in this action for both parties have a legitimate interest in the issue.

The first questions are answered in the affirmative, and I make declarations accordingly.

J R BROWN
PUISNE JUDGE