AROSI VISION LINK SERVICES AND ANOTHER -V- GEORGE MAE AND SUHIDANGI

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Civil Case No. 171 of 2003

Date of Hearing: 22nd September 2003
Date of Ruling:26th September 2003

P. Tegavota for the Plaintiff
K. Averre for the 1st and 2nd Defendants

RULING

Kabui, J. By a Summons filed on 22nd July 2003, the 1st and 2nd Defendants (the Defendants), sought an injunctive order in the following terms restraining the Defendants from-

"... (a) Blocking any logging road going through Manutagere land;

(b) Making any further claims or demands for compensation for the use of such logging roads going through the said land, and

(c)Resolving any dispute over the use of a logging road on Manutagere land through the road blockade and

(d) The carrying out of any acts whatsoever which will have the effect of restricting the rights of the plaintiffs from using the road going through Manutagrere land for the purpose of carrying out logging activities of the plaintiffs..."

The Plaintiffs also claim costs and any further orders as the Court may see fit to make.

The Background.

There is an access road previously used by Markwest when it carried out logging operation with Soma Limited some years ago. This road runs through Manutagere land. The Plaintiffs had been using the road with the consent of Markwest up until April 2003 when the Defendants set up a road block preventing access to the Plaintiffs. The Defendants have claimed ownership of Manutagere land. There was an alleged agreement between the parties under which road blockade was not to be the method of resolving dispute between the parties. In consideration of agreeing not to impose any further road blockade, the Plaintiffs paid to the Defendants the sum of $10,000.00. However, on 12th July 2003, the Defendants again set up a road block preventing access to the Plaintiffs. The Defendants demanded the payment of $250,000.00 compensation before they could remove the road blockade. The Defendants later removed the road blockade through the intervention of the Police from Kira Kira. The Defendants have in the meantime demanded the payment of another sum of $10,000.00. The road blockade has caused the Plaintiffs a loss of $340,000.00 at the rate of $85,000.00 a day loss there being 4 days of lack of production.

The nature of the injunction being sought.

The injunctive order being sought by the Plaintiffs is intended to prevent the Defendants from committing further breaches of the agreement signed between the parties in April 2003. So, this is

not the case of preventing further trespass being committed on someone else's land whilst the issue of title is being sorted out in the main action. Counsel on both sides each agreed that there were triable issues to be considered in the main action. Clearly, the Statement of Claim filed by the Plaintiffs on 22nd July 2003 does raise triable issues. Triable issues are so if they are not vexatious or trivial in nature. That is, such issues must be serious so as to become serious questions to be tried. (See **American Cyanamid Co. v. Ethicon Ltd.** [1975] 2 W.L.R. 316). The Writ of Summons and Statement of Claim do disclose issues of specific performance, permanent injunction, declaration and damages as issues to be tried in the main action. Counsel for the Defendants, Mr. Averre, then cited the principles governing the granting of interim injunctions set out in Lord Diplock's judgment in the **Cyanamid's case** cited above. That is, having established that there are triable issues, the next question is whether or not if the Plaintiffs are denied the injunction asked for and win in the main action at the end of the day, they would be adequately compensated. If the answer is yes, then normally no injunction need be granted. If the answer is no, then would the Defendants be adequately compensated if the Plaintiffs do undertake to abide by any decision of the Court for damages, if the injunction is granted on the basis of that undertaking. If the answer is yes, then the injunction can be granted. If after that, there is still doubt as to which way the Court should decide, the other factors would need to be taken into account keeping in mind the need to maintain the status quo at the time the Defendants first set up the road block in April 2003. That is, where does the balance of convenience lie?

Application of the principles upon which an interlocutory injunction may be granted to the facts.

I do not think this is a case of an interlocutory injunction at all. I do not think the **Cyanamid's case** cited above applies. It is not disputed that the road block had been removed but the Plaintiffs are apprehensive of it being repeated making it a further breach of the Defendants' undertaking and a threat to the smooth operation of their business causing further damage to them. It is that fear of that breach being repeated that prompted this application for an injunction to prevent further risk of that happening in the future. Such an injunction is called, "quia timet" injunction. It literally means "since he fears." (See **Eastern Development Enterprises Limited v. Stanley Zae and Others,** Civil Case No. 350 of 1999 and **Wilson Sagevaka and Others v. David Maure,** Civil Case No. 274 of 2001). This is a rather different sort of injunction by classification from interlocutory injunction although it can serve the same purpose as an interlocutory injunction. It is not governed, so it appears, by the principles stated by Lord Diplock in the **Cyanamid's case** cited above. Although the discretion of the Court is the mainstay in the decision of the Court, its utility does differ somewhat. For example, it is often used to prevent breaches of covenants or patents etc. which are either impending or have already occurred and are likely to occur again. In order to secure a quia timet injunction, the applicant must prove that the injury apprehended is of weighty concern and is imminent if not prevented. In this case, the agreement signed by the Defendants does contain a clause prohibiting setting up of road blocks by the Defendants. The Defendants having breached that obligation once have stopped at least for the moment. The Defendants are now fearful that a further breach is likely to occur again. They do not trust the Defendants to comply with the terms of the agreement they signed. There appears to be an initiative for further negotiation to increase the access fee. This is already being done but it is a matter for the parties. This is a case of claim to land rights as against abiding by the terms of an agreement to facilitate the efficacy of commerce. It is possible that the grant of an injunction may be perceived by the other members of their tribe other than the Defendants as affirming trespass on their land for there is the possibility that they have not received any access fee from the Plaintiffs. They may choose to ignore the injunction arguing that it only applies to the Defendants who took the access fee. Whilst such argument can be made, there is no evidence to support it. The Defendants did not file any affidavit material in response to the affidavit filed by Mr. Watoto in support of their case. They sat in Court silently throughout the hearing. The bottom-line clearly is that Manutagere is customary land assumed to be owned by the Defendants and their tribe. Road access must be agreed by the landowners. This was done

in this case but apparently not properly done by the Defendants on behalf of their tribe in that the access fee possibly had not reached every member of the tribe. The Plaintiffs have, as a result, became the victims of this situation provided they had not unduly persuaded the Defendants to make an undertaking for a fee paid personally to them for their own benefit which apparently backfired. There is however no evidence of any undue influence being at play in this case. I think the solution lies in negotiation between the parties. This is already being done to avert any further breach of the undertaking made by the Defendants. I will not grant a quia timet injunction. The impending threat of road block is really a conditional one. If the access fee is renegotiated to the satisfaction of the Defendants, the condition is satisfied and the threat disappears. There is another ground upon which an injunction may be granted. The following is that ground.

Breach of a negative undertaking.

There is in equity a type of situation that calls for the Court to intervene and restrain by injunction a breach of a negative undertaking in a contract. One such case was **Donnell v. Bennett** (1883) 22 Ch. D.835 where the Court granted an injunction to restrain the breach of the negative stipulation although the contract was one of which specific performance would not have been granted. In this case, only the 1st and 2nd Defendants did sign the agreement. The Plaintiffs did not counter-sign for their part. In consideration however of the promises made by the Defendants in that document, they received the sum of $10,000.00. The document was in effect an undertaking by the Defendants to observe the terms of that undertaking made by them. One of the terms of the undertaking was for the Defendants not to set up any road block but to resolve any dispute that may arise through negotiation and understanding. This is clearly a negative stipulation. I think this is a situation where an injunction is clearly in need to protect the Plaintiffs from the Defendants going back on their promise and doing the opposite. The Plaintiffs clearly are in need of protection. The only slight problem is that the Plaintiffs' Summons does not link the application to the terms of the undertaking. It is rather open-ended apparently for the reason that the injunction being sought was to be an interlocutory one. The true intention was however clear from the submission made by Counsel for the Plaintiffs and the evidence before the Court. Whilst Iam aware that the underlying issue is the ownership of Manutagere land, the issue here is one of abiding by the terms of one's undertaking as is obviously the cause of the dispute in this case. It is the responsibility of the Defendants to see to it that the other members of their tribe do respect the terms of the undertaking and if there are reasons for disquiet amongst them, it is also the responsibility of the Defendants to deal with those reasons to the satisfaction of the Plaintiffs. I can say almost with certainty that the reason for disquiet is the lack of equitable distribution by the Defendants of the $10,000.00 access fee to the members of their tribe. I hereby grant the application sought by the Plaintiffs. The parties will meet their own costs.

F.O. Kabui
Judge