BISHOP TUHENUA -V- SAVINO LAUGANA, SIMON MAVI, VINCENT KURILAU, RENATO KAVUCHAVI AND NICHOLAS VISONA (TRUSTEES OF KOLOTAHA LAND)

High Court of Solomon Islands
(Palmer CJ.)

Civil Case No. 238 of 2003

Date of Hearing: **14th April 2004**
Date of Judgement: **16th July 2004**

Presley Watts for the Plaintiff
Francis Waleanisia for the Defendants

Palmer CJ.: On or about 13th March 1996, the Defendants sold a piece of land, described as **Kolotoha land**, to the Plaintiff for $17,000.00. The Plaintiff alleges in his Statement of Claim filed 22nd September 2003, that the Defendants were the registered trustees of that land and referred to its registration description as "**P/N: LR 910, Kakabona, North West Guadalcanal**". This is however an unusual way of citing description of registered land because land that has been registered under the provisions of the Land and Titles Act [cap. 133] ("**the LTA**") usually contains specific details of ownership and normally would be given a parcel number (see sections 87-90 of the LTA). This process entails the opening of a registry map which depicts clear details of that registered land identified by its parcel number (see section 93 of the LTA). The description of Kolotoha land as pleaded in the Statement of Claim is vague and ambiguous. Even the details provided in the affidavit evidence of the Plaintiff filed 22nd September 2003 (paras. 3 and 5 and exhibits "BT1" and "BT2") do not help in ascertaining the identity of that land. For instance, at paragraph 2 of his affidavit the Plaintiff refers to the registered land as "**LR 910**". The map exhibited as "BT 1" however does not contain details of the boundaries of that "registered parcel LR 910". There is a block of land identified in the map ("Exhibit BT1") as "Kolotoha land" but there is nothing to indicate on the map itself whether that land is part of LR 910 or if it is LR 910 itself. Further confusion is engendered when paragraph 5 of the affidavit and the so-called perpetual estate register of LR 910 ("Exhibit BT2") are considered. "Exhibit BT2" is a photocopy of a copy and is not even clear. That is unsatisfactory. The parcel number in that register is recorded as 191-043-33; at the top right hand corner it is written as 191-046-33, at the front page it is certified by the Registrar of Titles as parcel 191-043-33, at the back page it is certified as 191-046-33! The description in the property section (Part A) is further described as **Lot 205 of LR 910**. Is this the same land referred to as "P/N LR 910"? There is no map attached to identify the location of that land ("Lot 205 of LR 910"), which would have been of some assistance. The confusion does not end there because a Memorandum of Subdivision attached as "Exhibit BT3" refers to a different parcel number **191-046-65** and a further different lot number "**222 of LR 910**"! This is simply unsatisfactory. We have a land described in six different ways: LR 910, parcel 191-043-33, parcel 191-046-33, Lot 205 of LR 910, parcel 191-046-65 and Lot 222 of LR 910.

What is also unusual about such claims of ownership by the Defendants over a registered piece of land is that disputes should be extremely rare, unless of course the Defendants had also sold the same land to other purchasers previously. I get the impression that the land was not registered land.

The Plaintiff is no longer interested in pursuing sale of the land; all he wants now is refund of his money back plus interest. The Defendants do not dispute that they owe him the money and have agreed to pay him back. The judgment in default entered for the sum of $17,000.00 was in order.

The claim for interest at 10% however needs to be commented on as there is no evidence to support that claim. The affidavit evidence adduced is silent on the matter. It appears the rate of 10% has been plucked out of somewhere and appended to the claim. That is not right. There must be evidence to back it up. In the absence of such, if the Plaintiff wishes to claim interest, then what he should do is to include a claim for interest, then provide evidence as to what he thinks would be the appropriate rate to claim for such money. The usual approach of the court in such situations is to enquire as to the rate of return if a similar sum is invested commercially (see section 3 of the Law Reform (Miscellaneous Provision) Act 1934 as applied by virtue of Paragraph 1 to Schedule 3 of the Constitution and as applied in **Longa v. Solomon Taiyo Limited**[1] and **Liliau v. Trading Company (Solomons) Limited (No. 2)**[2]). In the absence of evidence otherwise, the courts normally opt for a figure of 5%.

Also, interest is usually charged from date writ is commenced unless there are circumstances which indicate otherwise. In this instance, it is clear from the affidavit evidence that the Defendants knew or ought to have known from the beginning that the sale was a farce, as the same land had been sold to others, evidenced by the disputes encountered by the Plaintiff when he tried to take possession of the land. It was therefore correct and within the discretion of the court when taking into account the peculiar circumstances of this case to allow interest to be charged prior to the commencement of the case right from March 1996.

The Writ was served on the Defendants on or about 24th September 2003. On 29th October 2003 Plaintiff obtained a Judgement in Default against the Defendants for the sum of $34,505.00 plus interest of 5% from 1st September 2003 and fixed costs at $1,150.00.

It is pertinent to point out that the way the claim had been phrased at paragraph 7 of the Statement of Claim was inaccurate. I quote:

"*I therefore claim against the defendants ($34,505.00 S I currency), being:*

(i) The consideration sum of $17,000.00.

(ii) The accumulative interests (calculated at 10% p.a.) for the period of March 1990 to August 2003, the sum of $17,505.

(iii) *Total Claim - $34,505.00*"

It is not correct to state that the claim is for $34,505.00 when in truth it is only for $17,000.00. There is indeed a further claim for interest at 10% but that should be separately pleaded and claimed. Whether interest would be granted at the rate (10%) claimed or reduced is a matter in the discretion of the Court. It is improper to include interest in the original claim.

I note too that there is a flaw in the date the interest was claimed from. The pleadings give the year of 1990, but that cannot be right, as the transaction was concluded only in March 1996; that is, money changed hands only in March 1996. Any interest therefore should be claimed only from that time. I can only presume this was a typographical error. At the end of the day, the question whether interest would be granted and at what rate is a matter in the discretion of the court to exercise.

The judgement in default therefore was flawed when it stated that the amount awarded was for $34,505.00. It should have been for $17,000.00 plus interest. As to the question whether the rate of 10% was justified in the circumstances, this must be answered in the negative. There is no evidence in support of such rate. Also in the absence of supporting evidence to the contrary, a figure of 5% would be the more accurate rate in the circumstances.

The Plaintiff has had problems with recovering his money from the Defendants. He now seeks to garnishee this from the Commissioner of Lands on the grounds that the

---

[1] (1980/1981) SILR 239 at 259

[2] (1983) SILR 40 at 43 - 46

Defendants are trustees also of the land over the Kongulai Water Source and receive monthly rental from the Government for use of the Kongulai Water Source.

Mr. Waleanisia of the Attorney General's Office appears for the Government and objects to the issuance of any garnishee orders against the Government primarily on the basis that the law of trusts as applied in this jurisdiction to customary land concepts does not permit that to happen in this case. For instance where trust monies belonging to a tribe or tribal groupings are sought to be garnisheed, unless it can be shown that this pertained to tribal dealings and the consent of the tribe obtained, the court should be slow to grant such orders.
Learned Counsel relied on the authoritative statements of Sir John Muria CJ in **Allan Kasa & Elma Kasa v. Rex Biku and Commissioner of Lands**[3]. His Lordship highlighted in that case, the difference between concepts of a land trustee and representative as they applied to customary land and benefits arising from concepts of ownership.

In so far as the money derived from rental of the Kongulai Water Source is concerned, the Defendants stand in fiduciary relationship to the landowning tribe(s). The money received does not belong to them; they merely hold it in trust for the benefit of the tribe(s). That money therefore cannot be made the subject of a garnishee order without consulting the members of the tribe(s). I just do not see how any member of the tribe would allow their money to be used to pay for the dishonest dealings of the Defendants in selling land to multiple parties.

Further, that rental relates to a different land and possibly different tribe. But even if the same tribe is involved, there is no evidence to suggest that the sale of Kolotoha land was done with the consent of the landowning tribe(s) they represented or that they were a party to this dishonest dealing of the Defendants. The Defendants owe a fiduciary duty to their tribe(s) to act honestly, justly and fairly at all times for the good of the tribe and to consult with them regarding any particular dealing. To the extent the Defendants are considered as trustees on the statutory trusts under the LTA or trustees in custom or representatives over the same land, it is good customary law practice in this country to require that such land representatives or "land trustees in custom" account to their tribe for any dealing associated with such land unless otherwise established on evidence before the court. Section 195(3) of the LTA expressly recognizes this concept for registered land where joint owners on the statutory trusts are involved; that is where such land is held in trust for the benefit of a tribe.

It is important to separate those two issues; one relates to rental money received for the Kongulai Water Source, the other relates to the dishonest sale of Kolotoha land to the Plaintiff. I do not see how the money received in one can be justifiably used to pay for the dishonest dealings of the Defendants. The Defendants must refund the Plaintiff out of their own pocket. I suspect the money was received for their personal benefit and use in the first place. I do not see how any landowner can ever be a party to any such dealings of land which involves numerous sales to numerous parties; that is simply being dishonest.

It is obvious from the facts in this case that the purported sale of the land described as Kolotoha land was a farce from the beginning.

I have considered the copies of the Writ of Summons and Statement of Claim annexed as "Exhibit BT8" to the affidavit of Bishop Tuhenua filed 22nd September 2003, which relate to a land dispute case between **Alex Bartlett v. Paul Maenu'u**[4] over the same land. I note that the said land at that time was not registered land. There was no indication that it had been registered. That writ showed that as far back as October 1990 the said land had already been the subject of a dispute between two different parties. There can be no genuiness and honesty in the purported sale therefore of the same land to the Plaintiff in this case in 1996 because as deposed to by the Plaintiff in

[3] HCSI-CC 126/99 14th January 2000 at pages 6 - 11
[4] Civil Case No. 188 of 1990

his affidavit, all attempts to have the land surveyed for subdivision were obstructed by one of the previous disputants, Paul Maenu'u. It seems that Kolotoha land may not have been registered after all, as alleged or claimed by the Defendants. This may explain the ambiguities in the way the land had sought to be identified in the Statement of Claim of the Plaintiff.

This court cannot allow money belonging to a tribe to be garnisheed and used to pay for the shady dealings of the Defendants. In the circumstances, the Defendants must refund or repay the Plaintiff from their own pockets or assets.

The application to garnishee the rentals received from the Government must be denied.

To avoid any doubt the amount awarded in favour of the Plaintiff is $17,000.00 plus interest to be calculated from March 1996 at 5%, with fixed costs of $1,150.00. The legal costs claimed by Mr. Watts are costs which his client has to pay him for his services and are not included in the order for costs awarded here.

Orders of the Court:

1. **Dismiss application for orders of garnishee against the Commissioner of Lands.**
2. **Set aside Judgment in default of Appearance dated 29th October 2003.**
3. **Substitute the following orders:**
   - (i) **Grant judgment in default for $17,000.00 plus interest at 5% with effect from 13th March 1996 until payment.** [As at 13th July 2004 the total interest due is $7,083.33 ($17,000.00 x 5% x 8 4/12)].
   - (ii) **Grant fixed costs claimed at $1,150.00**

THE COURT