

IN THE HIGH COURT OF SOLOMON ISLANDS
(Chetwynd J)

Civil Claim No. 230 of 2007

BETWEEN

KALENA TIMBER COMPANY Ltd
First Claimant

And

**CHIEF NATHAN KERA, RONALD KITU,
NELSON HUTI, NEPIA OKA and JAMES RIAKEVU**
(Representing Saikile Chieftaincy)
Second Claimants

And

KALIKOQU DEVELOPMENT COMPANY
First Defendant

And

INTERGRADED FOREST INDUSTRIES (SI) Ltd
Second Defendant

Mr Fakarii for the First and Second Claimants
Mr Tegavota for the Defendants

Date of Hearing: 7th November 2011

Date of Judgment: 31st January 2012

Assessment of damages

1. Judgment was given against the Defendants on 29th March 2011. Damages were to be assessed. Directions as to the evidence required for assessment were made in September and the hearing was listed for 7th November. At the directions hearing Mr Tegavota indicated he was having difficulties obtaining instructions from his clients. When the matter came on for hearing in November the situation was much the same. Whilst I expressed some sympathy for Mr Tegavota's plight it would have been inequitable to allow the matter to drag on and to wait until the Defendants deigned to instruct their counsel. An order was made for Mr Tegavota to file a brief sworn statement confirming an address for service for the Defendants and also confirming that he had written to them informing them that the assessment would be considered on written submissions which were required by 5th December 2011, and that upon such a sworn statement being filed he would be given leave to withdraw. There is no sworn statement on file and no written submissions have been lodged on behalf of the Defendants.

2. The Claimants filed written submissions on 25th October 2011. They rely on the court book (filed 17th November 2010), a sworn statement by Nepia Oka (filed 1st August 2011) sworn

statements by Andrew Landa Murray (filed 1st August and 14th October 2011) and a sworn statement by Ronald Kitu (filed 18th October 2011).

3. The evidence shows the area trespassed upon by the Defendants. Maps and photomaps are exhibited to the sworn statements of Mr Kitu and Mr Murray. Also exhibited are an "encroachment report" ("the Alu report") and an "environmental impact assessment and environment audit" ("the EIA and Audit report") and a Valuation Report ("the Boeau report"). There has been no challenge to these documents except that the First Defendant does not think they are conclusive for irrelevant reasons. The report is challenged on the basis it does not show trespass. Given the judgment of the court, that is irrelevant. It is also said the airfares and accommodation were paid for by the Claimant and the "officer's" impartiality is questionable. Despite that claim the officers were not actually questioned about the report. The Defendants say the report was not addressed to the Commissioner of Forests and was not therefore official. They allege they were not aware of the assessment taking place and were not given a copy. What relevance the addressee of the report has is not explained and the detail of the report contradicts the Defendants' claim of ignorance.

4. The encroachment report follows an assessment carried out in May 2007 by Mr Kevin Alu (Assistant Chief Forester Operation with the Ministry of Forests Environment and Conservation) and Mr Ben Fafale (Range Officer Licensing, Ministry of Forests Environment and Conservation). According to a letter from Mr Alu dated 5th June 2007, a copy of the report was sent to the General Manager of the First Claimant and the Chairman of the First Defendant. The boundaries of Togasage were established by dint of the forestry officers taking each party separately into the bush and plotting where boundaries were said to be by means of GPS equipment. Having established the boundaries claimed by both sides the forestry officers counted all logs felled in the "area of encroachment". They did this by reference to records kept by the Second Defendant in respect of "skidded logs". That is logs physically removed from the area, presumably to the log pond. There were still logs left lying in the bush and details of those were obtained from chainsaw operators working on the land. In the Alu report Messrs Alu and Fafale accept the figure for the logs in the bush is an estimate. Their methodology and conclusions have not been challenged by the Defendants save as mentioned above in paragraph 3.

5. They estimated 254 logs were left lying in the bush and 127 in the log yard, a total of 381. Based on an average volume of 3.8 cubic metres per log the total volume was 1,447.800 cubic metres. Using records they were able to establish 477 logs were at the log pond with a total volume of 1,828.980 cubic metres.

6. It should be remembered one of the reasons for the dispute between the parties is that two logging licences were issued, one to the First Claimant and one to the First Defendant. The areas covered by the licences overlapped. This is relevant because the Alu report states (paragraph 6) quite clearly the calculations were prepared by reference to the "boundaries" set out in the two licences rather than the "customary" boundaries. It is put this way in the report, *"The focal point of issue is the Timber Right boundary determined by the appropriate government not customary boundary as what we might think"*. It is not a point taken by either the Claimants or the Defendants. However, there exists a possibility that the calculations may not exactly account for all logs converted by the Defendants.

7. There is a difficulty with the figures set out in paragraph 5 above. It is not clear if it is a problem with mathematics or a problem of omission of explanation. The figures are found in paragraph 5.2 of the Alu report. There set out is the number of pieces of timber in blocks, 8/9, 3 and 4. If the numbers in respect of block 8/9 are added together they come to 135 not 137. There then appears to

be a note which says 30 of those should be ignored leaving a total of 107. The correct math gives a figure of 105. For block 3 it is said there are 94 logs. However, if the addition is done correctly the total is 91. For block 4 the figure of 26 is correct. If the totals are added together it comes to 222 not 254. There is no explanation of how the Alu report total of 381 is arrived at. There is no explanation of where the extra (according to the figures in the Alu report) 127 logs come from. In the summary set out in the report there is a reference to the location being Bush and Log yard. One could assume that the extra logs are ones which have been skidded from the bush but which have not been scaled. They would not therefore be included in the totals of logs "already scaled". No matter how logical that assumption may be it is not supported by any evidence in the Alu report, or at least the copy on the court file. I say that because it is also noted two pages are duplicated in the copy of the report annexed to Mr Murray's sworn statement.

8. Any calculation for damages for conversion of the logs must be carried out by reference to figures shown in evidence. The value of the timber will depend on a number of variables. First, its volume. Next variable in the calculation exercise is the species involved. Some timber species are more valuable than others. The final variable is the market price. Like many market commodities the price of timber fluctuates. There is also a variation of market price depending on the size of the piece of timber and a piece classified as small or super small will fetch less than one classified as regular.

9. Dealing with the number of logs or pieces of timber, any calculation can only relate to figures set out in paragraph 7 above. That is the 222 logs left lying and the 477 scaled logs. As for volume, for the scaled logs a measured volume is available from records. For the remainder an average has been used of 3.8 cubic metres per piece. That is generally the accepted "average" in the trade. As for species, for the left lying timber the number of logs per species is available. For the scaled logs there is no breakdown by species, just an overall volume. No indication is given as to the classification of any piece of timber said to have been converted. With details of some of the variables missing any calculation of damages will have to be by reference to averages and is unlikely to represent the exact value.

10. The remaining difficulty with calculating damages is we are faced with two claimants. In reality the loss to each claimant will be different. The landowners intended the timber to be felled and exported. They would only have expected royalties. These seem to have been fixed by the agreement dated 27th March 2002 at 15%. The First Claimant is the logging operator and its loss would be the "profit" from the enterprise. The most equitable way to deal with this difficulty is to award one sum jointly to the two claimants and the lawyers can sort out the fine details of payment as between them.

11. There is one final mystery. Beginning at page 322 of the court book is an agreement between the parties in this case. It is dated 5th July 2007. The agreement pre-dates the order made by Brown J on 12th July (perfected and signed on 16th July) of the same year. The effect of the agreement is to allow the Defendants to "sell by export all logs extracted by them from Tagosage land". There is no evidence indicating whether that agreement disposed of all the logs noted in the Alu report. There is no evidence to say if the left lying logs were all extracted and exported. That is relevant because if the logs haven't been exported then the "costs" incurred by the defendants would be less. The Defendants would be entitled to their production costs, the expenses of felling, skidding and loading of logs actually exported. If they merely felled the logs and those logs were left in the bush, they would not be involved in the costs of skidding and loading.

12. I need not concern myself with some of the problems detailed above. The Claimants'

submissions suggest I utilise the formula set out in the judgment dated 31st August 2011 in Kikile and Another . There is no argument by the Defendants to the contrary. In the Kikile case the amount of damages was expressed in the formula $EV - (DT + (EX - PM))$. The element "EV" represents the export value of the timber converted. "DT" is equal to the duty paid to the Government. This is presently fixed at 25%. "EX" represents the expenses of the tortfeasor, the person or the company actually taking or converting the timber, and "PM" equals that entity's profit margin. In the present case we know that there were three shipments and the volume of logs exported was respectively 617.231, 816.000 and 1638.232 cubic metres; a total of 3,071.463 cubic metres. The value of this timber was US\$ 51,906.75, 48,831.04 and 101,436.99 respectively making a total of US\$ 202,174.78. If the latter is divided by the former an average value per cubic metre is arrived at of US\$ 65.82. The element EV in this case would be the total volume of timber $((222 \times 3.8) + 1828.980)$ or 2,672.580 multiplied by the average value (65.82) which would give a figure of 175,909.22 US\$. The next element of DT would equal 25% of that figure or 43,977.31 US\$. There are no details given of the expenses incurred by the Defendants. No copy of any agreement between the First and Second Defendants has been produced. It is said the usual agreement is the logging company receives 40% of the export value. I am aware from other cases the percentage can be up to 60% but as there is no real evidence in this case the "usual" percentage will have to be the one any calculations are based on. That percentage would include the profit they expected to make. A reasonable estimate of the profit margin expected would be between 10 and 20 per cent. The mean point would therefore be 15% of 40%. The total calculation would be;

$$175909.22 - (43977.31 + (70363.69 - 10554.55)) = \text{Damages of } 72,122.77$$

The Claimants are jointly entitled to damages for conversion of the timber amounting to a total of 72,122.77 US\$. No information is given as to the exchange rate prevailing at the time. The parties will have to approach the commercial banks or the Central Bank for the correct figure. The operative date for conversion will be the date of the last shipment which was 28th August 2007. The Claimants are entitled to interest on the damages at the statutory rate from the date of issue to the date of judgment.

13. There then remains the issue of damages for environmental harm caused. The EIA and Audit report produced by the Environment and Conservation Division of the Ministry of Forests, Environment and Conservation was carried out in August 2007. It identifies a number of areas for concern and the "Potential Environmental Impacts". The first is increased surface runoff. The causes and consequences are set out in paragraph 7.1 of the report. The next is accelerated soil erosion. This is linked to increased surface runoff caused by road building and the removal of vegetation. The causes and effects are set out in paragraph 7.2. The issue of siltation and sedimentation is also linked to the consequences of road building and removal of vegetation. Paragraph 7.3 sets out the problems. Paragraph 7.4 deals with a specific consequence of pollution (by sediments) of streams and rivers and paragraph 7.5 highlights the community disruption caused when the pollution affects local water sources. The EIA and Audit report does not touch upon the cost of any remedial work required to put right environmental damage caused by the logging operations. Nothing is said in the evidence or submissions about the Defendants being in possession of a Development Consent. Nothing is said about a public environmental report or an environmental impact statement as required by Part III of the Environment Act 1998. Nothing is therefore known of the state of the environment prior to the logging operations. The evidence can be taken to show the damage reported was all caused by the Defendants.

14. The Boeau report is supplemented by a second report from the Environment and Conservation Division . Ms Babaua accompanied Mr Boeau and inspected the area in July 2011. She confirms

what was said in the initial report in 2007. Problems with water supply were still evident some 4 years after operations had stopped. She reports flow rate for the Baraulu water supply was reduced by 80%. This was due to siltation and sedimentation in the dam area. The dam area has had to be moved to ensure continued water supplies. Mr Boeau concentrates mainly on the area damaged by the building of roads. He calculates an area of 64,571.46 square metres was affected by road building. The Boeau report also mentions a hydro scheme which has had to be put on hold and the re-positioning of the Baraulu water source.

15. The Boeau report calculates the cost of physical damage caused by road construction associated with the Defendants logging operations. It is based on a value of \$65 per square metre. In submissions the Claimants adopt the more generally accepted figure of \$ 7.50. This figure reflects the benefit to the Second Claimants of properly constructed roads. Damages in respect of the damage to the environment are calculated as $7.50 \times 64,571.46$ a total of SB\$ 484, 285.95. The Defendants shall pay the Second Claimants that sum.

16. It can be ascertained from the other reports that physical damage has been caused to the environment. Some of that damage would have occurred in any event because the Claimants' intended to carry out logging operations on the land. One must presume the First Claimants would have carried out their operations in a more environmentally sensitive manner but as there is no public environmental report or environmental impact statement from them (to the Director of Environment as required by the Environment Act) that is by no means certain. Given the Claimants' intentions to log the land and even on the assumption they would have been more sympathetic to their surroundings, there will be no damages payable in respect of the felling and removal of trees or the consequential harm to the environment that would naturally flow from such activity. However, damages should be paid for the impairment and harm to the water supply. There is no evidence available on the actual costs involved. A global sum will be awarded which has the effect of rounding up the damages set out in paragraph 15 above to SB\$ 525,000.00.

17. In summary, damages for conversion are awarded to the Claimants jointly of a sum being the Solomon Dollar equivalent as at 28th August 2007 of US\$ 72,122.77. Interest will be payable at the statutory rate from 28th August 2007 until judgment, that is today. Damages for environmental harm will be awarded to the Second Claimants of SB\$ 525,000.00. The combined awards will attract interest at the statutory rate from today until paid. The Defendants shall pay the costs of the Claimants, such costs to be taxed at the standard rate if not agreed.

Chetwynd J