
Case Note

Defending the Forest in the Clouds: Public Interest Law in Solomon Islands

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Abstract

Solomon Islands' forests have high levels of biodiversity and are an important component of the country's culture and custom. The forests are under threat due to decades of unsustainable logging. Under Solomon Islands' law, logging companies need approval from the government and the customary landowners before commencing logging. This case note summarises two cases in the Solomon Islands High Court brought by an association of landowners to protect the 'cloud forest' of Kolombangara Island. In the first case, the High Court held that the association had standing to seek an injunction to prevent a company from logging without obtaining the necessary government approvals. The second case, which has not yet been finally determined by the Court, challenges the legality of the approvals subsequently granted by the government. These cases potentially pave the way for further public interest environmental litigation in Solomon Islands.

I Introduction

Solomon Islands is a unique archipelago in the Pacific region, made up of some of the world's most biologically and culturally diverse islands. The country's larger islands are generally mountainous and covered by rainforest vegetation. The biodiversity of these forests has been ranked in the highest category, 'Globally Outstanding', based on an analysis of biodiversity across the five continents and their oceans.¹

Solomon Islands' forests contain about 4500 species of plants, some groups of which exhibit significant endemism.² Plant endemism is particularly

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¹ David Olsen and Eric Dinerstein, 'The Global 200: A Representation Approach to Conserving the Earth's Distinct Ecoregions' (1998) 3 *Conservation Biology* 502, 510.

² Pacific Horizon Consultancy Group, *Solomon Islands State of Environment Report 2008* (Report, Ministry of Environment, Conservation and Meteorology, July 2008) 29.

high in the forests known as ‘cloud forests’, which cover just 600 square metres of the country.³ Apart from the island of New Guinea, Solomon Islands’ forests and other ecosystems also support a higher level of diversity and endemism in animal species than any other Pacific island country.⁴ In addition to their biological importance, the forests of Solomon Islands form an integral part of many of the cultures and customs of the people, and are home to many of the country’s culturally significant (*tambu*) sites.

Although scientists are just beginning to understand the value of Solomon Islands from an ecological perspective, large tracts of forest have already been lost or are currently under threat. The biggest threat to the forests of Solomon Islands has, for a long time, been unsustainable (and under-regulated) commercial logging practices. While forest resources continue to diminish, the mining industry is expanding, bringing with it new environmental, social and economic challenges.

This article discusses two cases in the Solomon Islands High Court which were brought by an association of landowners from Kolombangara Island in the Western Province of Solomon Islands. The association is seeking to protect the rare cloud forest on the high-altitude slopes of the island. The article outlines the High Court’s decision in the first case, which set a new basis for standing in public interest environmental litigation in the Solomon Islands. It also discusses a judicial review case the association commenced as part of its efforts to protect Kolombangara from the effects of unsustainable commercial logging.

II Logging in Solomon Islands

Large-scale logging began in Solomon Islands in the early 1960s. Logging accelerated in the 1980s, when overseas companies entered the industry and logging began to move from government land to customary land (land owned by indigenous communities in accordance with their customs). This second phase of logging involved significantly less government control over logging companies, partly because the regulators responsible for enforcing forest legislation lacked the resources to carry out their statutory duties properly.⁵ Today, there is still limited government regulation of logging in Solomon Islands. The government’s enforcement of forest laws continues to be hampered by a lack of resources and also, arguably, by a lack of political will.

Solomon Islands has become economically reliant on logging, and log harvesting has grossly exceeded sustainable yield levels for many years. In 2003, it was estimated that the commercial resource would be exhausted by the end of 2015 if harvesting continued at the then current rate of 645 000 cubic metres per year and planted and regrowth forests did not make a significant contribution to

³ Patrick Pikacha, *Wild West: Rainforests of Western Solomon Islands* (Melanesian Geo Publications, 2008) 72.

⁴ *Ibid* 82.

⁵ Ian Frazer, ‘The Struggle for Control of Solomon Islands Forests’ (1997) 9 *The Contemporary Pacific* 39, 48.

the timber industry until 2025.⁶ From 2003 to 2005, the yield from natural forests further increased to over one million cubic metres per year, more than four times the estimated limit for a non-declining yield.⁷ By 2011, total production had almost doubled to 1.9 million cubic metres, with log revenue contributing to 17 per cent of domestically sourced revenue.⁸ The increase in production has been caused by a combination of sustained high international demand for logs, high log prices, an increase in the number of exported species, more clear-felling, and more re-entry into secondary (previously logged) forests.⁹

Predictions on when the natural forest resource will be exhausted vary. In 2003, URS estimated that the resource would be depleted by 2015.¹⁰ However, according to the Central Bank of Solomon Islands, a recent study by the Ministry of Forestry concluded that the industry could continue until 2036.¹¹ Regardless of the precise ‘exhaustion date’, it is clear that the forests of Solomon Islands are under threat, and for a long time have been logged at an unsustainable rate.

Most logging in Solomon Islands occurs on customary land, which comprises approximately 87 per cent of the land in the country. The principal Solomon Islands laws regulating logging are the *Forest Resources and Timber Utilisation Act 1969* (*‘FRTU Act’*) and the *Environment Act 1998* (*‘Environment Act’*).

Under the *FRTU Act*, before a developer can commence logging on customary land, it must enter into a logging agreement with the people who have the right to grant timber rights (usually the customary landowners) and obtain a logging licence from the Commissioner for Forests.¹² The Commissioner is a government official appointed by the Minister for Forests.¹³

The logging agreement must be in the form set out in the relevant Regulations.¹⁴ Under the Regulations, the agreement must contain a condition that requires the developer to obtain the further consent of the Commissioner for Forests before logging any land more than 400 metres above sea level (*‘ASL’*).¹⁵ This requirement is also contained in the *Solomon Islands Code of Logging*

⁶ URS, *Solomon Islands Forestry Management Project, National Forest Resource Assessment 2003* (Report, Ministry of Forests, Environment and Conservation, 2003), cited in URS, *Solomon Islands Forestry Management Project, National Forest Resource Assessment 2006* (Report, Ministry of Forests, Environment and Conservation, 2006) 2.

⁷ URS, *Solomon Islands Forestry Management Project, National Forest Resource Assessment 2006* (Report, Ministry of Forests, Environment and Conservation, 2006) 2.

⁸ Central Bank of Solomon Islands, *Central Bank of Solomon Islands 2011 Annual Report* (April 2012) 7.

⁹ Ibid 16.

¹⁰ URS, above n 6.

¹¹ Central Bank of Solomon Islands, above n 8, 17.

¹² *FRTU Act* ss 5–6.

¹³ Ibid s 3.

¹⁴ *Forest Resources and Timber (Prescribed Forms) Regulations 1978* (Solomon Islands) reg 5.

¹⁵ Ibid sch form 4.

Practice,¹⁶ with which developers must comply pursuant to their logging licences.

The *Environment Act* states that before a developer can commence or continue logging, it must obtain ‘development consent’ from the Director of the Environment and Conservation Division, unless the Director grants the developer an exemption.¹⁷ The Director, who sits within the Ministry of Environment, is a person appointed under the *Environment Act* to carry out certain duties under that Act.¹⁸ Before the Director can grant the developer development consent, the developer must prepare an environmental impact assessment (‘EIA’), unless the Director decides an EIA is not required.¹⁹

Under the *Environment Act*, people whose interests are likely to be affected by the logging have the right to participate in the EIA process.²⁰ This is important because logging has the potential to severely impact communities that depend on forest resources for food, medicine, clean water and building materials, as well as for culture and custom.

There are many examples of logging companies and their contractors failing to comply with the relevant legislative requirements. In particular, much logging in Solomon Islands is illegal because the companies have failed to do EIAs and obtain development consents. In addition, deficiencies in the *FRTU Act* and its administration (which are beyond the scope of this article) have meant that many companies have been granted the right to log on customary land by persons who do not lawfully represent all of the people who can grant that right.

Enforcement of the laws regulating forestry by the government is relatively limited. Consequently, landowners who want to ensure that logging companies operate legally must often seek to enforce the law themselves, either through the court system or by other means. The Kolombangara Island Biodiversity and Conservation Association (‘KIBCA’) is an association of landowners that is attempting to prevent illegal logging on Kolombangara Island, including through legal challenges in the High Court.

III KIBCA v Success Company Limited

KIBCA represents customary landowners on Kolombangara Island, and was established in 2008 primarily to protect and sustainably manage the cloud forest above 400 metres ASL. One of its objectives is to protect the unique ecological values of the forest for the benefit of current and future generations of Kolombangarans, as well as for the wider community.

¹⁶ Ministry of Forests, Environment and Conservation, *The Revised Solomon Islands Code of Logging Practice* (Ministry of Forests, Environment and Conservation, 2002) 3.

¹⁷ *Environment Act* s 19.

¹⁸ *Ibid* s 5.

¹⁹ *Ibid* s 17.

²⁰ *Ibid* ss 22, 24.

Kolombangara Island, in the New Georgia Island Group of the Western Province of Solomon Islands, is a volcanic island rich in rare, endangered and endemic flora and fauna. Several birds, mammals, reptiles and amphibians known to occur on Kolombangara are listed as threatened, endangered or vulnerable on The IUCN Red List of Threatened Species. Like most other islands in Solomon Islands, the land on Kolombangara is largely owned by indigenous locals, and includes many culturally significant *tambu* sites and local villages.

The island is round, with steep slopes leading up to peaks just over 1700 metres ASL and down to the craters at its centre. At altitudes above 400 metres ASL, Kolombangara is covered by what is known as ‘cloud forest’. KIBCA has entered into a Community Conservation Agreement with the Solomon Islands Community Conservation Partnership to try to protect this rare type of forest from illegal logging.

Despite the Community Conservation Agreement being in place, in mid-2009 Success Company Limited (‘Success’) obtained a logging licence over an area known as ‘Lot 1’ on Kolombangara Island, including parts of the cloud forest above 400 metres ASL. When Success commenced logging at Lot 1, KIBCA became aware that Success had not conducted an EIA and had not obtained any development consent under the *Environment Act*. KIBCA also became aware that no approval had been granted by the Commissioner for Forests for logging above 400 metres ASL, as required by the *FRTU Act*.

In July 2010, KIBCA filed an application in the High Court of Solomon Islands seeking various orders, including an order that Success and its contractor (Xiang Lin (SI) Timber Ltd) be restrained from logging on Lot 1, and a declaration that KIBCA did not require the fiat of the Attorney-General to bring proceedings seeking to enforce the *FRTU Act* and the *Environment Act*.

In August 2010, Justice Chetwynd of the High Court granted an interlocutory injunction restraining Success and Xiang Lin from logging on Lot 1 and on land above 400 metres ASL on Kolombangara.²¹ In granting this order, his Honour made a finding that has significant implications for the development of public interest environmental law in Solomon Islands.

Importantly, his Honour rejected the respondents’ submission that KIBCA lacked standing to bring the proceedings as it was not the owner of the land. In reaching this decision, Chetwynd J noted that KIBCA is a landowner association that aims to protect and sustainably manage land on Kolombangara Island. His Honour stated:

5. The preliminary question then is simply this, does an organisation whose avowed aims include the promotion of conservation have sufficient standing to apply to this court for orders concerning alleged breaches of codes of practice designed to protect the environment and alleged

²¹ *Kolombangara Island Bio-Diversity Conservation Trust Board (Incorporated) v Success Company Ltd* [2010] SBHC 54; HCSI-CC 282 of 2010 (27 August 2010).

breaches of an act which is designed to do the same thing? Not every organisation with similar aims and objects as those of the Claimant would necessarily have a sufficient interest to be able to establish *locus standi*. In the present case the Claimant is an organisation which was specifically set up to promote conservation on the island of Kolombangara. I have no hesitation in finding the Claimant has sufficient interest, can establish it has *locus standi*, to make the application now before the court. The First and Second Defendants' submissions relating to the ownership of land, or rather the Claimants lack of legal interest in the land, are largely irrelevant.²²

It is also noteworthy that Chetwynd J accepted KIBCA's submissions that its failure to provide an undertaking as to damages was not fatal to its case, and that an undertaking was not 'necessary or appropriate' in this case.²³

Justice Chetwynd revisited the question of standing in his judgment on the substantive proceedings, which was delivered in November 2010.²⁴ In that judgment, his Honour noted that, under the *Environment Act*, any person 'whose interests are likely to be affected' by the logging has a right to be consulted on the EIA prepared under the Act. Therefore, such a person also has a right to come to court to prevent breaches of the Act. His Honour stated:

6. Notwithstanding the criminal sanctions, given the provisions of section 22 in regard to publication (of any public environmental report required by the Act) it is right that anyone 'whose interests are likely to be affected' by the prescribed development should be able to seek the court's assistance in stopping it if it is in breach of the Act. That is the basis on which the injunctive order was granted to the Claimants in respect of the First and Second Defendants. Not to prevent breaches of the Act by injunction would deprive those whose interests are likely to be affected of their right of public scrutiny and appeal as set out in sections 22, 24 and 32 of the Act.²⁵

Justice Chetwynd's finding is significant, and marks the birth of a new basis for standing in public interest environmental litigation in Solomon Islands.

There are no open standing provisions in environmental legislation in Solomon Islands. Therefore, unless KIBCA could demonstrate that it had standing it would need the fiat of the Attorney-General, as the guardian of the public interest, to bring proceedings for the enforcement of public rights.²⁶ KIBCA's lawyers (the Public Solicitor's Office through its Landowners' Advocacy and Legal Support Unit) sought the Attorney-General's consent to

²² Ibid [5].

²³ Ibid [11].

²⁴ *Kolombangara Island Bio-diversity Conservation Trust Board (Incorporated) v Success Company Ltd* [2010] SBHC 82; HCSI-CC 282 of 2010 (26 November 2010).

²⁵ Ibid [6].

²⁶ See *Attorney General v Super Entertainment Centre Ltd* [1996] SBHC 24; HC-CC 031 of 1996 (7 May 1996), where the Attorney-General exercised the fiat as the defender of public rights and alleged breaches of the provisions of the *Gaming and Lotteries Act* (Solomon Islands) and Regulations by the defendant.

commence the proceedings; however, no consent was given. As such, Justice Chetwynd's declaration that no consent was needed in this case was of paramount importance because it allowed KIBCA to seek enforcement of environmental laws through the court in its own name without the consent of the Attorney-General.

The court's order restraining Success and its contractor Xiang Lin from logging above 400 metres ASL without the approval of the Commissioner for Forests was also the first of its kind in Solomon Islands, as this issue had not been raised in court before. Significantly, this order confirmed that the *Solomon Islands Code of Logging Practice*, which Success had to comply with pursuant to its logging licence, is a legally enforceable document. The court's decision paves the way for future enforcement proceedings where the *Code* is breached, for example, where loggers destroy *tambu* sites without the consent of the landowners or do not respect mandatory buffer zones around waterways.

Finally, the court made an order restraining Success and Xiang Lin from logging in Lot 1 without undertaking an EIA and without obtaining any development consent from the Director. Therefore, the court confirmed that logging carried out without such consent is unlawful, unless the Director has granted the developer an exemption from this requirement. The court also confirmed that logging that is unlawful on this basis can be subject to legal challenge by people whose interests are likely to be affected by the logging.

Chetwynd J's findings in the first KIBCA case, as outlined above, have contributed to the development of public interest environmental law in Solomon Islands. The decision in this case is likely to be relied on by other landowners seeking to enforce environmental laws in circumstances where the government has failed to do so.

IV After the First KIBCA Case

Success has now obtained both an approval to log above 400 metres ASL and development consent for logging on some areas of Kolombangara Island.

In August 2010, one of the directors of Success, Heinz Horst Bodo Dettke, was elected as the Member of Parliament for North West Guadalcanal. Later that month he was also appointed as the Minister for Forests.²⁷

In September 2010, the Commissioner for Forests granted approval for logging on land above 400 metres ASL (although, somewhat surprisingly, Success did not refer to this fact during the first KIBCA case). In March 2011, the Director granted Success a development consent for logging on certain land on Kolombangara Island. Before the development consent was granted, Success commissioned a consultant to do an EIA, as required by the *Environment Act*.

²⁷ National Parliament of Solomon Islands, Hon Heinz Horst Bodo Dettke (2007) <<http://www.parliament.gov.sb/index.php?q=node/503>>.

In July 2011, KIBCA filed an appeal against the Director's decision to grant the development consent to the Environment Advisory Committee ('EAC') under s 32 of the *Environment Act*. This section gives any person who disagrees with the Director's decision the right to appeal to the EAC. The EAC's decision can then be appealed to the Minister for Environment.²⁸

The EAC is a committee that is required to be established under the *Environment Act*.²⁹ KIBCA's appeal has not yet been heard by the Committee, despite the fact that the appeal was filed more than a year ago.

Under the *Solomon Islands Civil Procedure Rules*, a judicial review claim must be made to the High Court.³⁰ A claim seeking an order quashing a decision must be filed within six months of the relevant decision being made, except with the leave of the court.³¹ In November 2011, KIBCA applied for leave to file a judicial review claim, arguing that KIBCA had not been told that the approvals had been granted until several months after the relevant decisions were made, and only after Solomon Islands' Prime Minister publicly announced government support for the conservation zone above 400 metres ASL.³² The High Court granted KIBCA leave, and a judicial review claim was filed.³³

In the judicial review claim, KIBCA is seeking orders quashing both the Commissioner's decision to grant the 400-metre approval and the Director's decision to grant the development consent.

In relation to the Commissioner's decision to approve logging above 400 metres ASL, KIBCA contends in its claim that the Commissioner failed to consult with it before granting the consent, in contravention of the relevant Regulations and the rules of procedural fairness. KIBCA also contends that, on a proper reading of the Regulations, the Commissioner could only grant approval for logging above 400 metres if the land was flat or a plateau. KIBCA alleges that the Commissioner had no evidence regarding the slope of the land when he made his decision; therefore he could not have complied with that requirement.

In relation to the development consent, KIBCA contends in its claim that the Director failed to take into account all of the matters he was required to take into account under the *Environment Act*. In particular, KIBCA contends that the EIA report commissioned by Success was inadequate. The report was based on a field assessment conducted over just one day, and KIBCA alleges in the claim that it does not meet the requirements in the *Environment Act* and Regulations.

In the claim, KIBCA contends that the Director failed to properly consult with it before granting the development consent, again in contravention of the rules of procedural fairness, as well as the provisions of the *Environment Act*.

²⁸ *Environment Act* s 32(7).

²⁹ *Ibid* s 13.

³⁰ *Solomon Islands Courts (Civil Procedure) Rules 2007* (Solomon Islands) r 15.3.2.

³¹ *Ibid* rr 15.3.8, 15.3.9.

³² 'Prime Minister Backs Kolombangara Conservation', *Solomon Star* (Honiara), 23 June 2011.

³³ *Kolombangara Island Biodiversity and Conservation Association v Attorney General and Success Company Ltd* Civil Case 428/2011 (High Court, Solomon Islands).

Further, it alleges that when making his decision, the Director took into account an irrelevant consideration, namely the fact that the Commissioner had previously granted approval for logging above 400 metres ASL.

In August 2012, the Attorney-General (representing the Commissioner and the Director) filed a defence in which it denies KIBCA's claim. At the time of writing, Success had not filed a defence to the claim filed by KIBCA.

V Concluding Comments

For many years, landowner groups in Solomon Islands have fought against illegal logging carried out by foreign-owned companies seeking to make a quick profit exploiting customarily owned forests. Traditionally, these challenges have been brought under the *FRTU Act* on the basis that the logging company failed to properly negotiate with the true landowners. The KIBCA cases stand apart from most other logging cases in that the association is challenging illegal logging from the perspective of landowners seeking to protect the environment.

The first KIBCA case was brought on the basis that the company failed to obtain the environmental approvals that are required to conduct logging. The decision in that case is significant, not only because it recognises the rights of landowner associations to approach the courts to enforce environmental laws, but also because it highlights that the EIA process is mandatory and cannot be ignored by logging companies.

In the second KIBCA case, currently afoot, the High Court has been asked to consider the legality of the approvals that have been granted to Success by the Director and the Commissioner. Regardless of the outcome of the case, the High Court's decision could provide some guidance to both the government and landowners regarding the procedures decision-makers must follow when granting approvals for logging or other developments, such as mining projects.

Logging in Solomon Islands is a 'sunset industry'.³⁴ As forest resources are depleted, a new phase of development is fast emerging in Solomon Islands, led by foreign-owned mining companies. To avoid an environmental and social catastrophe, it is crucial that the mining industry be regulated more stringently than logging has been in the past. In this context, the *Environment Act* will be critically important, as it is through the EIA process that landowners and other people affected by large-scale developments have a legally enforceable right to be heard.

The government of Solomon Islands has a poor track record in ensuring the proper regulation of development in Solomon Islands. Landowners who want to prevent illegal and environmentally-damaging developments often have to take steps themselves to enforce the law. It is hoped that the KIBCA cases will pave the way for others to use the law to protect ecologically and culturally significant places, just like Kolombangara's forest in the clouds.

³⁴ URS, above n 7.