PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

WS NO 202 OF 2010

EDDIE TARSIE FOR HIMSELF AND IN HIS CAPACITY AS WARD COUNCILLOR OF WARD 3, SAIDOR LOCAL-LEVEL GOVERNMENT
First Plaintiff

FARINA SIGA, FOR HIMSELF AND IN HIS CAPACITY AS WARD SECRETARY OF WARD 3, SAIDOR LOCAL-LEVEL GOVERNMENT
Second Plaintiff

PETER SEL
Third Plaintiff

POMMERN INCORPORATED LAND GROUP NO 12591
Fourth Plaintiff

SAMA MELAMBO FOR HIMSELF AND AS CHAIRMAN OF POMMERN INCORPORATED LAND GROUP NO 12591
Fifth Plaintiff

V

RAMU NICO MANAGEMENT (MCC) LIMITED
First Defendant

MINERAL RESOURCES AUTHORITY
Second Defendant

DR WARI IAMO IN HIS CAPACITY AS DIRECTOR OF ENVIRONMENT
Third Defendant

DEPARTMENT OF ENVIRONMENT AND CONSERVATION
Fourth Defendant

THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Fifth Defendant

Madang: Cannings J
2010: 12, 19 March

INJUNCTIONS – interim injunctions – orders sought to restrain mining company from constructing tailings placement system and doing other things pending determination of substantive proceedings.

Individuals and land groups who claimed to have an interest in customary land over which a special mining lease has been granted commenced proceedings by writ of summons seeking permanent injunctions to restrain the holder of the mining lease (the first defendant) from committing various alleged nuisances arising from mining activities. Shortly after filing and serving the writ, the plaintiffs applied by motion for orders that: (i) the first defendant be stopped from constructing its planned deep sea tailings placement system pending determination of the substantive proceedings, (ii) the first defendant pay for an independent environmental assessment of the deep sea tailings placement system and (iii) all defendants provide the plaintiffs with all environmental plans and approvals and related documents concerning the project.

***Held*:**

(1) The second and third type of orders sought by the plaintiffs are unnecessary or inappropriate and neither the balance of convenience nor the interests of justice require that they be made.

(2) However, as to the first order sought – stopping work on the deep sea tailings placement system – different considerations arise, and the court was satisfied that:

(a) there are serious questions to be tried and the plaintiffs have an arguable case;

(b) an undertaking as to damages has been given;

(c) damages would not be an adequate remedy if an injunction is not granted;

(d) the balance of convenience favours the granting of an injunction;

(e) the interests of justice require that there be an injunction.

(3) All five considerations favour the granting of an interim injunction, stopping work on the deep sea tailings placement system, though not in terms as broad as sought by the plaintiffs.

(4) The Court made an order requiring the first defendant to cease all preparatory or construction work on the deep sea tailings placement system that involves directly or indirectly damages or disturbance to the offshore environment pending determination of the substantive proceedings.

(5) All other relief sought by the plaintiffs was refused and the parties were ordered to pay their own costs.

Cases cited

The following cases are cited in the judgment:

Chief Collector of Taxes v Bougainville Copper Ltd (2007) SC853
Ewasse Landowners Association Inc v Hargy Oil Palms Ltd (2005) N2878
Mainland Holdings Ltd v Stobbs (2003) N2522

Mark Ekepa v William Gaupe (2004) N2694

Counsel

T Nonggorr, for the plaintiffs
J Kumura, for the first defendant
*D Aikung-Hombhanje,*for the second defendant

19 March, 2010

1. **CANNINGS J:** The plaintiffs say that they are customary landowners or land groups in the Rai Coast area of Madang Province who are concerned about the environmental impact of the Ramu Nickel Project. In particular they are concerned about the proposed method of tailings disposal, known as a deep sea tailings placement system. On 4 March 2010, they commenced proceedings in the National Court at Madang, by a writ of summons and statement of claim, in which they are seeking permanent injunctions to restrain the holder of the mining lease (the first defendant, Ramu Nico Management (MCC) Ltd – "MCC") from committing various alleged nuisances arising from its mining activities. The plaintiffs claim that if the deep sea tailings placement system goes ahead, enormous damage will be done to the marine environment in and around Astrolabe Bay, which will affect their livelihood. They say that even though MCC has an environment permit which purports to authorise the proposed deep sea tailings placement system, that permit was granted under the repealed *Environmental Planning Act*, and does not as a matter of law authorise the torts of private and public nuisance that will be committed if the deep sea tailings placement system is allowed to proceed.

2. On the same day that they filed the writ, the plaintiffs filed a notice of motion under which they seek a number of orders, including interim injunctions. It is that motion that is now before the Court.

WHAT ORDERS ARE THE PLAINTIFFS SEEKING?

3. The plaintiffs are seeking three types of orders:

- First, they want the Court to stop MCC from starting work on the deep sea tailings placement system. In particular they want an order to prevent what has been called in various media reports as "coral blasting", pending determination of the substantive proceedings.

- Secondly, they want the Court to order MCC to fund an independent environmental impact assessment of the deep sea tailings placement system.

- Thirdly, they want all defendants ordered to provide them with all environmental plans and approvals and related documents concerning the Ramu Nickel Project.

4. The first type of order is sought under paragraphs 2 to 5 of the notice of motion, the second type under paragraph 6 and the third type under paragraph 7. These paragraphs state:

2. That pursuant to Order 14 Rule 10 of the *National Court Rules* and Section 155(4) of the *Constitution* the defendants and/or their associates and employees are restrained from any and all coral blasting and/or destruction whatsoever of the water, sea bed or fauna pending determination of the substantive hearing.

3. That pursuant to Order 14 Rule 10 of the *National Court Rules* and Section 155(4) of the *Constitution*, that the defendants and/or their associates and employees be restrained from any preparatory work including construction for the disposal of deep sea tailings or waste into the sea waters at Basamuk, Astrolabe Bay and/or Basamuk Bay pending determination of the substantive hearing.

4. That pursuant to Order 14 Rule 10 of the *National Court Rules* and Section 155(4) of the *Constitution* that the First Defendants and or their Associates or Employees be restrained from putting any waste whatsoever into the sea waters at Basamuk, Basamuk Bay or Astrolabe Bay pending the determination of the substantive proceedings.

5. That pursuant to Order 14 Rule 10 and Order 12 Rule 1 of the *National Court Rules* and Section 155(4) of the *Constitution* that the Defendants and/or their associates and employees be restrained from relying on the Ramu Nickel Environmental Plan 1999 Approval or any subsequent additional environmental approvals pertaining to the disposal of waste and tailings into the Basamuk and Astrolabe Bays pending the determination of the substantive proceedings.

6. That pursuant to Order 12 Rule 1 of the *National Court Rules* and Section 155(4) of the *Constitution* the First Defendant fund an independent environmental impact assessment of the proposed dumping of waste and tailings into the Basamuk and Astrolabe Bays in accordance with the terms of the *Environmental Act* 2000 and an examination of alternative methods of tailings and waste disposal -

> **(a) the entity that carries out the environmental impact assessment must be agreed to by all parties to these proceedings, and**
>
> **(b) the entity shall be at liberty to discuss its progress on the assessment with the lawyers for the parties in these proceedings, and**
>
> **(c) that once the assessment is completed, copies shall be provided to all the lawyers of the parties to these proceedings.**

7. That pursuant Order 12 Rule 1 of the *National Court Rules* and Section 155(4) of the *Constitution* that the defendants shall provide to the Plaintiffs' Lawyers within 7 days copies of the following documents:

> **(a) All environmental plans, all environmental approvals environmental impact statements and reports concerning the Ramu Nickel Project and Special Mining Lease;**

(b) Memorandum of Agreement (currently under review);

(c) Mine Development Contract;

(d) Any Compensation Agreement (such documents mentioned at the Review on Monday, 1st September 2008); and

(e) Any other Contract/Agreement/Determination relevant.

THE SECOND AND THIRD TYPES OF ORDERS SOUGHT BY THE PLAINTIFFS

5. I will deal with these orders immediately, as they are quite different to the first type of orders sought.

Second type: ordering MCC to fund an independent environmental impact assessment

6. An order to a mining company to fund an environmental assessment would involve expenditure of a considerable amount of money, perhaps in the millions of Kina, and is to be regarded as a form of substantive relief. It is not an order that can properly be regarded as an interim order – an order required to preserve the status quo pending a trial. It is therefore not appropriate to grant such an order via a notice of motion. It has no obvious connection to the causes of action being prosecuted under the statement of claim. It is therefore unnecessary and inappropriate for the Court to make this type of order and I refuse to do so.

Third type: ordering MCC and other defendants to provide plaintiffs with all environmental plans and approvals

7. I agree with MCC's counsel, Mr Kumura, that the pre-trial process of discovery is a more appropriate avenue by which the plaintiffs should request production of these documents. The defendants may be able to claim privilege over the documents or be able to argue that the plaintiffs are not entitled to have access to them. There was insufficient argument on the question of whether this type of order should be made, to warrant the Court making the sort of blanket order that the plaintiffs are seeking. There are also other means by which the plaintiffs may be able to get access to the documents, e.g. by seeking orders for enforcement of their constitutional right to freedom of information under Sections 51 and 57 of the *Constitution*. As with the second type of order, it is unnecessary and inappropriate for the Court to make the third type of order and I refuse to do so.

THE FIRST TYPE OF ORDERS SOUGHT BY THE PLAINTIFFS

8. Under paragraphs 2 to 5 of the notice of motion the plaintiffs want the Court to stop MCC from starting work on the deep sea tailings placement system. In particular they want an order to prevent what has been called in various media reports "coral blasting", pending determination of the substantive proceedings. This type of order is called an interim injunction and it is proper to seek it under a notice of motion. The principles that the National Court applies when a party comes before it with a motion seeking an interim

injunction or any sort of interim order designed to preserve the status quo pending a trial were recently confirmed by the Supreme Court in *Chief Collector of Taxes v Bougainville Copper Ltd* (2007) SC853. It is incumbent on a plaintiff to show that:

(a) there are serious questions to be tried and that an arguable case exists;

(b) an undertaking as to damages has been given;

(c) damages would not be an adequate remedy if the interim order is not granted;

(d) the balance of convenience favours the granting of the interim order; and

(e) the interests of justice require that the interim order be made.

9. The principles can conveniently be applied by posing five questions. They are drafted so that a 'yes' answer will be a factor weighing in favour of granting an interim order and a 'no' answer will work against making such an order.

(a) Are there serious questions to be tried and do the plaintiffs have an arguable case?

10. This requires the Court to make an assessment of the prospects of success of the plaintiffs' substantive action by looking at the originating process (in this case, the writ of summons) and the evidence that has been adduced to date. As I pointed out in *Ewasse Landowners Association Inc v Hargy Oil Palms Ltd* (2005) N2878 the issue is not simply whether the plaintiffs have raised serious allegations, but whether the plaintiffs appear to have a reasonable prospect of succeeding in the substantive case. This requires the Court to identify with some degree of precision the causes of action that the plaintiffs are relying on and then to consider the evidence that appears to be available in support of the elements of those causes of action.

11. Mrs Nonggorr, for the plaintiffs, submitted that the causes of action are clearly pleaded in the statement of claim: private nuisance, public nuisance and breach of the *Environment Act* 2000. The first two are common law based and the third will entail the plaintiffs proving that MCC's planned deep sea tailings placement system does not have statutory approval. Both Mr Kumura, for MCC, and Ms Aikung-Hombhanje, for the Mineral Resources Authority, contended that the statement of claim was vague and abstruse and that the prospects of success were bleak. They referred to an affidavit by Dr James Wang, MCC's Chief Technical Director, who deposes that MCC has complied with all the requirements of the *Environment Act* 2000 and in particular has an environment permit which specifically authorises its deep sea tailings placement system.

12. I consider that the elements of private nuisance and public nuisance are adequately pleaded and there are serious issues to be tried, particularly concerning whether the environmental approval for the deep sea tailings placement system is lawful. The statement of claim alleges that though the deep sea tailings placement system is ostensibly sanctioned by the Ramu Nickel Environmental Plan 1999, and that plan is apparently "saved" by Section 136 (*approvals, permits, licences, etc., to continue in force*) of the *Environment Act* 2000, the environmental harm caused by the activity in

question – the disposal of waste into Basamuk and Astrolabe Bays via the deep sea tailings placement system – is not saved, as immediately before the coming into operation of the *Environment Act* 2000, MCC was not lawfully carrying on that activity pursuant to an approval under the Acts that were repealed by the *Environment Act* 2000. This critical part of the statement of claim (paragraphs 22 and 23) appears to be based on Section 136(3) of the *Environment Act* 2000, which states:

> *Where, immediately before the coming into operation of this Act—*
>
> > *(a) a person was lawfully carrying on an activity pursuant to a permit, licence or approval under the repealed Acts which is deemed to be a permit by virtue of Subsection (1); and*
> >
> > *(b) the activity would constitute an offence under this Act,*
>
> *the person is entitled, subject to this section and to the permit, to carry on the activity and the carrying on of the activity does not constitute an offence.*

13. The statement of claim appears to be asserting that paragraph (b) applies (as operation of the deep sea tailings placement system would constitute an offence under the Act), but paragraph (a) does not apply. Therefore the operation of the deep sea tailings placement system is not 'saved'; it is contrary to the Act and the defendants ought to be permanently injuncted from doing anything to allow its construction or operation.

14. I am satisfied that important questions of interpretation of the *Environment Act* 2000 are raised through the statement of claim. The prospects of the plaintiffs succeeding cannot be dismissed at this stage as bleak. An arguable case exists. Question (a) is answered yes.

(b) Has an undertaking as to damages been given?

15. Undertakings to pay damages for any loss arising from interim orders made pursuant to the notice of motion filed on 4 March 2010 have been filed by the third, fourth and fifth plaintiffs, but not by the first and second plaintiffs.

16. Mr Kumura suggested that these undertakings should not be taken seriously as there is no evidence that the plaintiffs would be able to meet their undertakings in the event that they lose the case. I do not think that is a fair or proper approach to take. If the court were to insist on plaintiffs being adjudged financially capable of meeting all undertakings that are given, before allowing them to argue a case for an interim injunction, there is a danger that the National Court would be closing its doors to many citizens of Papua New Guinea. The court should largely be focussed on the genuineness of a plaintiff's motives; and insisting on an undertaking as to damages is a sufficient way of determining that.

17. I am satisfied that question (b) is answered yes in relation to three of the plaintiffs; so this criteria is substantially complied with.

(c) If an interim order is not granted, would damages be an inadequate remedy?

18. What will happen if the interim orders are not made, but it turns out the plaintiffs

succeed at the trial and they prove that MCC has committed a private or public nuisance or that the deep sea tailings placement system has been constructed or operated in breach of the *Environment Act* 2000? What if, by the time that the trial is completed and the orders made, the deep sea tailings placement system is operational? Would damages be an inadequate remedy?

19. The plaintiffs argue that the deep sea tailings placement system will cause enormous and irreparable damage to the marine environment. They have already filed a number of affidavits that claim that under the Ramu Nickel Environmental Plan 1999 MCC will dump 5 million tonnes of hot tailings into Astrolabe Bay each year for the life of the mine for 20 years.

20. They wish to rely on a report by Dr Phil Shearman, Director of the Remote Sensing Centre, Department of Biology, University of Papua New Guinea, commissioned by the Evangelical Lutheran Church of Papua New Guinea, which concluded that the environmental case for the discharge of mine tailings via a submarine pipe into Astrolabe Bay is fundamentally flawed and that the proposed method of tailings disposal will have a significant biological impact. In these circumstances, damages would be an inadequate remedy. Question (c) is answered yes.

(d) Does the balance of convenience favour the granting of interim orders?

21. As I said in *Ewasse Landowners Association Inc v Hargy Oil Palms Ltd* (2005) N2878 this requires the court to ask: what is the best thing to do on an interim basis taking into account the conflicting interests? What will happen if an interim order is not granted? What will happen if an interim order is granted? Who will suffer the greatest inconvenience or prejudice?

22. Mr Kumura submits that if an interim order is not granted, MCC will proceed with preparatory work for the deep sea tailings placement system. This will involve 'popping' of dead coral reef and sinking of pipes, work which has been planned to start in the middle of this month. Referring to Dr Wang's affidavit, he points out that the popping operation – which has been incorrectly called 'coral blasting' – will be carried out by a PNG licensed contractor in an area 50 metres long and 5 metres wide with two poppings daily, each popping consuming explosives of less than 10 kilograms. If, on the other hand, an interim order is made, Mr Kumura suggests that MCC, and many individuals and companies relying for their livelihood on the smooth development of the project, will suffer great prejudice, and the whole Ramu Nickel Project may come to a halt.

23. I have great difficulty with the last part of Mr Kumura's submission. The interim orders sought by the plaintiffs – though cast in quite broad terms – would not involve shutting down the whole project. It is essentially the construction of the deep sea tailings placement system that the interim orders being sought by the plaintiffs are intended to prevent. The plaintiffs are not trying to stop the project. What they are claiming is that MCC and the other defendants need to come up with a more environmentally responsible way of disposing of the mine wastes.

24. I don't think it can reasonably be disputed that MCC and other individuals will be prejudiced – certainly they will be inconvenienced – if interim orders are made; so to that extent I uphold Mr Kumura's submissions. On the other hand, I note that the plaintiffs

have already filed a number of affidavits from various environmental scientists who are saying quite clearly that the proposed deep sea tailings placement system will have substantial negative effects on the marine environment.

25. Provided that the plaintiffs' statement of claim can be prosecuted within a reasonable period – and I am confident that there is a good chance that that will be the case – I regard the balance of convenience being in favour of preserving the status quo, i.e. granting an interim order.

Question (d) is answered yes.

(e) Do the interests of justice require that interim orders be made?

26. This criterion gives the Court the opportunity to consider discretionary matters not previously considered. Again it is important to weigh the conflicting interests at play.

27. On the one hand, MCC and the other defendants assert that MCC has obtained the necessary statutory approvals to construct and operate a deep sea tailings placement system. The mine has been planned and is being developed on the basis of those statutory approvals. To delay this critical part of the mine's development is costly and unnecessary.

28. On the other hand the plaintiffs are concerned about the environmental effects of the deep sea tailings placement system. On the face of it, their concerns seem well founded. They also claim not to have been consulted, a claim which also appears on the face of it to be genuine. They claim that an environmental report commissioned by the National Government from the Scottish Association of Marine Science has been prepared but has not yet been published, so it would be dangerous to allow the deep sea tailings placement system to be constructed without knowing what this recent report concludes.

29. In these circumstances I consider that a safety first approach is warranted. The interests of justice would not be served by allowing construction of the deep sea tailings placement system to continue while serious and apparently genuine concerns and questions being raised by customary landowners are unresolved.

Question (e) is answered yes.

Conclusion

30. All five considerations favour the granting of an interim injunction, stopping work on the deep sea tailings placement system, though not in terms as broad as sought by the plaintiffs. I will make an order requiring the first defendant to cease all preparatory or construction work on the deep sea tailings placement system that involves directly or indirectly damage or disturbance to the offshore environment pending determination of the substantive proceedings. These are interim orders, which by their nature may be varied or discharged in the light of changed circumstances or new information being brought to the Court's attention (*Mainland Holdings Ltd v Stobbs* (2003) N2522; *Mark Ekepa v William Gaupe* (2004) N2694).

ORDERS

(1) The defendants and their associates, agents and employees and persons for whom they are jointly or severally responsible shall cease all preparatory or construction work on the Ramu Nickel Mine deep sea tailings placement system that involves directly or indirectly damage or disturbance to the offshore environment – including, without limiting the generality of the foregoing, all coral blasting or popping of dead or live coral and laying of pipes – and shall not carry out directly or indirectly any such work, pending determination of the substantive proceedings.

(2) All other relief sought in the notice of motion filed by the plaintiffs on 4 March 2010 is refused.

(3) The parties shall bear their own costs.

(4) Time for entry of this order is abridged to the date of settlement by the Registrar which shall take place forthwith.

Rulings accordingly.

Nonggorr William Lawyers: *Lawyers for the Plaintiffs*
Posman Kua Aisi Lawyers: *Lawyer for the First Defendant*
Dianne Aikung-Hombhanje: *Lawyer for the Second Defendant*