

**PAPUA NEW GUINEA
IN THE NATIONAL COURT OF JUSTICE**

WS No. 1115 OF 1998

Between:

**IBI ENEI ON HIS BEHALF AND ON BEHALF OF OGA CLAN OF LOUPON
ISLAND, ABAU**
Plaintiff

And:

RIMBUNAN HIJAU LIMITED
Defendant

Waigani: Gavara-Nanu J.
2007: 10 & 11 December
2008: 24 & 30 October
2009: 16 April
2011: 28 September

DAMAGES – Trespassing – Continuous trespassing - Customary land - Logging company occupying customary land illegally for eight years – Land used as a log pond and a port to export logs– Access road into the customary land – Use of heavy machinery such as trucks and a giant crane – Use of tug boats and pontoons to carry logs to load on ships – Types of damages discussed – Damages awarded based on the total benefits received by the logging company from the illegal use of the land – Logging company acting in breach of the Land Act, 1996.

DAMAGES – Local Land Court declaring a wrong clan as the owner of the land - Logging company paying rental fees for the land to the wrong clan – Memorandum of Understanding signed between the logging company and the clan – Logging company being fully aware of the dispute over the ownership of the land – Reckless disregard of the interests and rights of the true landowner by the defendant- Local Land Court decision quashed on appeal – Memorandum of Understanding having no legal effect.

EVIDENCE – Admissions made by the defendant in the pleadings binding – Newspaper cuttings accepted as credible evidence – Damages assessed by environmental science groups engaged by the plaintiff – Rate and formula used by the environmental science groups to assess damages adopted as fair and reasonable.

Cases cited:

Papua New Guinea Cases

Central Province Forest Industries Pty Limited v. Rainbow Holdings Pty Limited N321
Commissioner General of Internal Revenue Commission v. Julian Paul Leach (1988)

Eva Aglum & Ors v. MVIL (1988) N678
Helen Jack v. The Independent State of Papua New Guinea [1992] PNGLR 391
Inabari v. Sapat and Independent State of Papua New Guinea [1991] PNGLR 427
Kolaip Palapi v. Independent State of Papua New Guinea (2001) N2274
Madaha Resena & Ors v. The Independent State of Papua New Guinea [1990] PNGLR 22
Mark Hosea Sinai Customary Legal Representative of Buekau clan v. Kei Buseu Kampani Pty Ltd & Ors – N935
Mauga Logging Company Pty Ltd v. South Pacific Oil Palm Development Pty Ltd (No.1) [1977] PNGLR 80
Mumukrui Kopil v. John Wakon [1992] N2065
Pike Dambe v. Augustine Peri & The Independent State of Papua New Guinea [1993] PNGLR 4
Rainbow Holdings Pty Ltd v. Central Province Forest Industries Pty Ltd [1985] PNGLR 34
Reference by the Public Prosecutor under s.27(2) of the Organic Law on Duties and Responsibilities of Leadership and In the Matter of General Sigulogo [1988-89] PNGLR 384
Robert Brown v. MVIL [1980] PNGLR 409
Roselyn Cecil Kusa v. MVIL (2003) N2328
Susanna Undapmaina v. Talair Pty Ltd [1981] PNGLR 559
Toglai Apa & Ors v. The Independent State of Papua New Guinea [1995] PNGLR 43
Trevor Yaskin v. Wallya Abilio (2006) N3108
United Timber (PNG) Ltd v. Mussau Timber Development Pty Ltd N645

Other cases cited

Storm Bruks Aktie Bolag v. Hutchison [1905] AC 515

Counsel:

L. Yandaken, for the plaintiff

B. Frizzel, for the defendant

28 September, 2011

1. **GAVARA-NANU J:** The plaintiff claims damages against the defendant for trespass, continuous trespass and illegal use of his customary land known as Mogubo foreshore, including a site known as Magubo log pond ('the land'), which is situated at Loupom Island in the Abau District of the Central Province.
2. The land is recorded in the Department of Lands and Physical Planning as Portion 249C in Survey Plans Cat Nos. 53/136 and 53/137.
3. The plaintiff claims that in or around 1988, the defendant while engaged in logging activities, entered and occupied the land without seeking his prior approval or agreement and used the land to store logs for loading onto the log ships which were berthed not far from the shore for export overseas. The plaintiff says the defendant continuously used and occupied the land while carrying out logging operations in the project area until 1996

when it ceased logging operations.

4. The plaintiff claims that he repeatedly asked the defendant to pay and compensate him for the use of his land or to vacate it, but the defendant refused those requests and continued to use and occupy the land illegally to carry out its commercial logging activities without paying him any money at all.

5. The plaintiff says the actions of the defendant in entering the land without his approval, consent or agreement amounted to trespass, continuous trespass and illegal use of the land which he says was also in breach of the *Land Act*, 1996.

6. As a result of such illegal entry, use and occupation of his land by the defendant, the plaintiff says he suffered injury as a result of the destruction caused to the land, including damage done to the foreshore area, especially the seabed, marine and other aquatic life by barges, tug boats and pontoons carrying logs from the log pond to the log ships berthed not far from the shore.

7. The plaintiff claims the defendant exported round logs of hardwood in excess of 252,000 cubic meters during the period it used and occupied the land. The actual volume of logs exported is not pleaded but the 'Shipments Checks' which are records of logs exported annexed to the plaintiff's affidavit show that about 297,241.451 volumes of hardwood logs were exported in 1991, 1992, 1993 and 1994. There are no records of volumes of round logs exported in 1989, 1990, 1995 and 1996.

8. The plaintiff claims general, exemplary and special damages and claims interest and costs.

9. In its amended Defence filed on 11 May, 2006, in paragraph 4 (b), (c) and (e), the defendant admits that it did not seek approval or agreement from the plaintiff before entering the land and using it as log pond, it further admits that it has not paid any rental fees at all to the plaintiff for the use of the land.

10. The defendant in paragraph 4 (d) of its amended Defence denies receiving any requests from the plaintiff for payment for the use of the land or to vacate it.

11. In paragraph 1.1 of the Statement of Agreed and Disputed Facts and Legal Issues, the parties agreed that the plaintiff is the customary landowner, apart from this concession by the defendant and the admissions it made in its amended Defence, other evidence indicate clearly that the defendant has conceded that the plaintiff owned the land. For instance, at one stage an attempt was made by the defendant to pay the plaintiff K6,000.00 for the use of the land which the plaintiff refused, then in the second attempt, the defendant in the presence of the member for Abau, Sir Puka Temu, offered to pay K36,000.00 to the plaintiff, which the plaintiff again refused as inadequate for the cost of damages done to the land. This evidence appears in paragraph 23 of plaintiff's affidavit. The defendant has not denied or disputed this evidence and the Court accepts the evidence.

12. At the hearing the following documents were tendered:-

- i. Affidavit sworn by Ibi Enei on 28 June, 2006, Exhibit 'A';

- ii. Affidavit sworn by Ibi Enei on 26 November, 2007, Exhibit 'B';
- iii. Memorandum of Understanding (MOU) dated 24 May, 1994, between Warata clan of Laruoro Island, Amazon Bay, Central Province and Magarida Timbers Pty Ltd, the holder of Permit – TRP 3 – 28 and Rimbunan Hijau (PNG) Pty Ltd, the Contractor to Magarida Timbers Pty Ltd, Exhibit 'C';
- iv. Letter to the General Manager of Rimbunan Hijau (PNG) dated 18 November, 1994, by W.L. Noki, Senior Provincial Magistrate, to which the Kwikila Local Land Court Order of 4 November, 1994, was attached, Exhibit 'D';
- v. Letter to the General Manager of Rimbunan Hijau (PNG) Pty Ltd dated 9 November, 1994, by Pepi Kimas, then Regional Manager, Southern Region, Department of Lands and Physical Planning, to which Acting Valuer General's report dated 4 November, 1994 was attached, Exhibit 'E';
- vi. Letter to Rimbunan Hijau (PNG) Pty Ltd by Blake Dawson Waldron dated 6 October, 1993, Exhibit 'F'; and
- vii. A photostat copy of the Infrastructure Account, Exhibit 'G'.

13. The issues raised by the parties in the Statement of Agreed and Disputed Facts and Legal Issues are:-

- i. Whether the defendant's actions amounted to trespass and continuous trespass;
- ii. Whether the defendant should pay compensation to the plaintiff for the use of the land for which the defendant has already made payments to Warata clan pursuant to the MOU and the Order made by the Kwikila Local Land Court;
- iii. Whether the defendant should pay damages to the plaintiff and if so, what should be the amount payable when the defendant has already paid Warata clan for the use of the land;
- iv. Whether the plaintiff has a cause of action against the defendant when the defendant has already paid money to Warata clan for the use of the land; and
- v. Whether the plaintiff's cause of action is in fact against Warata clan.

14. The defendant argues that the payments it made to Warata clan in rental fees for the land were justified because the payments were made pursuant to the MOU which provided for Warata clan to be paid K500.00 per month. Furthermore, the Order made by the Kwikila Local Court declared that Warata clan was the owner of the land.

15. The defendant also argues that its occupation and use of the land was lawful and justified because Warata clan which was declared by the Kwikila Local Land Court as the owner of the land had authorized it to use the land. It therefore argues that it has no

obligation to pay any compensation in damages to the plaintiff. I will return to this issue later.

16. The plaintiff gave evidence, he told the Court that the defendant occupied the land without his permission and he repeatedly asked the defendant to compensate him for its use of the land or to vacate the land but the defendant ignored those requests. The defendant denies that the plaintiff made such requests.

17. The defendant called one Pia Dometa an authorized officer of the defendant as a witness, he was the only witness for the defence. Mr. Dometa admitted that when the defendant made rental payments to Warata clan for the use of the land the defendant was aware that the plaintiff was disputing Warata clan's claim of ownership over the land. He also agreed that the defendant continued to pay Warata clan for the use of the land after the plaintiff had filed proceedings at the Kwikila Local Land Court to challenge Warata clan's claim of ownership over the land.

18. There is no dispute that the land was outside the TRP area in which the defendant was allowed to harvest timber.

19. It was submitted by Mr. Yandaken of counsel for the plaintiff that although the defendant has told the Court that it made payments to Warata clan for the use of the land, there is no evidence before the Court to confirm that those payments were indeed made. Mr. Yandaken submitted that the defendant has not verified those payments. It was further submitted that even if payments were made to Warata clan, it does not relieve the defendant from compensating the plaintiff for trespassing onto his land and illegally using and occupying it to do business and causing damage to it.

20. Mr. Frizzel of counsel for the defendant submitted that if the Court found in favour of the plaintiff, any damages ordered for the plaintiff should be based on the value of the land which is K4,000.00. This submission is based on the Valuation Report made by the Acting Valuer General in which the land was valued at K4,000.00. Otherwise it was submitted that the defendant was justified in using and occupying the land under the MOU and the Kwikila Local Land Court Order. Mr. Frizzel further submitted that the plaintiff also needs to prove that he was in possession of the land when the defendant entered and occupied and used the land before he can claim damages against the defendant for trespassing. It was submitted that there is no evidence that the plaintiff was in possession of the land at the time the defendant entered the land, the defendant therefore should not pay damages to the plaintiff.

21. Mr. Yandaken also submitted that because the defendant was fully aware of the dispute regarding the ownership of the land all the rental fees it paid to Warata clan should have been paid into a Trust Account until the land-ownership issue was resolved.

22. Mr. Yandaken also told the Court that the defendant continually insisted that the issue of ownership of the land be resolved quickly first, yet it continued to occupy and use the land and continued to make payments to Warata clan for the use of the land even when Warata clan's claim of ownership over the land was still in dispute.

23. There is in my view overwhelming evidence that plaintiff is the owner of the land,

this view is based on the clear and unequivocal admissions made by the defendant in its amended Defence and the steps it took on two occasions when it tried to pay the plaintiff for the use of the land. So the only determinative issue left really is whether the use and occupation of the land by the defendant amounted to trespass and continuous trespass or was the use and occupation of the land by the defendant justified by the MOU and the decision of the Kwikila Local Land Court, as claimed by the defendant? In this regard it is quite plain that the defendant cannot rely on the Order or the decision made by the Kwikila Local Land Court because that decision was subsequently quashed on appeal. It is also plain that the defendant cannot rely on the MOU because the MOU is void of any legal effect because when Warata clan signed the MOU, it was not the owner of the land as such it had no legal capacity and authority to sign the MOU. The defendant's use and occupation of the land was as a result unlawful and it amounted to trespass and continuous trespass. This conclusion in my view effectively resolves all the other issues before the Court, including the issues raised in the Statement of Agreed and Disputed Facts and Legal Issues.

24. The defendant is in the result liable to the damages claimed by the plaintiff.

25. As I alluded to earlier, Mr. Frizzel has submitted that in the event that the Court finds in favour of the plaintiff, damages awarded to the plaintiff should be based on the value of the land, which according to the valuation report made on the land by the Acting Valuer General is K4,000.00. I find the contention by Mr. Frizzel untenable for a number of reasons. First: the valuation report was made at the behest of the defendant for its own benefit. This is clear from the plain reading of the report. The report shows that the land was for sale with the purchase price of K1,800.00, this amount and the part occupancy fee of K2,200.00, made up the purported value of the land i.e K4,000.00. There is evidence that the defendant was the intended purchaser. In a letter to the General Manager of the defendant dated 9 November, 1994, the Secretary for the Department of Lands and Physical Planning advised that his Office was preparing purchase document (sic.). In my view, this confirms that the valuation report was made for the sole benefit of the defendant. Second: the report states that the landowners agreed to sell the land outright, obviously the plaintiff could not be privy to such an agreement, if there was such an agreement, because he was fighting for his land and was asking the defendant repeatedly to compensate him for using the land or to vacate it. In this regard I accept on the balance of probabilities, the evidence by the plaintiff that he asked the defendant many times to compensate him for the use of the land or to vacate it. I also find on the balance of probabilities that the defendant refused or simply ignored those requests. I accept plaintiff's evidence because it is consistent with his action in these and other related proceedings. This action in fact emanates from those unsuccessful requests by the plaintiff to the defendant for compensation. Furthermore, there is no evidence that the plaintiff wanted to sell the land. Third: the defendant occupied the land to store and export logs from which the defendant derived huge revenue for itself, the plaintiff's damages must therefore be based on the total benefits the defendant derived from the use of the land. To use K4,000.00, which is the purported unimproved value of the land as the basis for the Court in deciding damages for the plaintiff would be grossly unfair and inadequate for the plaintiff. This is the approach adopted in assessing damages arising from the tort of trespass committed on another's land including customary land and where the trespasser uses the land to earn income and other benefits: *Madaha Resena & Ors v. The Independent State of Papua New Guinea* [1990] PNGLR 22 at 29. In that case, Bredmeyer J, quoted a passage from *McGregor on Damages*, 15th ed. (1988), Ch. 32,

paragraph 1417. At paragraph 1421, the learned author stated the principle this way:

"Nevertheless, on the strength of these decisions as establishing the principle, it was held in Whitwham v. Westminster Brymbo Coal Co. [1896] 2 Ch. 538 at 542, where the defendant had trespassed on the plaintiff's land by tipping soil from his colliery upon it, that the principle of the wayleave cases applied so that the damages were not to be assessed merely by taking the diminution of the value of the land but the higher value of the user to which the defendant had put it. Lindley L.J. said the law was settled by Jagon v. Vivian, (1871) L.R. 6 Ch. App. 742. He put the matter thus: "The plaintiffs have been injured in two respects. First, they have had the value of their land diminished; secondly, they have lost the use of their land, and the defendants have had it for their own benefit. It is unjust to leave out of sight the use which the defendants have made of this land for their own purposes, and that lies at the bottom of what are called the wayleave cases". In the result, it was held that as to so much of the plaintiff's land as was covered by the soil tipped thereon by the defendant, the value of the land by using it for tipping purposes was the correct measure, this value being much greater than the diminution in the land's value since it was the only land procurable for tipping purposes. And in more modern times the courts have applied Whitwham v. Westminster Brymbo Coal Co. to reach a similar result. In Penarth Dock Engineering Co. v. Pounds [1963] 1 Lloyd's Rep. 359, the defendant, having bought a pontoon or floating dock from the plaintiffs failed to have it removed within a reasonable time from the dock premises of which the plaintiffs were lessees and which were in the course of being closed down by their lessors. In the plaintiffs' action, which was framed as trespass or breach of contract, Lord Denning M. R. assessed the damages at the benefit obtained by the defendant by having the use of the dock premises after he should have removed the pontoon, although the plaintiffs had lost nothing since the dock premises were of no use to them and their lessors had not required them to pay extra rent". (my underlining).

26. The passage supports the view I have adopted that damages for the plaintiff should be decided on the basis of the total benefits the defendant derived from using the land. As illustrated in this passage, the plaintiff in this case has been injured in two respects; first, by the damage done to his land resulting in the diminution of the value of the land; second, he was deprived from using and benefiting from the land for the period the defendant used and occupied the land illegally. Application of the principles enunciated in the passage is also fitting to the gravity of the damages or injuries suffered by the plaintiff. The plaintiff has adduced evidence showing that defendant stored round logs on the land in large volumes. There is also evidence that the land was used by big machinery like loaders and a giant crane to move and load logs from the log pond onto pontoons, barges and tugboats which were berthed offshore which were then used to carry logs to the ships berthed not far from the shore. The plaintiff's affidavit, which annexed cuttings taken from Post-Courier for Tuesday 28 January, 1992, attesting to these facts is not challenged or disputed by the defendant.

27. It is also clear from the evidence that the defendant was exporting logs in large volumes from the logs stored at the log pond throughout the period it occupied the land.

28. The Post-Courier cuttings annexed to the plaintiff's affidavit, show pictures of large volumes of round logs being stored at the log pond and heavy machinery including a

giant crane, a tug boat and a pontoon waiting to move and tow logs from the log pond to sea for loading onto a ship. The Post-Courier reported that the ship pictured was waiting to be loaded with logs for shipment to markets in Asia.

29. There cannot be any doubt that with such large volumes of logs being transported from forests where they were harvested by heavy loaders and trucks to the log pond and such large volumes of logs being stored at the log pond, then the logs being transferred in large volumes from the log pond by heavy machinery including the giant crane continuously for eight years, and the continuous use of barges, tug boats and pontoon to move and transfer such volumes of logs to the waiting ships for eight years would have caused serious and substantial damage to the land and the foreshore areas, including the seabed, marine and other aquatic marine life. Clearly, in those circumstances K500.00 per month the defendant was to pay or was paying in rental fees for its use of the land under the MOU, was as I said earlier absurdly small and inadequate. With such level and intensity of activities in such a long period, some, if not, most parts of the land would have been seriously damaged and the value of land diminished substantially, if not forever. The effects of such damage were most certainly long term.

30. The plaintiff engaged two environmental science groups to assist him in assessing the damages done to the land, namely, Environmental Science and Community Development Foundation Inc. and Partners with Melanesians. The latter was engaged to reassess the damages, including damages for the log pond area because when Environmental Science and Community Development Foundation Inc. did its assessment of damages it only assessed damages for the access road, it did not assess damages for the log pond area.

31. The assessment of damages made by Environmental Science and Community Development Foundation Inc. on 27 November, 2002, for the access road is Annexure 'A' to the plaintiff's affidavit sworn on 26 November, 2007. The amount assessed is K5,131,368.00.

32. The assessment of damages made by Partners with Melanesians on 13 June, 2006 is Annexure 'B' to the same affidavit. The total amount assessed is K13,073,945.45, which is inclusive of K5,131,368.00 assessed by Environmental Science and Community Development Foundation Inc. for the access road. It should however be noted that the amount of K13,03,945.45 was made up of K5,131,368.00 for access road, K1,960,800.00 for log pond area and K5,981,777.45 for shipment of logs. The rate used by the two environmental science groups to arrive at these amounts is K1.90 per square meter. The formula the two groups used for access road and log pond area is Rate x Area x Years. So for the access road the formula used is $K1.90 \times 337,590m^2 \times 8$ years and for log pond, the formula used is $K1.90 \times 129,000m^2 \times 8$ years and for shipment of logs, the formula used is Rate x Cubic meters x 8 years, i.e $K1.90 \times 393,537.99m^3 \times 8$ years. It should be noted that 8 years adopted in these formulae is the number of years the two groups said the defendant used and occupied the land.

33. I have decided to reject the amount assessed for shipment of logs, which is K5,981,777.45, because there is no explanation given by the two groups on how and why 393,537.99m³ was adopted to make the assessment. Furthermore, I am of the view that damages awarded to the plaintiff should relate to the damages done to the land. Based on this same reasoning I have decided that the plaintiff should be compensated for damage

done to the foreshore area.

34. The total amount of damages assessed by the two environmental science groups for the access road and log pond areas is K7,092,168.00.

35. The plaintiff also claims:- (i) out of pocket expenses which he says were incurred when attending proceedings before the Kwikila Local Land Court and these proceedings. These expenses relate to transport from his village which is remotely located in the Abau District of the Central Province and back, food and accommodation, (ii) damages on behalf of some of his deceased clansmen who he says died while fighting this case with him, (iii) damages in berthing charges for ships, tug boats and barges that used to berth along and near the shores to tow, carry and ship logs during the period the defendant used and occupied the land. The plaintiff adopted the berthing rates used by the PNG Harbours Board which he says is K2.50 per hour to arrive at the amount claimed which is K2,610,000.00.

36. It was submitted by Mr. Yandaken that because the defendant has not challenged or denied the amounts claimed by the plaintiff in damages, all the amounts claimed should be awarded to the plaintiff in full.

37. Before assessing damages for the plaintiff, it is convenient that the period in which the plaintiff used and occupied the land be determined first because the parties do not agree on the period. This is important to properly decide the quantum of damages for the plaintiff.

38. In the Statement of Claim, the plaintiff claims that the defendant occupied and used the land from 1988 to 1994, which is a period of 7 years, however at the hearing he claimed that the period was from 1989 to 1996 which is a period of 8 years. The defendant on the other hand has maintained that it occupied and used the land from 1989 to 1994, which is a period of 6 years. In a number of Post-Courier cuttings, annexed to the plaintiff's affidavit, the Managing Director of the defendant Mr. Francise Tiong was quoted as saying compensation demands were a problem since the defendant started harvesting timber in the Bonua Magarida Timber Project in 1989. The headline on the particular page of the Post-Courier read "*Developer committed to project*". It was also reported that the Permit to harvest logs was issued on 15 October, 1988.

39. From the relevant evidence before the Court, I have concluded that the defendant occupied and used the land from 1989.

40. In regard to the year the defendant ceased occupying and using the land, it is noted that the defendant in paragraph 6 (a) of its amended Defence says:-

6. Further and in answer to the allegations made in the statement of claim the defendant says:-

(a) at all material times up until in or around 1996 when the defendant ceased its logging operations in the Bonua - Magarida Timber Rights Purchase Area pursuant to the Timber Permit No. TP3-28 the defendant paid compensation for use of the said land to the Warata clan; (my

underlining).

41. The defendant in this paragraph has in my view made a clear admission that it ceased its logging operations in the project area in 1996. On this basis it is reasonable to conclude that the defendant ceased occupying and using the land to store and export logs in 1996, this is the year the plaintiff also says the defendant ceased its logging operations in the project area.

42. Consequently I find that the defendant occupied and used the land for a period of eight years from 1989 to 1996. This is the period for which the plaintiff is entitled to claim damages.

43. It is noted that in paragraph 1.3 of the Statement of Agreed and Disputed Facts and Legal Issues, the parties agreed that the defendant in or around 1990, while engaged in logging activities entered and occupied the land and used it for purposes of storing round logs. Ordinarily the parties would be bound by what they have agreed, including 1990 as the year the defendant entered and occupied the land, however I have adopted 1989 as the year the defendant entered and occupied the land and started using it to store and export logs because at the hearing the parties, especially the defendant argued strongly that the defendant started using and occupying the land in 1989.

44. I note that damages for access road has not been specifically pleaded by the plaintiff in the Statement of Claim but the defendant has admitted entering and occupying the land without the plaintiff's approval. It would naturally follow from this admission that there was an access road constructed through which the defendant gained access to the log pond and foreshore areas. I therefore consider that the plaintiff is entitled to claim damages for the access road. In any case, I find that the pleadings in the Statement of Claim in regard to the description given of the land, i.e Portion 249C in Survey Plans Cat Nos. 53/136 and 53/137 in paragraphs 3, 4, 5, 6, 8, 9, 10 and 11 in regard to the defendant entering and trespassing onto the land are sufficient to include and cover damages for the access road. Furthermore the plaintiff's claim for damages in relation to the access road has been fully litigated by the parties, the Court is therefore entitled to consider the claim and have plaintiff's damages assessed for the access road: *Roselyn Cecil Kusa v. MVIT* (supra).

45. The plaintiff has only given evidence regarding the sizes of these two areas but it has not given any evidence regarding the type of land for which the plaintiff is claiming damages, the only evidence is given by the Acting Valuer General in his report dated 4 November, 1994. In the report the Acting Valuer General described the land as "*generally flat savannah grassland with clay black loamy soil suitable for agricultural purposes*".

46. From this description of the land it is reasonable to say that construction of the access road and the log pond would have resulted in the destruction of trees, shrubs, vines, grass, beaches, general foreshore area and general vegetation. The damages in this regard were significant for the plaintiff because he was deprived of making gardens and hunting on his land for eight years. He was also deprived of using the seas to fish for that same period. In regard to gardening, the land was described as "*...black loaming soil suitable for agricultural purposes*", the land was therefore good for subsistence farming and growing cash crops. The plaintiff was deprived of using and benefiting from such land by

the defendant for eight years. These are relevant factors for the Court to take into account when assessing damages for the plaintiff; which cannot be properly and fairly determined by reference to the unimproved value of the land. To do so would be unfair to the plaintiff because any amount of damages assessed using such criteria would be grossly inadequate when compared to the benefits the defendant derived from using the land to do logging business including exporting logs in eight years and the damages done to the land in that period.

47. Under the MOU, the defendant would have paid K500.00 to Warata clan every month for eight years it occupied the land. Thus, the defendant would have paid a total of K36,000.00 to Warata clan in those eight years. Such an amount as I said is absurdly small and inadequate to compensate the landowners when compared to the income and other benefits the defendant derived from using the land in those eight years.

48. Turning now to the MOU, its terms are significant because they indicate a couple of things, first; the defendant was aware that ownership of the land was disputed by the plaintiff, yet it went ahead and signed the MOU with Warata clan, second; the defendant knew that it was renting the log pond area as well as the foreshore area. This is significant because it indicates that the defendant appreciated that whoever owned the land also owned the foreshore area or had rights over it. The foreshore area for purposes of the plaintiff's claims is the area of the sea and shore between the log pond and where the log ships were berthed.

49. The damages for the foreshore area include damages done to the shore, marine and other aquatic life and the seabed. Such damages would have been done by the use of barges, tug boats, pontoons, a giant crane and log ships. The defendant has also acknowledged the plaintiff's rights over the foreshore area in the MOU.

50. The proper thing for the defendant to do in this case was to enter into a lease agreement either with the State or the plaintiff to use the land but it did not, it instead entered into a MOU with the Warata clan which was not the true landowner. This is fatal to the defendant. The timber permit pursuant to which the defendant carried out logging operations would have required the defendant to ensure that all landownership issues and interests arising either within or outside the TRP which were affected by its logging activities were resolved before embarking on logging operations. I have no doubt that this is the reason why the defendant entered into the MOU with Warata clan and was insisting that all landownership issues be resolved first. The overall scheme of the *Forestry Act* 1991 is also aimed at safeguarding such rights and interests of the resource owners. The provisions under *PARTS III* and *IV* of the *Act*, in particular provide for proper and good Forest Management and stipulate requirements regarding Development and Registration of Forest Industry Participants and consultants and their respective duties and responsibilities. Section 46 for instance, expressly states that rights of customary owners of forest resources are to be fully recognized and respected. Such mandatory statutory requirements were breached by the defendant when it occupied and used the land for eight years without the permission and authority of the plaintiff. These provisions of the *Forestry Act*, have a general application to damages done to land and other natural resources both within and outside the TRP areas by resource developers including logging companies.

51. In *Rainbow Holdings Pty Ltd v. Central Province Forest Industries Pty Ltd* [1985]

PNGLR 34 at 38, the Supreme Court stressed the obligation imposed on the logging companies by the *Forestry Act*, to adequately compensate the resource owners for any damages caused to their resources by their activities:

"Now the Forestry Act and Regulations together with Forestry (Private Dealings) Act, (Ch. No. 217), are designed to protect not only a valuable natural resource but also to provide adequate payment to the traditional or customary owners of the resources".

52. See also, *Reference by the Public Prosecutor under s. 27 (2) of the Organic Law on Duties and Responsibilities of Leadership and In the Matter of Gerard Sigulogo* [1988-89] PNGLR 384. The principles enunciated in these cases apply generally to resources both within and outside the TRP areas which may be affected by the activities of the resource developers.

53. When assessing damages in cases of this nature one view is that the plaintiff should only be entitled to damages equivalent to the rental fee for the land. Such an argument is in my opinion untenable in this case because tort was committed on a customary land. The argument would have merit had the tort been committed on a property held under a lease.

54. It is important that value of the subject land is understood and appreciated from the perspective of the plaintiff in order to properly determine the damages suffered by the plaintiff. This approach is in my view consonant with the scheme of the *Forestry Act* 1991. To a customary landowner land is a vital source of life because he uses the land to make gardens, hunt, plant and grow fruit trees, cut timber for making houses and canoes, creeks and rivers to fish and draw water and seas to fish and so on. Sometimes when land and other natural resources are damaged or destroyed, the damage can be permanent and irreparable, especially where regeneration of those resources is impossible.

55. It is also important to remember that land is also a source of wealth and status to its owner. These observations also apply to the plaintiff.

General damages.

56. It was submitted by Mr. Yandaken that damages claimed by the plaintiff should be awarded in full because the defendant has not disputed them. I cannot accept such an argument because claims must not only be reasonable and have proper basis but they must also be supported by credible evidence, the plaintiff still has the onus to prove his claims: *Kolaip Palapi v. Independent State of Papua New Guinea* (2001) N2274.

57. I bear in mind that this case is not about unpaid royalties, it is about damages done to the customary land by a trespasser. In that regard, it is important to note that even after the defendant had left and vacated the land the damages done to the land and the effect of such damages would have continued to impact on the land. I have no doubt that the plaintiff was not able to use the land anytime soon after the defendant vacated the land because of such long term or even permanent damage to the land.

58. The plaintiff has by his affidavit, adduced records of log exports for the Bonua

Magarida timber project. Going by the 'Shipments Checks' which show the F.O.B prices for volumes of logs exported, I estimate that the total value of logs exported by the defendant from 1989 to 1996, would have been at least K60,000,000.00 in F.O.B prices.

59. According to these records which are not disputed, in 1991, 1992, 1993 and 1994, K32,216,827.88 worth of logs were exported to Asian markets. For 1996, only one shipment of logs was recorded it was for 13 August, 1996, which was worth K547,984.45.

60. There are no records of logs exported in 1989, 1990, 1995 and 1996, except for the single shipment recorded for 13 August, 1996. The volumes and prices of logs exported in those four years are therefore not known. But going by the volumes of logs exported in 1991, 1992, 1993 and 1994 as shown above, it would be fair and reasonable to estimate that in 1989, 1990, 1995 and 1996, the defendant would have exported an average of K7,000,000.00 worth of logs in each of those years, which comes to a total amount of K28,000,000.00. Going by this figure, I estimate that in eight years the defendant would have exported logs to the total value of at least K60,000,000.00 in F.O.B prices. This is one way of estimating how much the defendant would have earned in log exports in the eight years it used and occupied the land.

61. In a further attempt to decide the total earnings or benefits the defendant would have derived from exporting logs in the eight years, I find the case of *Central Province Forest Industries Pty Limited v. Rainbow Holdings Pty Limited* N321, as another helpful guide. In that case the plaintiff went into liquidation and some of its assets which the Provincial Liquidator was to sell were the unsold logs it harvested prior to going into liquidation. The logs consisted of 6,000 cubic meters of rosewood and 1,000 cubic meters of taun. The logs were harvested in the Magarida area which is the same area in which the defendant harvested timber. The defendant company in that case offered to purchase the logs for K450,000.00. In the end the logs were sold for the reduced price of K270,000.00 because of depreciation in their value and quality over time. Clearly, had the logs been sold soon after they were harvested, they would have been sold for K450,000.00 because the defendant was willing to pay that amount. In other words the defendant would have paid K450,000.00 for 7,000 cubic meters of rosewood and taun. I find the case helpful as a guide because it illustrates the value of logs, it helps me in deciding defendant's total earnings from exporting hardwood logs during the eight years it used and occupied the land. See, also *United Timber (PNG) Ltd v. Mussau Timber Development Pty Ltd*, N645 and *Mauga Logging Company Pty Ltd v. South Pacific Oil Palm Development Pty Ltd (No.1)* [1977] PNGLR 80.

62. In this case, the plaintiff claims the defendant exported over 252,000 cubic meters of hardwood. Adopting the value placed for 7,000 cubic meters of rosewood and taun in *Central Province Forest Industries Pty Limited v. Rainbow Holdings Pty Limited* (supra), which is K450,000.00 or even at the price the logs were sold which is K270,000.00, I estimate that the defendant would have earned well in excess of K60,000,000.00 even if the defendant had sold only 252,000 cubic meters of logs. It should also be noted that in 1993 alone, the total log exports was worth K11,451,090.41 in F.O.B prices. This is one reason why I say the defendant could have earned more than K60,000,000.00 in the eight years it occupied and used the land. What then is the fair compensation for the plaintiff in damages? Using *Central Province Forest Industries Pty Limited v. Rainbow Holdings Pty Limited* (supra) as a guide the estimated total earnings of at least K60,000,000.00 by the

defendant in eight years is still a moderate figure even if only 252,000 cubic meters of hardwood had been sold. For purposes of determining the plaintiff's damages, I will use K60,000,000.00 total income or benefit for the defendant in eight years as the base.

63. The two environmental science groups assessed the plaintiff's total damages for the access road and log pond areas at K7,092,168.00. It is however noted that the two groups have not given any evidence regarding the nature and the extent of the damage caused to the two areas. The plaintiff also has not given any evidence regarding the nature of damages caused to the land and the foreshore areas. The claims are basically for trespass and illegal use of the land by the defendant. In the circumstances, I will only allow half of the amount assessed for the two areas. This comes to the amount of K3,546,084.00.

64. The damage caused to the foreshore area was not assessed by the two groups, thus taking into account the matters I raised in regard to the assessments made for the access road and log pod, I would assess damage for the foreshore area at K500,000.00.

65. Thus for access road, log pond and foreshore areas the total amount assessed in general damages is K4,046,084.00.

66. The key factor here is that the defendant illegally used and occupied the land and trespassed continuously and caused damage to the land for eight years and continued to benefit from its illegal use of the land in those 8 years. The damages caused to the land by defendant's activities continued unabatedly at the same level of intensity from when it first entered the land to store and export logs in 1989 to when it ceased its logging operations in 1996 and vacated the land.

67. I keep in mind that the aim of awarding damages to the plaintiff is not to over enrich him. The amount of damages awarded must be fair and reasonable and they should as much as possible put the plaintiff back in the position he was or would have been before the tort was committed or had the tort not been committed.

68. It should be noted that although the defendant has denied exporting in excess of 252,000 cubic meters of logs in his amended Defence, the undisputed evidence adduced by the plaintiff from the record of exported logs show that total of 297,241.451 volumes of logs were exported in 1991, 1992, 1993 and 1994. This confirms the claim by the plaintiff that over 252,000 cubic meters of hardwood logs were exported. This figure does not include the volumes of logs exported in 1989, 1990, 1995 and 1996, the records of logs exported in those years are not before the Court. If log exports for those years are added, the defendant's total earning in eight years would as I alluded to earlier definitely go well beyond the estimated K60,000,000.00: *Central Forest Industries Pty Limited v. Rainbow Holdings Pty Ltd* (supra).

69. The records of the F.O.B prices of exported logs adduced by the plaintiff show that the lowest price of a log per cubic meter was K41.90 and the highest price was K254.16. The F.O.B prices of logs according to these records were arrived at by multiplying the volumes of logs by the prices per cubic meter of logs. This is another reason why K60,000,000.00 is a moderate figure or amount to use as a base in determining plaintiff's damages.

70. I consider the amount of K4,046,084.00 fair and reasonable in general damages for the plaintiff given that the damages done to the land are likely to be long term if not permanent. Furthermore, the amount represents less than ten percent of the total estimated revenue of K60,000,000.00 the defendant would have earned in eight years it used and occupied the land.

71. I therefore award **K4,046,084.00** to the plaintiff in general damages.

72. The plaintiff also claims damages for the loss of some of his relatives who he says died while fighting this case in Court. I consider that the claim should be dismissed, first because it has not been pleaded and second, the claim is not for plaintiff's personal losses.

73. The plaintiff also claims damages for berthing by ships, tug boats and pontoons. I also consider that this claim should be dismissed first, because it has not been pleaded and second, the damages awarded for the foreshore area sufficiently cover such claims.

74. I have rejected other claims by the plaintiff either because they have not been pleaded in the Statement of Claim or have not been proven.

Exemplary damages

75. Exemplary damages are vindictive and punitive in their nature and are subject to the discretion of the Court: *Toglai Apa & Ors v. The Independent State of Papua New Guinea* [1995] PNGLR 43. The award of exemplary damages is aimed at punishing the party against whom award is made for the wrong done by the party. The damages awarded should have the element of deterrence to deter the party from repeating the wrong, it should also deter others from committing the same wrong: *Pike Dambe v. Augustine Peri & The Independent State of Papua New Guinea* [1993] PNGLR 4; *Helen Jack v. The Independent State of Papua New Guinea* [1992] PNGLR 391 and *Mumukrui Kopil v. John Wakon* [1992] N2065. These were criminal cases in which victims were shot and killed by police. In *Pike Dambe* and *Helen Jack*, the Court awarded K30,000.00 in each case and in *Mumukrui Kopil*, the Court awarded K60,000.00, in that case the victim was shot dead by police after he had surrendered. In all these cases deterrence was an element in the damages awarded.

76. In *Trevor Yaskin v. Wallya Abilio* (2006) N3108, K20,000.00 was awarded against the defendant for the conduct of his agents who deliberately breached the *Customs Act*, Chapter No. 101, when they unlawfully detained a vessel belonging to the plaintiffs from sailing.

77. In *Commissioner General of Internal Revenue Commission v. Julian Paul Leach* (1988), the defendant's cross-claim against the plaintiff succeeded. The Court found that the plaintiff had acted unreasonably resulting in the defendant suffering losses over a number of years. The Court awarded K10,000.00 for mental distress and K110,000.00 in general and exemplary damages.

78. In this case, there is undisputed evidence that when the defendant executed the MOU, it was fully aware that the plaintiff was disputing Warata clan's claim of ownership over the land.

79. The defendant had deliberately breached Clause 4 of the MOU when it continued to pay the monthly rental fees for the land to Warata clan when the issue of ownership of the land was not yet resolved.

80. Clause 4 of the MOU expressly stated that in the event of a dispute over ownership of the land, the monthly rental fees for the land were to be paid into a Trust Account. Clause 4 is in these terms:

4. That should there be a dispute over the true Customary Landownership, the rental fee of K500.00 per month be paid into a Trust Account – (Passbook). The trustee to be the Local Land Court Magistrate Magarida.

81. This breach of the MOU is a circumstance of aggravation because the breach was deliberate, the defendant's actions in that regard amounted to reckless disregard of the plaintiff's rights and interests. The defendant had in so doing also acted in breach of s. 46 of the *Forestry Act* and the scheme of the *Act*. Section 46 provides:

s. 46. The rights of the customary owners of a forest resource shall be fully recognized and respected in all transactions affecting the resource.

82. The plaintiff has also pleaded that the defendant had acted in breach of the *Land Act*. In that regard, the Court has found that the defendant in trespassing and continuing to trespass onto the land for eight years breached ss. 144 and 145 of the *Land Act*.

83. From the evidence it is clear that the defendant was more interested in its logging activities, including exporting logs for its own enrichment than being concerned with the interests of the landowners, hence its reckless disregard of the rights and interests of the plaintiff. As I said, the defendant carried on its logging activities unabatedly on the land for eight years without meaningfully addressing the plaintiff's concerns. Such an attitude requires deterrence: *Mark Hosea Sinai Customary Legal Representative of Buekau clan v. Kei Buseu Kampani Pty Ltd & Ors* N935. The defendant is a well established and well known logging company which is extensively involved in logging businesses throughout Papua New Guinea and such unscrupulous logging practices should be met with equally strong punitive damages against the defendant. The damages awarded should also provide general deterrence to other logging companies from engaging in similar practices.

84. In the circumstances, I consider that amount of K150,000.00 should be awarded for this claim.

85. I therefore award **K150,000.00** in exemplary damages.

Special damages

86. These damages are such losses which will not be presumed by law. They are expenses actually incurred such as out of pocket expenses which the plaintiff incurred up to the date of the hearing. Such expenses should relate to these proceedings, not to any other proceedings. Expenses for medical treatment, transportation, accommodation and food

would fall into this head of damages. Unlike general damages, these types of damages should be specifically pleaded, particularized and strictly proven: *Roselyn Cecil Kusa v. MVIT* (2003) N2328, this case and many other cases have adopted and stressed the principle stated by Lord MacNaghton in *Strom Bruks Aktie Bolag v. Hutchinson* [1905] AC 515 at 525 – 526, where his Lordship said:

"General damages are such as the law will presume to be the direct natural or probable consequence of the action complained of. Special damages on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary cause. They are exceptional in character and therefore they must be claimed and proved strictly."

87. In Papua New Guinea however, this principle has been applied with qualification especially in cases where the plaintiff is illiterate or in cases where it is shown that there were expenses incurred but it was not possible to keep records of the expenses. In such cases the Courts have, after satisfying themselves from evidence that there were expenses incurred, made reasonable estimates of expenses incurred. A typical example is expenses incurred for a funeral in a village: *Eva Aglum & Ors v. MVIT* (1988) N678; *Inabari v. Sapat and Independent State of Papua New Guinea* [1991] PNGLR 427; *Robert Brown v. MVIT* [1980] PNGLR 409 and *Susanna Undapmaina v. Talair Pty Ltd* [1981] PNGLR 559. This case is obviously one such case, as such, although no receipts have been produced by the plaintiff, I am satisfied that the plaintiff did incur expenses to attend the hearings. I will therefore estimate an amount in special damages which in my judgment is reasonable. In so doing I keep in mind that the plaintiff has not produced any records of expenses incurred at all. The proceedings were commenced on 25 October, 2005. The plaintiff comes from a remote village in the Abau District of the Central Province, he would have travelled to Port Moresby from his village to instruct his lawyers and would have from the date of filing the writ visited Port Moresby many times to attend to the case. In those trips he would have incurred costs in transport to come to Port Moresby from his village and back either by canoe or PMV. He would have also incurred costs on food and accommodation. For these costs I bear in mind that when staying in Port Moresby he would have stayed with relatives which is cheaper and affordable for him than staying in a hotel. The case was finally tried on 10 December, 2007, that is a period of two years two weeks from the date of filing the writ. The damages claimed are for that period.

88. In the circumstances I assess the plaintiff's special damages at K5,000.00. I therefore award **K5,000.00** to the plaintiff in special damages.

89. Thus the total amount awarded to the plaintiff in damages is **K4,201,084.00** (K4,046,084.00 + K150,000.00 + K5,000.00).

90. The rate of interest that should be awarded is discretionary. I have decided that interest should be at 4%, which is calculated from the filing of the writ which is 25 October, 2005 to the date judgment which is 28 September, 2011. That is a period of 5 years 11 months. For this period the amount awarded in interest is **K994,256.51**

91. Thus the total amount awarded to the plaintiff in damages and interest is **K5,195,340.51**

92. The defendant will pay the plaintiff's costs and incidentals to these proceedings.

93. Orders accordingly.

Yandaken Lawyers: *Lawyers for the plaintiff*

Warner Shand Lawyers: *Lawyers for the defendant*