

**PAPUA NEW GUINEA****In the Supreme Court of Justice at Waigani****SCA 87 of 2015**

BETWEEN

**KANAWI POURU****Managing Director, National Forest Authority**  
First Appellant**PATRICK PRUAITCH****Minister for Forest**  
Second Appellant**NATIONAL FOREST BOARD**

Third Appellant

**PETER APOI, THOMAS KUMUSI & JOSEPH KALANGE and**  
**42 customary owners of land**  
**within blocks 3, 4 & 5 Vanimmo Timber Project Area**  
First Respondent**THE STATE**

Second Respondent

WAIGANI: Salika DCJ, David and Neill JJ  
2016: 27 October; 2017:*Statutory Interpretation – Forestry Act 1991, Regulations & repealed Acts –  
whether extension of Timber Rights Purchase Agreement Permit permitted***Legislation***Forestry Ordinance 1936 (repealed)*  
*Forestry (Private Dealings) Act (Chapter 217) (repealed)*  
*Forestry Act (Chapter 216) (repealed)*  
*Forestry Act 1991 (Consolidated) & Regulations***PNG cases cited & authorities***Napanapa Landowners Assoc. v Gaudi Logae* [2016] SC1532  
*Telikom PNG Ltd v Independent Consumer & Competition Com.* [2008] SC 906  
*Vanimmo Forest Products v PNG Forest Authority* OS 549 of 2007 (unreported)  
*Halsbury's Laws of England* (4<sup>th</sup> ed.) volume 44(1)**Counsel**Mr I Molloy with Mr I Shepherd for all Appellants  
Mr A Baniyamai for the First Respondent  
No appearance by the Second Respondent

## JUDGEMENT BY THE COURT

### Background

Prior to Independence the then Administration introduced a system of issuing timber permits for contractors to harvest timber grown on land which was owned according to custom. The system was intended to allow for customary landowners to earn money and to use contractors' expertise, which they did not have, both to harvest the timber and to market it. Of particular concern to the Administration was to protect unsophisticated people from commercial exploitation and overharvesting.

As time passed, the level of education and commercial acumen of customary landowners developed. As well, the fact of corrupt practices in the forest industry became so evident that a Commission of Enquiry into the industry resulted in Parliament repealing previous legislation and enacting the current legislation. The changes over time can be noted from amendments to the legislation: *Forestry Ordinance 1936 (repealed)*; *Forestry (Private Dealings) Act (repealed)*; *Forestry Act Chapter 216 (repealed)*. The current legislation is the *Forestry Act 1991 (Consolidated) (Act) & Regulations*. While the former Administration that issued timber permits has been replaced, the preamble to the 1991 Act shows the legislature has expanded the purpose to encompass the changed circumstances.

### Facts

On 26 March 1968 a Timber Rights Purchase Agreement (TRPA) was entered into which allowed logging of timber within a specified area for a period of 40 years. The TRPA included the customarily owned land of the First Respondent and another Block owner. Thus logging was to end by 26 March 2008. The TRPA was pursuant to legislation that is now repealed. Of the 30 page document, two pages only set out the relevant legal wording. In summary, a TRPA is an agreement between State entities and customary landowners for the State to acquire rights to their timber. Once a TRPA is in place, a *Timber Permit* can then be issued to an entity with the expertise to harvest and market the timber and the resources to provide infrastructure. It follows that a TRPA must be current for a Timber Permit to be valid. To use an analogy, in land law a sublease cannot have validity beyond the term of the head lease.



Oddly, presumably an oversight, there were two TRPA issued in total for the whole area and these were set to expire on different dates, but only one Timber Permit (**Timber Permit 10-8**) was issued for the whole area. Timber Permit 10-8 was issued on 31 October 1991 for 20 years and so would expire by 31 October 2011.

A Project Agreement with the State and Vanimbo Forest Products Ltd (**company**) for the company to do the logging and provide infrastructure in the logging area was entered into when the Timber Permit had been issued. A Deed of Variation (**Variation**) between the State and the company recites the information that there are several areas being logged pursuant to the Project Agreement but the different timber permits of the areas expired on different dates. As the Project Agreement with the company would end on 31 October 2011, it was considered desirable for the date of expiry of the TRPA and Timber Permits should coincide on 31 October 2011. The Variation recites that the TRPA of the First Respondent's "is extended" to 31 October 2011. The Variation is signed by the First Appellant and dated 29 April 2008.

To extend the logging period to 31 October 2011 which was beyond the date of expiry of the TRPA i.e. by 26 March 2008, an extension of the TRPA or a fresh TRPA and Timber Permit needed to be issued by the Appellant. Timber Permit 10-8 was valid to 31 October 2011 but it would be invalid for the time beyond 26 March 2008. It follows that an extension of the TRPA had to be issued during the currency of the TRPA i.e. before 26 March 2008 so that the validity of Timber Permit 10-8 continued.

As noted, the Variation was intended to link with a "Supplementary TRP Extension Agreement" (**Extension Agreement**) as signed by the Third Appellant (**Board**). Similar to the Variation, the Extension Agreement recites the extension of logging to 31 October 2011 to address extending the TRPA over the First Respondent Blocks 3, 4 and 5 to 31 October 2011. The Extension Agreement had to be signed during the currency of the TRPA i.e. before 26 March 2008 for it to be valid. In contrast to the TRPA, Timber Permit 10-8 and the Project Agreement cover 144 pages of legal drafting. The (incomplete) Extension Agreement is just one page of recitals.

On the Extension Agreement the date 28 February 2008 is noted next to the signature of the Chair and a Member of the Board. The Extension Agreement was signed by customary landowners over 11, 12, 16 and 20 January 2008 and their signatures cover about 7 pages. The date of 21 April 2008 is noted next to the then Minister's signature and so the date put on the first page of the Extension Agreement is 21 April 2008.

### **Other litigation – 2009 proceeding**

The Extension Agreement was the subject of Judicial Review OS (JR) no. 713 of 2009 (**2009 proceedings**). There the Court found that the Extension Agreement was made on 21 April 2008, being the date that the Minister signed it. The National Court found that as the TRPA ceased on 21 (sic. 26) March 2008, the Extension Agreement did not address the period between 21 (sic. 26) March 2008 and 31 October 2011 and held that as a result it had no legal effect and so logging on Blocks 3, 4 and 5 after 21 March 2008 was illegal. For the reasons set out under *As to Issue B*, below, the Supreme Court holds a different view. The date 21 as opposed to 26 March 2008 is a slip rule matter and that will not be considered here.

### **Appealed proceeding**

- The National Court in proceedings WS no 176 of 2013 (**appealed proceeding**) found that the extension was invalid as there was no power under the legislation to extend the TRPA.
- Following that finding, the Court held that the timber harvested during the extension period was wrongly taken and the Court awarded the First Respondent substantial damages (the claim was for K200 million).
- The Court noted the history of the legislation, in particular the opportunity for corrupt practices, exploitation of landowners, disregard for the ecology and disregard for future needs. Regarding the TRPA, the Court took that history into account when interpreting the purpose of the Act.

### **Issues on appeal**

- A. If the TRPA could be extended, was the First Respondent competent to enter into the Extension Agreement and was it effectual.
- B. Whether the legislation that was in force, allowed for the TRPA to be extended to cover the period of Timber Permit 10-8 to 31 October 2011.



- C. The appeal also concerned the Appellants' right to be heard and the award of damages when that issue was not before the Court on a "stated case".

**As to Issue A**

There is another view of the date of the Extension Agreement which differs from the finding in the 2009 proceeding. The Extension Agreement, when sent to the First Respondent to consider was an offer to the First Respondent and which the First Respondent did accept as evidenced by the many signatures affixed to it in January 2008. Obviously that offer was made before 11 January 2008 when a group of landowners first signed. Thus under contract law, the Extension Agreement was made on 20 January 2008 by which time all landowners had signed, and not on 21 April 2008. The signature of the Minister on 21 April 2008 is required pursuant to section 56(2) of the Act. The signatures of the Board members are noted on 28 February 2008, by which date the offer of contract had been accepted. Section 56(2) provides: (2) An acquisition under Subsection (2) is not valid ...unless it is approved by the Minister.

Once the Minister approves of the acquisition, the acquisition is confirmed and can proceed as with a condition precedent to any contract, but the date of the agreement for acquisition has to be the date when the contract between the parties was entered into, i.e. offer accepted. To test the logic of this conclusion, hypothetically if the Appellants had failed to honour the Extension Agreement and consequently the First Respondent lost the consideration of some K2.5 million, the Appellants would be liable for breach of contract. The Appellants say that there was by mutual consent of the Appellants and the First Respondent for the TRPA to be extended and that as the First Respondent was not prohibited by law from giving their consent to the extension, it is a matter of contract that the Extension Agreement is binding on the parties.

After the introduction of the Act, there was an overhaul of the system of TRPA and Timber Permits. It was noted above that while the TRPA in 1968 was just one page of legal drafting, in 2008 when the Variation was signed, it with the Project Agreement covered some 144 pages. By 2008 the TRPA had been subjected to a process of thorough examination of all its aspects for protection of the resource and the landowners' interest. The TRPA had been in existence 40 years and it has to be concluded that no further process was needed to see if a 3 ½ year extension would meet the purpose of the Act.

As noted, the Extension Agreement was concluded by 20 January 2008 i.e. some seven weeks ahead of the expiration of the TRPA by 26 March 2008. By now, decades after Independence, it has to be assumed the First Respondent were able to make an informed and consensual choice. Over that period of 3 ½ years from 26 March 2008 to 31 October 2011, payments for the harvested timber were made and this shows performance of the Extension Agreement. In that light also it would seem that the claim for damages is an attempt to renege on the contract and to be paid more for the timber.

### **As to Issue B**

The Appellants argue that while there is no express provision in that repealed legislation to allow for an extension of a TRPA, there is no prohibition against allowing an extension by agreement. However, the First Respondent submits: "...to continue a TRPA after its expiration whether through an extension or some other means would be inconsistent with the intent and purpose of the [Act] to abolish such a regime..."

### **Relevant provisions**

The Supreme Court will firstly look at the wording of the legislation, secondly at the purpose of the Act.

The Act's interpretation section set out definitions:

"customary owners in relation to an area of customary land, means persons having customary rights—

- (a) of ownership over the land; or
- (b) of ownership over forest produce growing on the land; or
- (c) relating to the use of the land;"

"timber permit" means a timber permit granted under Section 73 or 75 and includes—

- (a) a permit or licence granted under the Forestry Act (Chapter 216) (repealed) continued by virtue of Section 137; and
- (b) an agreement deemed to be a timber permit by virtue of Section 137(1A); and

Section 78 of the Act provides for extension or renewal of timber permits (relevantly) as follows (emphasis added):

78. Extension or renewal of timber permit.

- (1) The holder of a timber permit may apply to the Board for extension or renewal of the term of the permit.



- (4) Where the reports required under Subsection (3) are satisfactory, the Board shall recommend to the Minister that an extension or renewal of the term be granted to the holder of the timber permit and the Minister may grant such extension or renewal.

Section 137 of the Act addresses the situation of TRPAs and timber permits that were granted, pursuant to repealed legislation (emphasis added):

136. Repeal.

The following Acts are hereby repealed:—

- (a) Forest Industries Council Act (Chapter 215);
- (b) Forestry Act (Chapter 216);
- (c) Forestry (Private Dealings) Act (Chapter 217).

PART X.—SAVINGS AND TRANSITIONAL.

137. Saving of existing permits, etc.

- (1) Subject to Subsection (2), all—
  - (a) registrations granted under the Forest Industries Council Act (Chapter 215) (repealed); and
  - (b) permits, timber rights purchase agreements, licences and other authorities granted under the Forestry Act (Chapter 216) (repealed); and, valid and in force immediately before the coming into operation of this Act, shall continue, on that coming into operation, to have full force and effect for the term for which they were granted or entered into or until they sooner expire or are revoked according to law.

Sub-section 137(1A) is similar to Subsection 137(1) regarding agreements entered into under the Forestry (Private Dealings) Act (Chapter 217) (repealed). Sub-section 137(1F) provides:

- (1F) All timber permits saved under Subsections (1) and (1A) and extended or renewed under Section 78 are deemed to be extended or renewed under this Section.

The *Forest Industries Council Act* (repealed) is not relevant to the appeal. Section 9(1) of the repealed Ordinance and section 8(1) of the repealed Chapter 216 are in similar terms, though the Ordinance uses archaic wording such as "native" and "Administrator" as follows (emphasis added):

[Forestry Act Chapter 216] section 8: Purchase of timber rights

- (1) Where the customary owners are willing to dispose of the timber growing on any land, the State may acquire the right of felling [etc.] on such terms as are agreed on between it and the owners.

[Forestry Ordinance 1936] section 9

(1) If the native owners are willing to dispose of the timber growing on any land, the Administrator may acquire the right of felling [etc.] upon such terms as may be agreed upon between him and the native owners;

The *Forestry (Private Dealings) Act* (repealed) in its section 5 provides, "...the owners by custom of any timber in a Local Forest Area may sell or otherwise dispose of the timber.." but subject to section 6 which provides that "...an agreement for the sale or disposal of timber under section 5 will be of not force or effect until assented to by the Minister".

The Appellants rely on Section 137 of the Act (emphasis added and restated):  
...permits, timber rights purchase agreements..valid and in force immediately before the coming into operation of this Act, shall continue, to have full force and effect for the term for which they were granted or entered into or until they sooner expire ...

The appealed decision cites *Vanimu Forest Products Ltd v PNG Forest Authority* OS 549 of 2007 (unreported October 2007) (Injia DCJ) which concerned an application for Judicial Review by the company who held the Timber Permit. The company claimed that the [defendants] had unlawfully suspended the Timber Permit. In dismissing the application the Court said

When a TRPA ... expires, it is the [PNG Forest Authority's] duty to ensure that its agreement with the resource owners is renewed so that the rights conferred by the [timber permit] ...is not frustrated or defeated by lack of a valid TRPA ....

That decision may have alerted the First Respondent to review the TRPA.

There is no dispute on the point that the repealed pieces of legislation do not prohibit an extension and they do not expressly provide for extension in their wording. The Court below looked at the purpose of the Act when considering whether the wording in the Act can be interpreted to allow an extension.

### **PURPOSE OF ACT**

After citing *Vanimu Forest Products*, the appealed decision considered the legislation on two bases. Firstly, with limited situations of discretion, this type of statute should be strictly construed and what it does not allow cannot be done. Secondly, the statute may be interpreted in light of its purpose. The appealed decision is summarised and cited under those headings. Numbering of selected paragraphs in the decision delivered on 12 June 2015 is not sequential in the decision but is given in this judgement for convenience.



### **Strict construction**

- 1) "Any step taken outside what is provided for in the legislation would be clearly illegal and therefore null and void and of no effect. Venturing out could even be the way of corrupt elements who wish not to go by what is specifically provided for, especially in a more controlled industry"....
- 2) "Indeed parliament made sure that, all timber permits must confirm to or correspond to the term or the period of life of a Forest Management Agreement (FMAs) under the new legislation"....
- 3) "Having regard to all of the above, I have no difficulty in arriving at the conclusion that TRPAs under the old Act and FMAs under the new Act are not open for renewal but timber permits, provided the term of the permits do not exceed that of the TRPAs or the FMAs. Accordingly, I reject the [Appellants'] submissions on the contrary"....
- 4) "It is a well-accepted principle of law that where an act or behaviour is regulated by law, all such actions or conduct must meet the requirements of the law in order for them to be legal, effective and binding"....
- 5) "Where a contract is entered into breach of the said provisions of the Act, the contract is illegal and therefore null, void and unenforceable"....

### **Interpret by reference to purpose**

- 6) "I do however accept that not all failure to meet statutory requirements will render the contract, instrument, document or conduct or behaviour under consideration illegal, null and void and of no effect. Where the requirement is discretionary and the breach is not seen as one violating the intent or purpose or objects of the statute under consideration, the breach may be excused"....
- 7) "If as a result of such examinations, the Court finds the decision of the [National Forest Authority] would frustrate the policy of the Act, the Court is entitled to intervene by setting aside any decision or determine not only as illegal but also unreasonable"....
- 8) "From early colonial times to Independence and post-Independence through the old and new Forestry Acts, it is clear that the forest industry is a regulated industry. A reading of the legislation makes it clear that, the traditional customary owners of the land on which forest resources are located have ownership and consequential right over them. No logging, particularly at a commercial scale is permitted except only through the process authorized under the legislation. The scheme and hence the objective or purpose of the legislation is clear"....

- 9) In this case, the lack of provision made for any extension in my view is deliberate. This is necessary not only from an economic reason but also from conservation and sustainability of our peoples' way of life and environmental considerations"....
- 10) Based on the reasons given above I find that, the extension on the TRPAs and the grant of the timber permits outside the terms of the TRPA in this case were outside what is permitted by the relevant legislation. The decision to extend and grant the timber permits outside the term of the TRPA were thus illegal and effectively a fraud on the legislative intent and purpose.

The Supreme Court, with respect, endorses the concerns of the National Court set out above as to: conservation, sustainability of our peoples' way of life, environmental considerations, future needs and the need to avoid corruption.

However, the Court below when interpreting the Act, gave undue emphasis to the history of the Act without adequate emphasis on the Preamble and the contract, which is the Extension Agreement, that the landowners freely entered into and from which they could benefit over some 3 ½ years and for which all the safeguards for the concerns noted in the last paragraph were in place. While the Supreme Court is well aware of the history which led to the Act's enactment, it is not featured in the Preamble. The Extension Agreement was entered into some 33 years after Independence. With the passage of time surely (b) in the Preamble must be taken into account and the paternalism of some 70 years ago of the Ordinance considered now not so relevant.

The Preamble to the Act sets out the purpose of the Act:

Forestry Act 1991,

Being an Act to provide for and to give effect to the National Goals and the Directive Principles and in particular to—

- (a) manage, develop and protect the Nation's forest resources and environment in such a way as to conserve and renew them as an asset for the succeeding generations; and
- (b) maximise Papua New Guinean participation in the wise use and development of the forest resources as a renewable asset; and
- (c) utilize the Nation's forest resources to achieve economic growth, employment creation and industrial and increased "down-stream" processing of the forest resources; and
- (d) encourage scientific study and research into forest resources so as to contribute towards a sound ecological balance, consistent with the National developmental objectives;

In regard to Compliance with Constitutional requirements, it is stated the Act concerns a matter of public welfare and relates to national interest.



*Halsbury's Laws of England* (4<sup>th</sup> ed.) volume 44(1) (pp. 751 to 910) at paragraphs 1265, 1404, 1372, 1392, 1414, 1442, 1462, 1473, 1477, and 1478 sets out rules of statutory interpretation (in summary):

1265: Since the mid-1800s the preamble has been accepted as part of an Act.

1404: The enactment should not be construed without reference to the preamble.

1372: The object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole and in its context and acting on behalf of the people.

1392: The court should presume the legislator intended common sense to be used in construing the enactment.

1414: The court must infer that the legislator intended an enactment to give a fully informed rather than a purely literal interpretation.

1442: The court should try to avoid a construction that leads to injustice or unfairness.

1462: It is legal policy that the property and economic interests of a person should be respected and not interfered with, such as private rights under contract.

1473: Language is not fixed in time and the court should adopt a construction to allow for changes since the Act was initially framed.

1477 & 1478: It is presumed that Parliament intends that the court, when considering opposing constructions of an enactment should find against a construction:

- That produces a result which is unworkable or impracticable, inconvenient, illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.
- That produces an unworkable or impracticable result, not intended by Parliament.

To interpret the Act other than to say there is no prohibition against an extension of the TRPA and that a TRPA could be extended, would bring about an outcome that frustrates the landowners in their intended contractual relations and the Appellants' and the purpose in the Preamble to the Act.

### **Issue C**

The grounds as to the conduct of the hearing and disregarding the Appellants' right to be heard and awarding damages when that issue was not before the Court in the "stated case" (Order 10 Rule 21 and 22), need not be considered in view of the Supreme Court's interpretation of the legislation.

### **Cases cited by First Respondent**

The Supreme Court did not need to refer to the following cited cases:

- *Napanapa Landowners Assoc. v Gaurdi Logue* [2016] SC 1532 and *Telikom PNG Ltd v Independent Consumer & Competition Commission* [2008] SC 906 which dealt with abuse of court process and *res judicata*. The trial court in the appealed proceeding did not find there was abuse or it was prevented from considering matters afresh and it was not necessary to consider such aspects in the appeal.

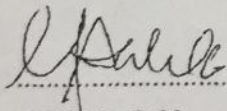
- *House v R* (1936) 55 CLR 499 was an appeal against a sentence of three months' imprisonment. The High Court of Australia considered how an appellate court should review a lower court's finding.
- *Kaiyo & anor. v Pawa & anor.* [2015] SC1469 was in regard to the right of a party to be heard and for a reasonable time to respond.
- *Curtain Brothers Ltd & ors. v University of PNG* [2005] SC 788 deals with the discretion of the court and the presumption that the discretion was correctly exercised unless it is clear that the court has acted on a wrong principle, or given weight to irrelevant matters while failing to give weight to relevant matters or made a mistake on the facts.
- *Chief Collector of Taxes v Bougainville Copper Ltd* [2007] SC 853 which *inter alia* dealt with raising fresh issues on appeal.
- *PNG Power Ltd v Registrar of the National Court* [2013] SC 1335 which *inter alia* dealt with contempt of court.


#### ORDERS

1. The appeal is upheld.
2. The decision of the National Court delivered on 12 June 2015 in proceeding WS no. 176 of 2013 and the orders made by the Court are quashed.
3. The First Respondent is to pay the costs of the Appellants to be taxed if not agreed. The costs of the Appellants shall be on the basis of the costs of one appellant. The cost of the Appellants' overseas counsel Mr I Molloy is allowed.

Made

2017

  
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SALIKA DCJ

  
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DAVID J

.....  
NEILL J

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Appellants:  
First Respondent:  
Second Respondent:

Ashurst, Port Moresby NCD  
Baniyamai, Lawyers Gordons NCD  
Solicitor General Waigani NCD