

[1988-89] PNGLR 216  
N751

PAPUA NEW GUINEA  
[NATIONAL COURT OF JUSTICE]

ARAWE LOGGING PTY LTD AND  
THOMAS KROKIO AND 30 OTHERS

V

THE INDEPENDENT STATE OF PAPUA  
NEW GUINEA AND MINISTER FOR  
FORESTS

*Waigani*

**Brunton AJ**

2 June 1989  
9 June 1989  
21 June 1989

**PRACTICE AND PROCEDURE** - Declaratory relief - Claim against State -  
Appropriate parties - Proper defendant State rather than Minister.

**Held**

Where a person makes a claim against the State seeking declaratory relief, it is sufficient to name the State as defendant without naming a particular Minister, whether by office or in person: the order itself binds the State, its servants or agents.

**Cases Cited**

*Dent v Thomas Kavali* [1981] PNGLR 488.  
*Mudge v Secretary for Lands* [1985] PNGLR 387.

## **Motion**

This was the hearing of a motion on notice to dissolve an interim injunction.

## **Counsel**

I Molloy and R C Gunson, for the first and second plaintiffs.

M J J Jalina and Z G Gelu, for the first and second defendants.

*Cur adv vult*

21 June 1989

**BRUNTON AJ:** The plaintiffs commenced their action by originating summons filed on 19 May 1989, seeking declarations in relation to a timber rights purchase and a timber permit which had been issued in respect of the Arawe Timber Rights Purchase area, in West New Britain. An amended originating summons was filed on 8 June 1989. By notice of motion dated 19 May 1989 the plaintiffs sought ex parte injunctions against the first and second defendants from dealing in any way with the timber resource under dispute. The same day Andrew AJ made orders that the State was to be restrained from granting or issuing a timber permit to any company, person or entity other than the first plaintiff until the return date of the order. The first and/or second defendants were to be restrained from entering into negotiations or dealing in any way with a proposed contractor or the servants or agents of any proposed contractor and in particular with a company called Cakara Alam (PNG) Pty Ltd until the return date of the order. The service of the order was to be substituted and effected on the first and second defendants by service on the Secretary for Department of Forests or the Secretary for Justice. The order was returnable before the court on 2 June 1989 at 9.30 am. By notice of motion on 30 May 1989 the State and the Minister for Forests sought to dissolve the ex parte interim injunction ordered by Andrew AJ. Further, the defendants sought to dismiss the whole of the proceedings including the injunction and the originating summons and they sought costs. On 2 June, by consent, the matter was stood over to a chambers hearing on 9 June 1989, and directions were made that the evidence-in-chief of the parties be reduced to affidavit form, and be filed before 13 June; that affidavits in reply be filed before 20 June; that each party was to give notice to the other party of those deponents required for cross-examination before 16 June, and that the hearing of the matter was to commence on 21 June. Each party was at liberty to apply on three days notice; the injunctions granted on 19 May 1989 and continued on 2 June 1989 were to be continued until the hearing of the action.

[His Honour then considered in a manner not calling for report the issues raised on the application including locus standi, whether there was a serious question to be determined and the balance of convenience and continued:]

## **SUMMARY**

It is my view that the first and second plaintiffs in this action have locus standi in that the second plaintiffs are property-owners in the land over which the timber permits and the Timber Rights Purchase Agreement have been issued. The first plaintiff, a company, was an applicant for a timber permit and this gives it a sufficient interest to dispute the issue of the timber permit over this resource to another company. The issues of law that are raised by this case are in my view genuine issues of law that raise serious questions. It is not for me to decide those questions

one way or another, merely to say that they are bona fide issues that could be tried.

On the balance of convenience as to whether or not the interim injunction should stay in place until this matter is finally settled by the courts, I am of the view that no action should be taken over this resource until the legal issues have been adjudicated upon. In my view the harvesting of this forest resource can wait a few weeks or a few months more until the law has been settled. The trees will not run away. However, if they are cut down they are lost forever. The fourth of the National Goals and Directive Principles in the *Constitution* calls for wise use to be made of our natural resources. Certainly, it would be unwise at this stage to go ahead and start harvesting this resource without the legal issues that have been raised being properly resolved. Further, I am concerned that the special attachment of the people to cleared land would result in activities such as rioting or damage to property, if the people saw logging going ahead without an authoritative pronouncement from the courts. This is not a case where machinery is on the ground and money has already been spent in putting in infrastructure such as roads and buildings. Work is yet to begin. In my view the balance of convenience is that the present situation should be held for a little longer while these important legal issues are determined.

### ISSUES RAISED BY THE DEFENDANTS

The defendants raised two procedural defects in the originating summons to this matter. First, the defendants said that the first defendant had been misnamed. The defendant said that the first defendant had been named as "Independent State of Papua New Guinea by its Department of Forests". I agreed with the first defendant in this matter, and struck out the words "by its Department of Forests". The defendants objected to my striking out those words, but when I asked Mr Jalina for the State to address me on how his clients had been prejudiced by these additional words, or how they would be prejudiced by my striking them out, I received no satisfactory answer. Mr Jalina merely relied on his written submissions that the plaintiffs had more than ample time and opportunity to rectify this defect, and had not taken steps to rectify it, that the proceedings appeared to be rushed, and therefore that the plaintiffs should bear the consequences, including having the court strike out the originating process because it was defective. In my view it would be quite inappropriate for me to strike out what is an important action for such a trivial reason.

The second procedural defect which Mr Jalina raised was that the second defendant had been named as "The Minister for Forests". Mr Jalina relied upon the Supreme Court decision, *Mudge v Secretary for Lands* [1985] PNGLR 387, per Kidu CJ, at 388. In that case the Chief Justice said that:

"In law only a person (a human being of age), or a corporate person (an incorporated body) can sue or be sued in a court."

In that case the appellant should have proceeded against the occupant of the office of the Secretary for Lands. If the principle in *Mudge* is to be applied in this case then it would be necessary to name Mr Karl Stack as being the second defendant.

P W Young in his book *Declaratory Orders*, 2nd ed (1984), par 1006 at 94 says:

"In view of the theory that the Crown is immune from suit in its own court there has been a tendency to seek declarations and injunctions against the responsible Minister. Just how proper this course is has never been decided and in more recent times the question has really become academic as in most jurisdictions there is specific legislation on the subject."

In the 4th ed of *de Smith's Judicial Review of Administrative Action* (1980) at 511,

the learned authors say:

“Problems have arisen in connection with actions by subjects against the Crown and its servants. If a Crown servant personally commits, or orders or authorises the commission of a tort, the plaintiff may sue him in his private capacity for damages and for a declaration that his act was invalid, notwithstanding that the act may have been done in the course of Crown duty. If, however, the wrongful act is not a tort, but is merely an unlawful act done or demand or order made by or on behalf of the Crown through the instrumentality of one of its servants, it may well be thought to be contrary to principle to award a declaration against the Crown servant in his private capacity. Nonetheless, several cases in which actions for declarations were brought against Ministers in their private capacities in respect of non-tortious but allegedly unlawful acts have appeared in the law reports. In these cases the plaintiffs were seeking what were in substance declarations against the Crown. Before the Crown Proceedings Act 1947 an action for a declaration (except on a petition of right) could not have been brought against the Crown as such. An appropriate defendant would have been either the Attorney-General or, in certain special cases, a government department or an officer of the Crown sued in his official capacity.

The right of action for damages and a declaration against the individual tortfeasor was, in general, preserved by the Crown Proceedings Act. But under the Act it became possible to bring an action for a declaration against the Crown by instituting civil proceedings against the appropriate authorised government department.”

The lists of authorised Departments are published by the Civil Service Department under s 17(1) of the *Crown Proceedings Act 1947* (UK).

In the United Kingdom all proceedings against the Crown are instituted against the appropriate authorised Government Departments, or if none of the authorised Government Departments is appropriate, or the person instituting the proceedings has any reasonable doubt whether any, and if so which, of those Departments is appropriate, against the Attorney-General: *Halsbury's Laws of England* (4th ed), vol 11, par 1420 at 754. This is so because the *Crown Proceedings Act 1947* (UK), s 17(1), allows the Treasury to publish a list specifying the several Government Departments which may sue or be sued.

There is no equivalent provision in the legislation of Papua New Guinea.

Under the *Claims By And Against The State Act* (Ch No 30), s 2, it is provided that a person making a claim against the State in contract or in tort may bring a suit against the State in respect of the claim in any court in which such a suit may be brought as between other persons. The problem here is that this section is confined, on its face, to actions in contract or in tort.

Before the passing of the United Kingdom *Crown Proceedings Act 1947*, the only methods by which redress might be sought against the Crown in the courts, was by way of petition of right, which was dependant on the grant of the Royal fiat by suits against the Attorney-General for a declaration, or by actions against Ministers and Government Departments which had been incorporated or declared liable to suit by statute: see *Halsbury*, par 1401 at 743. Leaving aside those specific Government Departments or entities which were entitled to sue and be sued by statute, the common law recognised only two ways of suing the Crown. The first was by petition of right in which case the plaintiff needed a Royal fiat to proceed. Secondly, there was a suit by way of declaration against the Attorney-General.

Papua New Guinea has never had an Attorney-General. It seems inappropriate for

this particular rule of common law to have been received into Papua New Guinea in its direct form. During pre-Independence times the appropriate person to name in a declaration against the Crown would have been the Secretary for Justice. Under s 156(1)(a) of the *Constitution* the Principal Legal Adviser to the National Executive is one of the Law Officers of Papua New Guinea; and under s 156(2) an Act of Parliament shall make provision for and in respect of that office. The *Principal Legal Adviser Act* (Ch No 54) says:

“If the Minister for Justice is a fully admitted practitioner he is the Principal Legal Adviser to the National Executive. If the Minister is not a qualified lawyer then the Principal Legal Adviser to the National Executive is the Secretary for Justice.”

The question then arises whether a person making a claim against the State and seeking a declaration can sue the State directly or whether that person should sue the Principal Legal Adviser. The *Claims By and Against The State Act*, s 2, reads:

“A person making a claim against the State in contract or in tort may bring a suit against the State in respect of the claim in any court in which such a suit may be brought as between other persons.”

The history of the declaration shows that it is not an action in tort or in contract. The declaration was never a creature of common law; it came into English proceedings by way of Scottish Civilian Law. It first infiltrated its way into the law of equity after 1852, although there are cases in the books before 1852. The traditional common law position had always been that courts would not make a declaration without granting consequential relief: see generally Chs 1 and 3 of P W Young, *Declaratory Orders*. The English *Chancery Procedure Act* 1852, s 50, and amendments to the English and Australian Rules of Court removed this objection. The English *Rules of Court* 1883, O 25, r 5, stated:

“no action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether or not an consequential relief is or could be claimed.”

Under the *Rules of the Supreme Court Queensland (Adopted)*, O 4, r 11, was in similar terms to the 1883 English Rule. The power of the Supreme Court and the National Court to make declarations is now contained in s 155(4) of the *Constitution*: *Dent v Thomas Kavali* [1981] PNGLR 488 at 490-491, per Bredmeyer J.

The procedural aspects of declaratory judgments are dealt with under O 16 of the *National Court Rules*. There are two methods of bringing an action for a declaration under the rules. The first is under O 16, r 1, subr 2, whereby an application for a declaration may be made by way of an application for judicial review. However, an action for a declaration may also be brought by writ of summons under O 16, r 9, subr 5. The applicant for leave to apply for judicial review must give notice of the application to the Secretary of Justice not later than two days before the application is made, and must at the same time lodge with the Secretary copies of the statement and every affidavit used in support, see O 16, r 3. The rules do not stipulate whether or not declarations sought against the State or State bodies must be actually brought against the Secretary for Justice. In short, there appears to be no statutory provision that indicates who is to be named as a party to an action when a declaration is sought in respect of the exercise of a discretion by an officer, or agent of the State. I use the words “an officer” here to include a Minister. Under our present law the Principal Legal Advisor to the National Executive does not play the same role as the Attorney-General in the United Kingdom, and I do not think it is appropriate, when apparently a plaintiff seeks a declaration in respect of an action of

a Minister, that it should be the Secretary for Justice who is named as the defendant. It is my view, that it is sufficient when seeking a declaration merely to name the State as a defendant without naming a particular Minister, whether by naming his office, such as "Minister for Forests", or by naming the Minister in person, such as "Karl Stack, Minister for Forests". I believe this to be so because of the nature of the declaratory action itself. A declaration is an action that will authoritatively inform and bind responsible Ministers of the State to what the law is on a matter which concerns them as Ministers. The declaratory order merely has to be made against the State and its servants and agents. That in my view is enough, because if a Minister or a public servant, or a servant or agent of the State proceeds in a manner contrary to the declaratory order, the courts will grant an injunction against the person concerned. That being so, it is my view that it is not necessary to name the Minister for Forests at all in these proceedings. I think there is additional merit in such a procedure because it avoids bringing the judicial arm of government into direct conflict with the executive arm of government in the person of a Minister. In addition, to name the Minister personally, in my view is inappropriate where the Minister has been performing a function granted to him by statute. Further complications may arise if a Minister is named in proceedings and for some reason he leaves that ministerial office, as following a cabinet reshuffle, general election, or for other cause.

I have decided that the interim injunction should stay in place as there are bona fide legal issues to be adjudicated, and for that reason I will not grant the application to dismiss the whole of the action.

The costs of this hearing go to the plaintiff.

*Interim injunction continued*

Lawyers for first and second plaintiffs: *Blake Dawson Waldron*.

Lawyer for first and second defendants: State Solicitor.