

**PAPUA NEW GUINEA**

**[IN THE NATIONAL COURT OF JUSTICE]**

OS. NO. 411 OF 2003

**PAPUA NEW GUINEA FOREST AUTHORITY**

*Plaintiff*

AND:

**CONCORD PACIFIC LIMITED**

*First Defendant*

AND:

**PAISO COMPANY LIMITED**

*Second Defendant*

AND:

**THE INDEPENDENT STATE OF PAPUA NEW GUINEA**

*Second Defendant*

**(NO. 2)**

WAIGANI: KANDAKASI, J.

2003: 28th August

12th September

***CONTRACTS – Settlement of Court proceedings by written deed of settlement – Timber Authority under the Forestry Act 1991 subject of Court proceedings and compromise - Whether entered into by mutual mistake that the Timber Authority was valid? – Both parties failed to give any proper consideration to the relevant and applying provisions of the Act – Effect of – Parties proceeded under a mutual mistaken belief that the Timber Authority was valid – Deed rendered null and void.***

***Construction of the terms of the Deed – Agreement by statutory authority not to exercise, regulatory, control and prosecutorial powers – Whether offending public policy and intention of legislation? – Agreement offending public policy and intention of legislation – Effect of – Agreement an illegal and unenforceable contract.***

***Capacity - Whether Solicitor General had ostensible authority to execute the Deed on***

*behalf of the State? – At time of execution of deed, no argument that the Solicitor General did have the ostensible authority to execute the deed – No issue taken on his authority and terms of deed relied upon and performed to the detriment of the other parties to the deed – The State acquiesced the Solicitor General’s actions – State may not be at liberty to raise lack of authority.*

**LAW OF AGENCY – Authority of Solicitor General as an agent of the State - Usual and apparent or ostensible authority to represent and settle Court proceedings on behalf of the State - No issue raised prior to, at the time or immediately after the execution of the Deed – Generally, the Solicitor General has the usual and apparent authority to represent and bind the State – Issue raised based on subsequent decision of the Supreme Court requiring specific authorisation by the Attorney General – Other parties relied on the representations and conduct of the Solicitor General and acted upon it to their detriment – State may not be at liberty to raise lack of authority.**

**Papua New Guinean Cases Cited:**

*Panga Coffee Factory Pty Limited & Ors v. Coffee Industry Corporation Limited (06/10/99) SC619.*  
*Fly River Provincial Government v. Pioneer Health Services Limited (24/03/03) SC705.*  
*The State v. Zachary Gelu & Monoburn Earthmoving Limited (15/08/03) SC715*  
*The State v. Keboki Business Group [1985] PNGLR 369.*  
*PNG Coffee Industry Board v. Panga Coffee Factory [1990] PNGLR 363.*  
*Curtain Bros (Qld) Pty Ltd v. Kinhill Kramer Pty Ltd Curtain Brothers [1993] PNGLR 285.*  
*SCR No 12 of 2001; Re Validity of National Capital District Commission Act 2001(20/02/01) SC680.*  
*Jack Livinai Patterson v. National Capital District Commission (05/10/01) N2145.*  
*The State v. Barclay Bros (PNG) Ltd (delivered 06/06/02) N2090.*  
*Tian Chen Limited v. The Tower Limited (delivered 20/01/03) N2319.*  
*Odata Ltd v. Ambusa Copra Oil Mill Ltd (delivered 06/07/01) N2106.*

**Overseas Cases Cited:**

*Holsworthy UDC v. Holsworthy RDC [1907] 2 Ch. 62.*  
*Moore v. Vestry of Fulham [1895] 1 QB 399.*  
*Callisher v. Bischoffsheim (1870) LR 5 QB 449.*  
*Bennette v. Bennette [1952] 2 QB 118.*  
*Magee v. Pennine Insurance [1969] 2 QB 507.*  
*Stone v. Wythinpol (1855) Cro Eliz 126; 78 ER 383.*  
*Miles v. New Zealand Alford Estate Co. (1886) 32CLD 266; [1886-90] All ER Rep 1726.*  
*Brent v. Brent (1841) 10 L.J. Ch. 84.*  
*Windhill Local Board of Health v. Vint (1890) 45 Ch. D. 351*

**Texts Cited:**

Foskett, *The Law and Practice of Compromise*, 5th Edn., Butterworths, Sydney, 2002.  
Carter & Harland, *Contract Law in Australia*, 4th Edn., Butterworths, Sydney, 2002.  
Seddon & Ellinghaus *Law of Contract*, 7th Edn., Butterworths, Sydney, 1997.

**Counsel:**

*Mr. I. R. Shepherd* for the Plaintiff.

*Mr. I. Molly* and *J. Yagi* for the First and Second Defendants.

*Dr. Nonggorr* for the Third Defendant.

**12th September 2003**

**KANDAKASI, J:** By an originating summons filed on the 31st of July 2003, the plaintiff (PNGFA) is seeking an order in the form of a declaration that a Deed of Settlement entered into between the parties in OS 739 of 1999 (the 1999 proceedings) on 12th December 2002 (Deed) null and void.

**The Arguments of the Parties**

The main ground relied upon by the PNGFA is a mutual mistake of fact and law as to the date of expiry of a Timber Authority, TA.024 (TA.024) the subject of these proceedings. It argues that TA.024 had already expired prior to the execution of the Deed. Further or in the alternative, the PNGFA argues that the terms of the Deed offend public policy and the intention of the *Forestry Act 1991* (the *Act*). This it argues is the case because the Deed waives its statutory authority, duty and obligation to regulate, manage, control and prosecute offenders in the forestry industry. This argument is supported by a number of both local and overseas authorities including the Supreme Court decisions in *Panga Coffee Pty Limited & Ors v. Coffee Industry Corporation* and *Fly River Provincial Government v. Pioneer Health Services Limited*. On these bases, the PNGFA is asking amongst other for an order that the Deed be declared null and void.

The State though named as a defendant, it has taken a position supporting the PNGFA's arguments and the relief sought. Then on its own part and in furtherance of the PNGFA's arguments, it argues with the support of the PNGFA that, the Solicitor General did not have the express or the usual or apparent authority to execute the Deed on behalf of the State. Reliance is placed on the recent judgement of the Supreme Court in *The State v. Zachary Gelu & Monoburn Earthmoving Limited*.

The first and second defendants (the Companies) argue that the expiry date and therefore the validity of the TA.024 was a live issue. It was thus addressed and resolved by the Deed. Hence, it was not a mutual mistake but a known fact. In relation to the argument that the terms of the Deed offend the public policy and the intention behind the *Act*, it concedes that no statutory authority can agree to something that is incompatible with the discharge of its powers and functions. Their submission is that, this is not the case here because the terms of the Deed are compatible with the PNGFA's discharge of its powers and functions under the *Act*. With regard to the argument that the Solicitor General did not have the relevant power and or authority to execute the Deed, they submit that, this is an issue that must be resolved by the law of agency. They then argue that, at the time of the execution of the Deed, the Solicitor General did have the usual and or ostensible authority to execute the Deed. In support of these arguments, they rely on a number of both overseas and local case authorities and textbooks, including those that are cited by the PNGFA.

## **The Relevant Issues**

These arguments present a number of issues, which the Court needs to determine. The issues are:

Whether the Deed between the parties executed on the 12th of December 2002 was entered into under a mutual mistake as to the currency of the TA.024 and is therefore null and void?

Are the terms of the Deed incompatible with the statutory powers and functions of the PNGFA and is therefore null and void?

Did the Solicitor General have the usual or ostensible authority to execute the Deed on behalf of the State?

If the answer to the last question is in the negative, does the fact of lack of authority render the Deed null and void?

## **Facts**

The facts giving rise to these issues are these. On the 24th of November 1999, the Companies issued the 1999 proceedings against the managing director of the PNGFA in his official capacity. This was done through Mr. Francis Damem until he was appointed Attorney General in early 2001, a position he continues to hold today. Two days later, they obtained an interim injunction restraining amongst others the PNGFA from interfering with their activities under TA.024, which was issued to them on the 18th of April 1994. On the 14th of December 1999, the injunctive orders were ordered to continue and the Companies were granted leave to proceed to judicial review.

The 1999 proceedings concerned operations of the Companies under TA.024. The PNGFA had issued notices to cease operations and suspension of rights under s. 85 of the *Forestry Act* and s. 146 of the *Forestry Regulations 1998* (the *Regulations*). The Companies sought amongst others, a declaration that these notices were null and void. No specific order or relief was sought in relation to the validity or otherwise of TA.024. It is apparent however, that the proceedings proceeded on the premise that TA.024 was valid.

On the 31st of July 2000, the then managing director of the PNGFA was found guilty of contempt of Court for trying to give effect to the notices to cease and to suspend rights. Then on an informal direction of the then presiding judge, Justice Sheehan, the parties entered into settlement negotiations. The initial communication on that went out from the Companies through Damem Lawyers on 14th August 2000 to the PNGFA via Patterson Lawyers who were acting for the PNGFA then. Of the terms proposed for settlement, there was nothing directly dealing with the validity of TA.024. There was however, a proposal for the State to acknowledge that the State had allowed the Companies to operate under it, based on various

purported extensions of the TA.024. There was no response to this offer.

Around September 2000, Gadens Lawyers took over from Patterson lawyers as lawyers for the PNGFA. By letter dated 22nd September 2000, the Companies wrote to Gadens Lawyers following up on their settlement offer and reminded and informed them that, the matter was adjourned to enable the parties to arrive at a negotiated settlement. By letter dated 20th September 2000, Gadens Lawyers informed Damem Lawyers that, they have sought instructions and would revert to them as soon as those instructions were received but they appear not to have done so.

By letter dated 1st November 2000, Damem Lawyers informed Gadens Lawyers that the then Minister for Forest, Mr. Ogio, had taken a number of steps effectively allowing, the Companies to operate under TA.024 on the purported extensions of that authority. That letter also informed that it had access to advice, the Solicitor General had provided to the PNGFA. How this was possible is unclear. But having regard to that advice, Damem Lawyers took the view that there was no need for any extension of the TA.024 but a new one needed to be issued because the old one was under transitional provisions and that the Provincial Forestry Committee had not signed it. This, they reasoned was the case because TA.024 was for a road line clearance project, namely the Aiambak –Kiunga Road. That meant the TA.024 was for the life of the road project within the meaning of s. 161(3) of the *Regulation*.

On the 30th of March 2001, Yagi Lawyers wrote to Gadens Lawyers and informed them that they had taken over from Damem Lawyers. Then by letter dated 22nd May 2002, Yagi Lawyers wrote to Gadens Lawyers inquiring on the earlier settlement proposals communicated to them by Damem lawyers. About four months later, Jerewai Lawyers wrote to Yagi Lawyers and informed that PNGFA changed its lawyer to them from Gadens. At the same time, they informed that they were instructed to probe the Companies in relation to four matters. Two of these aspects were, "the validity of the issuance of and subsequent renewals/ extensions of TA.024" and the "possibility of your client being allowed to harvest the outstanding allowable volume of log under TA.024." Yagi Lawyers responded by letter dated 4th October 2002 stating amongst others that:

"the central issue of contention in the proceedings is the validity of the timber authority TA.024 in respect of both the original grant and the subsequent renewals. Our clients have always maintained that the original grant and the subsequent renewals were valid. This belief is reinforced by the actions and conduct of your clients, particularly the Second Defendant, in continuing to renew the authority over the years without question. In essence our clients' submits (and quiet apart from the other arguments) that even if the validity of the timber authority is questionable the principle of acquiescence will apply to validate the authority.

...

***In respect of this issue our clients considers it paramount in view of the potential threats and the challenges being made now and in future in respect of the validity of the TA 024 that this issue be clearly and finally resolved and settled for the mutual interests of both our clients.***

...

***Accordingly our clients submits that the parties agree that the original grant of the TA.024 and its subsequent renewals/extensions throughout were valid."***

(Emphasis supplied)

By letter dated 16th October 2002, Jerewai Lawyers recommended the PNGFA to accept this offer even though, these lawyers did not have complete instructions in terms of the complete documentation relative to the 1999 proceedings. More importantly, these lawyers did not have before them, a copy of originating summons, setting out the relieves sought and the grounds relied upon, the affidavits in support and the other documents filed in Court up to the time of this firm coming into the scene. They did not also have a copy of TA.024. This advice did not make reference to any provision in the *Forestry Act* or the *Regulations* or any other law. It merely adopted a brief from the then Solicitor General and the arguments of the Companies.

On the basis of the advice of Jerewai Lawyers, it seems the PNGFA through Jerewai Lawyers accepted the submissions of the Companies by letter dated 17th October 2002, and agreed to cease altogether any contention on the validity of TA.024. It also accepted other offers of these Companies in relation to royalties of K10.00, approval to harvest logs from "elsewhere to make up" any "shortfalls" and legal costs not to exceed K150,000.00. The Companies through Yagi Lawyers confirmed acceptance of these terms of settlement by letter dated 21st October 2002 and asked for a draft settlement Deed to be forwarded for their consideration and execution if in order. That was done resulting in the execution of the Deed now under consideration.

On the basis of the settlement, the Companies discontinued the 1999 proceedings and filed a Copy of the Deed in Court on the 19th of December 2002.

As would be apparent from the above statement of the facts, TA.024 is central to the 1999 proceedings and the Deed. Its history starts with it being granted in favour of Paise on 18th of April 1994. On the 16th of August 1994, Minister Neville purported to vary and have it extended by 5 years to 16th April 1999. At that time, Concord was approved as the developer or contractor. Minister Philemon purported to further extend it for 5 years to April 2000. By letter dated 1st September 1997, Concord applied to Minister Pok for still further extension on the basis of delay in the approval of the environmental plan. On the same day, that application was granted until completion of road and allowable timber volume is harvested. All of these purported extensions were sought and approved by letter.

The string of purported extensions to TA.024 continued into 2000, with Minister Ogie purporting to extend it by letter dated 15th May 2000, "until completion of feed road projects and until the allowable log volume is harvested." The Deed noted that phase one of the project was completed, as at the time of the execution of the Deed, that is, 12th December 2002.

With these facts in mind, I now proceed to consider the issues presented. I start that process with the first issue before me, that is the question of whether or not the parties entered into the Deed under a mutual mistake as to its currency or validity.

## **Mutual Mistake as to Currency of TA.024?**

A close examination of the originating summons under the 1999 proceedings does not reveal any part of it that deals specifically with the question of the validity of the TA.024.

Accordingly, this issue was not one of the relief that was sought in those proceedings.

Instead, it seems clear to me from the matters set out in the originating summons that the Companies sought a number of declaratory and injunctive orders as they did, on the basis that TA.024 was valid and that they have acted appropriately under that authority. They therefore sought to have the *Notice to Cease Operations* and *Notice of Intention to Suspend Rights Under a Timber Authority* null and void.

The grant of the interim injunctive orders against the PNGFA, though at a preliminary stage, supported that view or position. In the negotiations between the parties leading up to the execution of the Deed, the Companies, strongly argued for the position that the TA.024 was valid. This position was taken on the premise that the various purported extensions to the TA.024 were valid and as such, it remained valid at all relevant times. If the issue at hand was seen from a factual perspective only, this view would appear correct. But because the forest industry is a statutorily regulated industry, it has to be examined from the perspective of the relevant and applying legislation as well. Consequently, it becomes a question of mixed fact and law as the PNGFA argues.

The factual position was already considered in terms of the number of extensions applied for and purportedly granted to TA.024. By reason of that, it would appear that TA.024 was factually valid at the time of the negotiations and the execution of the Deed. The question then is, were the purported extensions validly granted in terms of the requirements under the *Act* and the *Regulations* as to the procedure and manner of application for extensions, considerations of and arriving at a decision on such an application? This requires a consideration of the relevant provisions of the *Act* in question and the *Regulations*.

TA.024 was granted under s. 143 of the *Act*, which is one of the saving provisions under the *Act*. The provision reads:

### **"143. Board may extend saved permits, etc.**

The Board may, until—

- (a) the National Forest Plan has been drawn up under Section 47; or
- (b) 31 December 1993,  
whichever shall first happen, notwithstanding the provisions of this Act—
- (c) extend the term of any permit or licence saved by Section 137; or
- (d) grant a timber authority,

for a period not exceeding one year in a form approved by the Board."

Without considering anything further, this provision provides for a grant of a timber authority or a permit or a license by the National Forest Board for a period not exceeding one year. But this can happen only up until a National Forest Plan is drawn up or until 31st December 1993, whichever, first occurs. Clearly, this appears to be an interim arrangement until either of the events prescribed occurs. This is apparent in the words, "may until" as used in the opening of this provision.

There is no provision either in s. 143 itself or the *Act* that allows for an extension of a timber authority under s. 143 or under s. 87 or 90C, which are the provisions that might apply after the events covered in s.143. This position is to be contrasted with s. 95, which provides for extensions in the case of licenses to engage in forest industry activities. This position was effectively acknowledged and accepted by the Companies, in their lawyers' letter to the PNGFA's lawyer dated 1st November 2000, in these terms:

"In construing Section 87 and Regulations 161 (3) and 163 (2), the State Solicitor, in our view, came to the correct conclusion that a Timber Authority is issued for particular types of projects specified in the above mentioned Regulations and has no time frame or duration and is deemed valid until the project is completed.

Regulation 161(3) is relevant in the instant case because the Timber Authority in question was issued for a roadline clearance project namely, Aiambak –Kiunga Road.

...

Accordingly, though not clearly stated by the State Solicitor, it is our considered opinion that the Timber Authority No. 024 would ordinarily be valid and there would be no need for Forest Authority or the Minister to consider any extensions. It follows that any extensions would be a nullity."

As would be apparent from this position, the Companies' position was that once a timber authority is granted, it is valid up to the life or the end of the project for which it is granted. There is therefore no need for any extensions. Therefore, TA.024 remains valid until the project is completed. The subsequent purported extensions were thus in their view unnecessary and in any case, they are null and void and of no effect.

The advice to the PNGFA by the then Solicitor General proceeded on the basis that, TA.024 was granted under the previous legislation, which was saved under s.137 of the *Act*. That advice then had regard to the number of purported extensions granted by the various relevant National Forest Ministers at the relevant time. Considering these purported extensions, the advice went on to state in effect that, the PNGFA was bound by those representations. The Companies could thus sue on that basis. The case of *Curtain Bros (Qld) Pty Ltd v. Kinhill Kramer Pty Ltd* *Curtain Brothers* was cited in support of that advice. The subsequent advice to the PNGFA from Jerewai Lawyers dated the 16th of October 2002, which was the basis upon which the Deed was executed made no reference to any provisions of the *Act* or its predecessor. It merely endorsed the Solicitor General's advice and recommended settlement essentially in the terms proposed by the Companies.

On the evidence before me, I find that all the parties proceeded on the wrong footing for a number of reasons. Firstly, TA.024 was issued on the 18th of April 1994 purportedly under s. 143 of the *Act*. That could not be validly done. The reason for this is simple, a timber authority under s. 143 could be issued only if either of the two events stipulated in s.143 had not occurred. These events are (a) the National Forest Plan having been drawn up under Section 47; or (b) 31 December 1993 having arrived. The 18th of April 1994 was well passed the 31st of December 1993 and that alone could not enable the National Forest Board to issue TA.024. This, of course, raises questions over the validity of the grant. But was not picked up by either of the parties. As such, it was not part of the negotiations.

Secondly, the evidence before me such as, the *Notice of Intention to Suspend Operations* clearly shows that TA. 024 was granted for the Aiambak – Kunga Road project. It was therefore an authority that comes under s. 90C and not s.87 of the *Act*. The parties therefore proceeded under the wrong understanding that s.87 applied, when in fact it was s. 143 and s. 90C.

Thirdly, although the Solicitor General's advice suggests, TA. 024 were granted prior to the coming into force of the *Forestry Act 1991*, there is no clear evidence of the parties agreeing and or accepting that to be the case. The PNGFA, based on its legal advice, was of the view that the TA.024 was saved under s.137 of the *Forestry Act 1991*. This ignores the fact set out in TA.024 itself that it was granted under s. 143. Further, the Companies in support of their action under the 1999 proceedings stated that, on the approval of the Minister for Forests on the 11th of October 1993, TA.024 was granted on the 18th of April 1994 under the transitional provision of s.143 of the *Act*. This is clearly deposed to in paragraph 5 of the affidavit of Mr. Philip K.S. Lee of the 24th of November 1999, filed in support of the 1999 proceedings.

This leads to the next and final reason that the parties proceeded under a mistaken belief. As the Companies stated through Mr. Lee in support of their 1999 proceedings, TA.024 was an interim arrangement under the transitional provision. If this was validly granted, then this arrangement was to be in place for a period of one year only. There is no provision either in s.143 itself or the *Act* generally for any extension of this period. So the question is, what was to happen to the arrangements after the expiry of that period?

This question can be answered in my view, by reference to the purpose and or intent of the *Act*. This can be gleaned from the preamble to the *Act*, following the precedents set in many cases, the latest of which are the cases of *SCR No 12 of 2001; Re Validity of National Capital District Commission Act 2001 and Fly River Provincial Government v Pioneer Health Services Ltd*. The preamble to the *Act* in the present case makes it clear that, Parliament wanted to bring within the ambit of the *Act* the management, development and the protection of the nation's forest resources and the environment. It therefore set out to repeal all previous legislation and bring all timber authorities, permits and licenses granted under the previous legislation under the governance of the new *Act*. This is apparent from the words in the preamble which are in these terms when speaking of the purpose of the *Act* which is 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; and***
- (e) ***repeal various Acts and for related purposes".***

(Emphasis supplied)

This intention is carried through in s.137 by first permitting all timber permits, licenses and authorities granted under the previous legislation to continue under the new *Act*. It then authorises the National Forest Board to vary any of the terms and conditions under such permits, licenses or authorities that either offend or appear to be at variance with any provisions or the intent of the *Act*.

It follows therefore that, a grant of a timber authority, permit or a license under the interim provision of s. 143 can be valid only up to the period provided for, which is one year from the date of the grant. At the expiry of that period, I am of the view that an application for a timber authority has to be made in accordance with the relevant provisions of the *Act*, if the authority holder wishes to continue activities under the authority. This view is strengthened by the fact that there is no provision for an extension of the time period under s.143, as already noted.

What this means in the present case is that, if the Companies wanted to continue operations under TA.024, it was incumbent upon them to apply for an authority under the *Act*. The evidence clearly shows that they have in fact applied for an extension of the period stipulated under TA.024 and not necessarily an application under either s. 87 as was the provision mentioned in their lawyer's letters to the PNGFA or under s.90C, as this Court has opined. The applications were addressed to the relevant National Forest Ministers at the relevant time. The various and relevant National Forest Ministers granted all of these applications, with one of them even on the same day of the application.

In my view, all of these were invalid for a number of reasons as well. Firstly, s.143 under which TA.024 was initially granted does not vest in the National Forest Minister any power to receive, entertain and grant a timber authority. Secondly, the provisions dealing with timber authorities, namely ss.87 and 90C in so far as they are relevant do not vest any power in the National Forest Minister to grant a timber authority. These provisions instead vest the power in the Chairman of the relevant Provincial Forest Committee and the National Forest Board. These authorities can grant timber authorities only after the exhaustion of a long list

of steps, starting from a receipt of an application for an authority, to various levels of evaluation and consultation and the grant of such an authority. The process in the case of an application for a timber authority for a road line project is even more onerous. There are requirements for public hearing in relation to the application, notice of which must be given by gazettal, newspaper and radio broadcasts and inputs on the project from the Departments of Transport and Works as well as the Department of Environment and Conservation. This is in addition to a requirement for the relevant Provincial Forest Management Committee to consider the application and the results of the public hearing and decide whether or not to recommend that application and ultimately the application going before the National Executive Council (NEC).

The only part the National Minister for Forest is authorised to play is in relation to an application under s. 90C. Here, he is authorised to receive a recommendation from the National Forest Board on the application upon which recommendation he may recommend the NEC to endorse the application. Then once the NEC has given its consideration, the Minister is obliged to communicate the decision of the NEC to the Board. After this, there are additional requirements that must be attended to by persons other than the Minister. Upon the receipt of a NEC decision endorsing the application, the National Forest Board is obliged to call for public tender from persons other than the applicant or any one related to the applicant. If there is no successful bid from any other person, only then could the applicant be considered as the successful bidder. That is not the end of the process, the successful tender is then obliged to enter into a Sales and Purchase Agreement with the customary landowners.

All of these could not easily be completed within a matter of days, let alone within the same day of the application. The legislation was enacted after the Barnett inquiry into dealings in the forest industry. The inquiry recommended sweeping changes to the governing legislation, following a finding amongst others that, there was corruption in the industry and that, the Minister responsible at the time had abused his powers for personal gain. The clear intent of Parliament therefore was to ensure that the Minister for Forest did not have any personal and direct power and authority in relation to the issuance or grant of timber authorities, permits or licenses, except as provided for in the *Act*.

What actually happened in this case appears to me to be clearly outside the intent and purpose of the *Act*. There was no meaningful consultation and or input from the various people and authorities that ought to have been consulted and given the opportunity to have their say in relation to each of the applications. The negotiations between the parties leading to the Deed did not have any regard whatsoever to any of these important and relevant requirements under the *Act*. The parties appear to have proceeded on the premise that TA.024 was validly granted at the first place and that it was validly extended and therefore the view of the Companies that, it was issued for the life of the project. This cannot be sustained having regard to the provisions of s. 143, TA.024 itself and the foregoing discussions. Similarly, the advice to the PNGFA, both by the Solicitor General and Jerewai Lawyers was clearly wrong and erroneous and seriously flawed for a failure to give any consideration to the matters outlined above.

Having regard to all of these factors, I am of the view that, the correct position both factually and legally was that, TA.024 expired on the 18th of April 1995. The parties therefore proceeded under the shared or mutual mistaken belief that it was valid, if not a deliberate design to avoid the requirements of the *Act*. The validity of TA.024 was central to the parties' negotiations. So the first subject to which the parties agreed to was the validity of TA.024. The rest of the agreement proceeded on that basis. Hence, the validity of TA.024 was a fundamental term of the Deed and the agreement on that was arrived at under a mutual mistake that it was valid when in fact it was not.

The Companies concede that, generally, where the parties to a contract enter into it under a mutual mistake as to an essential term, the contract can be set aside. Many authorities such as *Magee v. Pennine Insurance* support this proposition. I find this case is one such contract. Consequently, I am minded to declare the Deed null and void on this basis.

But the Companies content however that, a contract to settle legal proceedings such as the one in this case cannot be set aside on the basis of a mutual mistake, such as the one alleged here, because it was an issue in the proceedings. Counsel for the Companies and that of the PNGFA ably assisted this Court by drawing to the Court's attention to a number of case authorities and leading textbooks, which discuss and state the law on point.

These authorities provide authority for the proposition that the Courts encourage out of court settlement and therefore compromises of the parties in relation to matters already in Court or are likely to be in Court. They will therefore not readily seek to invalidate compromises of the parties. They take this position even in cases that involve compromises in relation to a case, which presents "competing assertions of the law, which have debatable validity". They also acknowledge that when parties reach a compromise, they take the risk that they may be mistaken but that is no reason to invalidate a compromise. The same applies to a case in which a compromise has been reached in respect of a claim that is doubtful, because a party "cannot choose his own time for litigation. If he is sued, he must fight or submit; if he chooses to submit, his submission cannot be revoked on the ground that he was mistaken."

At the same time, and as already noted, the Companies accept that the parties to an agreement cannot contract to do something that is illegal or in the case of a statutory authority, something that is beyond its powers and incompatible with its powers and functions. This emerges from the Supreme Court decision in *PNG Coffee Industry Board v. Panga Coffee Factory Pty Ltd.*

For the reasons already given, I find that this was not a case of competing assertions of the law, which had debatable validity. Likewise, I do not find this to be a case in which the parties took the risk that they could have been mistaken as to the basis and terms on which they were prepared to compromise and more importantly, the validity of TA.024 in the way they resolved that question. The reason for these findings is simple. The parties negotiated and arrived at the shared view and eventual agreement that TA.024 was valid based on a clearly erroneous and seriously flawed legal advice. If the true and correct factual and legal position was taken into consideration by all of the parties in their negotiations, they would have come to the conclusion that TA .024 was invalid and as such, the success of the

Companies' action was doubtful.

This leaves the Companies' submissions based on the judgement in *PNG Coffee Industry Board v. Panga Coffee Factory Pty Ltd*. These submissions touch on the second main issue of, whether or not the terms of the Deed are incompatible with the *Forestry Act* and therefore null and void. I therefore consider it appropriate that I should now give consideration to that issue at this point.

### **Compatibility of the Terms of the Deed?**

I accept the Companies' submission as to the law on contracts with statutory or public authorities. The law is as was stated by the Supreme Court decision in *PNG Coffee Industry Board v. Panga Coffee Factory Pty Ltd*. In that case, the parties entered into a contract allowing for stockpiling by the respondent in a bid to help the country to meet international coffee quotas. Subsequently, due to changes in policy, the appellant tried to impose certain conditions and restrictions against the respondent, which went against its agreement with the respondent. That caused the respondent to go to Court and the National Court arrived at a decision in its favour. The appellant appealed to the Supreme Court against that decision. The Supreme Court held that the agreement was not incompatible with the PNG Coffee Industry Board's powers under s. 13 and s. 14 of the *Coffee Industry Act*.

Subsequently, the Supreme Court had both Panga Coffee and the Coffee Industry Board along with others back in Court in 1999, resulting in the judgement *Panga Coffee Factory Pty Ltd & Ors v. Coffee Industry Corporation Limited*. This time, the case involved an agreement between the appellants and the respondent, in which the respondent had agreed to exempt the appellants from coffee export levies. The respondent refused to honour its part of the agreement and the appellants sought specific performance of the agreement. The National Court found that the agreement was inconsistent with the clear intention and purpose of the relevant Act. The trial judge therefore found the contract void and unenforceable. The Supreme Court agreed and affirmed the decision of the trial judge. In so doing, the Supreme Court said at p. 7:

"The Appellants are claiming enforcement of a contract under deed which purports to acknowledge the appellants' claim for compensation and stipulates its mode of payment. Clearly, that mode of payment is illegal and unenforceable."

On my part, I had regard to these judgment of the Supreme Court and other local and overseas authorities and held a contract for legal services was null and void for not complying with the requirements under the *Public Finances (Management) Act 1995*. That was in *Jack Livinai Patterson v. National Capital District Commission*. A similar view was arrived at in *The State v. Barclay Bros (PNG) Ltd* by the then Deputy Chief Justice and now Chief Justice. Both of these decisions went to the Supreme Court on appeal. Both of the appeals were dismissed. In the first case, it was on a successful objection to the competency of the appeal. In the second case, the Supreme Court heard the appeal on its merits and dismissed the appeal affirming the decision of the National Court.

In the *Jack Livinai Patterson v. National Capital District Commission* case, I expressed the view that:

"It is apparent from these authorities that, where a contract is entered into contrary to the provisions of a relevant and applying legislation, there is no discretion whether to enforce it or not. It is simply void and unenforceable. Thus, it cannot be the law that the legislation sometimes depends on what is "fair" and it does not matter whether the public authority itself raises the issue of statutory non-compliance or not..."

In most cases, legislation expresses public policy considerations. They become the legislative intent behind whatever the legislation is. It is trite law in our jurisdiction that, all legislative provisions must be given their fair, large and liberal meaning so as to give effect to the legislative intent."

The Supreme Court in *Fly River Provincial Government v. Pioneer Health Services Limited* effectively endorsed the National Court judgements in *Barclay Bros'* and *Patterson* cases, following its decision in the *Barclay Bros'* case. The decision in the *Fly River Provincial Government* case is the latest Supreme Court decision on the subject of contracts with public or statutory authorities. It supports the proposition that, if a public authority or a statutory authority enters into a contract in breach of or outside the provisions of its enabling or any other relevant and applying legislation, the contract is null and void. The law is thus clearly settled that no contract that offends the intent and purpose of any legislation can be enforced. Instead, such a contract is illegal, null and void and thus unenforceable.

The other cases and textbooks referred to and relied upon by the Companies do correctly state the legal position historically and to the present in the context of a compromise of a Court action. These authorities correctly point out that such compromises fall into two broad categories, (1) a forbearance to sue and (2) a compromise of a suit. The former applies to cases in which proceedings have not yet been issued with the second applying in cases in which proceedings have been issued. The classification is relevant only in so far as they identify when a compromise of an anticipated or already issued Court proceedings, is reached, otherwise the same principles apply in both cases. I will briefly discuss the relevant legal position with this in mind.

As early as 1588, it was judicially recognised that a claim that was without any good legal basis could not be enforced for failure of valuable consideration. The rationale behind this was that, in such a case, there was no detriment to give up a claim that was baseless or had no prospect of success. Eventually, however, this position changed in the 19th century with the courts upholding doubtful claims. The only justification for this shift was one of convenience and the modern law proceeds on the basis that what matters is not whether the right or the claim can be sustained but the actual surrendering of the right to make the claim. This has its shortcomings such as the fact that a person who makes a baseless claim could be allowed to obtain something without giving anything in return, or it has the potential of permitting a person to make a claim that is manifestly improper to succeed. I accept as a sound suggestion in the learned work of Seddon & Ellinghaus which is based on a number of authorities. They

suggest that three requirements must be met by a party seeking to support a contract as even though it compromises a doubtful claim as a form of safeguard against the possible shortcomings of the law. These are that the party must prove that:

the claim is reasonable in itself, and not vexatious or frivolous;  
he or she has an honest belief in the chance of its success; and  
he or she has not knowingly concealed from the other party any fact which might affect its validity.

In my view, safeguards such as these are necessary to avoid the very kind of risks highlighted above.

The cases and texts referred to and relied upon by the Companies mainly deal with situations other than cases in which a compromise of a Court action in direct conflict with statutory provisions or those which offend public policy. But a case that appears to be on point and almost on all fours with the case before me is *Windhill Local Board of Health v. Vint*, cited by the PNGFA. In that case, the plaintiff was a local board that brought an indictment against the defendants for interfering with and obstructing a public road. Before the Court could hear and determine the matter, the parties compromised the proceedings between the solicitors of the parties. That compromise was sanctioned by the presiding judge and later confirmed by a deed executed by the parties. The compromise was that the defendants would restore the road within 7 years and the plaintiff would agree to consent to a verdict of not guilty on the indictment if the defendant restore the road within the agreed period. The defendants failed to restore the road as agreed and the plaintiff brought an action for specific performance and damages.

The trial judge held that the indictment was for a public injury and the agreement to consent to a not guilty verdict was against public policy and was therefore illegal. Accordingly, the plaintiffs could not maintain an action on the defendants' covenant. The action was therefore dismissed. On appeal to the Court of Appeal, the decision of the trial judge was affirmed.

Lord Justice Cotton in rejecting arguments against the trial judge's decision said at p. 363:

"the Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when it is for an act which is an injury to the public.... That to my mind is illegal".

Lord Justice Fry added at p. 364:

"where the matters of indictment are matters of public concern, they are not the subject of compromise ... 'These are matters of public concern, they are therefore not legally the subject of compromise.'"

Lord Justice Lopes on his part added at p. 366:

"In my opinion this case falls well within the decision in *Keir v. Leeman* ... citing from the end of the judgement of Lord Denman's judgement... 'But if the offence was of public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.' Now there can be no doubt that in the present case the offence was of public nature; and, in my opinion, the consideration for the agreement which was entered into, was the consent to an acquittal in the future, which seems to me in effect to be stifling of a prosecution.

I think the agreement in question was against public policy and illegal..."

In the present case, the PNGFA argues that the terms of the Deed are incompatible with the provisions of the *Act* for a number of reasons. First, it argues that the Deed has no date of commencement and expiry. Secondly, the terms are vague and are uncertain. Thirdly, the Deed is against the intent and purpose of the *Act* and is against public policy as it amounts to a stifling of prosecution. Finally, the Deed proceeds on the basis that TA.024 is valid when in fact it is not so and the Deed falls or stands on the validity of TA.024 and as such, the other terms of the Deed can not be severed from the validity of TA.024.

The Companies argue that, the Deed is not incompatible with the *Act*. The parties have arrived at a compromise to settle the Companies court action in the form of the Deed, upon proper legal advice. Then going by the general attitude of the courts not to strike down agreements of the parties and in so doing, encourage parties to settle their disputes out of Court, the Deed should be upheld. Further in accordance with the established principles, they submit that this Court should imply a term that the contract shall be performed legally. This submission is particularly in relation to clause 4. With regard to clause 1 and 3, they submit that, if these provisions are considered to offend the *Act*, then the part which offends can be severed without affecting the rest of the terms of the Deed.

These arguments can be resolved by reference to the terms of the Deed and its effect. I therefore consider it appropriate that I should view the Deed as a whole. This calls for a proper construction of the Deed. I summed up the law in *Tian Chen Limited v. The Tower Limited* after a review and consideration of some of the relevant authorities on the construction of contracts, in these terms:

"It is clear from these authorities that, it is the duty of the Court to uphold the agreement of the parties regardless of whatever difficulties there might be in the construction of their contract. In the exercise of that duty, the Courts must endeavour to uphold the agreement of the parties, particularly in commercial arrangements. This is because the Courts are not there to destroy the agreement of parties but to uphold them. This should readily be the case where the parties have not only agreed but have gone further into implementing their agreement resulting in expenses being incurred by either or both of the parties. In so doing, the Courts can and have ignored words or clause that are meaningless or superfluous following (*Nicolene v. Simmonds*) and supply terms or words as appear reasonable and necessary in the circumstances to give effect to the parties agreement."

Bearing these in mind, I note that the Deed in this case states clearly in the recitals, the

background to the Deed. In the first part, it speaks about the issuance of the 1999 proceedings and the fact that the Companies had obtained interim injunctive orders against the PNGFA restraining it from preventing the Companies from carrying out activities under TA.024, including road construction work on the Aiambak-Kiunga Road. Secondly, it speaks of the restraining order continuing in force up to the date of the Deed with the completion of the first phase and Companies having embarked on the second phase of the project. Finally, it states the parties' intention and desire to remove the various contentions before the Court for the purposes of returning to the status quo prior to the Court action, without further litigation.

The parties then agreed as follows:

"1. The Defendants [PNGFA] agree and undertake not to persist on and to pursue the issue as to the validity of the issue of and/or the renewals of extension of the Timber Permit No. TA-024, and for all related purposes the said Timber Permit is deemed to be valid.

The Plaintiffs [the Companies] agree and undertake that they will endeavour to and comply with the terms and conditions of the said Timber Permit, and more specifically the Plaintiffs, in the course of the road construction under the said Timber Permit, will fell, extract and export whole logs from the legally allowable distance on both sides of the center of the road-line adjacently traversing the entire length of the constructed road.

The Plaintiffs agree and undertake that as of the date of this deed, a Royalty/Premium of K6.00 per cubic meter of export whole logs will be paid to the individual landowners, and K4.00 of the same will be paid to the landowner company, Second Plaintiff.

The Defendants agree and undertake that they will permit the plaintiffs to fell, extract and export whole logs from elsewhere to make up for any short-fall in the maximum allowable volume of logs under TA-024. For avoidance of doubt, the said short-falls may occur where the road-line traverse surrounding land which is void of timber stands, and in such cases the Defendants will endeavour to allow the Plaintiffs to extract logs from the nearest reserve forest areas **SAVE AND EXCEPT** that such short-falls shall first be verified by the Second Defendant's technical officers.

The Defendants agree and undertake to pay the Plaintiffs costs of the Court action herein but any lack of mutual agreed costs shall not be an obstacle to the settlement reached herein; such costs however are not to exceed the sum of K150, 000.00.

The Plaintiff agree and undertake that upon execution of this Deed of settlement, they will simultaneously execute a draft Consent Order to discontinue the Court action herein by December 31st 2002."

The first thing to observe about this Deed apart from the obvious signs of poor draftsmanship is the validity of TA.024. The validity of any permit or authority issued to a participant in the forest industry can be determined only by reference to the requirements of the relevant and applying legislation. It is settled law that, generally where parties have reduced their agreement into writing the document should be allowed to speak for itself. No extrinsic evidence can be allowed to either add to or subtract from what is stated in the document. An authority on point is the Supreme Court judgement in *Curtain Brothers (QLD) Pty Ltd & Kinhill Kramer Pty Ltd v. The Independent State of Papua New Guinea*. This case has been cited with approval in a large number of cases, which includes my own judgement in *Odata Ltd v. Ambusa Copra Oil Mill Ltd*.

So what does the Deed say about the need for and the actual compliance of the requirement of the *Act*? There is nothing in the Deed that indicates that the requirements of the *Act* have been complied with. But the contrary intention is indicated in the words, "*the said Timber Permit [authority] is deemed to be valid.*" This is not the same as saying, "the Timber Permit *is* valid." It is apparent therefore that the parties knew there were problems with TA.024 on the basis of which they could not agree that it was valid. So they agreed to deem it valid.

Indeed, the evidence before me, without any objection of either of the parties on the basis of the rule against extrinsic evidence, supports this view. On the basis of that evidence, I already expressed the view that, TA.024 appears not to have been validly granted and thereafter purportedly extended a number of times. Further, I said that the invalid grant could not be cured by any of the subsequent purported extensions, which were themselves also null and void and therefore invalid for the reasons already given. Moreover, I found that the parties did not have any careful and detailed regard to the relevant and applying provisions of the *Act* or the *Regulations*, in the course of their negotiations. Yet, they came to the erroneous conclusion that TA.024 was valid.

TA. 024 and its validity became a central issue in the Deed, it appeared in the recitals and the very first term the parties agreed to. The other terms agreed to became secondary and dependant on the validity of TA.024. Going through each of other terms makes this more apparent. Clause 2 obligates the Companies to comply with all of the terms and conditions under TA.024. The next provision, clause 3 speaks of the rate of royalty and payments, which can only be on the basis of a valid TA.024. Clause 4 speaks of the obligations of the PNGFA again in terms of the TA.024. Likewise, clause 5 is dependent on the fact that TA. 024 was valid. This clause proceeds on the basis that TA.024 was valid (which was not in fact the case), the PNGFA was wrong to issue the notices it issued under s. 85. Accordingly, it provides for a payment of the Companies' costs up to a maximum of K150, 000.00. The final provision is merely an administrative clause. Its intention is to effect the terms of the settlement by ensuring that the proceedings that were being compromised were in fact discontinued by consent. Even that is dependent on the fact that the proceedings were being resolved in the provisions before it.

Hence, it is clear that the parties made no mistake in giving priority to the validity of TA.024 in the way they did by making that as the very first term they agreed to. This is

understandable, because that is the only way in which the Companies could legally harvest logs and export them. Hence, I find that, the whole Deed rides on clause 1, so much so that the other provisions and therefore the Deed can not be severed from clause 1. On the other hand, I find that the other clauses could be easily severed from clause 1 because clause 1 is capable, in my view, of standing alone but they would have no place, without a valid TA.024.

Now bearing this in mind, let me address each of the other arguments of the PNGFA. The argument in relation to the lack of any provision as to the date of commencement and expiry of the Deed, and ambiguity in clause 4 can easily be resolved by a consideration of the document as one as I have already done. That exercise makes it clear that the Deed concerns the parties' duties and obligations under TA.024. It is therefore reasonable and would not amount to a re-writing of the parties' agreement by inferring that, the duration of the Deed is for the duration of TA.024. Likewise, the allowance for the extraction of logs from "elsewhere" in clause 4 can only be within the area covered and permitted under TA.024. Given these, I reject the arguments of the PNGFA in these respects.

The third argument by the PNGFA requires an examination of the Deed in its totality and the background leading up to it. The Companies action under the 1999 proceedings was to prevent the PNGFA from carrying out its statutory powers and functions under the *Forestry Act*. They obtained interim restraining orders and they eventually got the PNGFA to abandon all of its powers and functions under the first term of the Deed.

As I already said, Parliament made a deliberate policy decision to overhaul the forest industry. Its desired aim was introduced through the *Forestry Act*, a system to properly "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". The objective of this system was to "maximise Papua New Guinean participation in the wise use and development of the forest resources as a renewable asset and utilize the Nation's forest resources to achieve economic growth, employment creation and industrial and increased "down stream" processing of the forest resources." The *Forestry Act 1991* therefore sets out the Nation's public policy in relation to its forest industry.

To achieve that aim, the legislature through the *Act* has charged the PNGFA with the onerous responsibility of ensuring an application for a timber authority, permit or a license is carefully assessed on its merits with inputs from a number of authorities. Only upon a recommendation in favour of an application from all of these authorities can such an application be granted. Once an application is granted, that is not the end of the requirement a person permitted to participate in the industry is required to meet. Such a person is required to observe the terms and conditions on which the license, permit or an authority is granted. Amongst the requirements that must be met, there is a requirement to meet a performance bond from which the PNGFA can draw from in the event of any default in the performance of the timber license, permit or an authority holder. They are also required to pay royalties to both the government and the local landowners, which comes under the economic benefits to the resource owners.

The Companies were served with a *Notice of Intention to Suspend Rights Under a Timber*

*Authority* under s. 85 of the *Act*. The grounds for issuing the notice was in terms of an inspection being carried out on the 16th to 21st June 1999 and 28th August to 5th September 1999, which revealed that the Companies failed to comply with certain terms and conditions for the grant of TA.024. These included a failure to establish a road center line, culverts and bridges, vertical profile, illegal logging outside the TA area, a failure to comply with the logging code of practice in a number of respects and using old rates to pay royalties which were lower than higher rates that were adopted. Other evidence before me suggests that the Companies also failed to meet the performance bond requirements set under s. 98 of the *Act*.

Thus clause 1 in effect saw the PNGFA agreeing to stifle, if not waive its policing and prosecutorial powers under s. 85 and s. 86 of the *Act* in respect of the matters covered in the 1999 proceedings. This result was brought about under the shared mistaken belief that TA . 024 was valid, which was in turn based on a seriously flawed legal advice.

I am also of the view that the Deed went against the intent and purpose of the *Act*, which is to properly, "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". In order to achieve that intent or purpose, the legislature charged the PNGFA with an onerous responsibility and gave it no power or discretion to contract that out.

The intent and purpose of the *Act* could not be achieved unless the requirements set under the *Act* are met and enforced by a system of due and proper inspection and policing together with prosecution of defaulters, which is what the *Act* provides for. The whole system of requiring timber licenses, permits or authorities under the *Act* is a critical and vital component to the intended aim, set by Parliament in enacting the legislation. Once a license, a permit or an authority has been issued, it is also critically important, in my view, to police compliance of the terms and conditions of the license, permit or the authority and prosecute and punish offenders in the terms provided for by the Act. The penalty provided for under the *Act* is a cancellation of the license, permit or the authority as the case might be, which is serious. The Companies have not pointed out and I can not find any provision granting any powers in the PNGFA or any other to exempt the application of these requirements and to waive the prosecution and penalizing of any offenders.

In the case before me, the PNGFA based on very poor legal advice, agreed to and indeed contracted out all of its powers and functions and hence duties and responsibilities in respect of TA.024 and the Aiambak –Kiunga Road project. This is despite there being no statutory foundation for it to do so. Clearly therefore, the case falls almost on all fours with the Supreme Court judgements in, *Panga Coffee Factory Pty Ltd & Ors v. Coffee Industry Corporation Limited*, to the extent that the contract was inconsistent with the intent of their enabling legislation. It also comes within the judgement in the *Fly River Provincial Government v. Pioneer Health Services Limited*, because the contract was contrary to the intent and purpose of a relevant and applying legislation. Similarly, the case comes within the ambit of the *Windhill Local Board of Health v. Vint*, to the extent that the Deed amounts to a stifling of prosecution, monitoring and control of the forestry industry by the PNGFA on behalf of the people of Papua New Guinea.

Before I come to a final decision on the issue of the Deed's compatibility with the *Act*, there is one final aspect to attend to. That is the Companies' submission for the Court to sever any of the terms of the Deed so as to allow the Deed to stand. This submission relies on some of the well known authorities on point. I do not consider it necessary for me to give consideration to all of those authorities, as the relevant principles of law have been adopted and applied in our country for some time now.

A latest statement of the correct principles on severance is the Supreme Court judgement in *Panga Coffee Factory & Ors v. PNG Coffee Industry Board* in these terms:

"When valid promises are associated with, but are separate in form from invalid promises the test for severance is whether they are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature."

Applying these principles to the case before it, the Court found that, "the whole agreement to settle was founded upon and was dependent on the arrangements over the levy monies."

In the present case, after closely examining the Deed, I came to the conclusion that the whole Deed was founded upon a purported validity of TA.024. The agreement on the validity of TA.024 is very central to the Deed. Without that agreement, the other terms can not stand alone because they are dependent on that agreement. They together form the Deed and hence the consideration for a discontinuance of the 1999 proceedings. Separating them would obviously tear the Deed apart. Accordingly, I am of the view that the severance argument can not save the inevitable consequence.

The inevitable consequence is that the Deed is null and void because:

the parties entered into the Deed under a mutual mistaken belief that TA.024 was valid when it was not in fact valid, considering its invalid issuance at the first place and subsequently its expiry on the 18th April 1995;

the Deed is incompatible with the intent and purpose of the *Act*; and

the Deed is against public policy in that it has effectively stifled prosecution of the Companies of possible breaches of the terms and conditions under TA.024 and therefore the *Act*.

### **Lack of Authority to Execute the Contract**

In view of the above findings and conclusion, it is not necessary for me to consider the argument by the State that the Deed is also null and void for lack of authority in the then Solicitor General to execute the Deed on behalf of the State. This argument has been raised because of the most recent Supreme Court judgement in *The Independent State of Papua New Guinea v. Zachary Gelu*. But I do make a number of observations.

Firstly, until the judgement in question, the Solicitor General has always executed legal documents on behalf of the State, entered appearances and appeared in Court and compromised Court proceedings on behalf of the State. All of these occurred without the need for specific and expressed instruction to do so from the Attorney General. This practice is consistent with the practice in nearly all of the Commonwealth countries or in most countries where there exists an office of an Attorney General and a Solicitor General. It could therefore be argued, quite legitimately that, the Solicitor General always had and did have the usual and apparent authority.

Secondly, based on the usual and apparent authority of the Solicitor General, contracts have been entered into and Court actions have been compromised. Then on the basis of these agreements or compromises, parties have altered their positions and taken steps which might now prove to be much to their detriment, as is being argued for here. This puts the State into a position of either being forced to honour its part of the bargain or be faced with a suit for damages. Either way, there might be no benefit or escape from liability for the State unless the contract or compromise is something similar to the one before me.

Thirdly, given that Mr. Damem was the Attorney General and that prior to his appointment, he was the lawyer through whom the 1999 proceedings were issued on behalf of the Companies, could he have been reasonably required to give his consent? If his approval was sought, could he be reasonably expected to withhold his approval? He could not have because he was in a position of conflict of interest.

Finally, I note the Supreme Court decision raises a number of fundamental questions, which the Supreme Court may have to decide for future purposes. Some of these, without limiting the list are:

In a case where the Attorney General is unable to give his consent where for example, he is in a conflict of interest situation as could have been the case in this matter, from whom is the Solicitor General to get his instructions and or authority to compromise or defend an action?

Can the Attorney General withhold his consent or approval and if so on what basis?

How could parties dealing with and or against the State be assured that the Attorney General would not allow politics or other reasons not going into the merits of a claim to influence his decision on whether or not to endorse a compromise of an action that has political consequences?

Is it proper for a politician to be involved in the day to day functioning and administration of the Solicitor General who is the primary advocate for the State?

## **Summary**

In summary, I find that:

the Deed was entered into under the mutual mistaken belief that TA.024 was valid,  
when in fact it was not;

The Deed is against public policy and the intent and purpose of the *Forestry Act*;  
None of the terms of the Deed can be severed to enable the Deed to stand to the  
exclusion of the offending terms;

For these reasons, I declare the Deed null and void.

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Lawyers for the Plaintiff:

Lawyers for the First and Second Defendants:

Lawyers for the Third Defendant:

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