

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

WS NO. 597 OF 2007

BETWEEN

**NIUGINI PEST CONTROL & MERCHANTS LIMITED**  
Plaintiff

AND

**TZEN NIUGINI LIMITED**  
First Defendant

AND

**CAKARA ALAM (PNG) LIMITED**  
Second Defendant

Lae: Gabi, J  
2009: 5th August

*CONTRACT- Contract to fumigate round logs – No agreement as to rate – Term implied to make agreement work.*

**Cases Cited**

*Ipa Seke v Collins & Leahy Ltd [1997] PNGLR 266*  
*Kimbe International Primary School v Narpal [1987] PNGLR 442*

**Counsel**

*P Ousi, for the plaintiff*  
*E Mambei, for the defendant*

**DECISION**

**5th August, 2009**

1. **GABI, J:** Introduction: On 22nd January 2008, the defendants engaged the plaintiff to carry out fumigation treatment of round logs amounting to 8, 489.193 cubic metres on a log ship. There was no agreement as to rate; however, both had dealings in the past and the rate in those transactions was K0.50 and K0.55 per cubic metre respectively. After completion of the work, the plaintiff applied the rate of K8.90 per cubic metre and invoiced the defendants for K83, 109.20. The defendants refused to pay claiming the

proper rate was K0.50 or K0.55 per cubic metre.

2. The issue is what the appropriate rate was in the circumstances.

### **The Evidence**

3. The trial proceeded by way of affidavit evidence and oral testimonies. The following affidavits were admitted into evidence: (i) 3 affidavits of Gani Worri sworn on 18th April and 9th May 2008 and filed on 21st April, 12th and 21st May 2008 respectively; (ii) affidavit of Naia Buangi sworn on 9th May and filed on 12th May 2008; (iii) affidavit of Victor Iga sworn and filed on 27th May 2008; and (iv) 3 affidavits of Jun Juaban sworn on 20th September 2007, 4th January and 24th September 2008 and filed on 20th September 2007, 28th January and 30th September 2008 respectively.

### **Facts**

4. Gani Worri is the Managing Director and Shareholder of the plaintiff, which appears to have commenced operations in July 2006. Prior to incorporating the company and going into business on his own, he was the Manager of W.S Flick & Company (Niugini) Ltd. Whilst the Manager of W.S Flick & Company (Niugini) Ltd, he was engaged by the first defendant to carry out fumigation treatment on logs it wanted shipped out of the country. In February 2006, Gani Worri, with the assistance and knowledge of Jun Juaban, dishonestly used the resources of W.S Flick & Company (Niugini) Ltd to carry out treatment of logs, but payments were made to his personal account. The rate he applied was K0.50 per cubic metre.

5. When he started his own company, he was engaged on at least two occasions by the defendants to carry out treatment services at the rate of K0.50 or K0.55 per cubic metre. In July 2006, he charged the defendants at the rate of K0.50 per cubic metre, but in October of the same year he increased the rate to K0.55 per cubic metre.

6. On 22nd January 2007, the defendants engaged the plaintiff again to carry out fumigation treatment of round logs on MV Haoda at Tanker Berth Main Wharf in Lae. There were 2, 485 round logs amounting to 8, 489.193 cubic metres. The treatment commenced at 4.00pm and finished at approximately 6.30pm on the same day. There was no agreement on the rate at the commencement of the work. After treatment of the logs, the plaintiff charged the rate of K8.90 per cubic metre and invoiced the defendants for K83, 109.92.

### **What was the appropriate rate?**

7. The plaintiff claims that the work was urgent as the boat was leaving the same evening. As such, he applied the "urgent" rate of K8.90 per cubic metre. The defendants deny that it was urgent as Gani Worri was informed by Jun Juaban in early January that sometime that month a ship would be in Lae port for outward clearance.

8. The plaintiff produced evidence to show that it had treated Break Bulk Sawn Logs at the rate of K35.00 per cubic metre and that **Bio Pest Solutions Limited's** commercial

rate for treatment of round logs was K12.00 per cubic metre.

9. The defendants also obtained quotations from other more established and experienced companies in the field of fumigation and pest control. The rates offered by PNG Pest Control were K0.48 to K0.50 per cubic metre. Olkain Pest Management Services Limited offered a flat rate for a given volume of logs. The rate for 8,000 or more cubic metres of logs was K4, 000.00 plus 10% VAT.

10. A term may be expressed or implied in a contract. A term of contract may be implied if the express terms of the contract are silent with regards to an essential matter, if it is a fair term which a reasonable person would think must be implied so as to make the agreement work: *Ipa Seke v Collins & Leahy Ltd* [1997] PNGLR 266. In that case His Honour Sawong J said:

*"I think it is necessary to set out the law as I understand it, in relation to implied terms in contracts and its application to the present case. I think a useful starting point is a passage by King AJ, as he then was, in Kimbe International Primary School v Narpal [1987] PNGLR 442...*

*The dispute in that case arose between the parties arose out of a lottery or raffle conducted by the school. A permit to hold the raffle was granted by the Department of West New Britain to the school under the Gaming Act (Ch No. 270). Mr Narpal bought five tickets for K10 each and that when he paid the money and received the tickets, nothing was said about the way the prizes would be allocated or drawn. The printed tickets bore no information about the way the prizes would be allocated. The permit did not require the draw to be conducted in any particular way. When the raffle was drawn, one of Narpal's tickets was the first one drawn. He was not given or awarded the first prize, but was awarded one of the other prizes. He took the school to the District Court claiming, amongst other things a breach of an implied term of the contract. The District Court ruled in his favour. The school appealed against the decision to the National Court. The National Court dismissed the appeal. King AJ said at 444:*

*'A term may be implied in a commercial or business contract to make it conform with the usual custom of trade or business when the parties have not expressly agreed otherwise. But this was not a business contract and that branch of the law cannot apply.'*

*The remaining way in which a term may be implied if the express terms of the agreement are silent as to an obviously essential matter is, if it is a fair term which a reasonable person would think must be implied so as to make the contract work. In deciding whether the term is to be implied, the court looks at the alleged term and asks: would a reasonable person, if called upon to consider whether this term should be implied, say 'of course it should'."*

11. It appears from the evidence that Gani Worri and Jun Juaban had some discussions in 2006 about rates. Gani Worri said he advised Jun Juaban that he would charge K10.00 per cubic metre in 2007. Jun Juaban said he never agreed to the rate and urged Gani Worri to

maintain the rate of K0.50 per cubic metre or he would engage other companies to do fumigation work for them.

12. I find that there was a valid contract; however, there was no agreement as to the rate to be applied at the time the work was undertaken and completed.

13. There is evidence that the plaintiff had charged K35.00 per cubic metre for sawn logs, but these are freshly cut round logs so the rate is inapplicable. There is no evidence that the plaintiff has charged anyone K8.90 per cubic metre for work it had done in the past nor is there any evidence of its normal rates before the court. Gani Worri deposed that his normal rate for fumigation was K10.00 per cubic metre (see paragraph 5 of affidavit of Gani Worri sworn on 9th May and filed on 12th May 2008). In his oral testimony, Gani Worri said that the normal rate was K5.50 per cubic metre. In cross-examination, he was asked to explain the basis for the "urgent" work at K8.90 per cubic metre when the normal rate was K10.00 per cubic metre. His explanation was unsatisfactory. Gani Worri is not a credible witness and I do not believe him.

14. The only evidence is that Gani Worri had charged the defendants K0.50 or K0.55 per cubic metre for round logs on at least two occasions in the past. Accordingly, I find that the reasonable rate in the circumstances is K0.50 per cubic metre. The defendants are entitled to pay K4, 224.60 at the rate of K0.50 per cubic metre. The plaintiff shall pay the costs of the proceedings.

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Warner Shand Lawyers: *Lawyers for the Plaintiffs*  
Rageau Manua & Kikira Lawyers: *Lawyers for the Defendants*