

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

WS 1088 OF 1996

BETWEEN:

**PINPAR DEVELOPER PTY LTD**

First Plaintiff/First Cross-Defendant

AND:

**RIMBUNAN HIJAU (PNG) LTD**

Second Plaintiff/Second Cross-Defendant

AND:

**T. L TIMBER DEVELOPMENT PTY LTD**

Defendant/Cross-Claimant

Waigani: Gavara-Nanu,J

2004: 6, 7, 8 & 19 October

9 November

2006: 9 August

***CONTRACT LAW - Agency – Implied agency – Relationship and conduct of parties - Objective test - Servants and agents of a company defined – Privity of contract - Conduct of a subsidiary company – Liability of the parent company.***

***CONTRACT LAW - Logging and Marketing Agreement – Parties to the Agreement –Logging company - The Contractor – Landowner company - The Permit Holder - Contractor formulating the Agreement without any real involvement of the Landowner company – Contractor telling the landowners to sign the Agreement - Illiterate servants of the Contractor signing the Agreement – Such servants having no capacity to explain the Agreement to the landowners- Contractor having the skill, expertise and the equipment for the timber project - Contractor having advantage over the landowners- Unconscionable conduct by the Contractor- Equitable fraud.***

***FORESTRY ACT – Forestry Act, 1991, s. 46 – Legislative scheme and structure – Mandatory legislative requirements to be strictly complied with – Respect for resource owners’ rights a mandatory statutory requirement – Interests of the resource owners paramount.***

***PNG FOREST AUTHORITY – Forestry Act, 1991, ss.5, 6, 7 & 8 – Duty to protect rights and interests of the Permit Holders – Duty to enforce the Forestry Act.***

***CONTRACT LAW - Logging and Marketing Agreement – Constant flagrant breaches of the Agreement by the Contractor- No remedy for the Contractor.***

***COMPANY LAW - Parent company – Control of a subsidiary company by the parent company – Pre-requisites to such control – Corporate veil – Circumstances in which corporate veil may be lifted.***

***PRACTICE & PROCEDURE – Res judicata – Relitigation of issues already decided on merit – Final decision – Abuse of process.***

***CONTRACT LAW – Duty to mitigate damages – A legal obligation – Failure in not taking reasonable steps to mitigate damages – Reduction in damages awarded.***

The cross-claimant, a landowner company and the Permit Holder engaged the first cross-defendant as the Contractor to develop its timber project. The two officers of the first cross-defendant who signed the Logging and Marketing Agreement ('the LMA') with the landowners had difficulty understanding and speaking English. Those two officers only attended their first brief meeting with the landowners then had no further dealings with the landowners and the timber project. The LMA was signed between the first cross-defendant and the cross-claimant. The landowners signed the LMA because they were told by the two officers of the first cross-defendants to sign it. The landowners were still concerned with the LMA.

At the time the first cross-defendant signed the LMA, it was not yet registered. It was registered two days after signing the LMA.

The first cross-defendant was a subsidiary of the second cross-defendant. All the subsequent meetings and negotiations between the first cross-defendant and the cross-claimant regarding the logging operations and a draft Sawmill Agreement were held between the officers of the second cross-defendant and the landowners at the head office of the second cross defendant.

The first cross-defendant and the second cross-defendant had same registered office and company Secretary. Some of their Board members were same.

The first cross-defendant had no office and staff of its own. All its affairs were ran and managed by the second cross-defendant and its two other subsidiaries. They also carried out all the obligations for the first cross-defendant under the LMA.

**Held:**

- (i) The first cross-defendant was agent of the second cross-defendant; and that it was purposely incorporated to give it a corporate status so that it could execute the LMA for the second cross-defendant to do logging business. The second cross-defendant was the undisclosed principal of the first cross-defendant.

- (ii) The second cross-defendant was the parent and the controlling company which ran and managed all the affairs of the first cross-defendant.
- (iii) There was element of fraud in the conduct of the cross-defendants and that their conduct in telling the landowners to sign the LMA which was formulated by the cross-defendants, with no or little involvement, if any, by the landowners was unconscionable. *Odata Ltd –v- Ambusa Copra Oil Mill Limited and National Provident Fund Board of Trustee* NZ106 – adopted and applied.
- (iv) There was constant breach of the LMA by the cross-defendants. In that regard, the landowners had legitimate concerns, which they tried to raise, but were ignored by the cross-defendants.
- (v) The legislative scheme and structure as reflected in s. 46 of *Forestry Act, 1991* provides for all parties dealing with resource owners to respect the rights of the resource owners. These rights were embodied in the LMA, but were totally disregarded by the cross-defendants as "*not important*". In those circumstances, the second cross-defendant should not have the protection of its corporate veil; and it should be lifted, so that it does not avoid its legal obligations. *C.B.S Inc. and C.B.S Records Australia Limited and Bali Merchants Pty Ltd –v- Ranu Investments Pty Ltd* [1978] PNGLR 66 – adopted and applied.
- (vi) The PNG Forestry Authority has the duty to protect the rights and interests of the Permit Holders and or the resource owners; and to ensure that the requirements of the *Forestry Act, 1991*, are fully complied with by the Contractors or the developers.
- (vii) The second cross-defendant is bound by the actions of the first cross-defendant and is vicariously liable to the cross-claimant

#### **Cases cited:**

#### **Papua New Guinea Cases**

*Alotau Enterprises Pty Ltd –v- Allen Enterprises Pty Ltd and Zurich Pacific Insurance Corporation* N1969.

*C.B.S Inc. and C.B.S Records Australia Limited and Bali Merchants Pty Ltd –v- Ranu Investments Pty Ltd* [1978] PNGLR 66.

*KL Engineering and Constructions (PNG) Limited –v- Damansara Forest Products (PNG) Limited & Ors* N2250.

*Kora Gene –v- Motor Vehicles Insurance (PNG) Trust* [1995] PNGLR 344.

*Michael Yaipupu –v- Tourism Development Corporation* N2258.

*Odata Limited v. Ambusa Copra Oil Mill Limited and National Provident Fund Board of Trustees* N2106.

*Papua Club Inc.-v- Nusaum Holdings Limited & Ors* N2603.

*Pinpar Development Pty Limited v- Timbers Development Pty Limited* N1857.

*Rainbow Holdings Pty Ltd v. Central Provincial Forest Industries Pty Ltd* [1983] PNGLR 34.

*Tolom Abai and 765 others –v- The State* N1402.

### **Overseas Cases**

*Albazero* (1975) 3 W.L.R 491.

*Bromley –v- Ryan* [1956] 99 CLR 362.

*Commonwealth Bank of Australia –v- Amadio* [1983] 151 CLR 447.

*Firestone Tyre and Rubber Co. v. Llewellyn* [1975] W.L.R 464.

*Gilford Motor Co. Ltd v- Horne* (1933) Ch. 935.

*Heatons Transport (St Helens) Ltd v. Transport and General Workers' Union* [1972] 3 All ER 101; [1973] AC 15.

*Holdsworth v- Caddies* (1995) W.L.R 352.

*Industrial Equity Ltd v. Blackburn* (1977) 137 C.L.R 567.

*Jamal –v- Moolla Dawood Sons & Co.* [1916] A.C 175.

*Littlewoods Stores V. I. R. C.* (1969) 1 W.L.R 121.

*Lloyds Bank Ltd –v- Bundy* [1974] 3 All ER 754.

*Midland Silicones Ltd v- Scruttons Ltd* [1962] 2 W.L.R 186.

*Re Darby* (1911) 1 K.B 95.

*Re FG (Films) Ltd* [1953] 1 W.L.R 483.

*Smith, Stone & Knight Ltd v- Birmingham Corporation* [1934] 4 All ER 116.

*Stroms Bruks Actie Bolag –v- John and Peter Hutchinson* [7405] AC 515

### **Counsel:**

*J. Shepherd*, for Cross-Defendants.

*S. Soi*, for Cross-Claimant.

1. **GAVARA-NANU, J:** By a writ of summons issued on 11 November, 1996, the first plaintiff/ first cross-defendant ( '*the first cross-defendant*' ) claimed damages against the defendant/cross-claimant ( '*the cross-claimant*' ) for K751, 280.00 for breach of the Logging and Marketing Agreement ( '*the LMA*' ) between them. The LMA was in respect of the Ormand Lako Timber Permit Area, which was executed on 24 November, 1992; with the first cross-defendant as the Contractor and the cross-claimant as the landowner company and the Permit Holder. The Timber Permit No. 3-30 for that timber project was issued on 19 January, 1990 for a period of 10 years (Ex. 'A').

2. The first cross defendant's claim was based on cl.34 of the LMA, under which it was agreed that the first cross-defendant would build and finance a sawmill in the Timber Permit Area ( '*the TPA*' ) and that the cross-claimant would repay the first cross-defendant for the cost of the sawmill in three years.

3. Clause 34 is in these terms:

34. *SAWMILL.*

*The sawmill shall be entirely owned by the Permit Holder (100% equity). The*

*Contractor shall help finance and set-up the sawmill for the Permit Holder. The total costs incurred in the setting up of the sawmill shall be repaid to the Contractor in three (3) years time without interest. The schedule for payment and other terms and conditions of the sawmill shall be detailed in a separate Management and Marketing Agreement for sawmill by the Permit Holder and the Contractor. The Contractor shall ensure that there is a steady supply of logs for the sawmill as provided for in the permit and the Permit Holder shall pay the Contractor the amount as set-out in the Cost of Logs for sawmill annexed hereto as Annexure C.*

4. The timber permit also provided that the Contractor would ensure that there would be steady supply of logs for the sawmill. The first cross-defendant claimed that it built a sawmill in the TPA as provided under cl.34, at the total cost of K751, 280.00, but the cross-claimant failed and refused to pay for the cost of the sawmill.

5. The first cross-defendant further claimed that since December, 1995, the cross-claimant refused the first cross-defendant's employees and agents access to the TPA. In so doing, the cross-claimant is claimed to have breached cl. 7 of the LMA, thus resulting in the first cross-defendant having to suffer loss and damages.

6. On 13 February, 1997, the cross-claimant filed its defence denying claims by the first cross-defendant. The cross-claimant claimed that it was the first cross-defendant who removed the machinery from the TPA before the expiration of the LMA and therefore the first cross-defendant was the one who breached the LMA. The cross-claimant also denied that the first cross-defendant had suffered any loss or damages.

**Facts back grounding these proceedings.**

7. On 6 March, 1997, the cross-claimant filed a cross-claim against the first cross-defendant, claiming K8,000,3000.00 in lost project benefits for the balance of the period of the LMA. The cross-claimant claimed that the loss in project benefits was as the direct result of the first cross-defendant's withdrawal from the TPA.

8. In paragraph 7 of the cross-claim, the cross-claimant claimed that on 29 August, 1996, the first cross-defendant legitimized or tried to legitimize its withdrawal from the TPA by obtaining an ex-parte National Court Order for it to remove its machinery and to finally vacate the area.

9. On 10 April, 1997, the first cross-defendant filed its cross-defence to the cross-claim. In the cross-defence, the first cross-defendant denied that the cross-claimant suffered loss and damages and claimed *inter alia* that the cross-claimant was still in possession of merchandise timber in the TPA which it could still harvest by engaging another Contractor.

10. On 12 March, 1999, the cross-claimant by a Notice of Motion applied for the second cross-defendant to be joined as a party to the proceedings. The basis of that application was that the cross-claimant claimed that the second cross-defendant was the parent and the controlling company of the first cross-defendant. The application

went before Kapi, DCJ (as he then was) and on 1 April, 1999, his Honour delivered his ruling in which he granted the application and ordered that the second cross-defendant be joined as a party.

11. Following that decision, the cross-claimant filed an amended cross-claim to make claims against the first and second cross-defendant (*'the cross-defendants'*).

12. On 27 March, 2000, after ascertaining that the cross-defendants had not filed an amended cross-defence to the cross-claimant's amended cross-claim, the cross-claimant's lawyers gave notice to the cross-defendants and advised that following their failure to file an amended cross-defence, the cross-claimant would apply for default judgment against them. The notice was given in a form of a letter. On 28 March, 2000, the cross-claimant's lawyers conducted a search on the court file and upon finding that no amended cross-defence had been filed, the cross-claimant filed an application by way of a Notice of Motion on 31 March, 2000, seeking Orders for default judgment against the cross-defendants and for the matter to be set down for trial for assessment of damages.

13. Sometime after 1 April, 1999, the cross-defendants appealed against the decision of Kapi DCJ. The leave to appeal against that decision was granted on 25 June, 1999. In April, 2000, the cross-defendants also applied for stay of proceedings pending the outcome of their appeal. The stay order appears to have been given on 10 April, 2000. On 20 February, 2001, the Supreme Court unanimously dismissed the cross-defendants' appeal. Thus, the second cross-defendant remained as a party to the proceedings.

14. On 28 February, 2001, another search was conducted on the court file by the cross-claimant's lawyers. It was found that the cross-defendants still had not filed an amended cross-defence to the cross-claimant's amended cross-claim. On 1 March, 2001, the cross-claimant's lawyers gave notice to the cross-defendants that they had defaulted in not filing their amended cross-defence and advised that the cross-claimant would pursue its application for default judgment against them.

15. The cross-claimant's application for default judgment was heard by Amet, CJ on 21 March, 2001. At the hearing, the cross-defendants maintained that there was no need for them to file an amended cross-defence, arguing that the cross-defence filed by the first cross-defendant against the cross-claimant's cross-claim was sufficient as it automatically enjoined all the issues arising from the amended cross-claim. For this, the cross-defendants also placed reliance on Order 8 r 51(5) of the *National Court Rules*.

16. In the arguments advanced by the counsel for the cross-defendants, one of the points raised was that the amended cross-claim was defective because they claimed that the pleadings had closed when the amended cross-claim was filed and no leave had been obtained.

17. After hearing submissions from both counsel, his Honour gave an extempore ruling in which he held that the amended cross-claim was valid as it was filed following granting of the application by the cross-claimant by Kapi DCJ to join the

second cross-defendant as a party to the proceedings. His Honour said the amended cross-claim was the consequential effect of the Order made by Kapi DCJ, which had the effect of re-opening the pleadings and therefore the cross-claimant was entitled to amend its cross-claim. Similarly, the cross-defendants were entitled to file their amended cross-defence to the amended cross-claim. His Honour said that this was on the basis that the amended cross-claim necessarily implicated the second cross-defendant as being vicariously liable as a parent or the controlling company of the first cross-defendant.

18. However, despite such findings, his Honour declined to order default judgment against the cross-defendants saying that the cross-defence against the cross-claim sufficiently enjoined all issues arising from the amended cross-claim and thus there was no need for the cross-defendants to file the amended cross-defence.

19. One of the claims in the amended cross-claim was that the first cross-defendant was a subsidiary of the second cross-defendant, thus the second cross-defendant was jointly liable for the claims made by the cross-claimant. It was also claimed in the amended cross-claim that the second cross-defendant being the controlling company of the first cross-defendant is liable for the actions and the conduct of the first cross-defendant, its servants and agents. Alternatively, it was claimed that the second cross-defendant is liable for the actions of its servants and agents.

20. It is further noted that in the interlocutory ruling delivered by Kapi, DCJ on 1 April, 1999, His Honour held that there was ground for the second cross-defendant to be joined as a party but the question of whether it was the controlling company of the first cross-defendant was a matter for evidence at the trial.

## **Evidence.**

### **(i) The cross-claimant's case.**

21. The cross-claimant called four (4) witnesses. Three of them were Directors of the cross-claimant. The fourth witness was a registered accountant. The three Directors were Mr. Biari Ubuna, a founder of the cross-claimant and a main negotiator for the timber project and the Sawmill Agreement. Mr. Napithalai Duri, the Chairman of the Board of Directors and Mr. Joe Jack Ubuna, the Company Secretary.

22. Mr. Ubuna and other Directors of the first cross-defendant (*the landowners*) had their first meeting in 1992 with the first cross-defendant's officers, Jimmy and James Wong, who were brothers. The meeting was at a place along the Spring Garden road at Gordons and according to evidence, the meeting was brief and the place where they met was an empty shed or office, with no staff and furniture.

23. The LMA was subsequently executed on 24 November, 1992. Mr. Ubuna and two other Directors signed the LMA for the cross-claimant, whilst Jimmy and James Wong, who were brothers, signed for the first cross-defendant (Ex. 'B'). After signing the LMA, because Jimmy and James Wong had difficulty in understanding and speaking English, they took the landowners to their elder brother, one Tony Wong at

his office at Garden City. There, more discussions took place between Tony Wong and the landowners.

24. Subsequent meetings were held in the office belonging to the second cross-defendant at Gordons, which according to the cross-claimant was also the head office for the first cross-defendant. Those meetings were held in the second cross-defendant's office because the first cross-defendant had no office of its own.

25. In the subsequent meetings, Jimmy and James Wong did not attend. This prompted the landowners to ask the officers of the first cross-defendant, the reason why Jimmy and James Wong were not attending those meetings. At first, the reason given for their non attendance was that their mother was very sick so they were attending to her. But, later, they were told that, they (Jimmy and James Wong) were "*small boys*" and they only did what they were told to do, like "*if they were told to run, they would run*". The landowners were also told that the LMA was only "*paper*" and it was not important, what was important was the timber project, so they should not be concerned about Jimmy and James Wong not attending the meetings. The landowners told the first cross-defendant's officers that Jimmy and James Wong were the ones who signed the LMA and they should attend all their meetings.

26. Some time later, the landowners also raised concerns with the PNG Forest Authority about the involvement of Niugini Lumber Ltd, a subsidiary of the second cross-defendant, in the timber project because it was not a party to the LMA. That prompted the National Forest Authority to write to the General Manager of the first cross-defendant on 21 November, 1994 and conveyed *inter-alia*, the concerns of the landowners and demanded the first cross-defendant to explain the nature of its relationship with Niugini Lumber Ltd (Ex. 'E').

27. The landowners also raised insurance concerns, but they later learnt that the second cross-defendant had already taken out the insurance cover for public liability for the first cross-defendant, (Ex. 'F').

28. The logging operations began in early 1994, but lasted only six months. Royalties were paid to the landowners in that period, but the landowners believed the second cross-defendant was paying them because the payment vouchers bore its name. For instance, the payment voucher for the royalty paid on 2 February, 1994, for K1,223.03 was under the name '*RIMBUNAN HIJAU (PNG) PTY LTD*' (Ex. 'H'). That payment voucher was stamped '*Debit Advice*'. It also showed that the amount was to be debited to the first cross-defendant under the Code Number 52779. The Exhibits 'I' and 'J' are same. They are payment vouchers under the name '*RIMBUNAN HIJAU (PNG) PTY LTD*'. The Exhibit 'I' is a payment voucher dated 29 March, 1994, for the royalty paid to the Central Provincial Government for K1,262.60. Again, the payment voucher showed that the amount of K1,259.00 was to be debited to the first cross-defendant under the Code Number 52 (other figures are illegible). It showed that K1,259.00 was paid in a ANZ bank cheque to the Central Provincial Government. The cheque was received by Mr. Ubuna who at that time was the Minister for Forests in the Central Provincial Government. The Exhibit 'J' is the payment voucher for the royalty paid to PNG Forest Authority for K15,593.76. The payment voucher was again under the name '*RIMBUNAN HIJAU (PNG) PTY LTD*'. In the middle of the



payment voucher, it also showed that amount of K15,590.16 was to be debited to the first cross-defendant under Code Number 52779.

29. In October, 1998, when Mr. Ubuna inquired with the National Forest Authority on whether the first cross-defendant had taken out a bank guarantee as required under cl. 21 of the LMA, he found out through Mr. Akiso So-omba, who was the officer responsible for timber operations that Timbers PNG Ltd, another subsidiary of the second cross-defendant, had taken out the bank guarantee for the first cross-defendant. This is confirmed by Exhibit 'K', which is a letter dated 14 February, 1997, by the Senior Manager of Timbers PNG Ltd, one Ivan Lu, to PNG Forest Authority. The letter advised that, Timbers PNG Ltd had taken out a bank guarantee for K36, 000.00, for Timber Permit No. 3-30, for the logging operations in Orman Lako area. Following that revelation, Mr. Ubuna raised concerns and queries about the first cross-defendant's ability to carry out its obligations under the LMA, with a lawyer with Warner Shand Lawyers. The lawyer told Mr. Ubuna that he could be wasting his time dealing with the first cross-defendant because the first cross-defendant could just be a K2.00 company.

30. This prompted Mr. Ubuna to do a company search on the first cross-defendant at IPA on 11 January, 1999. In that search, it was found that the cross-defendants had same registered office. They also had the same Company Secretary (Ex 'L'). Highlighting further the relationship between the cross-defendants, Mr. Ubuna told the Court that during meetings with the first cross-defendant, he was introduced to a number of second cross-defendant's officers including a David Sin, who was then the General Manager of the second cross-defendant.

31. The uncontested evidence shows that the parties started negotiating the Sawmill Agreement in about August, 1995. But the first felling of timber started between April and July 1994. It is noted that the approval to commence logging operations area was given by the Managing Director of PNG Forest Authority on 30 March, 1994. (Ex. 'S'). The second felling started on 2 December 1994. In the first felling, 1334 logs were felled and from those, 711 were exported while 624 were processed on site. In the second felling, all the logs were taken to the sawmill and sawn and the money made from the sawn timber was, according to the cross-claimant, given to the second cross-defendant. After the second felling, because there were so many logs, the land owners stopped any further logging. Also because the sawmill operations had already started, the landowners wanted the Sawmill Agreement to be concluded as quickly as possible. Those who attended the subsequent meetings and negotiations on behalf of the first cross-defendant were George Yong, Kenny Yong, Paul Tiong and David Sin.

32. The first cross-claimant claimed that under the LMA, all fixed assets for the sawmill were to remain in the site for the landowners in the event that the first cross-defendant withdrew or ceased its operations. However, using the ex-parte National Court Order, the first cross-defendant removed all its fixed assets from the site when it vacated the area on 4 September, 1996. Sometime soon after the first cross-defendant vacated the area, the landowners spoke to David Sin, Kenny Yong and David Yong and asked them to reconsider their position and resume operations, but the first cross-defendant did not resume its operations.

33. During negotiations for the Sawmill Agreement, the landowners put proposals to the first cross-defendant regarding landowner participation in the sawmill operations, but the first cross-defendant is claimed to have refused the proposals because it wanted exclusive control of the operations for three years before it could consider such proposals. That concerned the landowners because the sawmill was already operating. The landowners were opposed to the first cross-defendant having exclusive control of the sawmill. They wanted to have sufficient and meaningful say on who was employed in the sawmill so that they too could have opportunities for employment.

34. As to the requirement under cl. 34 for the cross-claimant to pay for the cost of the sawmill, the Court was told that cross-claimant did not have the money because the money it received from the royalties in the six months of logging operations was not enough. The cross-claimant also said that all the profits generated from the logging and sawmill operations were held and controlled by the second cross-defendant. The claim by the cross-defendants that the landowners wanted complete control of the logging and sawmill operations was refuted.

35. Also, the claims by the cross-defendants that the landowners arranged blockades against the first cross-defendant's servants and agents from entering the project area in August, 1996, to remove the machinery or at any other times were also refuted. The allegations in the affidavit sworn by one David Chin in which it was deposed that the landowners prevented the first cross-defendant's employees from entering the project site (Ex. 'O') was also denied. Mr. Ubuna denied claims made in the affidavit that he personally threatened to damage the machinery. He also denied that the employees of the first cross-defendant were assaulted by the landowners.

36. It was claimed that the truth was that, on 26 August, 1996, the first cross-defendant issued a notice to the landowners about winding up its operations in the project area and later brought two truck loads of police and two trailers to the project site to remove its machinery. The trailers were for loading the machinery and the police were used to threaten the landowners with guns. It was claimed that people were scared because the police fired shots. When that was going on, the first cross-defendant's employees loaded the bulldozers and forklifts on the trailers ready to move them out from the camp site. That was when Mr. Duri told the police that their actions were in breach of the LMA, so they off loaded the machinery and left. Mr. Duri said the only Asian man that went with the first cross-defendant's employees and the policemen to remove the machinery was David Lee, the campsite manager, not David Chin.

37. It was also claimed that the landowners were never advised that the disputes arising under the LMA could be referred to an arbitration.

38. When Mr. Ubuna did the search on the first cross-defendant at the IPA, he found that the first cross-defendant was not registered when it signed the LMA on 24 November, 1992. It was registered two days after on 26 November, 1992 (Ex. 'R'). The evidence is that the LMA was prepared by the first cross-defendant and Mr. Ubuna and other Directors of the cross-claimant were simply told to sign it. The landowners were never really involved in the formulation of the LMA and they were

still concerned about the LMA.

39. The Sawmill Agreement was also drafted by the first cross-defendant. The landowners later put their proposed amendments to the draft Sawmill Agreement in writing to the first cross-defendant on 27 October, 1995 (Ex. 'N1'). The first cross-defendant responded to those proposed amendments on 14 November, 1995, effectively rejecting them (Ex. 'N2'). On 28 November, 1995, the landowners' put further proposed amendments to the draft Sawmill Agreement to the first cross-defendant but the latter did not respond. The Sawmill Agreement was never finalized.

40. The sawmill, however, started operating in May, 1994, and it continued to operate for about eighteen months. The negotiations for the Sawmill Agreement continued throughout that period.

41. It was also claimed that the withdrawal by the first cross-defendant from the project area resulted in most harvested timber going bad.

42. The claim by the cross-defendants that the cross-claimant frustrated the LMA, thus resulting in the first cross-defendant vacating the TPA was also refuted. It was claimed that the real reason why the first cross-defendant withdrew from the timber project was that the parties could not agree on the terms of the Sawmill Agreement. The landowners wanted better deals under the Agreement, but the first cross-defendant could not compromise, so it stayed out of the project from December, 1995, till it obtained the ex-parte National Court Order on 29 August, 1996, to remove the machinery from the site and to vacate the TPA. That resulted in the first cross-defendant vacating the TPA on 4 September, 1996.

43. It was conceded that the first cross-defendant was stopped from taking timber to Port Moresby, because the Sawmill Agreement was not yet executed. The restriction was intended to be only up to such time when the Sawmill Agreement was signed by both parties (Ex. 'V').

44. Mr. Duri also conceded receiving a letter dated 5 June, 1996, from the second cross-defendant (Ex. 'X'), asking for a meeting with the landowners but the landowners did not attend the meeting because they were still waiting for the first cross-respondent to respond to their proposed amendments to the draft Sawmill Agreement.

45. In the week the machinery was removed from the campsite, the landowners, including Mr. Duri came to Port Moresby and spoke to a Mr. Selby Holland, a lawyer employed by Soi and Associates, raising their concerns about the first cross-defendant's withdrawal from the timber project and its effect. Following that meeting, Mr. Holland wrote to Blake Dawson and Waldron Lawyers on 10 September, 1996, and conveyed the landowners' concerns.

46. Mr. Lonbil Torebena is a registered accountant. He calculated the amount in lost project benefits for the cross-claimant for the balance of the period of the LMA, viz from 29 August, 1996 which is when the first cross-defendant terminated the

Agreement, by reason of the ex-parte National Court Order, to the date of the expiry of the LMA, which is 24 November, 2002. He said, he based his calculations on figures and rates provided in the LMA and the Timber Permit (Ex. 'T'), and the amount he arrived at is K6,458,690.00. This amount includes the 8 percent interest pursuant to the *Judicial Proceedings (Interest on Debts and Damages) Act*. He said he did not know how much of the benefits had been paid to the landowners.

**(ii) The cross-defendants' case.**

47. The cross-defendants did not call evidence, but they relied upon the material that was already in Court and the affidavit of David Chin.

**Submissions.**

**(i) Submissions by the cross-claimant.**

48. Mr. Soi submitted that the first cross-defendant was not genuine in its own claims against the cross-claimant because its action in W.S 1088 of 1996 was not progressed. He said this is further evidenced by the cross-defendants not calling evidence at the trial. He claimed that the cross-defendants applied delay tactics in the hope that the cross-claimant might settle or withdraw the proceedings. For this, reliance was also placed on the offer by the cross-defendants to withdraw proceedings on the day before the trial.

49. Mr. Soi was also argued that the cross-defendants were in breach of cl.29 of the LMA because they failed to refer their disputes to an arbitration.

50. He further claimed that the first cross-defendant vacated the TPA when it realized that it would not have exclusive control of the sawmill operations; and the ex-parte National Court Order obtained on 29 August, 1996, was really a disguise to facilitate its full withdrawal from the TPA and to remove its fixed assets and machinery from the site. He also argued that the first cross-defendant frustrated the LMA by withdrawing from the TPA in December, 1995, and the subsequent removal of its machinery on 4 September, 1996, was the end result of that earlier withdrawal. It was also claimed that the ex-parte National Court Order was a disguise to make its long absence from the TPA appear legal.

51. Mr. Soi also argued that the failure by the first cross-defendant to carry out its obligations under the LMA from December, 1995 to 4 September, 1996, was a clear breach of the LMA which resulted in the LMA being frustrated.

52. He also argued that the first cross-defendant had breached the LMA by allowing third parties to perform its obligations under the LMA. For instance, Timbers (PNG) Ltd took out the bank guarantee of K36,000.00 for the first cross-defendant, although the first cross-defendant was obligated under cl. 21 of the LMA to take out the guarantee. Similarly, the second cross-defendant took out the insurance cover for the first cross-defendant, although the first cross-defendant was obligated under cl. 11 of the LMA to take out the cover for K1m. Another subsidiary of the second cross-

defendant, viz, Niugini Lumber Ltd was also involved in the project negotiations as well as in the management of the logging and sawmill operations without the consent of the cross-claimant, which was a mandatory requirement under cl.12.3 of the LMA. These he said constituted serious breaches of the LMA. For this argument, he also placed reliance on the fact that the same Directors and Company Secretary served on the cross-defendants' Boards, as well as on the Board of Timbers (PNG) Ltd. It was also pointed out that the first and second cross-defendants have the same registered office.

53. It was therefore submitted that at all material times, the first cross-defendant did not have the administrative and financial capacity to fulfil its obligations under the LMA. The first cross-defendant was therefore only a front for the second cross-defendant as the second cross-defendant was the one actually carrying out obligations for the first cross-defendant under the LMA, either through its own officers or through its other subsidiaries.

54. Mr. Soi argued that the end result is that the second cross-defendant was in full and constant control of the first cross-defendant, thus providing the basis for its corporate veil to be lifted.

55. It was also submitted that the first cross-defendant was the agent of the second cross-defendant because the things that the first cross-defendant did were done for and on behalf of the second cross-defendant. The second cross-defendant is therefore bound by the actions of the first cross-defendant and thus is vicariously liable.

56. Mr. Soi also argued that there was an element of fraud in the conduct of the cross-defendants. For this, reliance was placed first on the fact that the first cross-defendant had no legal and corporate status when it signed the LMA on 24 November, 1992, as it was registered on 26 November, 1992, two days after it signed the LMA. Secondly, the first cross-defendant had no financial and administrative capacity to carry out its obligations under the LMA. This included its inability to pay royalties, its insurance cover and the bank guarantee. It was submitted that it misled the cross-claimant that it had such capacity. Thirdly, the negotiations for the logging and sawmill operations as well as the actual running and management of those operations were done by the officers of the second cross-defendant and its two other subsidiaries, namely, Niugini Lumber Ltd and Timbers (PNG) Ltd. Thus the brains and the skills needed to manage the logging and the sawmill operations were provided by the second cross-defendant and its other two subsidiaries. The first cross-defendant therefore existed only by name. In other words, it was a sham. It was therefore, argued that it would be in the interest of public policy and good that the second cross-defendant is not allowed to hide behind its corporate veil and avoid liability.

57. Mr. Soi also pressed the point that the cross-claim and the amended cross-claim being part of the pleadings, should be considered on their merits. He maintained that the cross-claim made no claim against the second cross-defendant, but the amended cross-claim did and pleads a cause of action against the second cross-defendant. He argued that the cross-claim on its face value pleaded no cause of action against the second cross-defendant. This he submitted is evidenced by the separate material facts alleged against the second cross-defendant in the amended cross-claim. Mr. Soi

further argued that there is no relief sought against the second cross-defendant in the cross-claim, but there is in the amended cross-claim.

58. Mr. Soi therefore submitted that, because the cross-defendants, in particular, the second cross-defendant failed to traverse the facts alleged against it in the amended cross-claim, it should be liable to the cross-claimant.

59. In regard to the issue as to mitigation of damages, Mr. Soi submitted that the cross-claimant could not engage a new Contractor to harvest the timber because the LMA was never terminated.

**(ii) Submissions by the cross-defendants.**

60. Mr. Shepherd claimed that up to December, 1995, the cross-claimant had no complaints or grievances against the first cross-defendant. He argued that the eventual termination of the LMA by the cross-defendants on 29 August, 1996 was as a result of the unreasonable demands made by the cross-claimant for the first cross-defendant to hand over control of the logging operations and for the premature review of the LMA. He submitted that the cross-claimant demanded review of the LMA only after 3 years of logging operations, which he said was contrary to cl.28, which provided for the review of the LMA after 5 years of logging operations. It was submitted that such unreasonable demands also forced the first cross-defendant to obtain the ex-parte National Court Order to remove its machinery and to withdraw from the TPA on 4 September, 1996. Mr. Shepherd rejected claims by the cross-claimant that it suffered loss.

61. It was also claimed that the cross-claimant or the landowners refused the employees and agents of the first cross-defendant access to the project site thus resulting in the first cross-defendant not being able to conduct logging operations in the area. He said by such conduct, the cross-claimant was in breach of cl. 7 of the LMA.

62. Mr. Shepherd also argued that by reason of the ruling by Amet CJ on 21 March, 2001, that there had been an automatic joinder of issues as regards all the claims contained in paragraphs 1 to 6 of the cross-claimant's amended cross-claim, the cross-claimant had been put to strict proof as regards all claims which had been denied in the cross-defence. These include the registration of the second cross-defendant with the IPA; that the first cross-defendant is a subsidiary of the second cross-defendant; that the second cross-defendant is vicariously liable for the actions or conduct of the first cross-defendant, alternatively, for the actions or conduct of its own servants or agents "in pursuit of the obligations" of the first cross-defendant under the LMA; that the first cross-defendant was in breach of cl. 11.1 of the LMA by not taking out the requisite insurance; that the first cross-defendant breached cl. 21 of the LMA by not taking out the bank guarantee and that the first cross-defendant had breached cl. 12.3 of the LMA by engaging Niugini Lumber Ltd, a third party, in logging operations at the Orman Lako timber permit area without the consent of the cross-claimant.

63. It was also argued that the cross-claimant has failed to establish a cause of action recognized in law against the first cross-defendant. Reference was made to par. 12 and

par. 14 of the amended cross-claim, which are reproductions of par. 6 and par. 8 of the cross-claim.

In par. 12 of amended cross-claim, it was alleged:

*"12. Since December 1995, the cross-claimant (TL Timber) and the first cross-defendant (Pinpar) did not compromise on the terms and conditions of the Sawmill Agreement, thus the employees and agents of the first cross-defendant (Pinpar) vacated the Orman Lako Timber Area, leaving the machinery and the sawmill idle."*

64. In par. 14 of the amended cross-claim, it was alleged:

*"14. As a result of the first cross-defendant's (Pinpar's) vacation of the Orman Lako timber area and removal of the machinery, the cross-claimant (TL Timber) has been unable to benefit from the logging operation in the Orman Lako timber area and as a result has suffered loss and damage until the expiration of the (LMA) on 31st December 2005 and the timber permit on 19 January 2000".*

65. It was also argued that the cross-claimant had failed to specify as to which cross-defendant the claims are against. It was further argued that the cross-claimant failed to give the particulars required to ground a cause of action based on the alleged breach of cl. 12; and by reason of such failure, the claim for K8,000,3000.00 in damages should fail.

66. Mr. Shepherd submitted that cl. 12 and cl.14 of the amended cross-claim had already been denied by the first cross-defendant in its cross-defence as they were pleaded in par. 6 and par. 8 respectively of the cross-claim. He said the basis for their denial was that the first cross-defendant was forced to vacate the TPA as a result of the stoppages and constant interference with the sawmill operations by the cross-claimant between December 1995 and late August 1996, which also resulted in the first cross-defendant having to obtain the ex parte National Court Order on 29 August 1996.

67. It was also claimed that the cross-claimant had conceded through Mr. Ubuna that the first cross-defendant had expended K751,280.00 in constructing the sawmill.

68. It was further claimed that the grievances between the parties came to fore in December, 1995 and thereafter plagued the whole logging and sawmill operations until the termination of the LMA by the first cross-defendant by virtue of the ex parte National Court Order given on 29 August, 1996. It was submitted that, that was also as a result of the first cross-defendant's rejection of the cross-claimant's increasingly unreasonable demands that it had control over the logging and sawmill operations and for the premature review of the LMA.

69. Mr. Shepherd further claimed that the cross-claimant had also failed to produce the draft Sawmill Agreement. But argued that, in any case,=24 it is clear from the proposed amendments made by the cross-claimant to the Sawmill Agreement, as

contained in Exhibit 'N1", that the cross-claimant was insisting that it have more control over the sawmill operations and that the first cross-defendant's rights under the LMA be severely abbreviated.

70. It was claimed that the increasingly intransigent attitude taken by the cross-claimant's Directors also resulted in the blockades and stoppages of the sawmill operations over a period of six months. For this, reliance was placed on the affidavit of David Chin sworn on 27 August, 1996 as evidence of the frustrations experienced by the first cross-defendant as a result of those blockades and stoppages. It was deposed in David Chin's affidavit that the first cross-defendant had attempted to resolve the disputes and was willing to continue logging operations, but was prevented by the landowners. These were expressed in a letter by the first cross-defendant to the cross-claimant dated 20 August, 1996, which was annexed to David Chin's affidavit as Annexure 'B'.

71. The last paragraph of that letter reads:

*"Pinpar remains willing to perform its obligations under the Logging and Marketing Agreement and urges you to reconsider your position so that the Permit Holder will also receive the benefits of the Agreement."*

72. Reliance was also placed on the two letters sent by the first cross-defendant to Mr. Duri respectively dated 5 and 12 June, 1996. In the letters, the first cross-defendant expressed concern that the Directors of the cross-claimant did not turn up for the meetings that the first cross-defendant called for and asked the Directors of the cross-claimant to attend the meeting that was arranged for 19 June, 1996. The two letters are Exhibits 'W' and 'X'. In this regard, Mr. Duri denied receiving the letter dated 12 June 1996. He only admitted receiving the letter dated 5 June 1996.

73. Further reliance was placed on two written notices given by Mr. Duri, one is Annexure 'D' to the affidavit of David Chin (Ex. 'O') and the other was addressed to Kenny Yong, which is Exhibit 'V'. In the first note, Mr. Duri wrote:

*"I as the Chairman of T.L Timbers would not allow the machines go until decision from the Court. I know for sure that your entering the project is illegal. Therefore I would not allow the machines go".*

74. In the second note, Mr. Duri wrote:

*"I am temporarily stopping your transport from bringing the timber down to Port Moresby. There is certain thing I would like to find out before transporting the timber again. I will be there at your office on 14.03. 96. Time 9 O'clock in the morning".*

75. In this regard, it is noted that according to the evidence by Mr. Duri, Kenny Yong was an official of Niugini Timber Ltd. He said, he sent these notes to Kenny Yong because after signing the LMA with Jimmy and James Wong, he continued to deal with Kenny Yong, George Yong and Tony Wong as Jimmy and James Wong took no



further part. This evidence is uncontested.

76. Mr. Shepherd submitted that, by issuing these notices, the cross-claimant had breached cl. 10.3, cl. 10.4 and cl. 29 of the LMA, because it refused to co-operate with the first cross-defendant in the logging and sawmill operations and that it failed to refer the disputes to an arbitration.

77. It was also pointed out that the first cross-defendant made an offer on 2 January, 1996 to hand over the operations of the sawmill if the cross-claimant paid K676,152.00 to the first cross-defendant. The offer lapsed when the cross-claimant did not pay the money after one month.

78. It was submitted that the cross-claimant has failed to establish with any credible evidence the necessary criteria outlined in *Odata Limited –v- Ambusa Copra Oil Mill Ltd and National Provident Fund Board of Trustees N2106*, for the second cross-defendant to be vicariously liable.

79. Mr. Shepherd maintained that there was no fraudulent conduct by the cross-defendants. He said the insurance cover taken out by the second cross-defendant for the first cross-defendant was for public liability and similar covers were taken out for all other companies associated with the second cross-defendant, thus it was normal and proper. As to the bank guarantee, he said the second cross-defendant had nothing to do with it.

80. In regard to the alleged involvement of Timbers (PNG) Ltd and Niugini Lumber Ltd in the affairs of the first cross-defendant, it was argued that there is no evidence before the Court to substantiate the claim.

81. Mr. Shepherd also submitted that the summary judgment obtained against the cross-claimant in WS. 858 of 1996 on 5 December, 1996 (Ex. 'P 3') effectively put the cross-claimant on notice that the first cross-defendant had abandoned the LMA pursuant to cl. 22.1 (b), which provided that if either of the parties abandoned the Agreement or repudiated its material obligations under the Agreement then, such conduct would amount to termination of the Agreement.

82. Mr. Shepherd informed the Court that the cross-defendants no longer took issue on the legality of the LMA, only the date of its execution is in issue. It was also conceded that the parties had the ability to enter into the Agreement. The cross-claimant also conceded that the first cross-defendant had the capacity to enter into the LMA. Both counsels also agreed on the date of first cross-defendant's date of registration with the IPA.

83. It was also conceded by Mr. Shepherd that the cross-defendants had the same registered office; and said that, that was the reason why the meetings and negotiations were held in the second cross-defendant's office. It was also argued that, there was nothing wrong with the second cross-defendant providing administration facilities for the first cross-defendant to carry out its obligations under the LMA as its associated company or subsidiary.

84. Mr. Shepherd told the Court that the cross-claimant has failed to mitigate its damages by not negotiating a fresh deal with a different Contractor to harvest its timber.

**Reasons for decision.**

85. From the outset, it is noted that the parties have agreed that the LMA was valid and the cross-defendants have also conceded that the first cross-defendant is a subsidiary of the second cross-defendant. In this regard, it is noted that the second cross-defendant confirmed taking out insurance cover for the first cross-defendant for public liability which appears to be a privilege extended also to all its associated companies or subsidiaries.

86. Three main issues arise for determination. First, whether the first cross-defendant was acting as agent for the second cross-defendant? Secondly, whether the second cross-defendant was in control of the first cross-defendant? If answers to these questions are in the affirmative then the second cross-defendant would be liable for the actions of the first cross-defendant, its servants and agents and that it would warrant the lifting of its corporate veil. Thirdly, the quantum of damages, but that is dependent upon the outcome of the first two issues.

**(i) Was the first cross-defendant agent of the second cross-defendant?**

87. The cross-defendants have conceded that the first cross-defendant was an associated company or a subsidiary of the second cross-defendant. However, that does not necessarily mean that it was agent of the second cross-defendant. The second cross-defendant also took out the insurance cover for the first cross-defendant. But again, that alone is insufficient to say that the second cross-defendant was in control of the first cross-defendant.

88. Above factors were noted by Kapi DCJ, in his interlocutory ruling on 1 April, 2002, in *Pinpar Development Pty Limited v. T.L Timber Development Pty Limited* N1857, where his Honour said:

*"Having regard to the authorities, I accept the principle that a parent company may be liable for the actions of a subsidiary company provided that the subsidiary company was acting as agent of the parent company. Alternatively, where the parent company in truth is in control of the subsidiary company and may or may not use the corporate veil for the purposes of fraud or as a device to evade a contractual or other legal obligations the parent company may be liable".*

89. His Honour did not decide the issues arising before this Court as he was only deciding the issue of whether the second cross-defendant could be joined as a party to the proceedings. In deciding that issue, his Honour said the test was whether or not there could be a cause of action against the second cross-defendant. In the end, his Honour decided that there could be a cause of action against the second cross-

defendant and ordered that the second cross-defendant be joined as a party to the proceedings. His Honour said:

*"Counsel for the cross-claimant relies on several factors as the basis for seeking to join Rimbunan: that Rimbunan and 15 other subsidiary companies had a common insurance cover in respect of logging operations; that the meetings with regard to the negotiations of the logging and marketing agreement took place in the offices of Rimbunan; that the General Manager of cross-defendant is also a manager of another subsidiary company of Rimbunan; that Rimbunan acted on behalf of cross-defendant in respect of compensation for workers employed by the cross-defendant and that Rimbunan paid royalties in respect of operations by the cross-defendant. I am of the opinion that all these factors point to the possibility that Rimbunan may be in control of the cross-defendant. Whether or not this is so is a matter which will be determined at the trial. For the purposes of the issue before me, I need only determine whether prima facie there could be a cause of action against Rimbunan. I am satisfied that there could be a cause of action against Rimbunan and it is proper to join it as a cross-defendant and I accordingly order that it be joined"* (my underlining).

90. On the issue of whether there was agency between the cross-defendants, I would start from the premise that agency may exist by reason of express or implied agreement between the parties. Where agency between the parties is not by express agreement, the existence of agency, may as a matter of law be determined objectively from the conduct of the parties and the nature of relationship. In such a case, the parties may not even intend to create a relationship of agency for one to exist. In other words, agency may still be implied from the conduct and the nature of relationship between the parties. See, *Heatons Transport (St Helens) Ltd v. Transport and General Workers Union* [1972] 3 All ER 101; [1973] AC 15. In that case, the House of Lords held that the shop stewards were agents of their trade union, thus making the union liable for their unlawful actions in an industrial dispute. This was despite the fact that there was no clear intention or expression by the parties that the shop stewards should be the agents of their trade union. See also, *Michael Yaipupu –v- Tourism Development Corporation* N2258.

91. The first cross-defendant in this case being a separate corporate entity was clearly capable of being agent of the second cross-defendant. Here, the agency between the cross-defendants was not by express agreement, thus it was an agency implied from their relationship and conduct. I hold this view on the basis that, Jimmy and James Wong who were directors and shareholders of the first cross-defendant (Ex. 'L'), only attended the first meeting with the landowners and that meeting was brief. All the subsequent meetings and negotiations between the landowners and the first cross-defendant were attended by the officers of the second cross-defendant and its other subsidiaries. The company search on the first cross-defendant also showed that the company Secretary for the first cross-defendant one Wong Geok Lion was also the Secretary for the second cross-defendant and Timbers (PNG) Ltd. The same search also revealed that the cross-defendants had the same registered office viz. Section 479 Lot 1, Kennedy Road.

92. From all these, it is clear to my mind that the first cross-defendant was incorporated purposely as a subsidiary of the second cross-defendant to give it a separate corporate entity status from the second cross-defendant, so that it could execute the LMA for and on behalf of the second cross-defendant. And by reason of such relationship between the cross-defendants, Jimmy and James Wong were also servants of the second cross-defendant, who were also under its direct control and supervision through the first cross-defendant. In that regard, it is to be noted that the affairs of the first cross-defendant were being run and managed by the second cross-defendant as it had no staff of its own. See, *Midland Silicones Ltd –v- Scruttons Ltd* [1962] 2 W.L.R186.

93. It is equally clear that the first cross-defendant signed the LMA with the principal objective of facilitating the logging operations in Orman Lako TPA by the second cross-defendant. In other words, the LMA was for the benefit of the second cross-defendant. This can be seen from the following uncontested evidence; first, Jimmy and James Wong only signed the LMA and after attending the first brief meeting with the landowners, played no further part, as all subsequent meetings and negotiations were attended by the second cross-defendant's officers and its two other subsidiaries, who for purposes of those meetings and negotiations were officers of the second cross-defendant as they were all representing the interests of the second cross-defendant; secondly, the landowners were told by the officers of the second cross-defendant that Jimmy and James Wong were "*small boys*" who only did what they were told to do. It is therefore not surprising that they took no further part after signing the LMA. In this regard, it is noted that, Jimmy and James Wong had difficulty understanding and speaking English. In other words, they were illiterate. It is also noted that all the subsequent meetings and negotiations were held in the second cross-defendant's office because the first cross-defendant had no office and staff of its own; thirdly, the second cross-defendant's officers told the landowners that the LMA was only "*paper*" and it was "*not important*", what was important was the timber project. On this point, it is relevant to note that the logging and the sawmill operations were managed and carried out entirely by the second cross-defendant and its officers or employees and Niugini Lumber Ltd; fourthly, there is overwhelming evidence that the money or the profits generated from the logging and sawmill operations were kept and controlled by the second cross-defendant; fifthly, the second cross-defendant paid all the royalties from the project although it was not a party to the LMA and sixthly, the evidence shows that the second cross-defendant caused its other subsidiaries, viz, Timbers PNG Ltd and Niugini Lumber Ltd to carry out obligations of the first cross-defendant under the LMA by attending negotiations and meetings with the cross-claimant's officers and managing the logging and the sawmill operations and paying the bank guarantee for the first cross-defendant. These are not in dispute. From this, it becomes abundantly clear that the first cross-defendant was used by the second cross-defendant as its agent to further its business interests in logging.

**(ii) Was the second cross-defendant in control of the first cross-defendant?**

94. On this question, the most significant and notable point is that the first cross-defendant had no office and staff of its own. Allied to this is that, it also had no financial and administrative capacity to run and manage its own affairs. All these were provided and done by the second cross-defendant. The evidence on this is

overwhelming. This is sufficient for me to find that the second cross-defendant was in control of the first cross-defendant. But there is more to this, for instance, as noted above, the royalties were paid by the second cross-defendant on behalf of the first cross-defendant. This is clear from the payment vouchers which bore the second cross-defendant's name (Exs.'H', 'I' and 'J'). Those payment vouchers also showed that the amounts paid by the second cross-defendant were to be debited to the first cross-defendant. There is also uncontested evidence that the second cross-defendant paid the insurance cover for the first cross-defendant and the compensation claim by one of the employees of the first cross-defendant (Ex.'G'). The other uncontested evidence is that the bank guarantee for the first cross-defendant was paid by Timbers PNG Limited, another subsidiary of the second cross-defendant (Ex.'K'). Then another subsidiary of the second cross-defendant viz. Niugini Lumber Ltd was involved in the logging operations.

95. A number of comments need to be made regarding Exhibits 'G' and 'K'. The Exhibit 'G' is the letter dated 18 December, 1995, to the Office of Workers Compensation in the Department of Labour and Employment by one Paul Chin of the Personnel and Administration Department of the second cross-defendant, regarding the processing of compensation claims for two injured persons. One of the claims was for Kora Wauro of Ormand Lako camp sawmill, the subject project area.

96. The Exhibit 'K' is the letter dated 14 February, 1997, to the Managing Director of PNG Forest Authority, by one Ivan Lu, who was the Senior Manager for Timbers PNG Pty Ltd. The letter was in regard to the bank guarantee for Timber Permit Nos. 16-4 and 3-30. The letter is significant. It is therefore reproduced here in full:

TIMBERS – PNG PTY. LTD.

P. O BOX 5697, BOROKO, N.C.D  
PAPUA NEW GUINEA  
TEL.675) 257677; 942121  
FAX.675) 257972; 942338

*14th February, 1997.*

*The Managing Director  
PNG Forest Authority  
P.O Box 5055  
Boroko, NCD.*

*Attn: Mr. Hakiso So-omba.*

*Dear Sir,*

*RE: BANK GUARANTEE FOR TIMBER PERMIT NO. 16-45 & 3-30.*

*We refer to the following Bank Guarantees that lodged with the PNG Forest Authority:-*

(a) an amount of Twenty Six Thousand Kina only (K26,000.00), in relation to our logging operation in Kaut area (under Timber Permit No. 16-45), New Ireland Province.

(b) an amount of Thirty Six Thousand Kina only (K36,000.00), in relation to our logging operation in Ormand Laku project under Timber Permit No. 3-30).

*Please find the attached copy of the Bank Guarantee for your easy reference.*

***In view of the fact that we have ceased both the logging operation in 1995, it would be most appropriate if we request for the said Bank Guarantees to be returned to us, for our onward presentation to the Bank for cancellation.***

*Your co-operation in this matter will be highly appreciated.*

*Yours Faithfully,  
for TIMBERS PNG PTY LTD.*

*(signed)  
IVAN LU  
(Senior Manager)*

97. This letter confirms a number of things: first, the first cross-defendant and Timbers PNG Ltd were subsidiaries and agents of the second cross-defendant; secondly, that as far as the cross-defendants were concerned, they ceased logging operations in the Ormand Lako area in 1995. To my mind, this affirms the claims by the cross-claimant that the ex-parte National Court Order which was obtained by the first cross-defendant on 29 August, 1996, was well after it had ceased operations and that it was intended to make its withdrawal from the TPA appear normal and legal; thirdly, Timbers (PNG) Ltd was actively involved in the affairs of the first cross-defendant; fourthly, the second cross-defendant had the overriding authority over its subsidiaries to cause or direct them to be involved in the affairs of its other subsidiaries and to do things on its behalf. Again, this to my mind is a clear evidence that the second cross-defendant had full control and authority over its subsidiaries.

98. It is therefore clear that the first cross-defendant was only a front for the second-cross-defendant and was a sham. For in truth, all the affairs of the first cross-defendant were being run and managed by the second cross-defendant.

99. Following case authorities clearly illustrate that in such circumstances, the second cross-defendant was controlling the first cross-defendant. In *Re FG (Films) Ltd* [1953] 1 WLR 483, a large American film company had an agreement with an English registered company whereby the American company was to assist the English company make a film. The president of the American company held 90 percent shares in the English company. The English company had no staff and place or office to do business; except a registered office. The English company sought registration of the

film as a British film on the basis that it was the maker of the film. The court held that the film could not be registered as a British film because the English Company could not make the film as it was only an agent of the American company which was the real maker of the film. The American company was also in control of the English company.

100. The relevant point to note in *Re FG (Films) Ltd*, is that the English company had no staff and place or office to do business. Similar factors were present in this case, in that the first cross-defendant had no office and staff of its own. These were provided by the second cross-defendant.

101. In *Smith Stone & Night Ltd v. Birmingham Corporation* [1939] 4 All ER 116, the Birmingham Corporation wished to purchase certain business premises on which another company, Birmingham Waste Co. Ltd, ostensibly conducted business for buying and sorting waste and its name appeared on the premises, note papers and invoices. The company was a wholly owned subsidiary of the parent company, which was a paper manufacturing company which also owned the premises. The parent company claimed that in truth, it was the one which was conducting the waste business and was therefore entitled to compensation for disturbance of its business. In upholding that claim, the court held that, although the subsidiary company had its name on the premises, note papers and invoices, it had no staff and no books of account of its own. It also did not pay its rent. Thus, it was the parent company which conducted the waste business. The parent company was therefore successful in arguing that it was in control of its subsidiary which had no financial and administration capacity. Plainly, had a situation arisen where the parent company had tried to assert that the waste business belonged to a separate entity, viz its subsidiary, the contention or the claim would have failed.

See, also *Littlewoods Stores* (1969) 1 WLR 1241; *Albeazero* (1975) 3 WLR 491 and *Holdsworth v. Caddies* (1995) WLR 352.

102. The ratio in *Smith Stone & Night Ltd –v- Birmingham Corporation* illustrates the point that accounts and rent to do business for Birmingham Corporation were kept and paid for by the parent company, thus it was still controlled by its parent company. The relevant point that emerges from the case before me is that, finances and profits made by the first cross-defendant were kept and controlled by the second cross-defendant, which also paid the royalties on behalf of the first cross-defendant.

103. Also, as regards agency, I have said that, although the cross-defendants had no express contractual relationship, there was implied agency between them. In that regard, it is in my view clear that there was understanding between the cross-defendants that the first cross-defendant would do things for and on behalf of the second cross-defendant. This can be seen and inferred from the brief involvement of Jimmy and James Wong, who were described by the second cross-defendant's officers as "*small boys*", who only did the things they were told to do. It is obvious from this that one of the things they were told to do was to sign the LMA and to attend the first meeting with the landowners. Other things like negotiations and the management of the logging and sawmill operations were left to the officers of the second cross-defendant. Thus in truth, the timber project as I alluded to earlier, was set up for the

benefit of the second cross-defendant as the first cross-defendant existed only by name. The first cross-defendant like other subsidiaries was controlled by the second cross-defendant and that, it was a conduit through which the second cross-defendant carried on more logging business. This point is highlighted and affirmed by Exhibit 'K' which shows that the second cross-defendant was also in logging business in Kaut in the New Ireland Province, obviously through its other subsidiary. These facts were not denied or contested by the cross-defendants.

104. The cross defendants were also operating as a single unit. A further reason why the second cross defendant is vicariously liable for the actions of the first cross-defendant. In *Industrial Equity Ltd v. Blackburn* (1977) 137 C.L.R. 567, this principle worked in reverse. In that case, the High Court of Australia held that profits made by the subsidiary company could not be regarded as profits for the parent company. There, the subsidiary company operated independently of its parent company. Thus contrasting that case to this case, the first cross-defendant never operated independently of the second cross-defendant because all its affairs, including its finances were being run and controlled by the second cross-defendant. A clear evidence that the second cross-defendant was in effectual and constant control of the first cross-defendant. The point that the cross-defendants were operating as a single unit is shown clearly by the letter written by Ivan Lu of Timbers (PNG) Ltd to PNG Forest Authority (Ex. 'K'), in which Ivan Lu adopted the word "we" in the last paragraph of that letter. There, Ivan Lu was referring to all the parties involved in the Orman Lako timber project, including the second cross-defendant.

105. Generally therefore, having regard to the principles in the cases cited above as regards control by a parent company over its subsidiary; the following factors emerge as necessary pre-requisites which should exist for the parent company to be in control of its subsidiary:-

- (i) where the subsidiary company has no office and staff of its own and that all its affairs, including its finances are either directly or indirectly run and managed by the parent company.
- (ii) where the profits of the subsidiary company are regarded and treated as profits for the parent company;
- (iii) where the persons conducting business of the subsidiary company are appointed or sanctioned by the parent company;
- (iv) where the parent company is the head and brain of any trading venture conducted or embarked upon by the subsidiary company;
- (v) where the parent company governs such venture and decides on what should be done or how it should be managed and determines the type of capital for such venture;
- (vi) where the profits of the business conducted by the subsidiary company are made by the parent company's skill and expertise; and



(vii) where the parent company is in effectual and constant control of the subsidiary company.

106. When looking closely at the evidence before the Court, it is clear that all the above factors were present in this case. For instance; the first cross-defendant had no office and staff of its own; the second cross-defendant was running and managing all the affairs of the first cross-defendant; the profits made by the first cross defendant from the logging and the sawmill operations were controlled and kept by the second cross-defendant, thus they were regarded and treated as belonging to the second-cross-defendant; the persons who signed the LMA on behalf of the first cross defendant namely, Jimmy and James Wong were appointed or sanctioned by the second cross-defendant through the first cross-defendant thus in truth, they were servants of the second cross-defendant. Again, this is inferred from the fact that they were "*small boys*" who only did what they were told to do. It becomes quite clear from this that the two men were appointed by the second cross-defendant through the first cross-defendant to serve its interests viz, to execute the LMA with the landowners; the negotiations were led by the second cross-defendant's servants, thus they were the head and brain behind the logging and sawmill operations; the second cross defendant determined how the logging and sawmill operations were to be managed. This is evidenced by the fact that one of its subsidiaries; viz, Niugini Lumber Ltd was engaged and involved in the running and management of the logging operations and further, the second cross-defendant got its other subsidiary company, viz, Timbers PNG Ltd, to pay the bank guarantee for the first cross-defendant; the second cross defendant provided administrative facilities including office, finance and staff to run the affairs of the first cross-defendant and determined its capital expenditure; the profits were clearly made by the skills and expertise of the second cross-defendant because its servants managed the logging and sawmill operations; the second cross-defendant was therefore in effectual and constant control of the first cross-defendant.

107. In *Odata Ltd –v- Ambusa Copra Oil Mill Ltd National Provident Fund Board of Trustees*, Kandakasi J, considered the circumstances in which corporate veil may be lifted. The facts and circumstances in *Odata* were much similar to those in this case. Brief and the relevant facts in *Odata* are these; the plaintiff (*Odata Ltd*) sued on the basis of a contract between it and the first defendant (*Ambusa Ltd*), which was incorporated by the second defendant (*NPF*) as its subsidiary. NPF wanted to go into copra oil milling business in Bialla in West New Britain, but it did not have land, so it incorporated *Ambusa Ltd*, which was a landowner company and entered into joint venture with it (*Ambusa Ltd*). NPF had 50 percent fully paid shares and the other 50 percent shares were owned by *Ambusa Ltd* in exchange of its land. NPF was running all the affairs of *Ambusa Ltd* as the landowners had no clue on how to run the business. An officer of NPF also conducted contract negotiations on behalf of *Ambusa Ltd* with *Odata Ltd*. The officer also signed the contract for *Ambusa Ltd* with *Odata Ltd*. His Honour held that, in those circumstances, the brain and skill behind the whole joint venture were provided by NPF. The Court therefore said the NPF should not be allowed to claim protection of its corporate veil.

108. In that case, Kandakasi, J adopted nine factors from the *CCH publication on the*

*New Zealand Company Law and Practices*; which would determine the lifting of the corporate veil. The eighth factor was considered relevant by his Honour and applied it in ordering the lifting of NPF's corporate veil.

109. In the instant case, I consider fifth and eighth factors relevant and apply them.

The fifth factor says:

5. *In the contractual context there is a need for some element of fraud or sharp practice in that party's conduct, or it must otherwise be unconscionable in the sense of equitable fraud to adhere to the doctrine (see Jones –v- Lipma (1962) 1 All ER 442, Gilford Motor Co. –v- Horne (1933) Ch 935)..*

The eighth factor says:

8. *The corporate veil may be lifted if a doing so is justified in all the circumstances of the case. The case in point is Creasey –v- Breachwood Motor Ltd (1992) BCC 638.*

110. In applying the fifth factor, it is noted that whilst the LMA was between the first cross-defendant and the cross-claimant, the Agreement was in truth formulated for the second cross-defendant to do logging business in the project area and as noted earlier, the first cross-defendant was only a front for the second cross-defendant. The end result is that the first cross-defendant was a dummy company incorporated purposely to be used by the second cross-defendant as a vehicle to commit fraud and to avoid legal obligations.

111. This point is neatly illustrated by *Gilford Motor Co. Ltd v. Horne* (1933) Ch. 935. In that case, Horne was appointed managing director of Gilford Motor Company Ltd for a term of six years. A service agreement provided that he was not to solicit or entice away from the company any of its customers during his appointment or after termination of his appointment. Three years later, Horne resigned and started his own business in competition with the company. He then sent out circulars to customers of the company seeking their business. Horne formed a company to conduct his business, the shareholders being his wife and an associate. Gilford Motor Co. Ltd brought an action seeking to restrain Horne and the company he formed from soliciting their customers. The action was successful and an injunction was granted against both Horne and the company, even though the company was not a party to the contract with the plaintiff. The company formed by Horne was really for Horne to avoid legal obligations. Lord Hansworth M.R said:

*"I do hold that the company was 'a mere cloak or sham'; I do hold that it was a mere device for enabling Mr. E.B Horne to continue to commit breaches of clause 9 (of the service agreement), and in those circumstances the injunctions must go against both defendants".*

112. A relevant point to note in this regard is that the LMA was prepared and formulated by the second cross-defendant. It could not have been prepared by Jimmy

and James Wong because they were illiterate. In that sense, the signing of the LMA by Jimmy and James Wong was done with contempt because obviously, they could not understand what they were signing and its significance. It was therefore of no surprise that the landowners were told that the LMA was not as important as the timber project. The contemptuous attitude by the cross-defendants towards the LMA is further evidenced by the fact that negotiations for the logging and the sawmill operations were done by the officers of second cross-defendant or third parties.

113. And given the fact that Jimmy and James Wong were illiterate and that the first cross-defendant had no staff and office of its own, correspondences for and on behalf of the first cross-defendant, including the LMA and the draft Sawmill Agreement were written and prepared or authored by the second cross-defendant's officers. For instance, the notices of meetings dated 5 and 12 June 1996 (Exs. 'W' and 'X'); the reply to the proposed amendment to the draft Sawmill Agreement by the cross-claimant dated 14 November, 1995 (Ex. "N2"), and the letter to the cross-claimant regarding the draft Sawmill Agreement and Marketing Agreement dated 2 January 1996 (Ex. 'U'). All these were written in English. The second cross-defendant therefore should not hide behind its corporate veil to avoid its legal obligations, *See Re Darby* (1911) I K.B 95.

114. Alternatively, it can also be said that the first cross-defendant being the agent of the second cross-defendant, the second cross-defendant would be liable for any fraudulent conduct by the first cross-defendant. In that regard, applying in particular the fifth factor in *Odata*, the conduct of the first cross-defendant had an element of fraud. For this, it is noted that the first cross-defendant was incorporated on 26 November, 1992, that was two days after the LMA was signed on 24 November 1992. The date of the execution of the LMA was disputed by Mr. Shepherd but there is overwhelming evidence in support of the claim by the cross-claimant that it was executed on 24 November, 1992. The Exhibit 'R' which is the certificate of incorporation for the first cross-defendant is conclusive evidence that it was incorporated on 26 November 1992. I therefore accept that the LMA was signed on 24 November 1992. The end result is that the first cross-defendant signed the LMA without it being incorporated or without it having attained its corporate status. This fact was not disclosed by the first cross-defendant to the cross-claimant at the time of it signing the LMA. The cross-claimant was therefore led to believe that the first cross-claimant was incorporated at the time of signing the LMA. The cross-claimant discovered this fact only after it conducted a search on the first cross-defendant at IPA on 11 November, 1999. All these also provide the reasons why the corporate veil of the second cross-defendant should be lifted.

115. It is also relevant to note two other factors: first, the LMA was prepared by the first cross-defendant. The landowners had no or little involvement in it, if any. They were only told to sign it. This is clear from Mr. Duri's evidence. He said, they were told to sign the LMA by the first cross-defendant so they signed it, but they were still 'concerned' about the LMA. This evidence has not really been challenged by the cross-defendants; secondly, the notice the first cross-defendant gave in August, 1996 that it was winding up its operations in the TPA was quite deceitful and fraudulent because the first cross-defendant knew that it had ceased operations in 1995. This is affirmed by Exhibit 'K' which is the letter by Timbers PNG Ltd to the PNG Forest

Authority.

116. The failure by the first cross-defendant to pay the requisite insurance cover and the bank guarantee, and the engagement of Niugini Timber Ltd in logging operations without the consent of the cross-claimant as alluded to earlier, constituted serious breaches of the LMA. These breaches were denied by the cross-defendants, but the evidence is overwhelming and I accept that there were such breaches of the LMA by the first cross-defendant. The second cross-defendant as the principal and the parent company is liable for these breaches of the LMA by the first cross-defendant.

117. In view of the findings I have made, I consider it necessary that I should specifically address the matters raised by Mr. Shepherd. He argued that the landowners had no complaints up to December, 1995. But this is contrary to the uncontested evidence before me. For instance, the letter by the PNG Forest Authority to the General Manager of the first cross-defendant dated 21 November, 1994, (Ex.'E') clearly indicates that well before 21 November, 1994, the landowners raised concerns with PNG Forest Authority that Niugini Lumber Ltd was being involved in the logging operations, even though it was not a party to the LMA. This prompted the PNG Forest Authority to write to the General Manager of the first cross-defendant on 21 November, 1994, expressing concerns of the landowners and directed the first cross-defendant to explain its relationship with Niugini Lumber Ltd. The relevant part of the letter is paragraph 2, but the letter also highlighted other concerns of the landowners. Those matters are relevant to the issues raised by Mr. Shepherd. The letter is therefore reproduced here in full.

118. Indeed, there is uncontested evidence that, from the beginning, the landowners were concerned that James and Jimmy Wong who signed the LMA with them were not attending the subsequent meetings and negotiations between them and the first cross-defendant. That concern was simply brushed aside by the officers of the cross-defendants and effectively told the landowners that Jimmy and James Wong were only "*small boys*" and were therefore irrelevant for those meetings and negotiations and they should not unnecessarily concern themselves about their non attendance at the meetings.

119. There is also evidence that the landowners became suspicious that the second cross-defendant was the main player in the timber project because they believed he was the one paying royalties, not the first cross-defendant. That suspicion was later confirmed by the payment vouchers for the royalties, all of which bore the second cross-defendant's name. The vouchers showed that the payments were made against a particular internal code number for the cross-defendants and the code number appeared to be for the first cross-defendant. Those vouchers therefore showed that the royalties paid by the second cross-defendant were to be subsequently debited to the first cross-defendant. A clear evidence that the second cross-defendant paid the royalties for and on behalf of the first cross-defendant and that the second cross-defendant was in control of the first cross-defendant.

120. The landowners also raised concerns about the requisite insurance and bank guarantee, which they learnt later, were paid by the second cross-defendant and

Timbers (PNG) Ltd.

121. It is therefore clear that the landowners had concerns and complaints from soon after the signing of the LMA up to September 1996, when the cross defendants eventually withdrew their machinery and vacated the TPA.

122. Mr. Shepherd also submitted that the eventual withdrawal of timber operations by the first cross-defendant was as a direct result of the unreasonable demands made by the cross-claimant to take control of the logging and sawmill operations and for the LMA to be reviewed prematurely. Mr. Shepherd said that those unreasonable demands forced the first cross-defendant to also obtain the ex-parte National Court Order to remove its machinery from the project site. But I am firmly of the view that all the actions taken by the landowners in that regard were taken as the direct result of the landowners not having any part in the formulation of the LMA and the draft Sawmill Agreement. See, *Stroms Bruks Actie Bolag –v- John and Peter Hutchinson* [7405] A.C. 515, at 525. As noted earlier, there is uncontested evidence from the landowners that the LMA was formulated by the first cross-defendant without the landowners' participation in any meaningful way and the landowners were simply told to sign it on 24 November, 2002. Both Jimmy and James Wong were in no position to explain the contents of the LMA, because they were illiterate. In that sense, the LMA was unilaterally prepared by the first cross-defendant. Note that, according to Mr. Duri, they signed the LMA because they were told to sign it. But they still had their concerns about the LMA. In that regard, the conduct of the cross-defendants in telling the landowners to sign the LMA was unconscionable and it constituted equitable fraud. The landowners being lay persons, the cross-defendants should have listened to their concerns and should have allowed the landowners to seek advice from a lawyer(s) before signing the LMA, so that they fully understood what they were signing. This Court has said elsewhere that in those circumstances, the conduct of the cross-defendants was unconscionable. See, *Kora Gene –v- Motor Vehicles Insurance (PNG) Trust* [1995]PNGLR 344; *Papuan Club Inc. v. Nusaum Holdings Limited & Ors.* N2603. See also, *Lloyds Bank Ltd –v- Bundy* [1974] 3 All ELR 757; *Blomley –v- Ryan* [1956] 99 CLR 362; and *Commonwealth Bank of Australia –v- Amadio* [1983] 151 CLR 447.

123. I also find that the subsequent actions taken by the landowners in stopping further logging were related to the issues and concerns raised by PNG Forest Authority which were conveyed to the first cross-defendant in the letter dated 21 November, 1994 (Ex.'E'). These matters cannot be considered in isolation, as they are a part and parcel of the overall facts and circumstances. Thus, whilst it may be true that the landowners may have demanded premature review of the LMA, such demand was in my view not unreasonable because it was as a direct result of the failure by the cross-defendants to involve the cross-claimant in the formulation of the LMA.

124. Apart from the breaches of the LMA by the cross-defendants as alluded to earlier, there were other breaches. For instance, the failure by the first cross-defendant to pay royalties. That was in breach of cl.10.2 (b)(i). The failure by the first cross-defendant to provide manpower, appropriate technical know how and expertise for the logging and sawmill operations. That was in breach of cl.12.2. The failure by the first cross-defendant to maintain Forest Working Plan as highlighted in Exhibit "K'. That

was in breach of cl.12.1 (ii).

125. Therefore, it can be seen from all these that, the cross-defendants constantly breached the LMA and thus they completely disregarded the LMA. The breaches of the LMA were flagrant. A clear reflection of the way the cross-defendants regarded the LMA as "*not important*".

126. I accept the evidence adduced by the cross-claimant that the landowners genuinely tried to negotiate better deals in the logging operations and in the draft Sawmill Agreement. I also accept the cross-claimant's evidence that the landowners did not set up blockades and stoppages and that they did not threaten to burn the machinery or threatened the employees of the first cross-defendant when they went to remove the machinery from the project site in September 1996. The witnesses for the cross-claimant have corroborated each other on this and I accept their version of events over what was deposed in David Chin's affidavit, which has been strongly denied by the claimant. Mr. Duri has also said that David Chin never went to the campsite. Also, there cannot be any doubt about the second cross-defendant's corporate status because it is proved by the company search made by Mr. Ubuna (Ex. 'L').

127. As regards the two notes written by Mr. Duri which are Annexure 'D' to David Chin's Affidavit and Exhibit. 'V', respectively; according to Mr. Duri, they were written because the cross-defendants were operating the sawmill without the Sawmill Agreement and the removal of the machinery from the project site was in the breach of the LMA. I accept those explanations by Mr. Duri. Also, for the reasons already given, I do not consider the two notes as an attempt by Mr. Duri to interfere with the logging operations, and I do not see anything unreasonable about them. The notes were in my view raising and reasserting genuine and legitimate concerns of the landowners.

128. As to the argument by Mr. Shepherd that it is not clear as to against which of the cross-defendants the claims are being made and that the cross-claimant has failed to establish a cause of action against the cross-defendants; in my view, there cannot be any doubt that the claims are against both cross-defendants. The claims against the second cross-defendant are made by reason of it being the parent and the controlling company. And the first cross-defendant being a subsidiary of the second cross-defendant has been conceded by the cross-defendants. Thus the second cross-defendant would be bound by the actions of the first cross-defendant and would therefore be vicariously liable for those actions. As to the question of whether there is a cause of action against the cross-defendants, in particular, the first cross-defendant, the material facts alleged in the cross-claim do in my view establish a cause of action.

129. There cannot be any doubt that the landowners have every right to protect their resources from being exploited by Contractors through illegal means. This right is protected by legislation through the *Forestry Act, 1991*. The scheme of the *Act* gives prominence to the interests of the resource or landowners. This is spelt out quite clearly in mandatory terms in s. 46 of the *Act*. This section appears under PART III of the *Act* which is headed – **FOREST MANAGEMENT AND DEVELOPMENT**.

Section s. 46 provides:

*"46. Customary Resource Ownership*

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

130. The legislation also gives the right to the forest resource owners to hold permit and to develop their resources, if they so desire (s.73). And it is the right of the resource owners to decide who to engage in developing their resources. In this case, it was the first cross-defendant who was engaged by the resource owners to develop their forest resource.

131. Here, as in all other cases, the PNG Forest Authority has the duty to ensure that the rights and interests of the Permit Holders or the resource owners are fully protected and that the requirements of the *Forestry Act* are fully complied with, especially by the Contractors or the developers.

132. Those who are engaged by the resource owners to develop their resources have no absolute right to do as they please. This is the reason why they enter into agreements with the resource owners so that statutory requirements and guidelines as embodied in those agreements are strictly adhered to and complied with.

133. In this case, the LMA was regarded by the cross-defendants as only paper and was *"not important"*. Indeed, it was totally disregarded by the cross-defendants.

134. It is noted that, one of the principal concerns of the landowners and the PNG Forest Authority as highlighted by the uncontested evidence is that the first cross-defendant started felling timber in April, 1994, but the first cross-defendant had no proper records of its Forest Management Practices. This is a requirement which every Contractor engaged in logging operations has to comply with. The failure by the first cross-defendant to comply with this requirement prompted the PNG Forest Authority to demand from the first cross-defendant the *"details of Past Logging Inventory for the two logged setups"* for purposes of enumeration by PNG Forest Authority (Ex. 'E'). So then, how can the cross-defendants now turn around and say that the cross-claimant's demands were unreasonable when they themselves were in constant flagrant breach of Forest Management Practices? Furthermore, according to paragraph 4 of Exhibit 'E', by 21 November, 1994, the first cross-defendant still had not built a permanent office at the campsite to oversee its operations. That also prompted the PNG Forest Authority to demand the first cross-defendant to *"build an office space within 21 days"* on receipt of the letter. Then according to the last paragraph of that letter (Ex. 'E'), the Orman Lako project was a sawmilling project; but the export of logs was at the discretion of the Minister. There was no Sawmill Agreement, yet the cross-defendants were already operating a sawmill. This was in direct breach of cl. 34, which *inter alia*, provided that: *"...The schedule for payment and other terms and conditions of the sawmill shall be detailed in a separate Management and Marketing Agreement for sawmill by the Permit Holder and the Contractor..."*

135. The requirements to have in place records of proper Forest Management Practices and a separate Management and Marketing Agreement for the sawmill under cls. 12.1 and 34 of the LMA were conditions precedent to a legal logging and sawmill operations. Those were two of the main concerns the landowners were raising, as resource owners when the first cross-defendant terminated the LMA on 29 August, 1996.

136. Thus, the actions by the cross-defendants were in my view callous and lacked propriety and probity. The most glaring aspect of this conduct was that, the sawmill operated for 18 months without the Sawmill Agreement. This was in fact the single most pressing concern the landowners had. In the circumstances therefore, equity and justice require that the cross-defendants should pay for their actions. The second cross-defendant who was the actual player in all these therefore should not have the protection of its corporate veil and avoid liability. On this point, I respectfully adopt the sentiments expressed by Pritchard J. in *C.B.S Inc. and C.B.S Records Australia Ltd and Bali Merchants Pty Ltd –v- Ranu Investments Pty Ltd (C.B.S)* [1978] PNGLR 66. At p. 68, His Honour said:

*"There has been considerable reverence paid by the Courts of many countries to the concept of a company being a legal person in its own right. In this regard I am somewhat of a heretic and in a newly developing country such as ours when under the Constitution the judges of this Court must develop the rules of the underlying law of this nation in accordance with the principles of natural justice and ensure that such law develops as a coherent system in a manner that is appropriate to the circumstances of the country from time to time. I believe that judges will be more inclined to go behind corporate structures than judges in other countries have been prepared to."*

137. It follows that the cross-defendants are jointly liable to the claims by the cross-claimant.

138. In view of the conclusions I have reached, I do not consider it necessary to determine whether the cross-defendants should have filed an amended cross-defence to the cross-claimant's amended cross-claim and whether by reason of their failure to do so, they should be liable to the cross-claimant's claims. But even if it is in the clear for me to decide the issue, I may be barred from doing so, for two fundamental reasons; first, this issue was decided by Amet CJ, on 21 March, 2001, and therefore the issue having been decided already, there may be estoppel by reason of principles of *res judicata*; see, *Tolom Abail and 765 others –v- The State* N1402; secondly, the issue having been decided by Amet CJ, the proper course for the cross-claimant to adopt may have been to appeal against the decision of Amet CJ, with leave if it wanted to challenge that decision. It may therefore be an abuse of process for the cross-claimant to raise the same issue before this Court. I say no more on these two issues because counsel did not raise them nor did they advance any arguments to address them.

#### **Damages.**



139. The cross claimant has claimed K8.3m in damages against the cross defendants in lost project benefits. The Agreement was terminated on 29 August, 1996, as conceded by the cross-defendants.

140. My task now therefore is to determine the quantum of damages for the cross claimant.

141. The cross claimant has not claimed for the period before 29 August, 1996. I will therefore disregard the period before 29 August, 1996.

142. For the purposes of determining the quantum of damages, I have decided to adopt the rates and figures used by Mr. Torebena (Ex. 'T'). Although the cross defendants have challenged these figures and rates as hearsay, I have decided to adopt them because they are based on rates and figures provided in the Timber Permit and the LMA, which are in evidence before the Court and which the cross-defendants have also accepted as valid.

143. I will therefore use K16.60 per cubic meter and multiply this by the maximum 50,000 cubic meters per year (cl. 4 of the Timber Permit) as adopted by Mr. Torebena (Ex. 'T').

144. Thus applying the above formulae ( $K16.60 \times 50,000m^3$ ) the total benefit for the cross-claimant per cubic meter is determined as follows: -

- i. 1996 - I allow K281,972.28. This amount is for the period from 29 August, 1996, to 31 December, 1996.
- ii. 1997 - K830,000.00. This amount is for the whole year.
- iii. 1998 - K830,000.00. Again this is for the whole year.
- iv. 1999 - K830,000.00. Again this is for the whole year.
- v. 2000 - K830,000.00. Again this is for the whole year.
- vi. 2001 - K830,000.00. Again this is for the whole year.
- vii. 2002 - K745,862.16. This is for the period from 1 January, 2002, to 24 November, 2002.

145. The total amount arrived at from the above calculations is K5, 177,834.44.

146. However, I cannot award this amount in total because I find that the cross-claimant has failed or neglected to take reasonable steps to mitigate its damages. The duty to mitigate damages is a legal obligation which is incumbent upon every claimant claiming damages either in tort or contract, as in this case, against another. This principle was succinctly stated by Lord Wrenbury in *Jamal Moolla Dawood, Sons & Co.* [1916] A.C 175. His Lordship at 179 said:

*"It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If, at that date, the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it".*

147. Pursuant to cl. 22.1(b) of the LMA, the first cross-defendant's conduct in removing its machinery from the project site and vacating the TPA on 4 September, 1996 amounted to repudiation of the LMA. This was subsequently confirmed when it (the first cross-defendant) refused to return to the TPA and resume logging after it was requested to do so by the cross-claimant. It then became incumbent upon the cross-claimant to take reasonable steps to engage another Contractor to develop its timber project so as to mitigate its damages.

148. It is fallacy for the cross-claimant to maintain that the LMA was never terminated when the evidence is quite clearly to the contrary.

149. It is clear that the cross-claimant neglected its legal obligation to mitigate its losses when the repudiation was clear. For this reason, I consider it reasonable that I should deduct one third of the above total amount I have arrived at as cross-claimant's lost project benefits.

I will therefore deduct K1,725,944.81, from K5,177, 834.44 for the failure by the cross-claimant to mitigate its damages. The balance remaining is K3,451,889.63. I will make further deduction to this amount to accommodate any unexpected events which could have affected the production or logging, such as *force majeure* or such other events. Again, I consider as reasonable that K3,451,889.63 should be reduced by a third. Thus the balance remaining is K2,301,259.75.

150. Consequently, I award K2,301,259.75, in damages to the plaintiff for lost project benefits.

### **Interest**

151. Interest is discretionary. I am aware that the cross-claimant has lost business and in such cases, interest at above 8 percent may be awarded. See, *Allotau Enterprises Pty Ltd –v- Allen Enterprises Pty Ltd and Zurich Pacific Insurance Corporation* N1969 and *KL Engineering and Constructions (PNG) Limited –v- Damansara Forest Products (PNG) Limited & Ors* N2250. However, in this case, I have decided to award interest at 4 percent, because the claim by the cross-claimant was filed because of the action by the first cross-defendant in WS 1088 of 1996. In my view, it would not be fair to the cross-defendants if I exercised my discretion to award interests either at 8 percent or above. I consider 4 percent to be a fair rate to apply.

152. The period for interest is from the date of the cross claim which is 6 March, 1997, to today's date which is 9 August, 2006. That is a period of 9 years, 5 months 3

days; and for this period, I calculate the interest at **K868,906.53**. I award this amount in interests.

153. Thus, the total amount awarded to the cross-claimant in damages and interests is **K3,170,166.28**.

154. I am aware that the first cross-defendant's claim was for the cost of constructing the sawmill, pursuant to cl.34 of the LMA. However, I have decided against the cross-defendants for two reasons: first, as I have said, the cross-defendants' own conduct necessitated these proceedings; secondly and more importantly, the cross-claimant was in no position to pay for the cost of the sawmill because all the money and profits generated by the logging and the sawmill operations were kept and controlled by the second cross-defendant.

155. The cross-defendants will pay the cross-claimant's costs of and incidentals to these proceedings which will include costs of any interlocutory applications made in connection with these proceedings.

*Soi & Associates: Lawyers for the cross-claimant*

*Blake Dawson & Waldron Lawyers: Lawyers for the cross-defendants*