

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

OS (JR) NO 715 OF 2010

TZEN PACIFIC LIMITED
Plaintiff

V

**KANAWI POURU, MANAGING DIRECTOR, PAPUA NEW GUINEA FOREST
AUTHORITY AND NATIONAL FOREST SERVICE, MEMBER OF THE NATIONAL
FOREST BOARD**
First Defendant

**JOSEPH LELANG, THOMAS PAKA, MOSES GAWI, JOSEPHINE GENA, BONNY
NINAI, DR WARI IAMO, BOB TATE & ANDA AKIVI, MEMBERS OF THE
NATIONAL FOREST BOARD**
Second Defendants

THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Third Defendant

INNOVEST LIMITED
Fourth Defendant

ARIA VANU TIMBER COMPANY LIMITED
Fifth Defendant

Waigani: Cannings J
2013: 20, 21, 22, 27 March, 25 April

JUDICIAL REVIEW – application for review of decision to grant licence to engage in forest industry activities – Forestry Act 1991, Section 91 (issue of a licence) – whether decision to grant licence contrary to Section 91 or unreasonable or made in breach of principles of natural justice or contrary to Forestry Act, Section 97 (conviction of the holder of a licence etc) or contrary to court order.

JUDICIAL REVIEW – remedies – whether court constrained by orders sought in notice of motion – whether acceptable to apply for relief by statement under National Court Rules, Order 16, Rule 3(2)(a).

The National Forest Board, the second defendant, granted a 12-month licence under Section 91 of the *Forestry Act* to a timber company, the fourth defendant, to engage in forest industry activities in a particular project area. The plaintiff, a competing timber company, was aggrieved by the Board's decision, its main grievance being that eight months earlier the Board had granted it a licence in similar terms to engage in forest industry activities in the same project area. The Minister for Forests had cancelled the plaintiff's licence before granting the licence to the fourth defendant but the plaintiff claimed that cancellation of its licence was unlawful. The plaintiff sought judicial review of the Board's decision to grant the licence to the fourth defendant and relief including orders quashing the fourth defendant's licence and confirming the legality of the plaintiff's licence and damages, on five grounds, that the decision was: (1) contrary to Section 91 of the *Forestry Act*; (2) unreasonable and an abuse of power; (3) contrary to the principles of natural justice as the plaintiff was not

informed that its licence would be cancelled; (4) contrary to the *Forestry Act* as the plaintiff's licence had not been cancelled in accordance with Section 97 of the *Forestry Act*; and (5) contrary to an order of the National Court.

Held:

(1) The first ground of review was based on two false premises: that the plaintiff's licence had not been cancelled and that Section 91 prevents the Board granting two licences over the same project area. In fact the plaintiff's licence was cancelled, and Section 91 does not prohibit two or more licences being granted over the same project area. The first ground of review was dismissed.

(2) The decision was not so unreasonable or absurd that no reasonable decision-maker in the position of the Board could have made it. Nor was there evidence that the decision was made in bad faith or for an improper purpose such that it could be regarded as an abuse of power. The second ground of review was dismissed.

(3) The plaintiff, being the holder of a statutory licence, was entitled to be heard on the question whether its licence ought to be cancelled. This was an underlying law right that would be readily implied in the absence of statutory provisions expressly conferring such a right. There are express provisions in the *Forestry Act*. A Section 91 licence may only be cancelled in accordance with the procedure in Section 97: the Managing Director shall serve a notice on the licence holder advising of the intention to cancel and the reason for the intended cancellation and requiring the licence holder within 14 days to make representations. Here, no such notice was served on the plaintiff so cancellation of its licence involved a denial of natural justice. It followed that it should have been given a right to be heard on the proposal to grant a new licence to the fourth defendant. No such right was given so it was again denied natural justice. The third ground of review was upheld.

(4) The fourth ground of review was repetitious and unnecessary and was dismissed.

(5) The Board's decision was not made in breach of the court order referred to in ground 5, which on its terms did not prevent and was not intended to prevent the Board from discharging its statutory powers, functions, duties and responsibilities. The fifth ground of review was dismissed.

(6) As one ground of review was upheld the Board's decision was susceptible to judicial review and the court had a discretion to exercise as to the appropriate relief. The court declined all substantive relief including the award of damages sought by the plaintiff some of which had not been properly sought by notice of motion and the granting of all of which would be contrary to the interests of justice as the court was satisfied that though mistakes were made in the decision to cancel the plaintiff's licence and the decision to grant the fourth defendant's licence, each licence was only of 12 months duration and the decisions to cancel the plaintiff's licence and to grant the fourth defendant's licence were made in good faith and for good reason as there was evidence that the plaintiff had breached the conditions of the licence and the circumstances in which the plaintiff had taken an assignment of rights and obligations under the logging and marketing agreement to which the licences were connected was questionable and the holder of the timber permit (the fifth defendant) to which both licences were connected had lost confidence in the plaintiff and wanted the fourth defendant to be granted a licence.

(7) The application for judicial review was accordingly dismissed and the parties were ordered to bear their own costs.

Cases cited

The following cases are cited in the judgment:

Bougainville Copper Foundation v Minister for Trade and Industry [1988-89] PNGLR 110
Central Pomio Logging Corporation Pty Ltd v The State [1992] PNGLR 20
Dale Christopher Smith v Minister for Lands (2009) SC973
Mision Asiki v Manasupe Zurenuoc (2005) SC797
Paias Wingti v Kala Rawali (2010) N3982
Paul Dopsie v Jerry Tetaga (2009) N3720
Paul Saboko v Commissioner of Police (2006) N2975
Peter Makeng v Timbers (PNG) Ltd (2008) N3317
Ralph Premdas v The State [1979] PNGLR 329
Tau Kamuta v David Sode (2006) N3067
Telepage Pty Ltd v PTC (1987) N605
Timbani Longai v Steven Maken (2008) N4021
Tzen Pacific Ltd v Peter Puana and Aria Vanu Timber Company Ltd SCA 17 of 2011, 02.03.12 unreported

Counsel

F A Griffin, for the plaintiff
I R Shepherd, for the first and second defendants
E S Geita, for the third defendant
A Waviha, for the fourth defendant
G Kaore, for the fifth defendant

25th April, 2013

1. **CANNINGS J:** This is a ruling on an application for judicial review. The plaintiff Tzen Pacific Ltd applies for judicial review of the decision of the National Forest Board to grant a 12-month licence under Section 91 of the *Forestry Act* to a rival timber company, Innovest Ltd, to engage in forest industry activities in the timber project area known as Aria Vanu Block 3 in the Arowe area on the south coast of West New Britain.

2. The plaintiff is aggrieved by the Board's decision as eight months earlier the Board had granted it a licence in similar terms to engage in forest industry activities in the same project area. The plaintiff is a licensed forest industry participant and says that it and its related companies, Cakara Alam (PNG) Ltd and Tzen Niugini Ltd, had been conducting forest industry activities including harvesting and marketing of forest produce lawfully and responsibly in the project area since 2003 in accordance with a series of licences granted by the Board under the *Forestry Act* and pursuant to a logging and marketing agreement with a local landowner company, Aria Vanu Timber Company Ltd, which is the holder of the timber permit authorising forest industry activities in the project area. The plaintiff says that the original logging and marketing agreement between Aria Vanu Timber Company and Cakara Alam was of five years duration. It ran from 2003 to 2008 and was extended in 2008 and will expire in November 2013. It says that Cakara Alam's rights and obligations under the logging and marketing agreement were assigned with the consent of Aria Vanu Timber Company to Tzen Niugini, which in turn assigned its rights and obligations to the plaintiff, again with the consent of Aria Vanu Timber Company. The plaintiff acknowledges that its licence was cancelled by the Minister for Forests before a new licence was granted to Innovest but argues that the decision to cancel its licence was made unlawfully. The plaintiff seeks a range of remedies including orders that would quash the decision to grant the licence to Innovest and confirm the legality of the plaintiff's licence and require by an order in the nature of mandamus that it be granted a new licence, and damages.

3. There are five defendants:

- the first defendant Kanawi Pouru, the Managing Director of the National Forest Service, who signed on behalf of the Board the licence granted to Innovest;
- the second defendant, the National Forest Board constituted by its various members, which made the decision to grant the licence to Innovest;
- the third defendant, the State, which supports the position taken by the first and second defendants;
- the fourth defendant, Innovest Ltd, which claims to have been lawfully granted a licence;
- the fifth defendant, Aria Vanu Timber Company Ltd, which supports the decisions to cancel Tzen Pacific's licence and to grant a licence to Innovest.

4. Curiously the Minister for Forests, who made the decision to cancel Tzen Pacific's licence, has not been joined as a defendant. All defendants are united in their opposition to the application for judicial review. They say that the Board's decision to grant a licence to Innovest was made lawfully and that Tzen Pacific's licence was cancelled for good reason and that all relief sought by Tzen Pacific should be refused.

5. There are three key dates to bear in mind:

- 22 February 2010 is when the Board granted the plaintiff its licence;
- 30 August 2010 is when the Minister for Forests, Hon Timothy Bonga MP, cancelled the plaintiff's licence;
- 18 October 2010 is when the Board granted a licence to Innovest, and it must be emphasised that it is the decision to grant that licence (not the Minister's decision to cancel the plaintiff's licence) that is the subject of the application for judicial review.

THE GROUNDS OF REVIEW

6. There are five. They are numbered 5 to 9 in the plaintiff's statement under Order 16, Rule 3(2)(a) of the *National Court Rules* but are renumbered for the purposes of this judgment as 1 to 5. It is argued that the Board's decision to grant the licence to Innovest was:

- (1) contrary to Section 91 of the *Forestry Act*;
- (2) unreasonable and an abuse of power;
- (3) contrary to the principles of natural justice as the plaintiff was not informed that its licence would be cancelled;
- (4) contrary to the *Forestry Act* as the plaintiff's licence had not been cancelled in accordance with Section 97 of the *Forestry Act*; and
- (5) contrary to an order of the National Court.

(1) BREACH OF THE FORESTRY ACT, SECTION 91

7. The plaintiff's Order 16, Rule 3(2)(a) statement states:

The decision of the first and second defendants to grant and issue a licence dated 18 October 2010 (under Section 91 of the *Forestry Act 1991*) to the fourth defendant was made in breach of Section 91 of the *Forestry Act 1991*, as the plaintiff had already been issued a licence on 22 February 2010, which to date has never been cancelled, revoked or terminated.

8. The plaintiff argues that the decision to grant the licence to Innovest was contrary to Section 91 as the plaintiff had already been issued a licence on 22 February 2010 which had never been cancelled, revoked or terminated.

9. I find that the plaintiff's argument is based on two false premises: that the plaintiff's licence had not been cancelled and that Section 91 prevents the Board granting two licences over the same project area. In fact the plaintiff's licence *was* cancelled by the Minister for Forests on 30 August 2010, so on 18 October 2010 when the Board granted the licence to Innovest there was no pre-existing licence operating in respect of the same project area.

10. Even if the plaintiff's licence had not been cancelled there is nothing in Section 91 that prevents the Board issuing two or more licences in respect of the same project area. Section 91 states:

(1) *The Board may, on the application of a registered forest industry participant, issue to that registered forest industry participant, a licence to engage in forest industry activities other than those carried out, or proposed to be carried out, under a timber permit or timber authority held by the forest industry participant.*

(2) *A licence shall—*

(a) *be in the prescribed form; and*

(b) *include as a condition compliance with the terms and conditions of any timber permit or timber authority or permit to which the activities authorized by the licence are related; and*

(c) *specify the activity or activities in respect of which the licence is granted; and*

(d) *require a performance bond in accordance with Section 98 for an amount specified in the licence; and*

(e) *include such other conditions in accordance with the National Forest Policy as are applicable.*

11. The plaintiff's argument presumes that the Board is prohibited from granting two licences over the same project area. I find nothing in Section 91 or in any of the other provisions of the *Forestry Act* to support the existence of such a prohibition. The first ground of review is misconceived and is dismissed.

(2) UNREASONABLENESS AND ABUSE OF POWER

12. The Order 16, Rule 3(2)(a) statement states:

The decision of the first and second defendants to grant and issue a licence dated 18

October 2010 (under Section 91 of the Forestry Act 1991) to the fourth defendant was unreasonable and an abuse of power by these public authorities, especially where the plaintiff held a current and valid licence dated 22 February 2010, which had never been cancelled, revoked or terminated.

13. The plaintiff argues that the decision to grant the licence to Innovest was unreasonable and an abuse of power.

14. To prove that an administrative decision was unreasonable it is incumbent on a plaintiff to establish that the nature or effect of the decision being reviewed was so unreasonable or absurd that no reasonable decision maker could have made such a decision (*Paul Saboko v Commissioner of Police* (2006) N2975, *Tau Kamuta v David Sode* (2006) N3067, *Paul Dopsie v Jerry Tetaga* (2009) N3720). To prove that a decision was an abuse of power it is necessary to show that it was made for an improper purpose or in bad faith (*Central Pomio Logging Corporation Pty Ltd v The State* [1992] PNGLR 20, *Tau Kamuta v David Sode* (2006) N3067).

15. The plaintiff has failed to establish that the nature or effect of the Board's decision was unreasonable, let alone that it was so unreasonable that it could not have been made by a reasonable decision-maker in the position of the Board. The only argument raised in support of the plaintiff's argument is the same argument that underpinned ground No 1: that the plaintiff had a licence over the same project area that had not been cancelled. I found in ground 1 that that argument was flawed, so it takes the unreasonableness argument nowhere.

16. There is nothing to support the abuse of power argument. On the contrary the court heard evidence that established that Mr Pouru's decision to recommend to the Minister that the plaintiff's licence be cancelled and the Board's decision to grant the licence to Innovest were made for good reasons that took into account the objects of the *Forestry Act* and in particular the views of the customary owners of the forest resources that were the subject of the licences, those views being represented by Aria Vanu Timber Company. In April 2010 Aria Vanu Timber Company, the timber permit holder, had served the plaintiff with a notice of termination of the logging and marketing agreement, having taken the view that the plaintiff was conducting logging operations inefficiently, resulting in low royalty payments and premiums for Aria Vanu Timber Company, and that the plaintiff had not complied with a number of conditions of the logging and marketing agreement relating to infrastructure improvements in the project area and that no tangible developments had taken place (highlighted in a March 2010 compliance audit report of the West New Britain area office of the PNG Forest Authority). On 19 August 2010 Mr Pouru presented a brief to the Minister that highlighted those matters. Mr Pouru deposed to those matters in a detailed affidavit that was admitted into evidence in these proceedings, as did a shareholder and spokesperson of Aria Vanu Timber Company, Mr Walter Lunga, and a previous chairman of the board of directors of Aria Vanu Timber Company, Mr Peter Puana. Mr Pouru, Mr Lunga and Mr Puana also gave oral testimony and were subject to cross-examination, the effect of which was to show that Aria Vanu Timber Company had lost confidence in the plaintiff by early 2010, that it wanted the plaintiff's licence cancelled and that it wished to enter into a new logging and marketing agreement with another contractor, Innovest.

17. In his brief to the Minister Mr Pouru questioned the enforceability of the logging and marketing agreement between the plaintiff and Aria Vanu Timber Company as it appeared that the agreement between Cakara Alam and Aria Vanu Timber Company had expired in June 2007 upon expiry of Aria Vanu Timber Company's timber permit (which was not renewed until November 2008). He also questioned the legality of the assignment by Cakara Alam of its rights and obligations under the logging and marketing agreement to Tzen Niugini and the subsequent assignment to the plaintiff. These were all valid considerations that were relevant to the decision whether to cancel the plaintiff's licence and whether to

grant a new licence to Innovest. They reinforce the conclusion that the decisions were made in good faith and were not an abuse of power.

18. I conclude that the plaintiff has failed to show that the decision to grant the licence to Innovest was unreasonable or that it involved any abuse of power. Ground 2 of the review is dismissed.

(3) BREACH OF PRINCIPLES OF NATURAL JUSTICE

19. The Order 16, Rule 3(2)(a) statement states:

Alternatively, the decision of the first and second defendants to grant and issue a licence dated 18 October 2010 (under Section 91 of the *Forestry Act 1991*) to the fourth defendant was made in breach of the plaintiff's right to fairness and natural justice in that the plaintiff was never informed or given notice that its licence dated 22 February 2010 would be cancelled, revoked or terminated before 18 October 2010.

20. The plaintiff argues that it was not informed of any proposal to cancel its licence and not given an opportunity to be heard by the Minister or the Board or Mr Pouru on the allegation that it had breached the conditions of its licence before its licence was cancelled. It was denied natural justice in August 2010 when the Minister cancelled its licence, and then it was denied natural justice again when the decision was made in October 2010 to grant a new licence to Innovest.

21. Unless there is a strong indication of legislative intention to the contrary the holder of a licence that has been granted under a statute must be given a right to be heard on any allegations against it if the authority granting the licence proposes to cancel the licence (*Ralph Premdas v The State* [1979] PNGLR 329, *Telepage Pty Ltd v PTC* (1987) N605, *Bougainville Copper Foundation v Minister for Trade and Industry* [1988-89] PNGLR 110). This is an underlying law right that will be readily implied even if the statute under which the licence is granted says nothing about giving the licence-holder a right to be heard. In the case of a licence under Section 91 of the *Forestry Act* the issue of giving the licence-holder a right to be heard before the licence is cancelled is put beyond doubt by Section 97 (*conviction of the holder of a licence, etc*), which states:

(1) *Where the holder of a licence (or where the holder is a corporate person, any of the principals of the holder)—*

(a) *is or are convicted of an offence—*

(i) *against this Act; or*

(ii) *relating to forestry matters, against any other law; or*

(b) *has or have failed to comply with any of the conditions of the licence,*

the Minister may cancel the licence.

(2) *For the purposes of Subsection (1), "principals" includes director, manager, secretary and other similar officer or any person purporting to act in such a capacity.*

(3) *Where it is proposed to cancel a licence under Subsection (1), the Managing Director shall serve a notice on the holder—*

(a) *advising him of the intention to cancel the licence and of the reason for the intended cancellation; and*

(b) *requiring him, within 14 days from the date of service of the notice to make representations as to why the licence should not be cancelled.*

(4) *On the request of the holder within 14 days from the date of service, the Managing Director shall allow the holder an opportunity to be heard.*

(5) *Where the holder does not, within the 14 days period, make representations under Subsection (3)(b) or a request to be heard under Subsection (4), the Minister shall cancel the licence.*

(6) *The Minister shall consider any representations made under Subsection (3)(b) and, where appropriate, shall cancel the licence.*

(7) *Where there has been a hearing under Subsection (4)—*

(a) *the Managing Director shall make and forward to the Board a written report on the hearing; and*

(b) *the Board shall consider the report and forward it, together with its recommendations thereon, to the Minister; and*

(c) *the Minister shall consider the report and the recommendations from the Board and, where appropriate, shall cancel the licence.*

22. The Minister cancelled the plaintiff's licence on 30 August 2010 under Section 97(1)(b) so the question arises whether the requirements of Sections 97(3) and (4) were complied with. Did the Managing Director serve a notice on the plaintiff advising it of the intention to cancel the licence and of the reason for the intended cancellation, requiring it within 14 days from the date of service of the notice to make representations as to why the licence should not be cancelled? Did the Managing Director allow the plaintiff an opportunity to be heard? These turned out to be significant issues of fact at the trial. The plaintiff's Managing Director Mr Peter Ling gave evidence that no such notice was ever served and the plaintiff was not given an opportunity to be heard. Against that Mr Pouru gave evidence that a Section 97 notice was prepared and that it was in the following terms:

**To The Managing Director
 Tzen Pacific Ltd**

Take notice that the Minister for Forests intends to cancel your licence for the reasons stated below. You are required within 14 days from the date of service of this notice to make any representations as to why the licence should not be cancelled.

Licence No: PNGFAL-664/10

Reasons:

My office has been advised by Aria Vanu Timber Company Ltd, the timber permit holder over Aria Vanu Block 3 LFA project in a letter dated 7 May 2010 that the logging and marketing agreement executed between your company and the timber permit holder has been terminated when your company failed to respond to the required fourteen (14) days

ultimatum which lapsed on the 4th of May 2010.

It has been noted that your performance in accordance with the logging and marketing agreement which incorporated the terms and conditions of the timber permit TP14-13 over Aria Vanu Block 3 LFA project has been unsatisfactory as per the performance report conducted and prepared by officers from NFS Kimbe. There have been gross breaches of the LMA which has prompted the timber permit holder to show cause as to why the LMA should not be terminated.

23. Mr Pouru also gave evidence that a covering letter was sent with the notice to the plaintiff containing blank forms that would be used by the plaintiff when exercising its opportunity to be heard. The difficulty for the defendants is that when Mr Pouru was cross-examined about the Section 97 notice he was unable to show that it was in fact served. He presumed that it was served by being posted to the plaintiff. Such a presumption is inadequate to rebut the sworn evidence of Mr Ling that the notice was not received by the plaintiff. I find that in fact the notice was not served on the plaintiff and that there was no notice of any other sort that set out the allegations against the plaintiff and that gave it an opportunity to be heard on the question of whether its licence should be cancelled. It was denied natural justice.

24. Does it follow that the plaintiff was also denied natural justice when the decision was made to grant a new licence to Innovest? If it was clear that the procedure in Section 97 had been followed before the plaintiff's licence was cancelled the answer to this question would be no. However, the procedure was not followed; therefore I find that in the peculiar circumstances of this case – no notice of the proposed cancellation having been served on the plaintiff – it was necessary to give the plaintiff a right to be heard on whether the new licence should be granted to Innovest. Though I have found nothing in the Act to prevent two Section 91 licences being granted over the same project area, this was something that would at the least be confusing but more importantly would interfere with the ability of the plaintiff to conduct its business profitably. That is why it should have been given an opportunity to be heard. The plaintiff was denied natural justice. Ground 3 of the review is upheld.

(4) BREACH OF THE FORESTRY ACT, SECTION 97

25. The Order 16, Rule 3(2)(a) statement states:

Alternatively, the decision of the first and second defendants to grant and issue a licence dated 18 October 2010 (under Section 91 of the *Forestry Act 1991*) to the fourth defendant was made in breach of the plaintiff's right to fairness and natural justice in that the plaintiff's licence dated 22 February 2010 was never cancelled, revoked or terminated before 18 October 2010 and in accordance with the provisions, process and procedures under Section 97 of the *Forestry Act 1991*.

26. This is another natural justice argument but it does not raise any issues in addition to those already dealt with in ground 3. More attention is given to Section 97 in this ground but that has also been dealt with in ground 3. Ground 4 is repetitious and unnecessary and is dismissed.

(5) BREACH OF ORDER OF THE NATIONAL COURT

27. The Order 16, Rule 3(2)(a) statement states:

The decision of the first and second defendants to grant and issue a licence dated 18 October 2010 (under Section 91 of the *Forestry Act 1991*) to the fourth

defendant was made in error of law and in breach of the orders of the National Court in WS No 560 of 2010, Tzen Pacific Ltd v Peter Puana & Ors, where the National Court on 19 May 2010 ordered inter alia that "the defendants, their agents, servants or whosoever otherwise are restrained forthwith from threatening, disturbing, interfering and preventing the plaintiff from conducting its logging operations within the Aria Vanu Block 3 Project in West New Britain Province (conducted pursuant to the logging and marketing agreement between the second defendant and Cakara Alam (PNG) Ltd dated 6 June 2003) until further order".

28. The plaintiff argues the granting of the licence to Innovest was prohibited by an order of the National Court. Therefore the Board erred in law by granting the licence.

29. The court order on which ground 5 is based was made in WS No 560 of 2010, proceedings commenced by the plaintiff against Aria Vanu Timber Company and its then chairman Peter Puana and other directors seeking amongst other things injunctions to restrain Aria Vanu Timber Company and its directors from giving effect to notices of termination of the logging and marketing agreement and from interfering with the plaintiff's logging operations within the project area. The plaintiff alleges that since 2003 logging operations had often been disrupted by landowners and that Aria Vanu Timber Company and its directors had provided no assistance to it or Cakara Alam or Tzen Niugini in resolving the problem. The parties agree that on 19 May 2010 the National Court (Justice Kandakasi presiding) made the order referred to in ground 5 and that the order was in force for the remainder of 2010 when the decisions were made to cancel the plaintiff's licence (30 August) and to grant the licence to Innovest (18 October). The proceedings WS No 560 of 2010 were not concluded until 2 March 2012 when the Supreme Court (Gavara-Nanu J, Manuhu J and Hartshorn J) upheld an appeal by the plaintiff against an order of the National Court (Kawi J) refusing to enter default judgment and referring the proceedings to mediation (*Tzen Pacific Ltd v Peter Puana and Aria Vanu Timber Company Ltd* SCA 17 of 2011, 02.03.12 unreported).

30. The evidence shows that during 2010 two fabricated court documents purporting to be in relation to WS No 560 of 2010 were given to the PNG Forest Authority and that these fabricated documents were taken into account when making the decisions to cancel the plaintiff's licence and to grant the licence to Innovest. The fabricated documents were:

- an order of 16 July 2010 purporting to state that the proceedings were dismissed;
- a written ruling of a Judge purporting to give reasons for dismissal of the proceedings.

31. It is intriguing that such fabricated documents were produced and found their way into the possession of the PNGFA and that they were relied on for official decision-making purposes. Fabrication of any court document is an extremely serious matter. I was informed during the course of the present proceedings that various people were charged with offences under the *Criminal Code* in relation to those matters. However it is not my role in this case to determine who fabricated the documents or why and I make no findings on those issues. The question that I am to decide remains whether any breach of the genuine order of 19 May 2010 that was in force occurred when the Board granted the licence to Innovest. It is clear that the Board was aware of the order as sealed copies of it were served on Mr Pouru by the plaintiff's lawyers. The order, amongst others, stated:

The defendants, their agents, servants or whosoever otherwise are restrained forthwith from threatening, disturbing, interfering and preventing the plaintiff

from conducting its logging operations within the Aria Vanu Block 3 Project in West New Britain Province (conducted pursuant to the logging and marketing agreement between the second defendant and Cakara Alam (PNG) Ltd dated 6 June 2003) until further order.

32. I consider that the order did not on its terms prevent the Board from discharging its statutory powers, functions, duties and responsibilities. Neither the Board nor any of the authorities with decision making power under the *Forestry Act* was a defendant in WS No 560 of 2010. Though the order was directed generally to "whosoever otherwise" which literally could include all persons even those who were not parties to the proceedings, the main purpose of the order was to restrain the conduct of the defendants, ie Aria Vanu Timber Company and the company's directors, and their agents and servants, presumably including the customary landowners who were allegedly guilty of unlawful interference with the plaintiff's logging operations. A court order, like any legal document, must be interpreted in the context of all the court's orders and the reasons given for making the orders and the circumstances in which the order was made (*Paia Wingti v Kala Rawali* (2010) N3982). Putting this order in the context of the allegations in the statement of claim and the purpose of the proceedings it is clear that it was not intended to prevent the Board from discharging its statutory powers, functions, duties and responsibilities. It did not prevent the Board granting a licence to Innovest. Ground 5 of the review is dismissed.

WHAT DECLARATIONS OR ORDERS SHOULD THE COURT MAKE?

33. An application for judicial review proceeds in two stages. First the plaintiff must establish good grounds for judicial review. Secondly if one or more grounds are established the plaintiff must make a case for a remedy, which is a matter of discretion (*Mision Asiki v Manasupe Zurenuoc* (2005) SC797, *Dale Christopher Smith v Minister for Lands* (2009) SC973). Here one ground of review, No 3, has been established: the Board was guilty of denying natural justice to the plaintiff when it granted the licence to Innovest without giving the plaintiff an opportunity to be heard. The question arises whether the plaintiff should be granted any of the relief it is seeking, which, according to the Order 16, Rule 3(2)(a) statement amended with the leave of the court after the close of the evidence and before submissions, falls into the following categories:

- 1 a declaration that the licence granted to Innovest was illegal and void *ab initio* (from the beginning) (statement, para 3(ii));
- 2 an order in the nature of certiorari quashing the licence granted to Innovest (statement, para 3(iii));
- 3 a declaration that the Minister's cancellation of the plaintiff's licence was illegal and void *ab initio* (statement, para 3(iii)(A));
- 4 an order in the nature of certiorari quashing the decision of the Minister to cancel the plaintiff's licence (statement, para 3(iii)(B));
- 5 an order in the nature of mandamus compelling the first and second defendants to grant a Section 91 licence forthwith to the plaintiff permitting it to engage in forest industry activities in the project area (statement, para 3(iii)(C));
- 6 damages to be paid severally and jointly by the defendants (statement, para 3(iii)(D));
- 7 an order in the nature of a 'stay' of the licence granted to Innovest (statement, para 3(iv)).

34. Mr Shepherd for the first and second defendants submitted that all relief sought should be refused as the plaintiff did not have a sufficient interest in the subject matter of the decision that is the subject of judicial review, the granting of the licence to Innovest, as there was no valid assignment of Cakara Alam's rights and obligations under the original logging and marketing agreement of 6 June 2003 to Tzen Niugini and no valid assignment from Tzen Niugini to the plaintiff. He pointed out that there had never been a National Court or Supreme Court ruling as to the validity of the purported assignments.

35. I agree that there is no court order as to the validity of those assignments and that their validity is questionable. The plaintiff's evidence as to the assignments, particularly the first one, is vague, and the evidence of lack of consent to the assignments presented by the fifth defendant, Aria Vanu Timber Company, seemed on the face of it to be persuasive. However I reject Mr Shepherd's submission as the issue of sufficiency of interest is in my view foreclosed by the fact that the plaintiff had a licence granted to it in February 2010 over the same project area as that to which the licence granted to Innovest related. The licence was granted to the plaintiff in good faith by a proper authority, the National Forest Board, exercising the powers available to it under the *Forestry Act*. That is all that matters. Because it in fact had a licence it had a valid interest in the decision to grant a similar licence to Innovest. Even if I were to make a finding that as a matter of law the plaintiff had no interest in the logging and marketing agreement on the ground that it had not taken a valid assignment or that its licence was wrongly or unlawfully granted that would not alter *the fact* that it was granted a licence.

36. Mr Shepherd submitted that there was another reason the plaintiff should be denied most of the relief it was seeking: it was not properly sought. Though the court granted leave to the plaintiff to amend its Order 16, Rule 3(2)(a) statement by the addition of new or amended relief, leave was not granted or sought to amend the notice of motion under Order 16, Rule 5 (*mode of applying for judicial review*) of the *National Court Rules*; and it is the notice of motion which is the originating process for an application for judicial review. I uphold this submission. The notice of motion is the process by which a plaintiff seeks relief, not the statement and not the originating summons by which leave for review is obtained (*Peter Makeng v Timbers (PNG) Ltd* (2008) N3317, *Timbani Longai v Steven Maken* (2008) N4021). The plaintiff is confined to the relief that was sought in its amended notice of motion under Order 16, Rule 5 filed on 20 May 2011, which covers only the relief numbered 1, 2, 6 and 7 in the list of remedies sought in the amended Order 16, Rule 3(2)(a) statement. The question therefore becomes whether the court should as a matter of discretion declare that the licence granted to Innovest was illegal and void *ab initio*, order that that licence be quashed, order that the plaintiff be paid damages or order a stay of the licence granted to Innovest.

37. I decline to make any of those declarations or orders. It would be contrary to the interests of justice to do so. Though mistakes were made in the decision to cancel the plaintiff's licence and the decision to grant the licence to Innovest – arising from the failure to ensure that the plaintiff was given an opportunity to be heard on the proposed cancellation of its licence – each licence was only of 12 months duration, and the licence to Innovest expired on 18 October 2011. Moreover, the decisions to cancel the plaintiff's licence and to grant the licence to Innovest were made in good faith and for good reasons:

- there was evidence that the plaintiff had breached the conditions of its licence;
- the circumstances in which the plaintiff took an assignment of rights and obligations under the logging and marketing agreement to which the licences were connected were dubious and there is doubt over the validity of the assignments; and
- most importantly, the holder of the timber permit, Aria Vanu Timber Company,

had lost confidence in the plaintiff and wanted Innovest to be granted a licence – and that remained the situation at the trial.

38. The plaintiff's claim for damages, which is quantified in the submissions of Mr Griffin as being K2,457,500.00 representing profits it could have received in 2010 but for cancellation of its licence, is ill-conceived and unconvincing. The decision to cancel the plaintiff's licence was never the subject of the application for judicial review. The lawfulness of that decision was only impugned in an indirect way and it would not be proper to allow the plaintiff to be awarded damages on the basis of a declaration or order as to illegality that has not been made. Besides that, the claim for damages is poorly articulated. Though the Court can award damages under Order 16, Rule 7 (*claim for damages*) of the *National Court Rules*, a statement of claim and particulars should normally be filed before an award of damages is considered. That has not been done and I see no reason to dispense with the requirements of the Rules in that regard.

39. All the relief sought by the plaintiff is refused. As the plaintiff succeeded with one ground of review and has proven that mistakes were made in the decision-making process, the parties will bear their own costs.

ORDER

- (1) The application for judicial review is dismissed.
- (2) All relief sought in the amended notice of motion filed 20 May 2011 and the amended statement pursuant to Order 16, Rule 3(2)(a) of the *National Court Rules* is refused.
- (3) The parties will bear their own costs.
- (4) Time for entry of the order is abridged to the date of settlement by the Registrar which shall take place forthwith.

Judgment accordingly.

Young & Williams Lawyers: *Lawyers for the plaintiff*
Ashurst Lawyers: *Lawyers for the 1st & 2nd defendants*
Solicitor-General: *Lawyer for the 3rd defendant*
Waviha Lawyers: *Lawyers for the 4th defendant*
George Kaore Lawyers: *Lawyers for the 5th defendant*