

N8325

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS NO. 668 OF 2019

BETWEEN
AMANAB FOREST PRODUCTS LIMITED
Plaintiff

AND
BEWANI PALM OIL DEVELOPMENT LIMITED
Defendant

Waigani: Thompson J
2020: 2nd, 4th & 20th March

S60 of Forestry Act – Protection Of Transport Infrastructure Act – use of roads and bridges under Forestry Management Agreements and Timber Permits – demands for compensation for use of roads and transport infrastructure – entitlement of developer to use of roads and bridges

Counsel

Mr. R I Shepherd, for the Plaintiff
Mr B S Lai, for the Defendant

20th March, 2020

1. **THOMPSON J:** In relation to the land in Amanab Blocks 1, 2, 3 and 4 and Imonda, a Forestry Management Agreement was entered into between a company and the PNG Forestry Authority (“PNGFA”) on 9 March 2004, and taken over by the Plaintiff in 2006. The Plaintiff’s Timber Permit originally ran from 2004, but was subsequently extended for a term of 35 years. The Plaintiff entered into a new Forestry Management Agreement with the PNGFA on 16 May 2012, for the same term as the Timber Permit.

2. For convenience, these Agreements are referred to as the Project

Agreements.

The Project Agreements

3. Pursuant to these Project Agreements, the Plaintiff was obliged to build, construct and maintain various roads including the proposed Vanimo-Green Highway (“the Highway”) bridges and other infrastructure (“the infrastructure”), both within and beyond the proposed Vanimo – Green Highway, including roads which were described as access roads and village access roads, and included a section of the Highway running from Sumumini. The Plaintiff was entitled to exclusive use of the roads, provided that all the roads were also able to be used by the customary landowners, the PNGFA and the State.

4. These conditions are in accordance with S60 of the *Forestry Act*, which provides that where the PNGFA has entered into a Forestry Management Agreement, persons claiming under that Agreement may enter on the land and build and use roads, bridges and other infrastructure covered by the Agreement.

5. Pursuant to S60, the Plaintiff is a party to the Forestry Management Agreement, and is entitled to enter the land and use the roads, bridges and other infrastructure.

6. There was also a specific provision that the Plaintiff had to permit a third party to use the roads, bridges and other infrastructure if required for the purpose of undertaking another resource project, on the basis that the PNGFA would use its best endeavors to ensure that the third party would be required to pay to the Plaintiff a proportionate share of the costs.

7. The Plaintiff duly constructed the required roads and infrastructure, and the evidence was that the roads were used by the Plaintiff, and were open to and used by local villagers and other members of the public.

The SABL

8. In circumstances which were not before this Court, on 17 July 2008 a Special Agriculture Business Lease (“SABL”) was issued to the Defendant for an area of land known as Portion 160C. The maps provided by the parties

showed, and it was agreed, that this area included the areas where roads had been constructed by the Plaintiff, and were being used by the Plaintiff and others. The maps did not show if all of the roads which had been constructed by the Plaintiff, were within the area covered by the Plaintiff's Forestry Management Agreement. In particular, it was not clear if part of the section of the road on which access was in dispute, was in the FMA area.

9. Even if this road area was not covered by the Plaintiff's Timber Permit, the Project Agreements had nevertheless provided that the Plaintiff was obliged to build the roads including the Highway. The Plaintiff was not claiming any right to carry out logging in that area. It was only claiming the right to use the roads.

The Road Access Agreement

10. On 20 May 2009 the Plaintiff had entered into a Road Access Agreement ("RAA") with the customary landowners from the villages along the roads. Pursuant to this RAA, the Plaintiff paid access fees to the customary landowners who were obliged to provide unobstructed use of the roads.

11. The Defendant was not a party to the RAA. The evidence showed that some of the persons who represented the landowner companies which were shareholders in the Defendant, were the same persons who signed the RAA. For instance, Moses Wump signed the RAA as a representative of the Imbinis village, and was also the chairman of the Foyo Incorporated Land Group which was a shareholder in one of the companies which was a shareholder in the Defendant. He and his Land Group received the RAA payments from the Plaintiff, and were obliged to provide unobstructed access to the roads.

12. However, the evidence did not establish a sufficiently close connection between the Defendant and the parties to the RAA, so as to justify a finding that the Defendant was bound by the obligations in the RAA.

13. This RAA arrangement continued until 2011, when some of the landowners set up road blocks on the road and demanded compensation from the Plaintiff for use of the roads. As a result, the Plaintiff issued legal proceedings on OS 134 of 2011, based on the same Project Agreements and RAA as in these current proceedings.

14. By this time, the Protection of Transport Infrastructure Act (“POTI Act”) had been enacted. This Act made it an offence to obstruct or demand compensation for use of transport infrastructure, which is defined in the Act to include any road open to or used by the public.

15. On 9 October 2017, the Court gave judgment to the Plaintiff in those proceedings, and made a number of Declarations. These included Declarations that the Plaintiff is entitled to build, maintain and use the roads and bridges in the area covered by the Project Agreement, the Plaintiff is obliged to build the Vanimo-Green Highway within that area, and the Plaintiff is obliged to build and maintain roads and bridges outside the area including the Vanimo- Green Highway and various other roads and access roads.

16. The Court made further Declarations that all the roads and bridges constructed by the Plaintiff pursuant to the Project Agreement are public roads and/or roads for the purpose of the Roads Maintenance Act, are roads and / or transport infrastructure for the purposes of the POTI Act, and the Plaintiff was entitled to use them under S60 of the Forestry Act.

17. Those findings and Declarations prima facie raise an issue estoppel on the issue that the roads and bridges built by the Plaintiff pursuant to the Project Agreements are roads within the meaning of the POTI Act.

18. It is nevertheless not necessary to rely on this issue estoppel, as the Defendant’s counsel properly conceded that the roads and bridges built by the Plaintiff did not have to be a National Highway to be covered by the POTI Act. It was sufficient that they were simply roads which were open to or used by the public, in accordance with the definition in the POTI Act.

Demands for Compensation

19. The RAA arrangements continued, until by its letter of August 2019, the Defendant demanded compensation for use of transport infrastructure within the meaning of the POTI Act, and in order to obtain compliance with its demand, threatened to block access and prevent use of the roads.

20. Prima facie, this is an offence under the POTI Act, and under the Act, it is not a defence that the person committing the offence acted under a claim of

right. The whole purpose of the Act is to prevent exactly this sort of situation from developing, whereby roads and other infrastructure are blocked by claimants to enforce demands for payment of compensation. Claimants are required to pursue their claims through lawful means, such as negotiations or legal proceedings.

21. In September 2019 road blocks were set up on part of the Highway, at Sumumini and Imbio. The Plaintiff issued these proceedings in September 2019, seeking various Declarations, and orders were made for removal of the road blocks.

22. In response, the Defendant has submitted that it is entitled to demand road access payments from the Plaintiff for the use of these roads, because since the SABL was issued to the Defendant in 2008, the Defendant has replaced the customary landowners, who no longer have any rights, and so the RAA between the Plaintiff and the customary landowners was no longer relevant. The Defendants submitted that the Plaintiff should now enter into a new road access agreement with the Defendant.

23. If the Defendant validly acquired an SABL in 2008, then the customary landowners had no legal capacity to enter into the RAA, and have been unlawfully receiving access payments from the Plaintiff since 2009. The Defendant gave no explanation as to why it allowed this to continue for almost ten years, until first demanding compensation from the Plaintiff in 2019.

The Defendant's Project Agreement

24. The Defendant gave evidence that on 28 October 2010 it, along with the four companies who were its shareholders, entered into a Project Agreement with and Sub-Lease to a Developer. The term of this Agreement was from the date of coming into effect of the Sub-Lease of the SABL from the Defendant to the Developer until the expiry of the SABL, ie. - the entire term of the SABL.

25. The Agreement provides in Clause 5.1.3 that the Defendant has given to the Developer, the exclusive right to enter upon and use the land in the project area.

26. The Agreement provides in Clause 17 that the Defendant shall not own

or have any claim to ownership of the roads and bridges referred to in the Agreement.

27. The Agreement provides in Clause 18 that the Developer may in its sole discretion permit a third party to have access to the roads and infrastructure within the project area.

28. It was not entirely clear if the roads constructed by the Plaintiff were included in the roads referred to in the Defendant's Agreement, but as it was not in dispute that those roads were on the land in the project area, then it followed that it was only the Defendant's Developer, and not the Defendant, which had the right to enter upon and use those roads, and which had the sole discretion to permit access to them.

29. The effect of these provisions was that the Defendant had assigned a complete Sub-Lease of the project area to the Developer in 2010, no longer had any claim to ownership of any of the roads and bridges referred to in the Agreement, no longer had any right to enter or use the land in the project area, and no longer had any right or discretion to permit a third party to have access to the roads.

30. As the Defendant had assigned the whole of the Sub-Lease to the Developer, the Defendant no longer had any legal standing to enforce any rights, claims or entitlements said to have arisen out of the SABL. The Defendant's Agreement with the Developer does not contain any reservation of any of such rights, and in particular, there is no reservation concerning the right to claim access payments for use of the roads and bridges. On the contrary, the Agreement specifically provides that the Defendant shall not have any right to enter or use all of the land, and shall not have any claim to ownership of the roads and bridges in the project area.

Relief Sought

31. In order to obtain declaratory relief, the Plaintiff must show a number of matters:

- (a) There must exist a controversy between the parties.

- (b) The proceedings must involve a right.
- (c) The proceedings must be brought by a person who has a proper or tangible interest in obtaining the order,
- (d) The controversy must be subject to the Court's jurisdiction.
- (e) The Defendant must be a person having a proper or tangible interest in opposing the Plaintiff's claim.
- (f) The issue must be a real one, not merely of academic interest or one whose resolution would be of no practical utility. (*Russian Commercial and Industrial Bank v British Bank for Foreign Trade LTD (1921) 2AC 438, The State and ors v Central Provincial Government (2009) SCA 99 and 100 of 2005*)

32. The evidence shows that there exists a real controversy between the parties over whether or not the Defendant is entitled to block or obstruct the Plaintiff's use of the road, bridges and other infrastructure, and claim compensation for their use.

33. The proceedings have been brought by the Plaintiff who has a proper and tangible interest under the Project Agreements and the Forestry Act in obtaining the order, and the Defendant has a proper and tangible interest in opposing the claim. These disputes concerns the construction of various contracts and agreements, and the application of various statutes, and so is subject to the Court's jurisdiction. The issue is real, not academic and its resolution will be of practical utility in determining the controversy.

34. Pursuant to S11 of the Land Act, customary land may be acquired for the purpose of granting an SABL, which may specifically reserve some customary rights. Pursuant to S66 of the Act, no provision of an SABL can be inconsistent with the terms of the Lease from the customary landowners. The full terms of the SABL which has apparently been granted to the Defendant, are not before this Court. It is therefore not known what are the terms and conditions of the State's Lease from the customary landowners.

35. In the absence of evidence of the terms of the Minister's Lease from the customary landowners, it must be presumed that no customary rights were reserved to them. On that basis, all the customary and other rights acquired by the Defendant under the SABL passed to the Defendant's Developer in October 2010, pursuant to their Sub-Lease and Project Agreement.

Findings

36. From October 2010, any right to claim compensation for use of the roads and bridges in the project area, passed to the Defendant's Developer. Neither the customary landowners nor the Defendant had any further entitlement to enter upon or use the land, or claim ownership of the roads and bridges.

37. The Defendant had no legal right to claim compensation from the Plaintiff by its letter of August 2019. Its conduct in demanding compensation and threatening to block access to obtain compliance with its demand, was prima facie an offence under the POTI Act.

38. Pursuant to the Project Agreements, and pursuant to S60 of the Forestry Act, the Plaintiff is entitled to enter on the land and build and use the roads which it has constructed in the area covered by the Forestry Management Agreement and Project Agreements.

39. Where this area is also covered by the area in the Defendant's Developer's Agreement, the Plaintiff and the Defendant's Developer are both entitled to access and use of the roads and bridges, and it is a matter between the PNGFA, the Developer and the Plaintiff to agree on payment of the costs of constructing and maintaining them.

Conclusion

40. The Plaintiff has the right to use the roads built pursuant to its obligations under the Project Agreements, which include the proposed Vanimo-Green Highway including a section running from Sumumini.

41. Those roads are roads and transport infrastructure within the meaning of S2 of the POTI Act.

42. Some of those roads, including a section of the Highway running from Sumumini, are within Portion 160C.

43. Regardless of whether or not the Plaintiff is entitled to the use of those roads, the Defendant is not the owner, and does not have any right to enter or use, any of those roads in Portion 160C.

44. It follows that the Defendant has no right to claim compensation for the use of any of those roads within Portion 160C.

45. Pursuant to S7, S8 and S10 of the POTI Act, it is prima facie unlawful for the Defendant to trespass, obstruct or demand compensation for the use of those roads.

46. For these reasons, I make the following orders:

(1) A Declaration is granted that the Plaintiff is:

(a) Entitled to build, maintain and use roads and bridges within the area covered by the Amanab Forest Management Area for Blocks 1-4 and Imonda, including the portion of road contained within the land known as Portion 160C, Milinch Oenake (SW) (SE) Bewani (NW) and (NE), Fourmil Vanimo and Aitape, West Sepik/ Sandaun Province.

(b) Entitled to build the Vanimo-Green Highway within the Amanab Forest Management Area Blocks 1, 2, 3, and 4 and on that Portion of the road contained within the land known as Portion 160C, and

(c) Entitled to construct and maintain the proposed Vanimo-Green Highway and roads from Fugumui to

Kwomtari, and access roads to Killifas Village.

(2) The Defendant, and its servants or agents are restrained from preventing, hindering, threatening, harassing and/or obstructing the Plaintiff, its employees, officers, servants or agents from using the roads and bridges constructed by the Plaintiff pursuant to its Project Agreements;

(3) The Defendant, its servants or agents are restrained from demanding compensation and/or road access payments from the Plaintiff for use of the Vanimo-Green Highway, or for use of other roads and bridges within the area covered by the Amanab Forest Management Area for Blocks 2 and 3 and / or the land known as Portion 160C.

(4) The Defendant is to pay the Plaintiff's costs on a party/party basis, to be agreed or taxed.

Ashurst Lawyers: *Lawyers for the Plaintiff*

B S Lai Lawyers: *Lawyers for the Defendant*