

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

WS 139 OF 2011

BETWEEN:

**MILUPOL DEVELOPMENT
CORPORATION LIMITED**
First Plaintiff

AND:

CAKARA ALAM (PNG) LIMITED
Second Plaintiff

AND:

PAUL GARAI
Defendant/Contemnor

Waigani: Hartshorn J.
2011:11 November,
2012: 8th, 17th and 28th February

Contempt - penalty

Facts:

The contemnor Mr. Paul Garai, after a trial, was found guilty of contempt of court in that he wilfully breached terms of a Restraining Order of this Court.

Held:

1. The appropriate penalty is a fine with imprisonment being the default penalty.
2. Mr. Garai shall pay a fine of K 17,000. If payment of that fine is not made within thirty days from today, then Mr. Garai shall be imprisoned for a period of six months.

Cases cited:

Papua New Guinea Cases

Yap v. Tan [1987] PNGLR 227
Bishop Brothers v. Ross Bishop (1989) N690
Ross Bishop v. Bishop Brothers [1988-89] PNGLR 533
Concord Pacific Ltd v. Thomas Nen [2000] PNGLR 47
Liriope v. Usurup (2009) N3931
Bank of South Pacific Ltd v. Anton Sekum & Ors (2011) N4588

Overseas Cases

Australian Meat Industry Employees Union v. Mudginberri Station Pty Ltd (1986) 161 CLR 98
Witham v. Holloway (1995) 183 CLR 525

Counsel:

Mr. F. Griffin, for the Plaintiffs
Mr. G. Kaore, for the Defendant/Contemnor

28th February, 2012

1. **HARTSHORN J:** The contemnor Mr. Paul Garai, after a trial, was found guilty of contempt of court. Mr. Garai wilfully breached paragraphs one and two of the orders of this court dated the 17th May 2011 (**Restraining Orders**) which are:

"1. The Defendant, his agents, servants or whosoever otherwise are restrained forthwith from threatening, disturbing, interfering and preventing the Plaintiffs from conducting their logging operations within the West Arowe Timber Resource Project Area in West New Britain Province, until the hearing and determination of this proceeding.

2. The Defendant, his agents, servants or whosoever otherwise are restrained forthwith from holding himself out as a director, shareholder or officer of Milupol Development Corporation Ltd, until the hearing and determination of this proceeding."

2. The facts are detailed in my decision delivered on 8th February 2012. I heard submissions on penalty from counsel for the plaintiffs, and counsel for Mr. Garai after Mr. Garai informed the court that his counsel would make submissions on his behalf.

3. No maximum punishment is prescribed for contempt. Pursuant to Order 14 Rule 49 (1) *National Court Rules*, where the contemnor is not a corporation, the court may punish contempt by committal to prison or fine or both.

4. The category of contempt of which Mr. Garai has been found guilty is referred to as

disobedience contempt. That is, the failure to comply with an order of the court or an undertaking given to a court. The punishments that have been imposed in this jurisdiction for disobedience contempt were considered by Cunnings J in *Liriope v. Usurup* (2009) N3931. Cunnings J noted that in four of the seven cases considered, the primary punishment was committal to custody and in two cases, *Yap v. Tan* [1987] PNGLR 227 and *Bishop Brothers v. Ross Bishop* (1989) N690 (appeal against conviction upheld: *Ross Bishop v. Bishop Brothers* [1988-89] PNGLR 533), committal to custody was the default penalty. In *Yap (supra)* and *Bishop (supra)*, where fines were imposed with committal to custody being the default penalty, the contempts were in relation to the operation of businesses. In the case of *Concord Pacific Ltd v. Thomas Nen* [2000] PNGLR 47 in which the contempt was business related, the punishment was an order for costs on a solicitor client basis against the contemnor.

5. Then in *Bank of South Pacific Ltd v. Anton Sekum & Ors* (2011) N4588, I sentenced the contemnor who had been found guilty of a disobedience contempt that was business related, to a fine and imprisonment if not paid within thirty days, and costs to be paid on a solicitor client basis.

6. As I said in *Anton Sekum (supra)*:

"The punishment of a fine with or without a default penalty and an order for the payment of costs, to an extent, reflects the punishment that was imposed for disobedience contempt historically. This was referred to in Australian Consolidated Press Ltd v. Morgan (1965) 112 CLR 483 by Windeyer J: "When contempt lies in disobedience of a court's order to do something, the contemnor may be imprisoned, until by doing what was ordered he purges his contempt. When contempt lies in disobedience of an injunction not to do something, the contemnor is ordinarily permitted to purge his contempt by an apology to the court, making reparation for the damage done by the forbidden act and paying the costs as between solicitor and client."

The imposition of a fine, which was not permitted in earlier times, can be seen to have replaced the making of reparations in the passage cited.

The payment of a fine with or without imprisonment as the default penalty is often the punishment for disobedience contempt imposed in the courts of Australia. The Federal and High Courts of Australia have the power to order that a contemnor, "pay a fine, be committed to prison or both pay a fine and be committed to prison." The decisions of these Courts are persuasive in this jurisdiction.

In the recent case of Vaysman v. Deckers Outdoor Corporation Inc [2011] FCAFC 17, a decision of the Full Court of the Federal Court of Australia, Gray J said that:

"The starting point for the process of reasoning in sentencing is the gravity of the

offence... In the case of contempt of court involving contravention of, or failure to comply with, court orders, that means assessing the seriousness of the defiance of the Courts authority."

Then later,

"... Restraint is appropriate in imposing sentences of imprisonment for contempt of court involving contravention of, or failure to comply with, orders of the Court. The authority of a court can be brought into disrepute, rather than enhanced, by too great a tendency to punish severely in cases that do not warrant severity."

In the judgment of Bromberg J in Vaysman (supra), His Honour had this to say as to punishment for contempt:

"... The question is whether by reference to the harm done, the seriousness of the contempt, any prior relevant misconduct and the physical, mental and other personal conditions of the person to be sentenced, no sentence other than imprisonment is (in all the circumstances) appropriate." "... non-compliance with court orders necessarily constitutes an interference with the administration of justice and thus the public interest of vindicating judicial authority is raised...." "The vindication of judicial authority must necessarily reflect the nature of the challenge to that authority inflicted by the conduct in contempt in question." "Imprisonment, as a disciplinary sanction for contempt, ought to be confined to the most serious of contempts.." "As Keane CJ, Dowsett and Reeves JJ recently observed in Jones v. Australian Competition and Consumer Commission [2010] FCAFC 136 at [36], there would be a serious question of the propriety of a sentence of imprisonment if the charges raised only a case of civil contempt; that is, a case where contumacious conduct was not contended for.""

7. In this instance, I have found that Mr. Garai disobeyed the Restraining Orders by writing a letter that by its content, threatened, disturbed and interfered with the plaintiffs' logging operations within the West Arowe Timber Resource Project Area and by holding himself out as a director or officer of Milupol Development Corporation Ltd by holding himself out as its Chairman. I concluded that Mr. Garai's actions were wilful as he wrote the subject letter three days after he had been personally served with the Restraining Orders.

8. Counsel for the plaintiffs submitted that Mr. Garai's actions were not only wilful, but were belligerent, recalcitrant and contumacious and as such should be punished with a term of imprisonment of up to two years. Counsel also made reference to s. 206 *Criminal Code* which prescribes a term of imprisonment not exceeding one year for the misdemeanour of disobeying a lawful order issued by a court, without lawful excuse.

9. Counsel for Mr. Garai submitted that this court should pardon Mr. Garai's actions or be lenient in its sentencing as:

- a) Mr. Garai was not acting in his own interests but those of forest resource owners who were frustrated with alleged previous actions of the plaintiffs,
- b) Mr. Garai did not intend to interfere with the administration of justice. The subject letter was written to the National Forest Authority on behalf of forest resource owners,
- c) there was no evidence of physical confrontation or that the second plaintiffs logging operations had been halted by the actions of Mr. Garai,
- d) Mr. Garai still believes he is a director of the first plaintiff,
- e) the plaintiffs have not referred this dispute with the defendant to a proper forum,
- f) the substantive matter is still pending.

10. To my mind, the above submissions are merely reasons why Mr. Garai wrote the subject letter and held himself out as the Chairman of the first plaintiff. They are not submissions as to why the court should be lenient in its sentencing. In written submissions, it is stated that Mr. Garai expresses his remorse, but I note that Mr. Garai did not personally apologise in court when he had the opportunity. I further note that neither Mr. Garai nor his counsel have given any indication to the court that it is acknowledged that Mr. Garai's actions were wrong.

11. As to whether Mr. Garai's actions were contumacious, I am prepared to give Mr. Garai the benefit of the doubt as to the submission that by writing the subject letter he did not intend to interfere with the administration of justice, and to that extent although his conduct was wilful, I do not find that it was contumacious.

12. Notwithstanding this, his actions have the effect of undermining the authority of this court and the administration of justice and the imposition of a penalty is necessary to protect both the interests of the plaintiff and the administration of justice. In their joint judgment in *Australian Meat Industry Employees Union v. Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 107, this was recognised by Gibbs CJ, Mason, Wilson and Deane JJ when they said that:

"Although the primary purpose in committing a defendant who disobeys an injunction is to enforce the injunction for the benefit of the plaintiff, another purpose is to protect the effective administration of justice by demonstrating that the Courts orders will be enforced."

and in *Witham v. Holloway* (1995) 183 CLR 525 at 533-4, Brennan, Deane, Toohey and Gaudron JJ stated that:

"Even when proceedings are taken by the individual to secure the benefits of an order or undertaking that has not been complied with, there is also a public interest aspect in the sense that the proceedings also vindicate the court's authority. Moreover, the public interest in the administration of justice requires compliance with all orders and undertakings, whether or not compliance also serves individual or private interests..... All orders, whether they be Mareva injunctions, injunctions relating to the subject matter of the suit, or, simply, procedural orders, are made in the interests of justice. Non-compliance necessarily constitutes an interference with the administration of justice even if the position can be remedied as between the parties.'

13. Having regard to the seriousness of the contempt, the evidence that it had what the plaintiffs submit was an immediate and deleterious effect on them as the National Forest Authority has delayed issuing a licence to the second plaintiff, and that Mr. Garai's actions were wilful but not contumacious, I am satisfied that the penalty to be imposed should be substantial but with a primary penalty other than imprisonment.

14. I also consider, in line with the decisions of *Yap (supra)*, *Bishop (supra)* and *Anton Sekum (supra)* that as the contemptuous conduct has affected a business operation, the appropriate penalty is a fine with imprisonment being the default penalty. As I did in *Anton Sekum (supra)*, I note that as to the fine to be imposed, in *Yap (supra)* in 1987, the fine imposed for each charge was K5,000.00; the total fine being K15,000.00. The value and the purchasing power of the local currency since then have declined.

15. In *Anton Sekum (supra)*, the penalty that I imposed upon the contemnor, a lawyer, was a fine of K 25,000 and in default of payment within thirty days, a period of imprisonment of six months together with costs to be paid on a solicitor client basis.

16. It was submitted on behalf of Mr. Garai that he is unemployed and that he has no prior convictions, but there was no evidence of that. There was also no submission made that Mr. Garai did not have any assets or that he was impecunious.

17. For the above reasons and in the circumstances therefore, the appropriate penalty and the one that I impose is that Mr. Garai shall pay a fine of K 17,000. If payment of that fine is not made within thirty days from today, then Mr. Garai shall be imprisoned for a period of six months.

18. Finally, I order that Mr. Garai is to pay the costs of the plaintiffs' of and incidental to their notice of motion seeking orders for contempt, on a solicitor client basis.

Young & Williams Lawyers: *Lawyers for the Plaintiffs*

George Kaore Lawyers: *Lawyers for the Defendant/Contemnor*