

N7950

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

OS NO. 997 OF 2017

BETWEEN
DENGNENGE RESOURCES DEVELOPMENT LIMITED
First Plaintiff

AND:
DENGNENGE LAND GROUP INCORPORATED
Second Plaintiff

AND
VANIMO JAYA LIMITED
First Defendant

AND
PAPUA NEW GUINEA FOREST AUTHORITY
Second Defendant

AND
**LOBOT LOTU, HOSEA KUNAM, JOHN SURUGA, ORIM KOPMAN
AND THOMAS TURANA, claiming to be customary landowners of the
Dengnengeand Loi Resource Areas, Open Bay, Lassul-Baining Local Level
Government, East New Britain Province**
Third Defendant

Kokopo: Anis J
2019: 5th, 6th June, 14th August

LAND – Declaratory relief – interest over land the subject of 2 timber permits issued under sections 78 and 137 of the Forestry Act, 1991 – Whether provisions of the Act were breached in the granting of the timber permits

PRACTICE & PROCEDURE – primary right – whether the plaintiffs have primary rights which they seek to protect or enforce

PRACTICE & PROCEDURE – res judicata - whether the issues raised in the notice of motion to dismiss have been determined

PRACTICE & PROCEDURE – Duplicity of proceedings – proceeding filed subsequent to this proceeding – this proceeding filed first in time

PRACTICE & PROCEDURE – mode of proceeding – whether the correct mode of proceeding should have been by way of a judicial review

Facts

In 1967 and 1968, 7 timber rights purchase agreements had been entered into on a land mass or areas in Open Bay in Lassul, Gazelle District of East New Britain Province. The terms of the 7 timber rights purchase agreements were for periods of 40 years each. Two timber permits had been issued in relation to the areas covered by the 7 timber rights purchase agreements. They were described as TP 15-50 and TP 15-53. The plaintiffs alleged their interests as registered owners over the land which had been the subject of the two timber permits. The plaintiffs alleged that after the lapse of the 40 years periods for the 7 timber rights purchase agreements in 2007 and 2008, the land had reverted back to the traditional landowners including them, and they alleged that they had registered their interests over the land after that. They therefore claimed that without any valid extensions to the 7 timber rights purchase agreements, the two timber permits which were purportedly extended and granted by the second defendant to the first defendant in 2017, were done in breach of sections 78, 137 and 46 of the *Forestry Act* 1991 which they claimed had affected their interests over their customary or registered land.

Held

1. The 7 Timber Rights Purchase Agreements where Timber Permits TP 15-50 and TP 15-53 covered, survived under the *Forestry Act* 1991, until they expired in 2007 and 2008.
2. The timber areas covered under the 7 TRP agreements and under TP 15-50 and TP 15-53, reverted to the landowners including those landowners that were represented by the second plaintiff after 2008.
3. No timber rights purchase agreements based upon which TP 15-50 and TP 15-53 had been issued, were ever extended prior to 2007 and 2008, and as such, they ceased to exist in 2007 and 2008, and no person including a former timber permit holder could have qualified to apply to extend any of the 7 TRP agreements or TP 15-50 and TP 15-53 after 2008.

4. Timber Permit TP 15-50 and Timber Permit TP 15-53 that were granted by the second defendant to the first defendant in 2017, were done so in breach of sections 46, 78 and 137(1) & 137(1C) of the *Forestry Act* 1991.
5. Timber Permit TP 15-50 and Timber Permit TP 15-53 were declared null and void.

Cases Cited:

Amos Ere v. National Housing Corporation (2016) N6515
Simakada Holdings Ltd and 2 Ors v. PNG Forest Authority and 4 ORs (2019) N7703
Rafflin v. Richard Gault Industries Pty Ltd [1998] PNGLR 394
Samson Mangae v. Jackson Aka (2010) N4107
Joseph Kelange v. Kanawi Pouru (2011) N4662
Raibow Holdings Pty Ltd v Central Province Forest Industries Pty Ltd [1983] PNGLR 34
Peter Apoi v. Kanawi Pouru (2015) N5983
SCA 87 of 2015 - Kanawi Pouru and 2 Ors v. Peter Apoi and 1 Or (2016)

Counsel:

Mr T. Tape, for the Plaintiff
Mr N. Saroa, for the First Defendant
Mr S. Mitige, for the Second Defendant
Mr F. Cherake, for the Third Defendant

JUDGMENT

14th August, 2019

1. **ANIS J:** The first plaintiff is a company incorporated under the *Companies Act* 1997, and the second plaintiff is an incorporated land group. They seek various declaratory orders under their Amended Originating Summons filed on 12 April 2019 (**Amended OS**). The main relief they seek are, and I quote:

2A. *A declaration that Dengnengi & Simbali Timber Rights Purchase (TRP) which is TP No. 15-53, East New Britain Province extended on the 29th of August 2017 and Loi Timber Rights Purchase (TRP) which is TP No. 15-50, East New Britain*

Province extended on the 29th of August 2017, were extended over part of land, which has an existing group, Dengnenge Land Group Incorporated, which was registered first in time and which has never given its consent over its land for TRP extension.

3. *A declaration that the initial TRP Permit Holder was Open Bay Timbers Limited under consolidated TP No. 15-53 (which includes TP No. 15-50) and thereafter the extension granted to the First Defendant is contrary to Section 136 and 137 of the Forestry Act 1991 (as amended) which is intended for an existing Timber Permit Holder and not a new applicant such as the First Defendant.*
4. *An order that the extension of consolidated Dengnengi & Simbali TRP which is TP No. 15-50 is void and of no effect.*
5. *Alternatively, if the Court does not grant the order sought in item 4 above, the Second Defendant be ordered to cancel, within 21 days from the date of this Order, the said extended consolidated Dengnengi & Simbali TRP, TP No. 15-53, East New Britain Province which includes Loi TRP, TP No. 15-50 forthwith.*

2. Before the trial, the first defendant informed the Court that it had a pending notice of motion. It was filed on 6 May 2019. It was agreed then that the motion would be considered as a preliminary matter in the substantive proceeding. The trial then proceeded on that understanding by the parties and the Court.

PRELIMINARY ISSUE

3. The preliminary issue of course is to consider the notice of motion of 6 May 2019. I will deal with it now. The main relief in the motion is this, and I quote, *Pursuant to Order 12 Rule 40(1)(a), (b) and (c) of the National Court Rules, the proceedings herein be dismissed for disclosing no reasonable cause of action and an abuse of the Courts process.*

4. The first defendant submits these. It says the first plaintiff's primary right or interest, namely, *Forest Clearing Authority FCA No. 15-10 (FCA)* had been extinguished by the National Court in proceeding *OS (JR) No. 144 of 2018, Simakada Holdings Ltd and 2 Ors v. PNG Forest Authority and 4 ORs (2019) N7703*, on 22 February 2019. As such, it submits that the first plaintiff does not have a primary right that would require enforcement or protection in

this proceeding. Its second argument is this. It says this proceeding amounts to duplicity of proceedings and therefore is an abuse of the court process because the legal question raised herein is also being raised in an earlier proceeding which is still pending, namely, *OS 285 of 2018, East New Britain Provincial Government and Wilson Matava v. PNG Forest Authority & 2 Ors.* Thirdly, the first defendant submits that the plaintiff commenced this proceeding using a wrong originating process. It submits that the correct mode should have been to seek judicial review and name Open Bay Timbers Pty Ltd as the correct party given that the company was the previous owner of the 2 timber permits which have been subsequently extended and granted to the first defendant.

5. The second and third defendants support the first defendant's motion.

6. The plaintiffs in response submit these. Firstly, they say that a similar motion was filed on 30 January 2018; that it was later heard and a decision delivered on 23 February 2018. They submit that the Court in its ruling rejected the first defendant's motion to dismiss the proceeding. They submit that the matter is res-judicata and therefore the present motion, which is seeking the same relief, is misconceived and must be dismissed. Their second submission is this. They say that their claim is not without merit. They concede that relief 1 & 2 have been defeated by the Court's decision in the earlier judicial review proceeding, that is, *OS (JR) No. 144 of 2018* where the Court had ordered cancellation of the FCA of the first plaintiff. But they submit that the second plaintiff was incorporated after the expiry of the 7 timber rights purchase agreements in 2007 and 2008, to represent the interests of landowners who come from the Dengenge and Simbali areas. The two areas used to be covered by 2 of the 7 timber right purchase agreements, namely, Dengenge Timber Rights Purchase Agreement (**DTRPA**) and the Simbali Timber Rights purchase agreement (**STRPA**). They argue that since the timber rights purchase agreements for these two areas have expired, their land has reverted back to them and that there was no legal basis for any timber permits to be extended over their land. They argue that by granting extension of the 2 timber permits, namely, Timber Permit 15-50 and Timber Permit 15-53 (**the 2 timber permits**), to the first defendant without seeking their consents or without an existing timber rights purchase agreement or a forest management agreement, the second defendant breached various provisions in the *Forestry Act 1991 (the Forestry Act)*, namely, sections 46, 78, 136 and 137 of the *Forestry Act* by illegally extending the 2 timber permits to the first defendant. Therefore, the plaintiffs submit that their claim is valid and is not frivolous, vexatious or an abuse of the court process.

Res-judicata

7. I firstly refer to the res-judicata claim by the plaintiffs to the motion that

is filed by the first defendant. I have considered the earlier motion filed by the first defendant on 30 January 2018 to the present motion filed on 6 May 2019. The main relief sought in both motions are identical, that is, pursuant to order 12 Rule 40 of the *National Court Rules*, which is to dismiss the proceeding on the basis of disclosing no reasonable cause of action, frivolity and abuse of the court process. My view is this. I do not find the issues res-judicata. I note that the circumstances of the case since the earlier motion had been moved have significantly changed. Let me explain. At the hearing of the earlier motion, the first plaintiff was the only plaintiff named in this proceeding. Also and at that time, the first plaintiff had title to the FCA which was then valid and which had been issued over the land where the 2 timber permits now cover. The first plaintiff filed this proceeding initially to protect its primary right or its interest over the FCA against the 2 timber permits. By the time the latter motion was filed, the second plaintiff was joined, the relief in the originating summons had been amended to include the interests of the second plaintiff, and the first plaintiff had by then lost its interest in its FCA. These changes were significant. As such, the first defendant has filed the latter motion asking the same questions before the Court based on these change of events and in particular, questioning the primary right of the first plaintiff and of what effect it has or may have in relation to continuation of the present proceeding. I therefore do not find the issues raised in the current motion as res-judicata. I dismiss the said argument by the plaintiffs.

Primary rights

8. It is common ground that the first plaintiff's primary right before commencing this proceeding was in relation to its interest in the FCA. It had wanted to protect its FCA by seeking declaratory orders against the 2 timber permits which it said had been issued over land the subject of the FCA. Now that the FCA has been cancelled, and in my opinion, the first plaintiff no longer has a valid primary right in the proceeding. The first plaintiff also claims to be a landowner company. I have considered the evidence. Apart from its company extract and testimonies of individuals, I see nothing that may be legally interpreted to say or support the proposition that the first plaintiff holds shares in trust or on behalf of a particular landowner group or beneficiaries. All there is, is evidence of 7 issued shares to 7 individuals.

9. I find that the first plaintiff has not disclosed a valid primary right in this proceeding. I dismiss its claim against the defendants.

10. I turn to the second plaintiff. I note that its legal status and whom it represents are not disputed. The second plaintiff has represented the interests of its landowners in mediation and court proceedings concerning the now void FCA and the current 2 timber permits. At the presentation of submissions

hearing, it was confirmed by all counsel that, except for the second defendant, parties to the proceeding represent the 2 factions of landowners who all come from the Open Bay area of Lassul in East New Britain. Both factions have engaged developers of their separate choices, to harvest timber on their customary land. The plaintiffs obtained the FCA and the defendants the 2 timber permits. The FCA has been declared void, and now the plaintiffs or the second plaintiff is challenging the legality of the 2 timber permits over the interest of its land. Evidence of registration of customary land by its members are contained in evidence including those contained in annexures “N”, “O”, “P” and “Q” to the affidavit of Lobot Lotu, filed by the third defendant which is marked **Exhibit F2**.

11. I also note this. There is presently no registered customary land disputes over the area where the FCA once occupied which is now occupied by the 2 timber permits. Both factions of landowners, namely, those represented by the second plaintiff and those represented by the third defendants, own or share land where the 2 timber permits now cover or where the FCA once occupy.

12. I find that the second plaintiff has a primary right or interest over its registered customary land or the customary land of the people that it represents, which it now seeks to protect. Its interest is also registered under the ILG.

Duplicity of proceedings

13. I note the parties’ submission on the issue, *duplicity of proceedings*. I note that the plaintiffs did not challenge the first defendant’s submission that the legal issues raised in proceeding *OS 285 of 2018* were the same as those raised in this proceeding, namely, challenging the legality of the 2 timber permits. So I will assume that that is the case. But that said, my view is this. The present proceeding was filed first in time. As such, it should have been incumbent upon the parties in proceeding *OS 285 of 2018* to join or consolidate their proceeding to this proceeding and not the other way around. My second view or reason is this. The first defendant’s submission on point is raised belatedly. This matter was set down for hearing and has now been heard. Had the first defendant been serious, it should have addressed that earlier, and I note that there was nothing stopping it from applying for orders to consolidate the proceedings.

14. I therefore dismiss this ground.

Mode of proceeding

15. Did the second plaintiff file a wrong mode of proceeding? Should the correct proceeding have been by way of judicial review? My answer to that is this. This proceeding is commenced using the correct mode or originating

process, that is, an originating summons. The second plaintiff, who represents a faction of the landowners of Lassul in the Gazelle District of East New Britain, is seeking declaratory relief because it alleges that its interest in the customary land of its ILG members, which is registered under it, has been infringed. It claims that there had been blatant breaches of law under the *Forestry Act*. It says that if the relevant law has been broken by the first and second defendants in granting the 2 timber permits, then the 2 timber permits should be declared null and void in order to protect its primary right or interest in the matter. See case: *Amos Ere v. National Housing Corporation* (2016) N6515. The second plaintiff, in my view, is not seeking to review the decision of the second defendant.

16. I dismiss this argument.

MAIN ISSUES

17. Let me now address the main issues. In my view, the main issues are, (i) Where there existing timber rights purchase agreements based upon which the 2 timber permits were extended by the second defendant, and (ii), regardless of the first issue, can the second defendant grant further extensions of the 2 timber permits at all to the first defendant under sections 78 or 137 of the *Forestry Act*?

WHERE THE TRPAs EVER EXTENDED?

18. I have considered the evidence of both parties concerning the relevant historical background of the 2 timber permits. The said background is not disputed by the parties, and in my view, is better summarised in the evidence of the second defendant.

19. The second defendant filed one affidavit which is the affidavit of Goodwill Amos. It was filed on 22 May 2019 and it is marked **Exhibit E1**. The undisputed facts are as follows. In 1967 and 1968, 7 forest areas were identified in the Open Bay area in Lassul, Gazelle District of East New Britain. Following that, 7 Timber Rights Purchase Agreements (**7 TRPAs**) were executed between the then Colonial Administration and the landowning clan agents. The 7 areas where the 7 TRPAs were executed over were as follows, (i), Makolkol, (ii), Kabolu, (iii), Simbali, (iv), Tamoip, (v), Loi River, (vi), Aghaghat and (vii), Dengnenge (**the 7 TRP areas**).

20. The 7 TRPAs each had a lifespan of 40 years. Based on **Annexure C** to Mr Amos's affidavit, they all expired in 2007 and 2008 respectively. Their exact expiry dates are not relevant for this purpose so I prefer to only use the years when they expired, namely, 2007 and 2008.

21. The 7 TRPAs were then all consolidated under one project which was

known as the Open Bay Consolidated TRP Project. And of that, 1 Timber Permit described as TP 15-50 had been issued to a company called Open Bay Timber Company Pty Limited (**Open Bay Timber Company Ltd**). Open Bay Timber Company Ltd had operated under TP 15-50 over the Open Bay Consolidated TRP Project.

22. TP 15-50 was later changed or renumbered as TP 15-53 but which still covered the Open Bay Consolidated TRP Project area. I note that the parties are also at common ground with the said fact. What this means is that all the 7 land areas described under each of the 7 TRPAs, including the land areas of Dengnenge and Simbali, were subject to TP 15-53. And I think the following fact is the crucial part which had been deposed to by Mr Amos. At paragraph 14, he states and I quote, *Upon expiry of the TRPAs, all timber rights reverted to the land/resource owning clan and the TRPA boundaries have ceased to exist*. I note that Mr Amos's deposition was also confirmed by evidence and submissions of all the other parties to this proceeding. I therefore find that to be the case or as a fact, that is, that the 7 TRPAs expired or ceased to exist in 2007 and 2008 respectively, and that the land areas that used to be under the 7 TRPAs and under TP 15-53 reverted to the landowners of Lassul, in the Gazelle District of East New Britain after 2008.

23. At this juncture, I note that there is no evidence disclosed by the parties to show whether the 7 TRPAs have been extended thereafter beyond 2007 and 2008. The second plaintiff argues that no such extensions had been sought. The second defendant also makes similar submissions on point. I find that to be the fact or the case, that is, that no extensions had been sought and had on all the 7 TRPAs before they expired in 2007 and 2008.

SECTIONS 78 & 137

24. The parties are also at common ground that the first defendant had applied for extension of TP 15-50 and TP 15-53, under section 137 of the *Forestry Act* in 2016 or in 2017, and that based on that, the second defendant issued the extension of the 2 timber permits under section 78 of the *Forestry Act*.

25. Section 78 states and I quote:

78. Extension or renewal of timber permit.

- (1) *The holder of a timber permit may apply to the Board for extension or renewal of the term of the permit.*
- (2) *An application under Subsection (1) shall—*
 - (a) *be in the prescribed form; and*

- (b) *be accompanied by the prescribed fee; and*
- (c) *be lodged with the Managing Director.*
- (3) *The Board shall obtain from the Provincial Forest Management Committee a report on—*
 - (a) *the social acceptability of the holder of the timber permit in the project area; and*
 - (b) *the performance of the holder of the timber permit in carrying out the operations authorized by the timber permit; and*
 - (c) *the amount of forest resources available in the vicinity of the project area in accordance with sustained yield management practices.*
- (4) *Where the reports required under Subsection (3) are satisfactory, the Board shall recommend to the Minister that an extension or renewal of the term be granted to the holder of the timber permit and the Minister may grant such extension or renewal.*

26. And section 137 states, and I quote:

137. *Saving of existing permits, etc.*

- (1) *Subject to Subsection (2), all—*

.....
 (b) *permits, timber rights purchase agreements, licences and other authorities granted under the Forestry Act (Chapter 216) (repealed); and,*

valid and in force immediately before the coming into operation of this Act, shall continue, on that coming into operation, to have full force and effect for the term for which they were granted or entered into or until they sooner expire or are revoked according to law.

.....
 (1B) *Where the term of a timber rights purchase agreement granted under the Forestry Act (Chapter 216) (repealed) is longer than the term of a timber permit granted in respect of the timber rights purchase agreement, the timber permit may be extended or renewed under this section subject to*

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- (a) *the social acceptability of the timber permit in the project area by the customary owners in writing; and*
 - (b) *the satisfactory performance of the holder of the timber permit in carrying out the operations including compliance with the Act, the terms and conditions of the timber permit and the Papua New Guinea Logging Code of Practice; and*
 - (c) *the amount of forest resources available in the project area*

to commercially support the operations for not less than two years; and

(d) the rate of the annual allowable harvest which shall not be increased at the time of the application for extension; and

(e) the currency of or payment of a performance bond as prescribed; and

(f) where applicable, amendments to the terms and condition of the timber permit to include a time table for the delivery of infrastructure and other community based benefits and any forest management and other silvicultural treatments specified in the permit.

(1C) The holder of a timber permit under Subsection (1)(b) may apply to the Board for an extension or renewal of the term of the timber permit in the prescribed form, be accompanied by the prescribed fee, and be lodged with the Managing Director.

(1D) The Board shall obtain a report from the Provincial Forest Management Committee on the requirements in Subsection (1B) and where satisfactory, shall recommend to the Minister to extend or renew the term of the timber permit and the Minister may grant such extension or renewal subject to the term of the timber rights purchase agreement.

(1E) A timber permit under Subsection (1A) may be extended or renewed under this section by the Minister upon recommendation of the Board where the Board considers that the remaining forest resource in the project area is not sufficient to meet the requirements of Section 78.

(1F) All timber permits saved under Subsections (1) and (1A) and extended or renewed under Section 78 are deemed to be extended or renewed under this Section.

(2) Where the Board is of the opinion that any term or condition of any

(a) registration as a forest product operator granted under the Forest Industries Council Act (Chapter 215) (Repealed); or

(b) permit, licence timber rights purchase agreement or other authority granted under the Forestry Act (Chapter 216) (repealed); or

(c) agreement entered into under the Forestry (Private Dealings) Act (Chapter 217) (repealed),

is at variance with the provisions of this Act to an extent which makes it unacceptable, it shall by written notice—

(d) advise the registered forest product operator, holder of the permit, licence or other authority or parties to the agreement or

timber rights purchase agreement, as the case may be, of the term or condition that is unacceptable; and

(e) specify the variation in the term or condition required to ensure compliance with this Act; and

(f) intimate that variation shall apply in respect of the registration, permit, licence, other authority or agreement or timber rights purchase agreement, as the case may be, with effect from a date specified in the notice, unless it receives notification from the registered forest product operator, holder of the permit, licence or other authority or parties to the agreement or timber rights purchase agreement, as the case may be, that such variation is unacceptable, in which case the registration, permit, licence, other authority or agreement or timber rights purchase agreement, as the case may be, shall cease to have effect from the date specified.

(3) In order to achieve the intention of this Act that registrations, permits, licences, agreements, timber purchase agreements and other authorities saved by this section are able to be adapted to conform to the provisions of this Act, the Board may grant in respect of any registration, permit, licence, agreement, timber purchase agreement or other authority a grace period during which—

(a) the provisions of this Act shall not apply; and

(b) the provisions of the repealed Act under which the registration, permit, licence or other authority was granted or the agreement or timber purchase agreement was entered into shall apply.

WHETHER SECTIONS 78 AND 137 WERE BREACHED

27. Let me restate this fact. The 7 TRPAs expired in 2007 and 2008. Under the repealed *Forestry Act Chapter No 216 (repealed Act)*, a timber rights purchase agreement is similar to a forest management agreement under the *Forestry Act*, where it has to be signed between the landowners and the Forest Authority or the State, to pave way for issuance of timber permit(s) by the Forest Authority to a developer to enter and harvest logs on customary land. And the duration of a timber permit that is issued is limited to the duration of a timber rights purchase agreement or a forest management agreement. See cases: *Rafflin v. Richard Gault Industries Pty Ltd* [1998] PNGLR 394; *Samson Mangae v. Jackson Aka* (2010) N4107; *Joseph Kelange v. Kanawi Pouru* (2011) N4662; *Raibow Holdings Pty Ltd v Central Province Forest Industries Pty Ltd* [1983] PNGLR 34; *SCA 87 of 2015 - Kanawi Pouru and 2 Ors v. Peter Apoi and 1 Or* (2016).

28. Section 137 makes provisions for timber rights purchase agreements and

timber permits that were entered into under the repealed Act, to survive under the *Forestry Act* when the latter came into effect. This is of course to ensure the smooth transition and continuity of agreements and permits that had been entered into under the repealed Act.

29. In the present case, the 7 TRPAs had survived the transition period because their 40 years terms were set to expire in 2007 and 2008. And as revealed, in 2007 and 2008, the 7 TRPAs expired. Therefore and according to law, it also meant the end of the 2 timber permits as they could not have survived without the 7 TRPAs, or a timber rights purchase agreement (**TRPA**), or a forest management agreement (**FMA**). This now brings me closer to my first query. The 2 timber permits were extended in 2016 or in 2017 by the second defendant to the first defendant. So I ask myself this. How was that possible? If we were to assume that the 2 timber permits had survived after 2008, then where is the evidence of the 7 TRPAs or a TRPA or a FMA being extended on from 2007 and 2008 that would have kept the 2 timber permits valid up until the time of their renewal or extensions on 29 August 2017? And after the extensions of the 2 timber permits from 29 August 2017, the next question is this, which TRPA(s) or FMA has or have survived or has or have been extended where the 2 timber permits, after their extensions, could survive under?

30. The next query I have is this. It is not disputed that the original holder of the 2 timber permits was Open Bay Timber Company Ltd. It is also not disputed that the first defendant was not the holder of the 2 timber permits before they expired together with the 7 TRPAs in 2007 and 2008. But in this case, the first defendant was the one that had applied for their extensions. Can a person who is not a holder of a timber permit apply for an extension under sections 78 and 137 of the *Forestry Act*?

31. These are my findings. Firstly, sections 78(1) and 137(1C) are express. They say that the holder of a timber permit, whose timber permit has survived together with a timber rights purchase agreement under the repealed Act, is the person that may apply for an extension of the timber permit. What this means in practical term is this. The *Forestry Act* came into force on 25 June 1992. In this case, the expiry dates for the 7 TRPAs were in 2007 and 2008. If Open Bay Timber Company Ltd had wanted to extend the 2 timber permits beyond 2007 and 2008, it would have applied for the extensions of the 7 TRPAs if not all then one or more of them, before 2007 and 2008. But I do note that section 137 only has provisions for extending a timber permit that survives from the old Act [see section 137(1B)]. It does not have express provisions to extend a TRPA that had been created under the repealed Act and that has survived under the *Forestry Act* by virtue of section 137(1)(b). These obviously explains why the 7 TRPAs have had to expire in 2007 and 2008, that is, when they had reached

their 40 years terms. So I find that it is not possible for the first defendant to apply for an extension of the 2 timber permits in 2016 or in 2017 because they would have ceased to exist 8 years ago in 2007 and 2008 together with the 7 TRPAs. The 2 timber permits could not have survived on their own after the expiry of the 7 TRPAs. Secondly, the first defendant was not the holder of the 2 timber permits before they expired together with the 7 TRPAs in 2007 and 2008. The previous holder of course was Open Bay Timber Company Ltd. So the first defendant was also not qualified under sections 78 and 137 to apply for extension of the 2 timber permits. But even before that, the 2 timber permits had already expired or ceased about 8 years ago, so no one, not even Open Bay Timber Company Ltd, could have successfully lodged an application under sections 78 and 137 of the *Forestry Act* for extension of the 2 timber permits. In other words, the 2 timber permits had to be current or valid before an application for their extensions can be made under sections 78 and 137. In the present case, none of these conditions or facts existed at the time when the first defendant applied for extensions of the 2 timber permits.

32. I therefore find that both the first and second defendants breached sections 78 and 137 of the *Forestry Act* in the application and granting of the 2 timber permits. I therefore find that the second plaintiff has established its claim.

SECTION 137(3)

33. I think it is worth noting this provision, that is, sub-section 3 of section 137 of the *Forestry Act*. The provision had been invoked by the second defendant to grant a grace period of 3 years to 3 of the 7 TRPAs, namely, Dengnenge & Simbali TRPs with TP 15-50 and Loi TRP with TP 15-53. These are contained at annexures A, B and C of Exhibit D3 or the affidavit of Chang Pang Heng filed on 26 April 2019.

34. But I note that for the second defendant or its board to invoke sub-section 3, the 3 TRPAs and the 2 timber permits had to be saved by section 137. In the present case, the 7 TRPAs including the 3 TRP referred to, were saved by section 137 in that their terms have extended beyond the repealed Act, to 2007 and 2008, which was accepted under section 137(1)(b). However, after 2007 and 2008, the 7 TRPAs including the 3 TRPs referred to, have ceased or have expired. Therefore, no timber permits, including the 2 timber permits, that had been issued over these 7 TRPAs could have existed independently or survived beyond 2007 and 2008. The second defendant's purported action to grant a grace period on the 2 timber permits on 13 and 14 December 2016, occurred about 8 years after the 7 TRPAs have expired. In other words, a period of 8 years had lapsed before the second defendant or its board decided to exercise their powers under section 137(3) of the *Forestry Act*.

35. Section 137(3) is not expressly intended to revive an expired timber permit(s) or an expired TRPA that had been issued under the repealed Act but which have survived under section 137(1)(b) the *Forestry Act*. It is also not expressly intended to, after reviving an expired timber permit or an expired TRPA, allow a grace period for an applicant to then apply for an extension of either a timber permit or a TRPA. Quite to the contrary, only those interests that have survived under section 137(1)(b) and continue to exist may be granted grace periods under section 137(3). If they survive, like the 7 TRPAs in this case, but have since expired afterwards again like the 7 TRPAs, section 137(3) does not cover them or can be used to revive or re-create for example the 7 TRPAs or the 2 timber permits.

36. The second defendant refers to the unreported Supreme Court case, that is, *SCA 87 of 2015 - Kanawi Pouru and 2 Ors v. Peter Apoi and 1 Or* (2016). Counsel submits that the Supreme Court had overturned the National Court's decision, that is, *Peter Apoi v. Kanawi Pouru* (2015) N5983. The second defendant submits that the decision of the National Court is therefore not binding. Counsel for the second defendant Mr Mitige has taken the liberty of providing a copy of the Supreme Court's decision for which I am grateful. I note that the Supreme Court found on point as follows. It noted that the timber rights purchase agreement which had extended beyond the repealed Act was saved under section 137(1) of the *Forestry Act*. The timber rights purchase agreement concerned had a lifespan of 40 years and it was to expire on 21 March 2008. The timber permit issued for the said timber rights purchase agreement was granted for a period of 20 years. It too had survived the repealed Act pursuant to section 137(1)(b) of the *Forestry Act*, but it would expire in 31 October 2011. So the appellant, knowing of that fact took steps whereby an extended agreement to the original timber rights purchase agreement was signed on 28 February 2008, which was about a month before the original timber rights purchase agreement would expire on 21 March 2008. The extension was signed between the parties and the term of the extended timber rights purchase agreement was set to coincide or end together with the expiry date of the timber permit which was set to end on 31 October 2011. In that case, the parties had extended the timber rights purchase agreement before it expired, in order to continue to validate their timber permit, till 2011 so that their operations were unaffected. Had they not taken the step to extend the timber rights purchase agreement, their timber permit could not have continued to survive beyond 2008 which would have meant the end of the operations by the permit holder. The Supreme Court upheld the appeal and found that the extension was consistent with section 137 and the intention of the *Forestry Act*.

37. The case is distinguishable from the present case. In the present case, the 7 TRPAs were never extended before they expired in 2007 and 2008. Without

the said extensions, the 2 timber permits could not have survived after 2007 and 2008. And the first defendant was not the holder of the 2 timber permits that had expired so it could not have qualified to apply for an extension under sections 78 or 137. But even if we were to assume that the first defendant did qualify or that Open Bay Timber Company Limited had wanted to apply under sections 78 and 137, they could not because the 2 timber permits and the 7 TRPAs had already expired; sections 78 and 137 of the *Forestry Act* could not have been invoked after 2008 by the first defendant, or by the second defendant, or by the former permit holder Open Bay Timber Company Limited.

BURDEN OF PROOF

38. I find that the second plaintiff has discharged its burden of proof on the balance of probabilities. I find that the second plaintiff has established its interest over the land where the 2 timber permits cover. I find that it has established that the original holder of the 2 timber permits was Open Bay Timber Company Limited. I find that it has established that the first defendant and not Open Bay Timber Company Limited that had applied for the extension of the 2 timber permits. I find that it has established that by the time the first defendant was registered as a permit holder, the 7 TRPAs including the 3 TRPs had already lapsed by more than 8 years.

39. In my view the burden shifts and in this case, I find as follows for the defendants. The defendants have failed to disclose whether the 7 TRPAs had been extended before they expired in 2007 and 2008. The defendants have also failed to establish how and when the first defendant had acquired the 2 timber permits from the original TP holder Open Bay Timber Company Limited before it decided to apply for their extensions. The defendants have also failed to adduce evidence to show the timber rights purchase agreement(s) that had existed which had kept the 2 timber permits valid before the application and extensions of the 2 timber permits were made and granted respectively. These queries remain outstanding but only to the detriment of the defendants.

40. I find that the defendants have failed to disprove the second plaintiff's claim.

CONSEQUENTIAL BREACH – SECTION 46

41. The second plaintiff has argued that the consent of the landowners it represents were never obtained by the first and second defendants in dealings in relation to the granting of the extension of the 2 timber permits.

42. The argument is founded under section 46 of the *Forestry Act*. It reads, and I quote in part, *The rights of the customary owners of a forest resource shall*

be fully recognized and respected in all transactions affecting the resource. Given all my findings above in my judgment, I will say this. The second defendant's action to extend the 2 timber permits to the first defendant without any existing TRPA or FMA, which would have ensured receipt of consents of all the landowners of the land including those represented by the second plaintiff, was also in breach of section 46 of the *Forestry Act*.

RELIEF

43. I have considered the relief sought by the second plaintiff. The relief to be granted should of course reflect upon the Court's findings in the matter. The second plaintiff cannot automatically be entitled to all its relief. I have assessed the relief sought in the Amended OS. In this case, I am not inclined to grant relief 2A. But I am inclined to and will grant relief 3. I note that the second plaintiff also seeks other consequential orders in its Amended OS. And under relief 9, it seeks and I quote, *Any other order as this Court deems fit*. I will grant additional orders as well as consequential orders with variations based on the Court's findings.

COST

44. Cost is discretionary. I will order cost to follow the event to be assessed on a party/party basis, to be taxed if not agreed.

ORDERS OF THE COURT

45. I make the following orders:

1. The application for extensions of TP 15-50 and TP 15-53 was made by the first defendant in breach of sections 78(1), 137(1)(b) & (1C) and of the *Forestry Act* 1991.
2. The granting of extensions to TP 15-50 and TP 15-53 by the second defendant were done in breach of sections 78 and 137 and also section 46, of the *Forestry Act* 1991.
3. TP 15-50 and TP 15-53 are declared null and void.
4. A declaration that the initial TRP Permit Holder was Open Bay Timbers Limited under consolidated TP No. 15-53 (which includes TP No. 15-50) and thereafter the extension granted to the First Defendant is contrary to Section 136 and 137 of the *Forestry Act* 1991 (*as amended*) which is intended for an existing Timber Permit Holder and

not a new applicant such as the First Defendant.

5. The first defendant shall cease immediate operations on sites and on timber areas in Lassul, Gazelle District of East New Britain, that are covered under TP 15-50 and TP 15-53, and it shall be allowed a period of 28 days from the date of this Court Order, to vacate the area or areas concerned.
6. The second defendant, its agents including police may assist to ensure the smooth transition within the said 28 days period.
7. All parties are at liberty to discuss what to do with any logs that have been felled, within the said 28 days period.
8. If discussions fail under order 7, then logs felled shall be left where they are.
9. If the time allowed in this order is insufficient, whether it be in terms of any discussions on the logs felled or otherwise or in terms of the time to vacate the area or sites, then parties are at liberty to apply for extension of time provided that sufficient notice is given to the other parties to the proceeding.
10. The defendants shall pay the second plaintiff's cost of the proceeding on a party/party basis which may be taxed if not agreed.
11. Time is abridged.

Kandawalyn Lawyers: *Lawyer for the Plaintiffs*

Nelson Lawyers: *Lawyer for the First Defendant*

PNG Forest Authority In-House Lawyer: *Lawyer for the Second Defendant*

Cherake Lawyers: *Lawyer for the Third Defendant*