SC1892

PAPUA NEW GUINEA
[IN THE SUPREMECOURT OF JUSTICE]

SCA NO. 99 OF 2006

BETWEEN
PINPAR DEVELOPER PTY LTD
First Appellant

AND
RIMBUAN HIJAU (PNG) LTD
Second Appellant

AND
TL TIMBER DEVELOPMENT PTY LTD
Respondent

Waigani: Kassman, Nablu and Berrigan JJ
2018: 18th December
2019: 20th December

SUPREME COURT – Appeal – Circumstances in which the corporate veil may be lifted or pierced – Agency – Sham, fraud and unconscionable conduct – Damages – Duty to take all reasonable steps to mitigate – Onus.

Cases Cited:
Papua New Guinea Cases

C.B.S Inc. and C.B.S Records Australia Limited and Bali Merchants Pty ltd –v- Ranu Investments Pty Ltd [1978] PNGLR 66
Pinpar Developer Pty Ltd v TL Timber Development Pty Ltd [1999] PNGLR 139
Odata Ltd v Ambusa Copra Oil Mill Ltd (2001) N2106

Overseas Cases

British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673
Jamal Moolla Dawood, Sons & Co. [1916] A.C 175
Smith Stone & Night Ltd v Birmingham Corporation [1939] 4 All ER 116

Re FG (Films) Ltd [1953] 1 All ER 615
Firestone Tyre & Rubber Co Ltd v Llewellin (Inspector of Taxes) [1957] 1 All ER 561
Kargotich v Mustica [1973] WAR 167
Brewarrana v Commissioner of Highways (1973) 4 SASR 476, at 480.
Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd [1976] 1 NSWLR 5
Industrial Equity Ltd v Blackburn (1977) 137 CLR 567
Woolfson v Strathclyde Regional Counsel [1978] SC 90 (HL) at 96
Adams v Cape Industries plc [1990] 1 Ch 433 (CA) at 539
Pialba Commercial Gardens Pty Ltd v Braxco Pty Ltd & Ors [2011] QCA 148

References Cited

S. 3 *Supreme Court Act*
S. 46 *Forestry Act,* 1991

Counsel

Mr I. Molloy and Ms E. Heagi, for the First and Second Appellants
Mr S. Soi, for the Respondent

DECISION ON APPEAL

20th December, 2019

1. KASSMAN J & BERRIGAN J.: This decision arises from an appeal from the decision of Justice Gavara-Nanu of 9 August 2006 in National Court proceedings WS 1088 of 1996: *Pinpar Developer Pty Ltd v TL Timber Development Pty Ltd* (2006) N3075.

2. As outlined further below, the matter has a long history. In terms of the appeal, leave was granted by the Supreme Court on 28 September 2009 and within time as extended by the Court. On 9 September 2016 the Supreme Court (Logan, Poole and Higgins JJ) dismissed an application for dismissal of the appeal by the Respondent finding that there had been no want of prosecution by the Appellants.

3. The appeal was heard on 18 December 2018 before a Supreme Court constituted by Kassman, Nablu and Berrigan JJ. The Court reserved its decision. On 28 July 2019 Nablu J. died. After being requested to inform the Court of their position, all parties agreed that the remaining judges should continue to hear the appeal pursuant to s. 3(1) of the *Supreme Court Act*. The judgement of the Court is now given.

Procedural and Factual Background

4. The Respondent, TL Timber Development Pty Ltd (TL), a landowner company, entered into a logging and marketing agreement (LMA) as permit holder for the Ormand Lako Timber Permit Area with the First Appellant, Pinpar Developer Pty Ltd (Pinpar), as contractor, in 1992. The Ormand Lako Timber Permit Area is located in the Kupiano District, Central Province.

5. A dispute subsequently arose and in 1996 Pinpar claimed damages against TL for breaching clause 34 of the LMA under which it was agreed that Pinpar would finance and build a sawmill in the Timber Permit Area (TPA) which would be wholly owned by TL. The cost of the sawmill was to be repaid to Pinpar by TL, without interest, within three years according to a repayment schedule to be agreed. The timber permit also provided that Pinpar would ensure that there was a steady supply of logs for the sawmill.

6. Pinpar claimed that it had built a sawmill in the TPA at a total cost of K751,280 but that, in breach of the agreement, TL had failed and refused to pay the costs of the sawmill, and furthermore had refused Pinpar access onto the land to conduct logging operations, in breach of the LMA.

7. On 6 March 1997 TL filed a defence and a cross-claim for K8,000,300.00 in lost project benefits for the balance of the LMA as a direct result of Pinpar's withdrawal from the TPA. It also claimed that on 29 August 1996, in separate proceedings between Pinpar and TL, Pinpar sought to "legitimise" its withdrawal from the TPA by obtaining an *ex-parte* National Court order requiringTL to deliver to Pinpar its machinery and equipment in the TPA or to permit Pinpar to remove the machinery and equipment.

8. On 10 April 1997 Pinpar filed its cross-defence to the cross-claim, denying that TL suffered loss and damage and claiming, *inter alia*, that TL was still in possession of merchandise timber in the TPA which it could harvest by engaging another contractor.

9. On 12 March 1999 TL applied for the Second Appellant, Rimbunan Hijau (PNG) Ltd (RH) to be joined as a party to the proceeding. The basis of the application was that RH was the parent and controlling company of Pinpar. The application was granted by Kapi DCJ (as he then was), following which TL filed an amended cross-claim against both Pinpar and RH: *Pinpar Developer Pty Ltd v TL Timber Development Pty Ltd* [1999] PNGLR 139 *(Pinpar Joinder Decision)*.

10. RH and Pinpar failed to file an amended cross-defence to the amended

cross-claim and on 27 March 2000 default judgement was sought but stayed pending an appeal against the decision to join RH as a party. On 20 February 2001 the Supreme Court unanimously dismissed the appeal.

11. On 1 March 2001 TL gave notice of its intention to pursue default judgement against RH and Pinpar on the basis that they had still not filed an amended cross-defence.

12. The application for default judgement was heard on 21 March 2001 at which RH and Pinpar argued that Pinpar's cross-defence to TL's cross-claim was sufficient as it automatically enjoined all the issues arising from the amended cross-claim. In addition, RH and Pinpar argued that the amended cross-claim was defective for being filed without leave. Amet CJ found that the amended cross-claim was valid as it was the consequential effect of the order made by Kapi DCJ which had the effect of re-opening the pleadings and therefore the cross-claimant was entitled to amend its cross-claim. Similarly, RH and Pinpar were entitled to file their amended cross-defence to the amended cross-claim on the basis that the amended cross-claim necessarily implicated RH as being vicariously liable as a parent or the controlling company of Pinpar.

13. Despite these findings his Honour declined to order default judgement on the basis that the cross-defence sufficientlyenjoined all issues arising from the amended cross-claim.

14. The trial was heard in the National Court by Justice Gavara-Nanu on 6 October 2004.

15. At the trial before the National Court, Pinpar discontinued its claim against TL. The hearing proceeded on TL's amended cross-claim against both Appellants for breach of the LMA.TL called four witnesses. The Appellants relied on the affidavit evidence of one witness from Pinpar.

16. The learned trial judge found in favour of TL. He found that Pinpar was the agent of RH, and that it was purposely incorporated to give it corporate status so that it could execute the LMA for RH to conduct logging business. RH was the undisclosed principal of RH, which was the parent and controlling company which ran and managed all the affairs of Pinpar. Furthermore, there was an element of fraud in the conduct of Pinpar and RH in having the landowners sign the LMA which was formulated by Pinpar and RH with little or no involvement, if any, by the landowners, which was unconscionable. In addition, there was constant breach of the LMA by Pinpar and RH. In that regard the landowners had legitimate concerns, which they tried to raise, but which were ignored by Pinpar and RH. The legislative scheme reflected in s. 46 of the *Forestry Act* 1991 provides for all parties dealing with resource owners to

respect their rights. These rights were not embodied in the LMA but were totally disregarded by Pinpar and RH as "not important".

17. In those circumstances, the learned trial judge found that RH should not have the protection of its corporate veil, and that it should be lifted so that it does not avoid its legal obligations. Furthermore, that RH is bound by the actions of Pinpar and is vicariously liable to TL.He awarded damages and interest in the amount of K3, 170, 166.20 for breach of the LMA.

Grounds of Appeal

18. The Appellants rely on eighteen (18) grounds of appeal, all of which have been considered in rendering this decision. The grounds, which allege errors of fact only,may be summarised as follows:

(a) Grounds 3(a), (g), (h), (i): - the learned trial judge erred in fact in finding that Pinpar entered into the LMA as agent of RH;
(b) Grounds 3(c), (j), (n), (o) and (p): - the learned trial judge erred in fact in finding sham, fraud and unconscionable conduct;
(c) Grounds 3(b), (e), (f), (k), (l), (m), (q) and (r): - the learned trial judge erred in fact in finding that Pinpar and RH breached the LMA; and
(d) Ground 3(d): - the learned trial judge erred in fact in finding that TL suffered the alleged (or any) damage, that damages were the appropriate remedy, and in the calculation of damages.

Grounds 3(a), (g), (h) and (i): Finding that Pinpar entered into the LMA as agent of RH

19. The Appellants submit that the learned trial judge erred in fact in finding that Pinpar entered into the LMA as agent of RH.

20. The grounds are expressed in very general terms. Ground 3(a) simply states that the primary judge erred in finding that the First Appellant entered into the LMA as agent on behalf of the Second Appellant and "in the application of the correct principles in determining this issue". Neither the principles nor the basis upon which they are said to have been incorrectly applied are articulated. Nor were any authorities provided during submissions to assist either this or the lower court.

21. Grounds 3(g) and (h) express the matter in alternative terms, such that his Honour "should have found there was no agency" and "that the facts and circumstances do not justify the inference that the First Appellant entered into the LMA as agent for the Second Appellant" but take the matter no further.

Ground 3(i) submits that his Honour's finding that Jimmy Wong and James Wong, who signed the LMA on behalf of the First Appellant, were illiterate was against the evidence and the weight of the evidence.

22. The House of Lords in *Salomon v Salomon & Co* [1897] AC 22 affirmed the legal principle that upon incorporation a company is generally considered to be a separate legal entity distinct from its shareholders and directors: *Salomon v Salomon & Co* [1897] AC 22. The principle of separate legal personality is "the fundamental starting point" and any proposed departure from it should be treated with caution: per Kandakasi J (as he then was) in *Odata Ltd v Ambusa Copra Oil Mill Ltd* (2001) N2106.

23. There are circumstances, however, which may warrant the lifting or "piercing" of the veil of incorporation, to set aside the separate legal personality of a company. Whilst it is neither possible nor desirable to categorise with any precision the circumstances in which there may be a departure from the general principle, the courts have refused to be bound by the fact or form of incorporation in cases involving: agency; fraud; sham or facade; and the interests of justice. See again the comments by Kandakasi J (as he then was) in considering joinder in *Odata (supra)*. See also the discussion in *C.B.S Inc. and C.B.S Records Australia Limited and Bali Merchants Pty Ltd –v- Ranu Investments Pty Ltd* [1978] PNGLR 66; and *Pinpar Joinder Decision (supra)*, also decisions on joinder.

24. As above, one such basis is where it is established that there is a relationship of agency between a company and its controller, most commonly where a parent company controls its subsidiary or subsidiaries. In those circumstances a parent company may be liable for the actions of its subsidiary. This was the primary basis upon which liability was imposed upon RH in this case.

25. In this regard the learned trial judge rightly observed that the mere relationship of parent and subsidiary is not of itself sufficient to establish agency. Furthermore, that such agency may be express or implied.

26. His Honour found that there was no express agency in this case. In determining that there was an implied agency the learned trial judge had regard to the decision in *Smith Stone & Night Ltd v Birmingham Corporation* [1939] 4 All ER 116, which has often been referred to by courts in the United Kingdom, Australia and New Zealand in determining whether an implied agency exists between a parent and subsidiary company.

27. Whether a subsidiary is carrying on the business as the parent's business or as its own is a question of fact. For the purposes of determining the issue

Atkinson J in *Smith Stone & Night (supra)* formulated six questions to be considered:

(a) Were the profits treated as the profits of the parent?
(b) Were the persons conducting the business appointed by the parent?
(c) Was the parent the head and the brain of the trading venture?
(d) Did the parent govern the venture, decide what should be done and what capital should be embarked on the venture?
(e) Did the parent make the profits by its skill and direction?
(f) Was the parent in effectual and constant control?

28. It is clear from the face of the questions that there is a considerable degree of overlap amongst them, but the key issue is whether the parent has such a degree of control that the acts of the subsidiary are deemed to be the acts of the parent. See also *Firestone Tyre & Rubber Co Ltd v Llewellin (Inspector of Taxes)* [1957] 1 All ER 561 where an assessment of tax was upheld where the business of both the parent and subsidiary were carried on by the subsidiary as agent for the parent company; and *Re FG (Films) Ltd* [1953] 1 All ER 615, also referred to in his Honour's decision, in which the British subsidiary was brought into existence for the sole purpose of obtaining British classification for a film made in reality by its American parent company. In this regard the subsidiary is sometimes described as the "alter ego" of the parent: see for example, Bray CJ in *Brewarrana v Commissioner of Highways* (1973) 4 SASR 476, at 480.

29. In the present case the primary judge adopted and applied the questions, together with a further one having regard to the Australian High Court authority of *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567: whether the subsidiary has no office and staff of its own and all its affairs, including its finances, are either directly or indirectly run and managed by the parent company.

30. In doing so he found at [106] that (emphasis added):

> *"When looking closely at the evidence before the Court, it is clear that all the above factors were present in this case. For instance;* ***the first cross-defendant had no office and staff of its own; the second cross-defendant was running and managing all the affairs of the first cross-defendant; the profits made by the first cross defendant from the logging and the sawmill operations were controlled and kept by the second cross-defendant, thus they were regarded and treated as belonging to the second-cross-defendant****; the persons who signed the LMA on behalf of the first cross defendant namely, Jimmy and James Wong were appointed or*

> ***sanctioned by the second cross-defendant through the first cross-defendant thus in truth, they were servants of the second cross-defendant***. *Again, this is inferred from the fact that they were "small boys" who only did what they were told to do. It becomes quite clear from this that the two men were appointed by the second cross-defendant through the first cross-defendant to serve its interests viz, to execute the LMA with the landowners; the negotiations were led by the second cross-defendant's servants, thus they were the head and brain behind the logging and sawmill operations;* ***the second cross defendant determined how the logging and sawmill operations were to be managed. This is evidenced by the fact that one of its subsidiaries; viz, Niugini Lumber Ltd was engaged and involved in the running and management of the logging operations and further, the second cross-defendant got its other subsidiary company, viz, Timbers PNG Ltd, to pay the bank guarantee for the first cross-defendant****; the second cross defendant provided administrative facilities including office, finance and staff to run the affairs of the first cross-defendant and determined its capital expenditure; the profits were clearly made by the skills and expertise of the second cross-defendant because its servants managed the logging and sawmill operations; the second cross-defendant was therefore in effectual and constant control of the first cross-defendant.****"***

31. The findings were open on the evidence, which his Honour considered in detail above and elsewhere in his judgement. Whether or not as alleged in Ground 3(i) the finding that Jimmy Wong and James Wong were illiterate was against the weight of the evidence, which in our view it was not, is beside the point.

32. Evidence that James and Jimmy Wong were only involved in the first meeting which took place in Pinpar's office, which was a "burnt down" shed was not challenged by the Appellants. Nor was evidence that other than tables and chairs, there were no staff, nor anything you would normally expect to find in an office, like photocopy machines or computers. Nor was evidence that the spoken English of Jimmy and James Wong was poor. Nor, moreover, was evidence as to the nature, location, participants or content of subsequent meetings and negotiations, including that meetings took place at RH headquarters with representatives from RH, including its General Manager. Nor did the Appellants lead evidence to contradict any of these matters. The evidence tendered by Pinpar through the affidavit of David Chin, as one of its Managers, was silent as to all such matters.

33. In addition, documentary evidence showed that RH and Pinpar shared the

same registered office. Company searches showed that the Company Secretary for Pinpar held the same position with RH and Timbers (PNG) Ltd.

34. Documentary evidence further showed that RH paid royalties both to TL and the Central Provincial Government on behalf of Pinpar. Similarly, documentary evidence showed that RH obtained insurance cover for itself and 15 companies including Pinpar, and that it was RH who managed the claim with respect to one of the landowners who was injured at the site of the logging operations.

35. It was not in dispute that it was not Pinpar but Timber PNG Pty Ltd who obtained the bank guarantee required under the LMA. Nor that Niugini Lumber Ltd, which was also associated with RH, was involved in running and managing the logging operations.

36. There were no errors of fact. His Honour's finding that Pinpar entered into the LMA as agent of RH was open on the evidence.

37. Grounds 3(a),(g), (h) and (i) are dismissed.

Grounds 3(c), (j), (n), (o) and (p): Findings of sham, fraud and unconscionable conduct

38. The Appellants submit that the primary judge erred in finding that Pinpar was a sham or mere façade.

39. It is well established that the courts will not allow the corporate form to be used for the purposes of fraud, or as a device to evade a contractual or other legal obligation: see the discussion in *Odata, Pinpar (joinder) and CBS (supra)*. Or in other words, to "mask" the real purpose of the corporate controller. If incorporation has been used to avoid legal obligations or allow conduct that would otherwise be prohibited, a court may disregard the separate legal personality of the company to reverse the effects of the "sham" arrangement: *Woolfson v Strathclyde Regional Counsel* [1978] SC 90 (HL) at 96. This has been regarded by the courts as an alternative basis upon which to pierce the corporate veil.

40. In this case the learned trial judge was satisfied that Pinpar was a "front" for the RH and was a sham. At [98] he said: "*For in truth, all the affairs of first cross-defendant were being run and managed by the second cross-defendant.*" He was satisfied that the timber project was set up for the benefit of RH and that Pinpar existed in name only, and thus RH should not be allowed to avoid liability under the LMA.

41. The evidence from which the findings were made was essentially the same as that set out above. As above, the evidence was largely uncontested and the learned trial judge's findings were open on that evidence.

42. Nor do we find any error on the part of the learned trial judge in finding that the negotiations surrounding the LMA were unconscionable, having regard to the evidence regarding those matters discussed above.

43. Grounds 3(c), (j), (n), (o) and (p) are dismissed.

Grounds 3(b), (e), (f), (k), (l), (m), (q) and (r): Appellants' breach of the LMA

44. Having found that RH controlled Pinpar as its agent, RH could be held liable for Pinpar's breaches of the LMA.

45. As a preliminary matter, it is noted that the Appellants'notice of appeal seeks that the judgement and orders of the National Court be quashed. Pursuant to Clause 4(b) of the Notice of Appeal, the Appellants seek in lieu thereof, an order that TL's cross-claim be dismissed and there be judgement on Pinpar's cross-claim for the Appellants. The relief sought is misconceived. As above, Pinpar discontinued its claim against TL for breach of the LMA at the commencement of the trial.

46. The misconception is reflected in a number of the grounds of appeal. Putting that aside, in summary, the Appellants argue that the learned trial judge erred in finding that the Appellants had breached the LMA, or alternatively, in failing to find that the cessation of logging and sawmill operations was a result of unreasonable demands made by TL and/or the landowners to take control of such mill operations and for the LMA to be reviewed prematurely.

47. The learned trial judge found that there were repeated, ongoing and "constant" breaches of the LMA, and that the Appellants "disregarded the LMA".

48. He found that Pinpar failed to obtain the insurance cover and bank guarantee, required pursuant to the LMA, which were instead secured by RH and Timbers (PNG) Ltd, respectively. Further that another company, Niugini Timber Ltd, was engaged in logging operations without the consent of TL, in direct contravention of the LMA. He found that Pinpar failed to pay royalties, to maintain a Forest Working Plan, to submit log returns, to build a site office, and to provide manpower and appropriate technical expertise for the logging and sawmill operations. His Honour was satisfied that Pinpar was operating a sawmill despite the fact that there was no sawmill agreement in place as

required pursuant to the LMA. He found that the requirement to have in place a Forest Working Plan and a sawmill agreement were conditions precedent to legal logging and sawmill operations and were two of the main concerns the landowners were raising, as resource owners, when Pinpar terminated the LMA on 29 August 1996.

49. His Honour specifically considered the Appellants' argument that TL and/ or the landowners had no complaints prior to December 1995 but dismissed it on several grounds, including the fact that a letter from the PNG Forest Authority to the General Manager of Pinpar showed that the landowners had raised concerns prior to November 1994. He was also satisfied that the evidence showed that TL's representatives had expressed concerns about the failure of James and Jimmy Wong, with whom they had entered the LMA, to attend any subsequent meetings. His Honour was satisfied that concerns and complaints arose soon after the signing of the LMA and continued up to September 1996, when the Appellants eventually withdrew their machinery and vacated the TPA.

50. His Honour also specifically considered the Appellants' argument that the withdrawal of the timber operations by Pinpar was a direct result of the unreasonable demands made by TL to take control of the logging and sawmill operations and for the LMA to be reviewed prematurely.

51. In doing so he considered the evidence relied upon by the Appellants and deposed to in the affidavit of David Chin that the cessation of works under the LMA was brought about by the conduct of the landowners at the site but went on to accept the evidence adduced by TL.

52. At [126] to [127] he said (emphasis added):

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

proved by the company search made by Mr. Ubuna (Ex. 'L').

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

53. In addition, his Honour found that whilst Pinpar gave TL notice that it was winding up its operations in the TPA in August 1996, correspondence sent by another company within the corporate group, Timbers PNG Ltd, to the PNG Forest Authority, showed that Pinpar had ceased operations even earlier, in 1995.

54. The learned trial judge had the opportunity to hear and observe the witnesses called by TL. He considered in detail the documentary material in evidence. The finding was open to him on the evidence, much of which was not challenged. There were no errors of fact.

55. Grounds 3(b), (e), (f), (k), (l), (m), (q) and (r) are dismissed.

Ground 3(d): Damages

56. As above, his Honour found that Pinpar prematurely terminated the LMA in August 1996, if not earlier. For the purpose of calculating damages, he adopted the figures obtained by the accountant called by TL on the trial, using rates contained in the Timber Permit and the LMA. His Honour initially determined the total project benefit lost that would have been derived per year from the date the LMA was terminated, for the period claimed. He then deducted a third to take into account what could have been derived if TL had engaged another contractor to continue with the logging operations. He made further deductions to accommodate unexpected events which could have affected production or logging, such as *force majeure*. In the exercise of his discretion the primary judge awarded interest. Despite recognising that TL had lost business and that in such circumstances interest at a rate of about 8 % might be awarded, he decided to award interest at 4 % because the cross-claim was filed in response to the initial claim, since abandoned, by the Appellants.

57. In determining damages his Honour had regard to the principle outlined in Lord Wrenbury in *Jamal Moolla Dawood, Sons & Co.* [1916] AC 175:

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

58. The Appellants argue that the true measure of any loss was the difference between the benefit to be derived under the LMA and what could be derived if the respondent engaged another contractor. They complain that no attempt was made to adduce that evidence, and that the onus was on TL.

59. As a general rule, in assessing the damages flowing from the breach of a contract, the onus lies on the plaintiff to show the extent of the loss suffered: *Kargotich v Mustica* [1973] WAR 167.

60. In *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*[1912] AC 673, 689,Viscount Haldane LC referred to compensation as the basic principle of damages and continued (emphasis ours):

> *"But this first principle is qualified by a second, which imposes on a plaintiff* ***the duty of taking all reasonable steps to mitigate the loss consequent on the breach****, and debars him from claiming any part of the damage which is due to his neglect to take such steps."*

61. Depending on the circumstances, what would be reasonable steps to mitigate loss caused by breach of contract may include seeking substituted performance: see also *Pialba Commercial Gardens Pty Ltd v Braxco Pty Ltd & Ors* [2011] QCA 148 at [96].

62. As the Court pointed out in the latter case, however, at [97]:

> *"Although it is commonly said that an injured party has "a duty" to mitigate its loss, as Irvine CJ said in Driver v War Service Homes Commissioner (1923) 44 ALT 130 at 134:*
>
> > *"...This expression, I think, does not mean that he is*

> *under any duty in the ordinary sense, towards the party breaking the contract, but* ***that he cannot be said to have really incurred any loss which might have been avoided by his taking such steps as a reasonably prudent man in his position would have taken to avoid further loss to himself****; and the best test is, what would such a man do to avoid such a further loss to himself, supposing that, from insolvency of the other party, or from some other reason, he could not get any damages."*

63. Moreover, it is our view that once the breach is established, the onus shifts to the defendant to show that the plaintiff has not fulfilled this duty, and the extent to which he has not: *Pialba (supra)* adopted and applied.

64. The task of proving that a plaintiff might have taken particular steps, and thus reduced the losses he suffered, may for many reasons be difficult to discharge. Nevertheless, the "plaintiff is not under any obligation to do anything other than in the ordinary course of business, and the standard is not a high one, since the defendant is the wrongdoer": *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5 at 9 per Yeldham J adopting the views of James LJ in *Dunkirk Colliery Co v Lever* (1878) 9 Ch. D 20 at 25.

65. In this case no attempt was made by the Appellants to establish those matters. In the circumstances, we see no error in the primary judge's approach to reduce the claim by one third to reflect TL's failure to mitigate its loss.

66. There was no error of fact. Ground 3(d) is dismissed.

Conclusion

67. Having dismissed all grounds of the appeal, the appeal is dismissed.

68. Formal orders of the Court:

1. The appeal is dismissed.
2. The decision of 9 August 2006 in National Court proceedings WS 1088 of 1996, *Pinpar Developer Pty Ltd and Rimbunan Hijau (PNG) Ltd v TL Timber Development Pty Ltd* is confirmed.
3. The Appellants shall pay the Respondent's costs of the appeal, such costs shall be assessed on a party and party basis and shall be taxed if not agreed.

Ashurst: *Lawyer for the First and Second Appellants*
Soi & Associate Lawyers: *Lawyer for the Respondent*