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PAPUA NEW GUINEA

[IN THE NATIONAL COURT OF JUSTICE]

WS NO 1192 OF 2010

LOUIS MEDAING
ON HIS OWN BEHALF AND ON BEHALF OF
THE MEDAING FAMILIES OF THE TONG CLAN
BEING NUJAR MASA, SEBMAM MANINA, ILOGO MEDAING, GAMAO MEDAING, JOSALE MEDAING, HELMISH MEDAING, JUNIS MEDAING, RACHEL MEDAING, CONSTIN SEBMAM, KOGO MASA, BARAGEN MASA, LOUIS MEDAING (JUNIOR), SEMMY SOWO, JOYCE MEDAING, MATHILDA IHAGA, BUDA DAMISE, HENRY JACOB AND CHARLES BAGUGA
AND THE SAWANG FAMILIES THAT MAKE UP
THE ONGEG CLAN
BEING BAGUGA SAWANG, IDDU SAWANG, GIMAL BAGUGA, GEORGE BAGUGA, WEBA SAWANG, KUMBONGA BARUK, JIMMY WILLY, JUNIOR BARUK, MANGAN IDDU, GIGIBE WEBA, JAMES WILLY, SADU MURUNGAI, PETER ANITANGO, BARUK ANITANGO, JOHANES ANITANGO, NINGE WILLIAM, MONIKA WILLIAM, JANE GUMONG, SAMUEL M MADE AND BOU JAKOBUS

Plaintiff

V

RAMU NICO MANAGEMENT (MCC) LIMITED
Defendant

MADANG : CANNINGS J

15, 22 OCTOBER 2010

Injunctions – interim injunctions – interim order sought to prevent preparatory or construction work on tailings placement system for a mine.

The plaintiff, representing himself and members of families who claim to have an interest in customary land, including sea waters, affected by a nickel mine being constructed by the defendant, commenced proceedings by writ of summons seeking a permanent injunction to restrain the defendant from committing an alleged nuisance arising from its mining activities, in

particular constructing and operating a deep-sea tailings placement system. Shortly after filing and serving the writ, the plaintiff applied by motion for an interim order, pending determination of the substantive proceedings, that the defendant cease all preparatory or construction work on the proposed deep sea tailings placement system that involves directly or indirectly damage or disturbance to the offshore environment.

***Held*:**

(1) The primary considerations to be taken into account when the court decides how to exercise its discretion whether to grant an interim injunction are: (a) are there are serious questions to be tried and does an arguable case exist? (b) has an undertaking as to damages been given? (c) would damages be an inadequate remedy if the interim order is not granted? (d) does the balance of convenience favour the granting of the interim order? (e) do the interests of justice require that the interim order be made?

(2) If all considerations are in the affirmative it will generally be the case that an interim injunction should be granted. Failure to satisfy one or more of the criteria will work in favour of refusing the injunction.

(3) Here: (a) there are serious questions to be tried and the plaintiff has a serious, not merely speculative, case, with a real possibility of ultimate success; (b) an undertaking as to damages has been given; and (c) damages would be an inadequate remedy. Those factors favour granting the injunction.

(4) However: (d) the balance of convenience does not favour granting an injunction in the terms sought, in view of the relatively insignificant harm that would be caused between now and the trial, the commencement of which will be expedited; and (e) the interests of justice do not require that the injunction be granted, given the delay by the plaintiff in seeking it and the circumstances in which, in separate proceedings, similar claims by persons with similar interests to those of the plaintiff against the same defendant, were abandoned on the first day set for a trial.

(5) As two of the five considerations do not favour its granting, an injunction in the terms sought by the plaintiff was refused.

(6) However, as a matter of discretion, it was in the interests of justice, in the interim, to restrain operation (but not construction) of the deep-sea

tailings placement system; and an injunction in those terms was granted accordingly.

Cases cited

The following cases are cited in the judgment:

Chief Collector of Taxes v Bougainville Copper Ltd (2007) SC853
Ewasse Landowners Association Inc v Hargy Oil Palms Ltd (2005) N2878
Mainland Holdings Ltd v Stobbs (2003) N2522
Mark Ekepa v William Gaupe (2004) N2694
Medaing v Minister for Lands and Physical Planning (2010) N3917
Ramu Nico Management (MCC) Ltd & Others v Eddie Tarsie v Others (2010) SC1075
Tarsie v Ramu Nico (MCC) Ltd (2010) N3960
Tarsie v Ramu Nico (MCC) Ltd (2010) N3987
Tarsie v Ramu Nico (MCC) Ltd (2010) N4005
Tarsie v Ramu Nico (MCC) Ltd (2010) N4097
Tarsie v Ramu Nico (MCC) Ltd (2010) N4041
Tarsie v Ramu Nico (MCC) Ltd (2010) N4042

Counsel

T Nonggorr for the plaintiff
I Molloy, G Gileng & C Posman for the defendant

CANNINGS J: This is a ruling on an application by the plaintiff, Louis Medaing, for an interim injunction.

The plaintiff, acting on his own behalf and on behalf of certain members of two families, says that he is a customary owner of land in the Rai Coast area of Madang Province, who has customary rights over land in the vicinity of the Ramu Nickel Project and the sea waters of Astrolabe Bay. He is concerned about the proposed method of tailings disposal from the mine, known as a deep-sea tailings placement system (DSTP). He says that if the DSTP goes ahead the developer of the mine, Ramu Nico Management (MCC) Ltd ("MCC"), will be dumping 5 million tonnes of tailings per year into Astrolabe Bay, at a point 400 metres offshore, at a depth of 150 metres. He claims that this will cause great damage to the marine environment, which will amount to a common law nuisance. He also claims it will be an unlawful activity, as the serious environmental harm that will be caused is not authorised by the permits granted to MCC under the *Environment Act*.

On 24 September 2010 he commenced proceedings in the National Court at Madang, by a writ of summons and statement of claim, in which he is seeking a permanent injunction to restrain MCC from committing the nuisance which he claims would be constituted by disposing of the tailings in the sea. He also seeks declarations that he and his family members must in future be consulted and informed on any matter concerning tailings disposal from the mine; that the DSTP is not a permitted activity under the *Environment Act* 2000; and that operation of the DSTP is in breach of that Act and is unlawful.

INJUNCTION SOUGHT

On the same day that he filed the writ, the plaintiff filed a notice of motion under which he seeks an interim injunction to restrain construction of the DSTP. It is that motion that is now before the Court.

The terms of the injunction the plaintiff seeks are:

> **That pursuant to Order 14, Rule 10 and Order 12, Rule 1 of the *National Court Rules* and Section 155(4) of the *Constitution* the defendant and its associates, agents and employees and persons for whom they are jointly or severally responsible shall cease all preparatory or construction work on the Ramu Nickel Mine deep-sea tailings placement system that involves directly or indirectly damage or disturbance to the offshore environment – including, without limiting the generality of the foregoing, all coral blasting or popping of dead or live coral and laying of pipes – and shall not carry out directly or indirectly any such work, pending determination of the substantive proceedings.**

I granted an injunction in those terms, in this Court, on 19 March this year in separate proceedings, WS No 202 of 2010: *Tarsie v Ramu Nico (MCC) Ltd* (2010) N3960. That injunction remained in place until 24 September 2010, when it was discharged upon discontinuance of WS No 202 of 2010. The significance of this is that the issues raised by the present case are very similar to those in WS No 202 of 2010. The statement of claim in each case is similar, the causes of action pleaded are similar, the relief sought is similar. In fact, it could be said that the present proceedings are almost a carbon-copy of WS No 202.

The injunction of 19 March survived an appeal to the Supreme Court by the defendant, MCC, and other parties (*Ramu Nico Management (MCC) Ltd & Others v Eddie Tarsie v Others* (2010) SC1075: Davani J and Sawong J; Hartshorn J dissenting). The matters I took into account when deciding to grant the 19 March injunction were found to be correct, and the approach I

took to the application and the exercise of discretion were also found to be valid. It follows that I should, and will, take the same matters into account when determining the present application. I will take the same approach as in WS No 202 and I will go about the task of determining how the discretion of the court should be exercised in the same manner as in WS No 202.

RELEVANT CONSIDERATIONS

As I said in WS No 202 the principles that the National Court applies when a party comes before it with a motion seeking an interim injunction or any sort of interim order designed to preserve the status quo pending a trial were recently confirmed by the Supreme Court in *Chief Collector of Taxes v Bougainville Copper Ltd* (2007) SC853. It is incumbent on a plaintiff to show that:

(a) there are serious questions to be tried and that an arguable case exists;

(b) an undertaking as to damages has been given;

(c) damages would not be an adequate remedy if the interim order is not granted;

(d) the balance of convenience favours the granting of the interim order; and

(e) the interests of justice require that the interim order be made.

The principles can conveniently be applied by posing five questions. They are drafted so that a 'yes' answer will be a factor weighing in favour of granting an interim order and a 'no' answer will work against making such an order.

(a) ARE THERE SERIOUS QUESTIONS TO BE TRIED AND DOES THE PLAINTIFF HAVE AN ARGUABLE CASE?

This requires the Court to make an assessment of the prospects of success of the plaintiff's substantive action by looking at the originating process (in this case, the writ of summons) and the evidence that has been adduced to date. The issue is not simply whether the plaintiff has raised serious allegations, but whether the plaintiff appears to have a reasonable prospect of succeeding in the substantive case (*Ewasse Landowners Association Inc v Hargy Oil Palms Ltd* (2005) N2878). Put another way, the court assesses whether there are serious questions to be tried and the plaintiff has a serious, not merely speculative, case, with a real possibility of ultimate success.

This requires the Court to identify with some degree of precision the causes of action that the plaintiff is relying on and then to consider the evidence that appears to be available in support of the elements of those causes of action. The Court will also examine the strength of the defences that appear to be available to the defendant.

The plaintiff's statement of claim pleads two separate causes of action that I consider are clearly discernable. First, nuisance, the claim being that operation of the DSTP will constitute a common law nuisance. Secondly, statutory illegality, the claim being that operation of the DSTP will give rise to unauthorised serious environmental harm, which has not been authorised, and will therefore be unlawful under the *Environment Act* 2000.

There appears to be a third cause of action pleaded, which might be dubbed 'unconstitutionality'. The claim appears to be that operation of the DSTP will be contrary to Goal 4 of the National Goals and Directive Principles of the *Constitution*, Natural Resources and Environment. I am not satisfied, however, for the purposes of the present application, that this is a sound cause of action. I say that, in view of Section 25(1) of the *Constitution*, which provides that the National Goals and Directive Principles are, generally, non-justiciable. That said, it would seem almost impossible not to determine the trial of a case of this nature without regard to National Goal No 4 and the duty of the Court under Section 25(3) to, in the manner and to the extent prescribed, give effect to it.

But, it is the two causes of action that I consider are clearly discernable that now must be focused on: nuisance and statutory illegality. Both causes of action were pleaded in WS No 202, although, I suggest, not as clearly and discretely as they are in the present proceedings. I found, in my decision of 19 March, that the plaintiffs had an arguable case on those causes of action. I concluded likewise on 14 April when refusing an application by the defendants to discharge the injunction (*Tarsie v Ramu Nico (MCC) Ltd* (2010) N3987). My decision of 14 April also survived the Supreme Court appeal (*MCC v Tarsie* (2010) SC1075). I also had occasion to comment on the strength of the plaintiffs' case and the nature of the defences available to the defendants in WS No 202 when I refused, on 11 May, an application by the defendants for orders that there be a decision by the court on two questions arising in the proceedings, before the trial (*Tarsie v Ramu Nico (MCC) Ltd* (2010) N4005). There was another application by the defendants to discharge the injunction, which I refused on 24 August; and though the issues there were not directly about the strength of the plaintiffs' case, it was another opportunity for the question of whether the plaintiff had a

sustainable case to be ventilated (*Tarsie v Ramu Nico (MCC) Ltd* (2010) N4097).

What this potted history of WS No 202 is intended to show is that I, as the Judge who dealt with that case – including conducting a number of pre-trial hearings that led to the trial being set down to commence on 21 September, only to have the remaining plaintiffs seek on that day leave to discontinue, which was granted – am fairly well versed with the matters pleaded in the present case. I formed a view in WS No 202 that the plaintiffs had an arguable case. I was not persuaded to alter that view. The Supreme Court agreed that it was a correct view. So, frankly, the defendant has been hard pressed to persuade me that the opposite view should now be formed.

I do not have a closed mind on the issue, of course. I have carefully considered the submissions of Mr Molloy, for MCC, which emphasise that construction of the DSTP is authorised by the Ramu Nickel Environmental Plan 1999, approved by the Department of Environment and Conservation under the (now repealed) *Environmental Planning Act*, in 2000, and that the original approval has been saved by Section 136 of the *Environment Act* 2000 and has actually been reinforced by recent, specific approvals under the *Environment Act* 2000. I have also closely examined the dissenting opinion of Hartshorn J in *MCC v Tarsie* (2010) SC1075, in which his Honour found error in my view that the plaintiffs in WS No 202 had raised serious issues to be tried and respectfully failed to see how I could form such a view.

Having had the benefit of all that material, I am of the view that the present plaintiff, Louis Medaing, has an arguable case.

As to nuisance, there is an arguable case that operation of the DSTP will adversely affect the marine environment at Astrolabe Bay (and perhaps further away, maybe the waters around Karkar Island will be affected, according to some scientists who have provided affidavits) and the plaintiff will be affected. There is an arguable case that, even if the court finds that MCC has statutory approval to operate the DSTP, the type of environmental harm that will be caused is not the inevitable consequence of the operation of the DSTP that was approved, and that therefore the statutory approval will not provide MCC with a defence.

As to statutory illegality, there is an arguable case that operation of the DSTP will cause serious environmental harm, which is unauthorised. The plaintiff seeks to argue that the Ramu Nickel Environmental Plan 1999 and related permits have been approved on the basis – and subject to the

condition – that operation of the DSTP will not cause any environmental harm. He claims that, in fact, operation of the DSTP will create serious environmental harm. He has lined up a number of scientists who he says are experts in marine ecology and related fields, some of whom have already deposed to detailed affidavits, whose evidence he wants to rely to prove as a fact that operation of the DSTP will lead to immense environmental harm.

MCC has already filed a defence, highlighting the existence of the statutory approvals it has obtained to build and operate the DSTP. It has also lined up a number of scientific experts, whose opinions on the effect on the environment of the DSTP differ markedly from those of the plaintiffs' experts. The legal arguments of MCC and the opinions of their witnesses all need to be carefully assessed and it may well be that MCC will succeed at the trial. But in those legal arguments and the affidavits already filed, there is nothing that jumps out as showing that the plaintiff is running a hopeless case.

I am of the view that there are serious questions to be tried and the plaintiff has a serious, not merely speculative, case, with a real possibility of ultimate success.

(b) HAS AN UNDERTAKING AS TO DAMAGES BEEN GIVEN?

Yes. The fact that the plaintiff would be unlikely to be able to meet the undertaking in the event that he loses the case is, in the circumstances, not significant. As I said when granting the injunction to the plaintiffs in WS No 202, if the court were to insist on plaintiffs being adjudged financially capable of meeting all undertakings that are given, before allowing them to argue a case for an interim injunction, there is a danger that the National Court would be closing its doors to many citizens of Papua New Guinea. The court should largely be focussed on the genuineness of a plaintiff's motives; and insisting on an undertaking as to damages is a sufficient way of determining that. That approach was endorsed as correct by the Supreme Court in *MCC v Tarsie* (2010) SC1075

(c) IF AN INTERIM INJUNCTION WERE NOT GRANTED, WOULD DAMAGES BE AN INADEQUATE REMEDY?

What will happen if the injunction is not granted, but it turns out the plaintiff succeeds at the trial and proves that MCC has committed a private or public nuisance or that the DSTP has been constructed or operated in breach of the *Environment Act* 2000? Would damages be an inadequate remedy?

The answer is yes. The plaintiff wants to argue that the DSTP will cause enormous and irreparable damage to the marine environment. In these circumstances, damages would be an inadequate remedy. Question (c) is answered yes.

(d) DOES THE BALANCE OF CONVENIENCE FAVOUR THE GRANTING OF THE INJUNCTION?

As I said in *Ewasse Landowners Association Inc v Hargy Oil Palms Ltd* (2005) N2878 this requires the court to ask: what is the best thing to do on an interim basis taking into account the conflicting interests? What will happen if an injunction is not granted? What will happen if the injunction is granted? Who will suffer the greatest inconvenience or prejudice?

Mr Molloy submits that if the injunction is not granted, MCC will proceed with constructing the DSTP. But, he submits, based on the evidence of MCC's Construction Manager, Dr George Shou, the DSTP could not be operational until about February 2011. The construction of the DSTP will involve minimal environmental damage, centred on removal – perhaps by blasting – of dead coral and though there will be some discharging of water and perhaps of slurry of naturally occurring ore mixed with water, this will be of no detriment to the plaintiff. By contrast, Mr Molloy submits, if the injunction is granted, the significant financial prejudice that MCC has already suffered due to the injunction of 19 March will continue.

By focussing on how the balance of convenience will be played out in the period between now and the trial – which I agree should and can be set down to commence early next year – Mr Molloy has raised a valid point. It is a new point and it has considerable merit. In light of the evidence about the limited extent of environmental damage that will be caused by the construction (stopping short of full operation or commissioning) of the DSTP, the balance of convenience lies in allowing construction to commence.

Question (d) is answered no.

(e) DO THE INTERESTS OF JUSTICE REQUIRE THAT THE INJUNCTION BE GRANTED?

It is at this point that the history of this case and its predecessor, WS No 202 of 2010, comes sharply into focus, as does the conduct of the parties, particularly the plaintiff.

There are two things going against the plaintiff. First, delay. Secondly, the conduct of the plaintiffs – persons who he shares similar interests with – in WS 202.

The plaintiff, Louis Medaing, did not apply for the injunction he now wants the court to grant, until 24 September – six months after the court granted the original injunction of 19 March. He has provided an explanation, and I accept that it is an honest one: that he was satisfied that the plaintiffs in WS No 202 were sufficiently protecting his interests and the interests of his fellow customary landowners by taking MCC to court; it was not necessary for him to join those proceedings; and he had his own case still going on, a judicial review which challenged the granting of a State Lease over portions of land at Basamuk on which the Ramu Nickel Project is located (*Medaing v Minister for Lands and Physical Planning* (2010) N3917). He also tried to join WS No 202 but his application was refused by the Court on 24 September (*Tarsie v Ramu Nico (MCC) Ltd* (2010) N4041). However, six months is a considerable delay, especially when it is considered that the defendant has in the interim suffered significant financial prejudice.

The other thing working against Mr Medaing is the conduct of Eddie Tarsie and the other plaintiffs in WS No 202. Having obtained the sort of injunction that Mr Medaing is now seeking, and invoked the jurisdiction of the National Court on a number of occasions and taken up a considerable amount of the National Court's time on their case, they suddenly, within the space of three weeks in September, successively dropped the case – the last group of plaintiffs filing leave to discontinue on day 1 of the trial, 21 September. This course of action disrupted the court's program and many parties in other cases, both civil and criminal, were adversely affected (*Tarsie v Ramu Nico (MCC) Ltd* (2010) N4042). What guarantee is there that the same thing will not happen in this case?

Some people might think that this is a harsh approach. Louis Medaing should not be blamed for delaying his case and should not be held responsible for what happened in WS No 202. I have carefully considered those points of view. My comments are not intended as a personal criticism of Mr Medaing or an expression of doubt about the genuineness of his motives or his interest in the issues he has raised. He is a victim of circumstance. His case has a history, which is inextricably intertwined with WS No 202. I do not think it is in the interests of justice to grant an injunction in the terms he seeks.

Question (e) is answered no.

CONCLUSION

Summing up the five considerations: (a) there are serious questions to be tried and the plaintiff has a serious, not merely speculative, case, with a real possibility of ultimate success; (b) an undertaking as to damages has been given; and (c) damages would be an inadequate remedy. Those factors favour granting the injunction.

However: (d) the balance of convenience does not favour granting an injunction in the terms sought, in view of the relatively insignificant environmental harm that would be caused between now and the trial, the commencement of which will be expedited; and (e) the interests of justice do not require that the injunction be granted, given the delay by the plaintiff in seeking it and the special circumstances in which, in separate proceedings, similar claims by persons with similar interests to those of the plaintiff against the same defendant, were abandoned on the first day set for a trial.

As two of the five considerations do not favour its granting, an injunction in the terms sought by the plaintiff will be refused.

However, that does not mean that all manner of interim relief should be refused. Mr Molloy suggested that MCC would be prepared to provide an undertaking not to start operating the DSTP without the approval of the court, and perhaps pending the result of the trial. I think this would be a useful compromise. The best and fairest way to give it effect is to make it a court order. As a matter of discretion, therefore, it is in the interests of justice, in the interim, to restrain the operation (but not the construction) of the DSTP; and I will craft an order along those lines.

So, there will be an interim injunction granted – but not in the terms sought by the plaintiff. As with the 19 March injunction, it is an interim order, which by its nature may be varied or discharged in the light of changed circumstances or new information being brought to the Court's attention (*Mainland Holdings Ltd v Stobbs* (2003) N2522; *Mark Ekepa v William Gaupe* (2004) N2694).

As to costs, as neither side has had a clear victory, it is appropriate that they bear their own costs.

As for the trial, it must be expedited. It is in everyone's interests that there is an early trial. I will set a directions hearing for 5 November next and I suggest now that the parties ready themselves for a trial in January 2011.

ORDER

(1) The plaintiff's motion for an interim injunction in the terms sought by paragraph 3 of the notice of motion filed on 24 September 2010, is refused.

(2) The defendant shall not, pending determination of the substantive proceedings, allow mine tailings or waste to be discharged into the sea through the deep-sea tailings placement system or by any other means except by express order of the National Court or the Supreme Court.

(3) There will be a directions hearing for the trial at Madang on 5 November 2010 at 9.00 am.

(4) The parties shall bear their own costs.

(5) Time for entry of this order is abridged to the date of settlement by the Registrar which shall take place forthwith.

Ruling accordingly.

Lawyers for the plaintiff : Nonggorr William Lawyers
Lawyer for the defendant : Posman Kua Aisi Lawyers