In THE **NATIONAL COURT**]
OF JUSTICE AT **MADANG**] **WS NO. 202 OF 2010**
PAPUA NEW GUINEA]

Between:
Eddie Tarsie for himself and in his capacity as Ward Councilor of Ward 3, Sidor Local Level Government, Madang Province.
First Plaintiff
And:
Farina Siga for himself and in his capacity as Ward Secretary of Ward 3, Sidor, Local Level Government, Madang Province
Second Plaintiff
And:
Peter Sel
Third Plaintiff
And
Pommern Incorporated Land Group No 12591
Fourth Plaintiff
And
Sama Melambo for himself and as Chairman of Pommern Incorporated Land Group
Fifth Plaintiff
And:
Ramu Nico Management (MCC) Limited
First Defendant
And:
Mineral Resources Authority
Second Defendant
And:
Dr Wari Iamo in his capacity as the Director of the Environment
Third Defendant
And:
Department of Environment and Conservation
Fourth Defendant
And:
The Independent State of Papua New Guinea
Fifth Defendant

SUBMISSIONS OF PLAINTIFFS

A APPLICATION

1. This is an application for Interim Injunctions pursuant to the Notice of Motion filed by the Plaintiffs 4 March 2010

2. The documents relied on by the Plaintiffs are:-

a) Notice of Motion filed 4 March 2010
b) Affidavit of Dr Phil Shearman sworn 3 March 2010
c) Affidavit of Peter Sel sworn November 2009
d) Affidavit of Eddie Tarsie sworn November 2009
e) Affidavit of Farima Siga sworn November 2009
f) Affidavit of Tony Sua sworn 3 March 2010
g) Affidavit of Sama Melambo filed 5 March 2010

h) Undertaking as to Damages by Third Plaintiff filed 4 March 2010
i) Undertaking as to damages filed 4 March 2010
j) Affidavit No 2 of Sama Melambo filed 11 March 2010
k) Affidavit of Dr Amanda Reichelt- Brushett filed 11 March 2010
l) Affidavit of Ticker Hayka filed 11 March 2010

B BACKGROUND FACTS

Plaintiffs

3. The First Plaintiff is a customary landowner on the Rai Coast and the duly elected Ward Councilor of Ward 3, Sidor Local Level Government, Madang Province and by virtue of his office held is entitled to sue on his own behalf as a landowner and in his representative capacity on matters concerning the environment and the welfare of the people in Ward 3, Sidor Local Level Government, Madang Province who have customary land rights over the land of Rai Coast and waters in Astrolabe Bay.

4. The Second Plaintiff is a customary landowner on the Rai Coast and the Ward Secretary of Ward 3, Sidor, Local Level Government, Madang Province.

5. The Third Plaintiff is an adult male citizen and customary landowner on the Rai Coast of land and riparian rights and is entitled to sue on his own behalf.

6. The Fourth Plaintiff is Pommern Incorporated Land Group No 12591 which is the incorporated entity of a Landowner Group from Basamuk in Madang Province and is a registered disputing claimant.

7. The Fifth Plaintiff is a clan leader of Mebu Clan at Basamuk customary landowner disputing claimant at Basamuk in Madang Province and the Chairman of the Pommern Incorporated Land Group.

8. The Plaintiffs and the people the First Plaintiff represents have customary rights to and have relied and continue rely upon the shores, land and sea waters of the Rai Coast for their livelihoods, including for food, being protein, greens and seaweed for transport for people and goods, for washing persons, for traditional ceremonies and customs and for the aesthetic beauty of the areas.

History of the Ramu Nickel project

9. In or around January 1999 Ramu Nickel Ltd (a subsidiary of Highlands Pacific Ltd) lodged an application for a Special Mining lease for the Ramu Nickel project and lodged the Ramu Nickel Environmental Plan 1999 for this project with the Department of Environment and Conservation (Fourth Defendant).

10. On 21 March 2000 the Department of Environment and Conservation approved the Ramu Nickel Environmental Plan 1999 under the repealed legislation the *Environmental Planning Act (repealed).*

11. On 26 July 2000 the Special Mining Lease (hereinafter referred to as **"SML")** was granted to Ramu Nickel Ltd.

12. The SML and Environmental Plan Approval was subject to numerous conditions including that the leassee shall comply with all the relevant legislation applicable to the lease including that administered by the department of Mining, Office of Environment and Conservation and the Bureau of Water Resources.

13. On 1 January 2004, the *Environment Act 2000* came into force and amongst other things repealed the *Environmental Planning Act*, the *Water resources Act* and the *Environmental Contaminants Act*.

14. The Ramu Nickel Environmental Plan 1999 Approval itself was technically saved however pursuant to section 136 of the *Environment Act 2000.*

15. In 2004 however the China Metallurgical Construction Company (hereinafter referred to as **"MCC"**), a Chinese State-owned steel company started negotiations to fully finance the operations, including rights to construct, operate and secure off take arrangements for the proposed Ramu Nickel mine.

16. On 9 February 2004 a framework agreement was signed in Beijing by MCC, Ramu Nickel Limited, Mineral Resources Development Company Limited and the Independent State of Papua New Guinea. Neither the Plaintiffs, nor any landowners were consulted or involved. The framework agreement states that those parties agree in good faith to form a Joint Venture to develop the project and that the "landowners" would be a party to the Joint Venture. The agreement records that that Ramu Nickel Limited and the State shall give **the mine and all exploitation rights to MCC** in exchange for **only a 15% interest(to be divided 8.7% to Highlands Pacific and 6.3% to the State)** and that MCC would be responsible for the 100% funding of the project.

17. A Joint Venture Agreement and also a Mining Development Contract was signed between MCC, Ramu Nickel Limited and the Independent State of Papua New Guinea in 2005 and the SML was transferred from Ramu Nickel Limited to MCC in or around October 2005.

18. A company was registered by its 100% owner MCC to manage and operate the Ramu Nickel mine project and that is the First Defendant.

19. The construction of the mine commenced in 2008 by the First Defendant, but the mine is not yet operational.

20. When operational, the Ramu Nickel mine will be a series of open cut mine pits and a beneficiation plant to produce ore slurry at Kurumbrukari in

Madang Province. A slurry pipeline approximately 134km long will transport the ore slurry from the Kurubrukari mine site eastwards to the refinery plant at Basamuk Bay on the Rai Coast. The refinery plant will produce nickel metal and a cobalt salt product using acid pressure leaching technology.

The Ramu Nickel Environmental Plan 1999 and Environmental Approval

21. The Ramu Nickel Environmental Plan 1999 was prepared by NSR Environmental Consultants Pty Ltd, an Australian company that has advised companies on 25 ocean disposal projects clustered in 9 countries being Indonesia, Papua New Guinea, New Caledonia, the Philippines, Chile, Fiji, the Solomon Islands, Cuba and Canada.

22. According to the Ramu Nickel Environmental Plan 1999, the First Defendant will then dump 5 million tones of hot tailings into Astrolabe Bay each year for the life of the mine which is estimated at 20 years, totaling 100 million tones of tailings. The tailings will consist of mainly sediment and fines which will contain among other substances high levels of heavy metals including but not limited to manganese, chromium, nickel and mercury. It will also contain high levels of ammonia and sulphuric acid. The First Defendant will additionally dump waste rock and soil directly into the sea at Basamuk Bay during the construction and life of the mine as well as **raw sewerage** from 2500 people for 30 months.

23. Because of concerns as to the environmental effects of these tailings and waste disposal, in late 2000 the Evangelical Lutheran Church of Papua New Guinea commissioned the Mineral Policy Institute to undertake an independent review of aspects of the Ramu Nickel Environmental Plan 1999 as complied by Natural Research Systems (herein after referred to as "NSR"). This was motivated by concerns for the well being of the Madang Community and an underlying desire for both development and environmental protection in Madang province (Aff Dr Phil Shearman – full report annexed.)

24. The selection of the team for this review was based on two criteria; independence and expertise. Consultants were required that had a track record of excellence in research in the region, who had experience in environmental impact assessments and who could talk authoritatively on complementary aspects of the Ramu Environmental Plan that involved deep Sea Tailings Disposal. Independence was crucial, individuals were needed who had not worked for the mining industry in Papua New Guinea and who were not aligned with "green" groups in other parts of the world.

25. After a search for suitable candidates , three eminent scientists from Australian institutions were employed being

    a) Dr John Luick, an oceanographer and Lecturer in Ocean wave Theory and Scientific Consultant to the National Tidal facility at The Flinders University of South Australia (p17 report).

b) Dr Gregg Brunskill, a marine geochemist and research fellow at the Australian Institute of Marine Science in Townsville Australia (p18 report)
c) Dr Marcus Sheaves, a marine ecologist and Lecturer at James Cook University in Townsville Australia(p18 report).

26 Dr Phil Shearman, an Ecologist and currently the Director of the Remote Sensing Centre in the Biology Department at the School of Natural and Physical Sciences at the University of Papua New Guinea was chosen to author the final report and analise the three separate findings and reports of the scientists.

27 The fundamental findings of the reports were that NSR had compiled a well presented but fatally flawed case for the discharge of mine tailings via a submarine pipe into Astrolabe Bay and that further that there can be no doubt that disturbance on the scale of a Submarine Tailings Disposal operation will have significant biological impact.

28 The report found If the dumping is to proceed, then the potential consequences should be weighed against the environmental degradation which could result from both Submarine Tailings Disposal and other tailings disposal methods. The Government of Papua New Guinea did not have this option in regard to the Ramu Nickel Project as the Environmental Plan prepared by NSR gave no indication of the likely impacts or risks associated with the proposal and did not thoroughly examine alternatives to marine discharge.

29 Essentially the review found that the behavior of tailings discharged into Astrolabe Bay was not adequately explained in the NSR Environmental Plan. While NSR claim that tailings will be deposited safely on the deep floor of the Vitiaz Basin, on the basis of their own date, this is extremely improbable. The review found overall sheds significant doubt on NSR's predictions about the biologiocal impacts of Submarine Tailings Disposal in Astrolabe Bay. (refer to report)

Events after Lutheran Report

30 The project was essentially put on hold from 2001 to 2006 after the SML had been transferred to MCC. Given the announcement that the Ramu Nickel project was to start, people in Madang started expressing concerns about it. An update forum was held at Divine Word on Monday 14 August 2006 and there, the Lutheran Church presented to Sir Peter Barter (the then Member for Madang, Minister and member of NEC) a copy of their report commissioned in 2000/2001 (annexed to the affidavit of Dr Phil Shearman). Sir Peter Barter described the report as credible and assured the church representatives that the issue would be looked at seriously. The people waited.

31 On 9 February 2007, a report was published in the Post Courier newspaper by a Clement Kunandi Victo, which highlighted the dangerous effects of the proposed dumping of the tailings on the fisheries resources in Madang. There was no response from Government.

32 On 14 January 2008, it was reported that 1.2 million Lutherans (the Plaintiffs and people at Basamuk are Lutherans) had petitioned the Somare Government to seriously look at the environmental impact of the Ramu Nickel mine, and that that action had been taken after Prime Minister Michael Somare rejected **three attempts in 2007** by the ELCPNG head the late Bishop Dr Wesley Kigasung to receive the environmental study commissioned by the Church. It reported that Dr Kigasung had wrote to Sir Michael, his deputy and Mining Minister Dr Puka Temu and Environment and Conservation Minister Benny Allen to accept the report and seriously consider the mine's pollution impact to the sea. Former Member of Parliament Sir Peter Barter joined with Dr Kisagung and requested that these politicians meet personally with Dr Kisagung. There was no response from the Ministers.

33 On 7 April 2008, a Newspaper report in the Post Courier stated that the Fisheries Minister Ben Semri had said that he would not allow mine tailings from the Ramu Nickel project to enter PNG waters and said that he totally opposed the submarine tailings disposal and it would be a major environmental disaster if true. He was reported as stating in parliament that the NFA documented and strongly opposed the idea and stated that *"NFA will not be irresponsible to let destruction or pollution enter PNG seas."*

34 On the 10th of April 2008, a Post Courier newspaper report recorded Minister Semri as stating that 30,000 people in the country would lose their jobs and fish exports could be rejected if the waters of PNG were polluted with mining waste and that the NFA opposed any toxic form of tailings.

35 On 11 April 2008, the Post Courier reported that the opposition asked the government a series of questions during a press conference relating to environmental damage and asked and asked the Ministers of Mining, Environment and Fisheries to state what their positions were with regard to the much debated Basamuk Tailings.

36 On 18 April 2008, the Post Courier reported that the catholic Bishops Conference issued a statement saying they joined the increasing number of groups and individuals calling for a review of the environmental issues involving the Ramu Nickel project and stated that the submarine tailings disposal plan must not be allowed to go ahead.

37 On 13 May 2008, the Post Courier reported that the Head of the Lutheran Church of PNG, Dr Kisagung described the prolonged silence of Sir Michael Somare on their report into the effects of the Ramu Nickel mine waste on marine life in Madang Province as a matter of great concern not only for the church but also for the country as a whole.

38 Eventually Dr Puka Temu, the Deputy Prime Minister and Minister for Mines, then announced in June 2008 that the government had commissioned a study to be conducted by the Scottish Association of Marine Science to study the environmental impact of the Ramu Nickel project on the Basamuk area., following widespread concerns over the proposed deep sea tailings disposal system (see newspaper report). The Minister said all stakeholders including the Madang Provincial Government and Landowners, particularly those at Basamuk, would be given a full report on the findings after the study was completed. The Scottish Association of Marine Science was actually tasked to (1) provide a report on the effects of the submarine tailings disposal operations at Lihir and Misima, (2) to provide a baseline study as to the marine environment at Basamuk in Madang Province and (3) provide a set of guidelines for submarine tailings disposal in Papua New Guinea.

39 The Scottish Institute of Marine Science then in November 2008 ran a Deep Sea Tailing Placement Conference in Madang which according to a Post Courier report dated 11 November 2008, ended with calls for the National Government not to pursue the submarine tailings disposal option until all uncertainties were resolved. This was in response to the presentation of **Draft** guidelines and criteria generally for deep sea tailings disposal. The findings of the team as to the effects of tailings was NOT presented at all, in darft or otherwise, as it was not completed nor intended to be so presented. The newspaper report also recorded the Governor of Madang as saying that the people are concerned and not satisfied with the current understanding of impacts on our livelihood and life and are not willing to accept the uncertainty of risks posed by deep sea tailings disposal.

40 The Plaintiffs have been waiting for the Final report by the Scottish Institute of Marine Science to be produced and made public by the government and assumed that the government would not allow the deep sea tailings disposal to go ahead without considering the final report. They were shocked to read then in the newspaper this year that coral blasting was to commence in March.

41 Also shocked to hear about the blasting was Telikom.

42 Telikom PNG and Pipe International are laying a new Fibre Optic Submarine Cable System between Sydney, Madang and Guam.This cable system is designed to be the principal gateway to the country for voice and internet traffic and through it will pass the majority of the country's e-business as well as tele-medicine and education data. The cable laying into and out of Madang was completed in 2009. Telikom PNG is extremely concerned that Ramu Nico management (MCC) Ltd's stated plan to place 5 million tonnes a year totaling 100 million tones of tailing waste on the seabed in Basamuk Bay, could leading to conditions for a future slide of heaped tailings down the submarine slope leading to a break in the cable. Based on available science and reports, a report was compiled which sets out Telikom PNG's main concerns and the basis upon which the concerns are founded (aff Ticker Hayka).

43 Even on Ramu Nico Management (MCC) Ltd's own predictions, that the tailings will slide down a slope in a continuous coherent flow to deeper water, the risk of a massive turbidity current being triggered by a tectonic event will be increased. In their Environmental Plan by NSR, terrestrial and seabed landslides, and earthquakes are considered a real threat

44 Such a turbidity current may be capable of breaking and washing away a section of the cable system. A similar turbidity current, generated by a tectonic event in the Luzon Strait in 2006 travelled 150 kms and broke a number of cables in the process.

45 If a break does occur, this would cause significant dislocation to PNG's telecommunications services while a specialist repair ship was brought to PNG to recover and replace the cable. Apart from the specific cost of the repair operation, the cost to the country in down-time would also be significant.

46 Given Telikom PNG's concerns they sent a letter in January to Dr Wang, the Technical Director of Ramu Nico Management (MCC) Ltd and expressed their concerns, enclosing their report and requesting a meeting. Telikom met with Dr Wang and he stated that they were reviewing their tailings disposal options and disposal sites and would keep Telikom informed as to their progress.

47 Telikom were not contacted again by Dr Wang or anyone from Ramu Nico Management (MCC) Ltd to date, so they were very surprised to see the Newspapers reporting that Ramu Nico was to commence coral blasting.

48 In addition to the potential break in the cable Telikom are extremely concerned that the blasting program announced by Ramu Nico so as to facilitate the laying of the outfall pipe will adversely impact or disrupt the operations of the telecommunications cable.

49 The Plaintiffs then requested a copy of the report from the Mineral Resources Authority as they assumed that the government must have received the report or they wouldn't be allowing Ramu Nickel to proceed with construction for the dumping. They as yet have not received any information from MRA on this report.

50 The Plaintiffs however on 8 March 2010 contacted the Scottish Association for Marine Science and asked for a copy of the report. Dr Tracy Shimmield, the team leader for the report replied stating that the draft final report was with MRA and the department of Environment and Conservation for comments and then once the comments have been communicated to her, the Final report will be sent to the department of Environment and Conservation. She also stated that whilst the European Union paid for the report, the report could only be obtained from the relevant authorities.

51 The plain and disgraceful situation is the government is allowing the First defendant to go ahead with its proposed deep sea tailings disposal plan despite

a) There being in existence a credible, unchallenged and independent report compiled by 4 individual reputable marine scientists that essentially finds there will be a lot of environmental harm if the tailings dumping goes ahead and that the Environmental Plan of the First Defendant is fatally flawed,
b) Objection by the National Fisheries Authority to the dumping as it will endanger fish resources
c) Well known findings by the World Bank Extractive Industry Report in 2003 that "*Submarine Tailings Disposal should not be used until balanced and unbiased research , accountable to balanced stakeholder management, demonstrates its safety. Whatever the outcome of the research, STD and riverine tailings disposal should not be used in areas such as coral reefs that have important ecological functions or cultural significance or in coastal waters used for subsistence purposes.*"(*annexed to Aff No 2 of sama melambo executive summary of the World Bank Extractive Industry Review dated 26 November 2003)*
d) The Government not having received and considered and made available for public consultation the independent report it commissioned in response to community concerns on deep sea tailings disposal
e) Serious concerns by Telikom as to the safety of its new cables which are the future of e-communication in PNG
f) The land disputes not being finalized and no proper consultation with landholders or disputing claimants, effectively depriving them of proper consultation and negotiations over their land, and
g) There being in existence alternative means of tailings disposal that would not pose such an ecological risk.

Authorities Ignore the Plaintiffs

52 The people of the Rai Coast other than those at Basamuk have been completely ignored on questions of environmental impact of the mine. They have not been included in any compensation agreement with the First Defendant. Where the first three Plaintiffs live, there are no roads, no telephones, no electricity and no access to newspapers. Their access to Madang is by sea. The Fourth and Fifth Plaintiffs claim land within the land zone of the refinery and are registered at the Land Titles Commission and are therefore disputing claimants within the meaning of the Mining Act. They have not however been consulted in any way on the compensation agreements, nor have they been consulted with on the environmental effects of the mine. The 4th and 5th Plaintiffs objected to the formation of the Basamuk Landowners Association on the basis that the people involved did not represent the true landowners at Basamuk (see letter to Registrar of Companies – Aff sama Melambo) but their objections were ignored. The 4th and 5th Plaintiffs tried to engage directly with the authorities on the development but were ignored. In a desperate attempt to get information, the 5th Plaintiff joined the Basamuk Landowners Association at a annual fee of K200 – but it has been a waste of money as the Association has not represented his group nor has it provided any information to him. The 5th

Plaintiff has also written to Mineral Resources Authority (MRA) stating that the basamuk landowners Association have no legal standing to represent the landholders and/or disputing claimants under the Mining Act and that his group must be dealt with directly as they are registered disputing claimants with status under the Mining Act – but he is still ignored.

53 The fifth Plaintiff also objected to a current graveyard with bones and decomposing bodies being relocated to land not accessible to his clan and wrote to the Mining Warden and the Governor and despite the Mining warden and the Governor telling the First Defendant not to relocate the graveyard without proper consultation, the First defendant did it anyway. The fifth defendant cites numerous occasions at Basamuk where the First defendant is not complying with its obligations but the authorities do nothing to correct the situation.

54 The fifth Defendant saw in the newspaper that the First Defendant had received permission from the Department of Environment and Conservation to blast corals to make way for the tailings disposal pipeline, but has no idea when and where this will happen or when the approval was given. He instructed his lawyers to write and seek information from the authorities and letters were sent and follow up phone calls were made, but the Department of Environment and Conservation has ignored the correspondence. The Mineral Resources Authority did respond but simply said they don't have any copies of the Environmental Plan or the Environmental Impact Assessment and they should get copies from DEC.

55 The people of the Rai Coast in these proceedings are completely in the dark about the affect of this tailings and waste disposal on their environment. They have certainly not been consulted on which reefs are being blasted within days and the effects of that. The only report they have had access to says the dumping risks being a complete environmental disaster and that the dumping is certain to cause biological and environmental harm.

C THE LAW ON INTERIM INJUNCTIONS

56 The power for this Court to order injunctions are found by combination of ***Section 155(4***) of the **Constitution**, and ***Order 14 Rule 10 of the National Court Rules***.

57 The principles upon which the Court can grant an interlocutory injunction are well settled. In the decision of ***Golobadana No. 35 Limited –v- Bank of South Pacific Limited*** N2309, delivered on 11 November 2002 by His Honour Justice Kandakasi, His Honour cited with approval the Deputy Chief Justice's judgment in the ***Employers Federation of Papua New Guinea v Papua New Guinea Waterside Workers*** **and Seamans Union and Arbitration Tribunal N393 (1982),** particularly pages 3 and 4.

> *"However, the House of Lords had the opportunity to reconsider this principle in the case of American Cyanide Company v Essecon Limited (1975) 1 All E.R. 504. The House of Lords laid down the following principles in this case:-*

1. Is the action not frivolous or vexatious? Is there a serious question to be tried? Is there a real prospect that the applicant will succeed in a claim for an injunction at the trial?

2. The Court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory relief; and

3. As to the balance of convenience, the Court should first consider whether if the applicant succeeds, he would be adequately compensated by damages for the losses sustained between the application and the trial, in which case no interlocutory injunction should normally be granted; and

4. If damages would not provide an adequate remedy, the Court should then consider whether if the applicant fails, the Defendant would be adequately compensated under the applicant's undertaking in damages, in which case there would be no reason on this ground to refuse an interlocutory injunction.

5. An important factor in the balance should, other things being even, preserve the status quo.

6. When all other things are equal it may be proper to take into account, in tipping the balance, the relative strength of each party's case as reviewed by the evidence before the Court hearing the interlocutory application."

7. *A necessary precondition to the granting of an injunction is an adequate undertaking as to damages…*

58 His Honour Justice Kandakasi stated, after summarising the authorities, at page 13 of the *Golobadana* case:-

"A reading of these authorities show consistency or agreement in all of the authorities that the grant of an injunctive relief is an equitable remedy and it is a discretionary matter. The authorities also agree that before there can be a grant of such relief, the court must be satisfied that there is a serious question to be determined on the substantive proceedings. This is to ensure that such a relief is granted only in cases where the Court is satisfied that there is a serious question of law or fact raised in the substantive claim. The authorities also agree that the balance of convenience must favour a grant or continuity of such a relief to maintain the status quo. Further, the authorities agree that, if damages could adequately compensate the applicant, then an injunctive order should not be granted".

59 In the Supreme Court case of **Craftworks Niugini Pty Ltd –v- Allan Mott**, SC 525 [1997] the full Court held that the principles applicable to the granting of interim injunctions were well settled in our jurisdiction and that they were the principles as set out by His Honour, the Deputy Chief Justice (as he then was) in the **Employers Federation** case.

60 In the case of ***Ewasse Landowners Association Incorporated v Hargy Oil Palms Limited (2005) N2878,*** His Honour Justice Cannings determined that there was a third consideration based on the use of Section 155(4) of the Constitution. His Honour referred to judgement of CJ Frost in the case of ***Mauga Logging Company Pty Ltd v South Pacific Oil Palm Development Pty Ltd [1977] PNGLR 80***and stated

> *His Honour held that, if an application for an interim injunction did not meet the conventional 'tests' in common law or equity, which form part of the underlying law, recourse could be had to Section 155(4) of the Constitution, which states:*
>
> > *Both the Supreme Court and the National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case.*
>
> *I will therefore determine the plaintiff's application for an interim injunction by asking three questions:*
>
> · *Are there serious questions to be tried? Does the plaintiff have an arguable case?*
>
> · *Does the balance of convenience favour granting the injunction?*
>
> · *Is an injunction necessary to do justice in the circumstances of this case ?*

61 In the case of ***Gobe Hongu Limited –v- The National Executive Council, The Independent State of PNG and Others, N1920***, Judge Sevua held that;

> *"the usual undertaking as to damages is a condition precedent to the granting of an interlocutory injunction"*

62 The question of adequacy or inadequacy of undertakings should not necessarily affect a ruling of the court taken on the balance of convenience. ***Mauga Logging Co Pty Ltd v South Pacific Pil Palm Development Pty Ltd,*** which was followed in the case of ***Kurt Reimann v. George Skell (2001) N2093***. The principles in these cases were referred to with approval in the Supreme Court case of ***Chief Collector of Taxes v Bougainville Copper Ltd (2007) SC853.***

D APPLICATION OF FACTS TO LAW

ARGUABLE CASE

63 The First Defendant is about to commit gross private and public nuisances in the Basamuk and Astrolabe Bays and such activity is unlawful.

64 This activity of disposing tailings and waste into Basamuk and Astrolabe Bays by the First Defendant and consequently the Ramu Nickel Environmental Plan 1999 Approval will adversely affect matters of national importance within the meaning of section 5 of the *Environmental Act 2000*, being that these activities will adversely affect:-

(a) The preservation of Papua New Guinea traditional social structures; and
(b) The maintenance of sources of clean water and subsistence food sources to enable those Papua New Guineans who depend upon them to maintain their traditional lifestyles; and
(c) The protection of areas of significant biological diversity and the habitats of rare, unique or endangered species; and
(d) The recognition of the role of land-owners in decision-making about the development of the resources on their land; and
(e) Responsible and sustainable economic development.

65 The uncontested Lutheran church commissioned independent report predicts that this disposal of waste by the First Defendant into Basamuk and Astrolabe Bays and consequently the Ramu Nickel Environmental Plan 1999 Approval does not protect the environment from harm and is likely to cause Environmental and or serious environmental harm, and consequently this disposal is unlawful and contrary to ss7, 10 and 11 of the Environment Act 2000

66 This disposal of waste by the First Defendant into Basamuk and Astrolabe Bays and consequently the Ramu Nickel Environmental Plan 1999 Approval will adversely affect the beneficial value of the environment within the meaning of the Environment Act 2000 and will be detrimental to ecological health, public benefit, welfare, safety, health and aesthetic enjoyment and which requires protection from environmental harm.

67 This disposal of waste by the First Defendant into Basamuk and Astrolabe Bays and consequently the Ramu Nickel Environmental Plan 1999 Approval is not the best practice environmental management for this activity.

68 The disposal of waste by the First Defendant into Basamuk and Astrolabe Bays and consequently the Ramu Nickel Environmental Plan 1999 Approval is contrary to Goal 4 of the National Goals and Directive Principles of the *Constitution* and the scheme and spirit of the *Environmental Act 2000* which is an Act to give effect to the Fourth National Goal and Directive Principle of the *Constitution,* in that it does not promote sustainable development of the environment and the economic, social and physical well-being of people by safeguarding the life-supporting capacity of air, water, soil and eco-systems for present and future generations, and does not avoid or mitigate any adverse effects of the activity on the environment.

69 Whilst the Ramu Nickel Environmental Plan 1999 Approval was initially saved by the transitional provisions of section 136 of the *Environmental Act 2000*, It is the Plaintiffs' submission that the First defendant's proposed dumping and the consequential the environmental harm caused by the activity being the disposal of waste into Basamuk and Astrolabe Bays is unlawful and not saved and allowed as immediately before the coming into the operation of the *Environmental Act 2000* the First Defendant was not lawfully carrying on the activity pursuant to an approval under the repealed Acts.

70 The Environmental Act provides that

71 As the activity was not being carried on by the First Defendant or anyone else under Ramu Nickel Environmental Plan 1999 Approval at the commencement of the *Environmental Act 2000*, the Activity must be subject to the *Environmental Act 2000*, and would not be lawful under that *Act,* for the reasons set out above in paragraphs 64 to 68 inclusive and ought to be restrained.

72 It is the Plaintiff's contention and argument consequently that the defendants cannot rely on the Defence of Statutory Authority to deny the Plaintiffs' claim of public and private nuisance.

73 Further, the activity of dumping waste into the Basamuk and Astrolabe Bays by the First Defendant in reliance on the Ramu Nickel Environmental Plan 1999 Approval or anything else, which in addition to the harms as set out in paragraphs 16 to 20 inclusive of this Statement of Claim will and/or will potentially cause (relying on the Lutheran report and the Affidavit of Dr Amanda Reinhelt-Brushett):-

- Ore slurry deposits and turbidity in shallow habitats
- Condition suitable to Tsunamis
- Biological and spatial interference on shallow water and deep water fishes and fauna
- Shallow water habitat change and burial of fauna
- Toxic effects from tailings
- Tailings brought onshore from upwelling and currents
- Turbidity Plumes of sediment, both toxic and otherwise, spreading out horizontally over hundreds of kilometres
- Adverse biological impacts on the Goldband Snapper and the Ruby Snapper
- Morality of Benthic Fauna over a large area
- Increased bioconcentration of trace metals and eco-toxicological risks to the food web
- Destruction to essential services being the new Telikom cables
- Irreversible damage to Corals, including biut not limited to their breeding cycles.

- Elevated levels of chromium, iron, manganese, nickel and mercury in the marine environment as well as extremely high levels of ammonia which
  - will be ingested by benthic fauna (bottom of the food chain),
  - may/will be acutely and chronically toxic to fish, crustaceans and cephlapods,
  - will create sub-lethal affects as well, including reduced growth and gill damage

74 The First Defendant intends, unless restrained by this Court, to commit the said public nuisance and/or private nuisance and injure the Plaintiffs in their use and enjoyment of their customary land and water rights on the Rai Coast.

75 The Plaintiffs have an arguable case for nuisance and for declaratory orders involving the construction of instruments made under the Environment Act 2000.

BALANCE OF CONVENIENCE

Hardship, inconvenience, or prejudice to the parties

76 The Plaintiffs are being ignored. It is predicted that their families and future generations will risk suffering devastating consequences from the nuisance if this blasting and dumping is allowed to commence. Deep Sea tailings disposal is effectively banned in Canada and the United States and is recommended by the World Bank never to be used in these circumstances. This tailings disposal method is the complete contrary of world best practice.

77 If the miner is not restrained now from constructing further and commencing mine operation, the very rights that the *Environment Act 2000* and the *Constitution* seek to protect, will be irreparably forfeited.

78 We have a credible, uncontested scientific report predicting there will be serious environmental harm.

79 If the Plaintiffs are wrong then it will only be a delay for the defendants to refine the tailings and dump the waste into the sea. The nickel will remain there. They can mine it later. It is not going to perish, unlike the Plaintiffs, the Plaintiffs' Melanesian way of life, the fish, the coral and the benthic organisms.

80 The objects of the Environmental Act 2000 in section 5include protecting the environment while allowing for development in a way that improves the quality of life and maintains the ecological processes on which life depends. Thjis method of tailings disposal goes completely against that. The objects also mandates at section 5(h) that a **precautionary approach** to the assessment of risk of environmental harm be adopted and that we must ensure that all aspects of environmental quality affected by environmental harm are considered in decisions relating to the environment;

81 If the Plaintiffs are wrong, then there will be a delay – but this is necessary to ensure that a precautionary approach is adopted so that all aspects of environmental harm are considered. The government doesn't even have the Final report iot commissioned to develop guidelines on Submarine Tailings Disposal and which was supposed to report on the effects of submarine tailings disposal at Lihir. The government is applying the OPPOSITE of a precautionary approach at great risk to the people and the environment of madang province.

82 Both the Government and the Miner knew of all the community concerns and the Lutheran report. The report by the Government was commissioned in mid 2008. The miner knew this. Nonetheless the Miner decided that in spite of all of this it would go ahead and construct the mine without waiting for the outcomes.

83 It is our submission that if the miner suffers prejudice then it accepted the risk of prejudice itself by its own actions by constructing the mine. It hasn't constructed the tailings disposal yet because they haven't blasted the coral to put the pipes in.

84 These environmental concerns are matters of "national importance" within the meaning of the Environment Act 2000. We are measuring a delay for the Defendants against losses for the future generations. It is incomparable.

85 What happens if the Plaintiffs are right ? What happens if there is no injunction, the tailings dumping commences in the sea (along with the rare sewerage and waste soil and rock) and there are gross nuisances ? What happens if the building up of the sediments creates conditions for a tsunami and that occurs ? What happens if the tuna migratory track changes to get away from the putrid water of the tailings ? What happens if the metals get consumed by the bethnic organisms are they die leaving a gaping whole in the food chain and fish die? What happens if fish species are toxic and humans consume them ? what happens if 50% of the coral from basamuk to Kar Kar stop bredding because they are sensitive to the metals in the tailings ? What mollusks for a kilometer each way contract cholera from the sewerage of 2500 ?

86 Will monetary damages be enough ? And even if they are (which is disputed) how do you get them from a State Entity in China – obtaining compensatory damages from Barrack in Canada or BHP in Australia is possible due to the common law system – but from China – with respect, not a hope.

Undertaking as to damages

87 Separate Undertakings as to Damages have been signed by 3rd, 4th and 5th Plaintiffs.

The Overall Interests of Justice and Bona Fides

Lack of Bona Fides of Miner

88 The First Defendant/Miner knew of the independent Lutheran scientific report, knew that there was widespread community opposition to the method of tailings disposal, knew that the government had commissioned an independent report and guidelines on submarine tailings disposal, but they have continued with the plan of submarine tailings disposal nonetheless. It is just deceitful to say that "look, we've spent x million and we can't go back now".

89 The First Defendant does not listen to landowners or local authorities or the mining warden (See affidavit of Sama Melambo). They were asked by the mining warden and the provincial administration not to relocate a graveyard at Basamuk, but they did it anyway.

90 The First defendant knew of the concerns of Telikom but is proceedings anyway.

91 There are constant deaths and injuries at the mine site, even today a Chinese worker has been killed in an accident.

Lack of bona fides of State entities

92 The government authorities have been completely derelect in their duties under the Mining Act and the Environmental Act.

93 There has been a failure to resource the authorities to determine land disputes expeditiously.

94 There has been a failure of government to follow the processes under the Mining Act to deal with the appropriate landholders for negotiations and consultations to come to a compensation agreement.

95 There has been a failure of government to expeditiously listen to the peoples concerns on submarine tailings disposal.

96 There has been a failure of government to enact and implement proper guidelines and laws for submarine tailings disposal.

97 There has been a failure of government to properly consider the Environmental Approval granted to the miner under the new Environmental Act 2000

98 The has been a failure of government to be truthful to its people as it eventually promised to get an independent report into the submarine tailings disposal and obtain guidelines – but has allowed the miner to construct and continue with a plan for submarine tailings disposal without first considering the report and its recommendations.

99 Either the government's failures are indicative of complete incompetence or it is indicative of intentionally allowing development contradictory to the Constitution and the Environment Act 2000.

100 The Plaintiffs and others have tried to be heard but essentially the government has treated them with disrespect and contempt.

101 See Affidavits of Sama Melambo Number 1 and Number 2 and Tony Sua.

102 The State is also acting contrary to the Coral Triangle Initiative, which is an international agreement PNG has signed to.

103 The government entities involved being the 2nd to 5th defendants have not acted in any way bona fides.

Plaintiffs actions bona fides

104 The Plaintiffs have tried to be heard but are frustrated at every turn, particularly by the very government entities that are meant to regulate the system for the benefit of the people of Papua New Guinea. They have registered their disputes properly with the Land Courts and the Special land Titles Commission. They have directly informed the Developer of the disputes. They objected to the formation of the landowner association and its representation of all Basamuk landowners. They have waited 11 years for the State to resolve the land disputes. The Plaintiffs are suffering and will suffer and it is the fault of the miner and the government bodies responsible. The only place these Plaintiffs can now turn to is the courts to be heard and to protect them, their rights, their families and their future. They have tried to negotiate with the other stakeholders but are treated with a complete lack of respect or care.

105 Each landholder or disputing claimant is entitled to be part of the process from the beginning. The documents that form the basis of this dumping and blasting and the mine are not a state secret and should be provided to the Plaintiffs pursuant to their rights to be heard on the development of the mine under the Mining Act and pursuant to section 51 of the Constitution. Despite this the Mineral Resources Authority refuses to provide full information and DEC ignores them.

106 They have believed the government when it said wait for disputes to be resolved and then you will be involved and can have a say then. They have believed the government when Dr Puka Temu said wait for the independent report it had commissioned. And they have just been lied to.

107 The Plaintiffs actions have always been bona fide.

Is it is the interest of justice to grant the injunction ?

108 It is in the interests of justice that all relevant information should be provided to the Plaintiffs who require them to participate fully.

109 It is in the interests of justice that the miner be restrained from finalizing the preparations to dump waste and tailings as this intervention is the only way that will push the State and the developer to deal with all issues in accordance with the Law. They cannot be trusted to do this on their own based on past performance.

110 The plaintiffs have been patient, polite, waiting for the State to resolve the landowner issues and environmental issues but they have been severely let down.

111 The Plaintiffs have been fraudulently induced into waiting for a government commissioned report, believing that nothing was really decided until the report would be released. It is clear the government and the miner never intended to wait for the report but were content to deceive the people of PNG into believing they were.

112 It is in the interests of justice for the court to intervene in this development process of the disposal of tailings and waste to grant injunctions – which will in turn force the developer and the State to comply with the Mining Act and the Environment Act 2000

113 In coming to a decision, we submit the Court should refer to 2 separate but important pieces of Legislation.

Environmental Act 2000

114 The Environmental Act 2000 is the Act which gives effect to NGDP 4 of the Constitution and also the Act which is to protect the environment from Harm. We draw you attention to section 4 of the Act which sets out its objects.

115 Justice will be done if a decision is made by this Court that relects the objects of this Act and not the objective of development at whatever cost.

<u>The Constitution</u>

116 Section 25 of the Constitution places an obligation on all governmental bodies, including the court, to give effect to the National Goals and Directive Principles, and the relevant NGDP here is Goal 4.

> *Natural resources and environment.*
> *We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations.*
> *WE ACCORDINGLY CALL FOR—*
> *(1) wise use to be made of our natural resources and the environment in and on the land or seabed, in the sea, under the land, and in the air, in the interests of our development and in trust for future generations; and*
> *(2) the conservation and replenishment, for the benefit of ourselves and posterity, of the environment and its sacred, scenic, and historical qualities; and*

(3) all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees.

117 section 25(3) obliges a decision maker, whatever the source of his power to give effect to the NGDP, so long as that is what parliament intended.

118 Parliament clearly intended for the environment to be protected from harm and for those decision makers to take a pre-cautionary approach.

119 It is in the interests of justice to grant the injunctions to give effect to NGDP4

Dated 11 March 2010

TIFFANY NONGGORR of
Nonggorr William Lawyers
Lawyers for the Plaintiffs

IN THE **NATIONAL COURT**]
OF JUSTICE AT **MADANG**]
PAPUA NEW GUINEA]

WS NO. 202 OF 2010

Between:
Eddie Tarsie for himself and in his capacity as Ward Councilor of Ward 3, Sidor Local Level Government, Madang Province.
First Plaintiff
And:
Farina Siga for himself and in his capacity as Ward Secretary of Ward 3, Sidor, Local Level Government, Madang Province
Second Plaintiff
And:
Peter Sel
Third Plaintiff
And
Pommern Incorporated Land Group No 12591
Fourth Plaintiff
And
Sama Melambo for himself and as Chairman of Pommern Incorporated Land Group
Fifth Plaintiff
And:
Ramu Nico Management (MCC) Limited
First Defendant
And:
Mineral Resources Authority
Second Defendant
And:
Dr Wari Iamo in his capacity as the Director of the Environment
Third Defendant
And:
Department of Environment and Conservation
Fourth Defendant
And:
The Independent State of Papua New Guinea
Fifth Defendant

SUBMISSIONS OF PLAINTIFFS

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