revailSC1605

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SCA 126 OF 2011

BETWEEN:
RIMBUNAN HIJAU (PNG) LIMITED
Appellant

AND:
INA ENEI on his behalf and on behalf of Moga clan of Loupom Island, Abau District, Central Province
First Respondent

AND:
PUBLIC CURATOR OF PAPUA NEW GUINEA AS REPRESENTATIVE OF THE ESTATE OF IBI ENEI (Deceased)
Second Respondent

Waigani: Salika DCJ, Kandakasi & Toliken JJ.
2015: 27th April
2017: 25th September

APPEALS – Practice & Procedure - Appeals to the Supreme Court – Grounds raising issues not raised in the Court below – A party is precluded from raising and succeeding on appeal an issue not first raised in the Court below – Principles – Five member Supreme Court decision in Isaac Lupari v. Sir Michael Somare & Ors (2010) SC1071 settled the law – Appeal grounds raising issues not first raised in the Court below dismissed.

PRACTICE & PROCEDURE – Locus standi – Suing for and in the name of a land owning clan – A defendant at the National Court has a duty to raise with the plaintiff all issues on correctly naming and pursing a claim in the name and for the benefit of a clan or a landowning clan – No requirement for a clan to be incorporated before issuing proceedings in the name of a clan - Issue not taken up at the National court – Appellant not at liberty to raise issue on appeal.

LAW OF TORTS - Tort of trespass – Common law requiring possession by landlord as an essential element for finding trespass – Requirement inappropriate and inapplicable to the circumstances of the country – No waste and vacant land in the country – Duties of State, developers and other persons wishing to enter, occupy and use customary land obliged to carry out due diligence to ascertain true and correct owners of such land, properly organise enable and deal only with the true and correct owners – Need for the State or the developer to seek secure and obtain the "social license to operate" - Failures and or choosing to deal with persons other than the true and correct landowners amounts to trespass, fraud, illegal entry, occupation and use of land illegally – Any agreement with persons other than the true and correct owners null and void and of no effect.

DAMAGES – Tort of trespass – Measure of damages – Use of land and gain or benefit to the trespasser basis to assess damages – Damages to be proportionate to defendants gain and must reflect the defendant's gain – Formula for measure of damages – Key factors contributing to gain – Resources extractive industry - Expense one component, sale of product another and land subject of trespass and illegal occupation and use third factor - Hence, one third of gross income before allowing for expenses and tax reasonable compensation for landowner.

EXEMPLARY DAMAGES – Tort of trespass – Total disregard and disrespect for customary landowners rights and interest – Purpose of awarding exemplary damages – Punish and to deter – Failure to take all steps necessary identify, organise, enable and deal only with true and correct land owner – Failure amounting to failure to seek and properly secure the social license to enter and operate business - Ownership of relevant land clearly raised and in Court– Defendant ignoring and choosing to deal with fraudster – Higher award of damages called for – No convincing argument presented to demonstrate award by the trial Court is excessive or on wrong principle – Award by trial Judge confirmed .

LAW OF EVIDENCE - Relevant evidence of gain usually in the defendants possession and is required to produce the evidence or disclose them – Defendant fails to disclose or adduce the relevant evidence - Plaintiff produces some evidence not objected to and no arguments present as against the acceptance and use of such evidence – Court duty bound to use the evidence available to it and do the best it can and arrive at a reasonable award – Defendant precluded from taking issue with award of damages in such circumstances.

Cases Cited:

Papua New Guinea Cases

Alex Bernard & P'Nyang Resources Association Inc. v. Hon. Nixon Duban, MP, Minister for Petroleum & Ors, (2016) N6299
Able Construction Ltd v W.R. Carpenter (PNG) Ltd (2014) N5636
Abel Tomba v. The State (1997) SC518
Brian Laki v. The State (2005) SC783
Central Province Forest Industries Pty Limited v. Rainbow Holdings Pty Limited N321. *Rainbow Holdings Pty Ltd v. Central Province Forest Industries Pty Ltd* [1983] PNGLR 34
United Timber (PNG) Ltd v. Mussau Timber Development Pty Ltd, N645
Dillingham Corporation of New Guinea Pty Ltd v. Constantino Alfredo Diaz [1975] PNGLR 262
Daera Guba on behalf of himself and the Tubumaga Clan of Poreporena v The Administration of the Territory of Papua and New Guinea; Lohia Doriga on behalf of himself and the Giakone Clan v The Administration of the Territory of Papua and New Guinea and Daera Guba on behalf of himself and the Tubumaga Clan of Poreporena [1971] FC 18
Emas Estate Development Pty Ltd v. John Mea & Ors [1993] PNGLR 215
Eva Aglum & Ors v. MVIT (1988) N678
Helen Jack v. The Independent State of Papua New Guinea [1992] PNGLR 391
Inabari v. Sapat and Independent State of Papua New Guinea [1991] PNGLR 427
Isaac Lupari v. Sir Michael Somare & Ors (2010) SC107
Kanga Kawira v. Kepaya Bone & Ors (2017) N6802
Koitachi Ltd v. Walter Schnaubelt (2007) SC870
Madaha Resena & Ors v. The Independent State of Papua New Guinea [1990] PNGLR 22
Mauga Logging Company Pty Ltd v. South Pacific Oil Palm Development Pty Ltd (No.1) [1977] PNGLR 80.
Michael Kuman & Ors v. Digicel (PNG) Limited (2017) SC1638
Mumukrui Kopil v. John Wakon [1992] N2065
Mudge v. Secretary for Lands [1985] PNGLR 387
MVIT v. James Pupune [1993] PNGLR 370
MVIL v. Maki Kol (2007) SC902
*Paru Aihi v. Peter Isoaimo & Anor (*2013) SC1276
Pike Dambe v. Augustine Peri & The Independent State of Papua New Guinea [1993] PNGLR 4.*Philip Takori & Ors v. Simon Yagari & Ors* (2008) SC905
PNG Deep Sea Fishing Ltd v. Luke Critten (2010) SC1126
Rawson Constructions Limited and 238 Ors v. The State (2005) SC777
Rex Lialu v. The State [1990] PNGLR 487
Robert Brown v. MVIT [1980] PNGLR 409
Roselyn Cecil Kusa v. MVIT (2003) N2328
Susanna Undapmaina v. Talair Pty Ltd [1981] PNGLR 559

Toglai Apa & Ors v. The Independent State of Papua New Guinea [1995] PNGLR 43
Trevor Yaskin v. Wallya Abilio (2006) N3108
Van Der Kreek v. Van Der Kreek [1979] PNGLR 185
William Mel v. Coleman Pakalia (2005) SC790

Overseas Cases Cited:

Attorney General vs. Blake & Anor (2000) UKHL 45; 92000) 4 All ER 385
Star Engery Weald Basin Limited & Anor v. Bocardo SA (2010) UKSC 35
Strom Bruks Aktie Bolag v. Hutchinson [1905] AC 515
Penarth Dock Engineering Co. Ltd v. Pounds [1963] 1 Lloyd's Rep. 359
Whitwham v. Westminster Brymbo Coal Co [1896] 2 Ch 538

Other Materials Cited:

McGregor on Damages, 15th ed. (1988)

Counsel:

Mr. Ian Molloy & Bill Frizzell, for the Appellant
Mr. Louis Yandeken, for the First Respondent
No Appearance for the Second Respondent.

25th September, 2017

1. BY THE COURT: Rimbunan Hijau (PNG) Limited (RH) is appealing against a K6, 198, 599.38,inclusive of K150, 000.00 exemplary damages and K1, 997, 515.38 interests. That was on findings of RH trespassing and illegally using including an access road for its logging operations the First Respondent (Moga)'s customary land described as Mogubo Foreshore including a site known as Mogubo log pond which is registered as Portion 249C in Survey Plans Catalogue Nos. 53/136 and 53/137 and its environment (the Land) for 8 years.

The grounds of appeal and the respondents' response

2. In its notice of appeal, RH pleads 36 grounds. They are not with respect organised in a logical way so that issues on liability get dealt with first before getting in to the questions on damages. We have therefore taken the liberty of reordering the grounds of appeal and they could be summarised as claims of the learned trial Judge falling into error in:

(1) finding trespass when:
   (a) there was no evidence of the respondent being in continuous occupation (ground 2) or had not established an entitlement to the land;
   (b) RH had the consent and had signed a contract (MOU) with the party who was found as the owner by a Local Land Court decision (grounds 6) which the National Court erroneously found was void and of no effect (5);

(2) making the award in favour of Moga clan when it was not correctly pleaded and named as a party (ground 35);

(3) making awards that manifestly excessive, (grounds 24, 31) and making an award that went beyond restoring Moga to a position it would have been had it not been for RH's tort (grounds 25, 26, 27);

(4) admitting into evidence, hearsay, newspaper cuttings and other documentary evidence and acting on inadmissible evidence (grounds 7, 8, 9, 10, 17);

(5) made certain findings of fact and made the award (grounds 13, 14) without the support of any evidence (grounds 11, 12, 15, 16, 29);

(6) basing the award of damages upon the total economic benefits it had obtained from log exports and not calculating the respondents loss by reference to deprivation of their use of and diminishing the value of the lands by the alleged trespass and illegal use resulting in deprivation of their use of the land and (grounds 1, 3, 18, 19, 20, 28);

(7) finding that by reason of the respondents appealing against the Magarida Local Land Court, RH had reason to know the respondents would be pursuing a compensation claim (ground 4);

(8) awarding damages for matters not pleaded namely, (a) an access road (ground 10) and (b) special damages (32 and 33) which was not supported by any evidence (ground 34);

(9) failing to reduce the award by reference to awards made in proceedings WS 1116 of 1998 between the respondents and Magarida Timber Pty Ltd and Sinocham (PNG) Pty Ltd (ground 23); and

(10) awarding K150,000 in exemplary damages when:

(a) no evidence was before the Court supporting its finding that RH acted in reckless disregard of the rights and interest of Moga and was guilty of unscrupulous logging practice (group 21);

(b) there was evidence of RH paying occupation fees for the use of the land to the customary owners of the land (ground 30); and

(c) section 24 (3) (a) of the *Wrong (Miscellaneous Provisions) Act* Chp. No 297 precluding the awarding exemplary damages since the plaintiff had died (ground 36).

3. Moga's response is, the learned trial judge made none of the errors RH claims and argues for a dismissal of the appeal with costs. At the same time, Moga argues that RH is precluded from raising the issues it raises in grounds 7, 8, 9, 10, 18, 23, 35 and 36 (respectively items 4, 9, 2 and 10 (c) above), because it failed to raise these issues in the Court below.

Relevant Issues

4. The issues for this Court to then consider and determine are these:

(1) Is RH entitled to raise on appeal issues not first raised at the trial?

(2) Subject to an answer to question (1) above, did Moga fail to properly name and plead itself as the party making the claim and therefore did the learned trial Judge err in making the award in Moga's favour?

(3) Did the learned trial Judge fall into error by finding trespass and illegal use of the Land by RH when:
(a) Moga was not in continuous occupation or had not established an entitlement to the land; and
(b) RH had the consent and had signed a MOU with the party who was found as the owner by a Local Land Court decision which MOU the National Court erroneously found was void

and of no effect?

(4) Were the awards in general damages and exemplary damages manifestly excessive and beyond restoring Moga to a position it would have been had it not been for RH's tort?

(5) Subject to an answer to question (1), did the learned trial Judge admit into evidence, hearsay, newspaper cuttings and other documentary evidence and acted on inadmissible evidence?

(6) Did the learned trial Judge made certain findings of fact and made the award, without the support of any evidence?

(7) Did the learned trial Judge fall into error by assessing Moga's damages on the basis of the total economic benefits RH obtained from log exports and not calculating the respondents loss by reference to deprivation of their use of and diminishing the value of the Land by the alleged trespass and illegal use resulting in deprivation of Moga's use of the land?

(8) Did the learned trial Judge fall into error by finding RH had reason to know that Moga would be making compensation claims when Moga appealed against the Moreguina Local Land Court's decision?

(9) Did Moga fail to properly plead and the learned trial Judge erred in awarding damages for an access road and special damages and or without the support of any evidence?

(10) Subject to an answer to question (1) did the learned trial Judge fall into error by failing to reduce the award by reference to awards made in proceedings WS 1116 of 1998 between the respondents and Magarida Timber Pty Ltd and Sinocham (PNG) Pty Ltd?

(11) Was there evidence supporting the learned trial judge's finding that RH acted in reckless disregard of the rights and interest of Moga and was guilty of unscrupulous logging practice to award K150, 000 in exemplary damages and in so doing also erred in failing to:

(a) allow for RH paying occupation fees to the owners of the land; and

(b) subject to an answer to question (1) take into account s. 24 (3) (a) of the *Wrong (Miscellaneous Provisions) Act* Chp. No 297 which precludes awarding exemplary damages on claims of the plaintiff having predeceased the award.

5. The first two issues need to be dealt with first as a determination of these issues will have a follow on effect on a determination of the rest of the issues. Hence we will deal with those issues first. A consideration of the rest of the issues will follow the order in which they are stated except for question (3) because this will be dependent on the answer to the all of the other questions.

Issue 1 - Raising issues not first raised at the trial

6. Dealing firstly then with the first question, we note the relevant principles of law are well settle in our jurisdiction. A very detailed and useful discussion of the relevant principles with their genesis and current position is in this Court's decision in *Paru Aihi v. Peter Isoaimo & Anor*, per Kandakasi J. with whom, Yagi J., the other member of the Court agreed. After a careful consideration of almost all of the cases on point his Honour noted there are two schools of thought. Led by the decision in *Van Der Kreek v. Van Der Kreek*, is one view that a party can be allowed to raise a legal point without first raising it in the National Court and succeed. The other view is led by the decision of Supreme Court in *MVIT v. James Pupune*, which stands for the complete opposite regardless of whether the issue is one of law or fact. As clearly pointed out in that judgment, a large majority of the judgements of this Court including the 5 member Supreme Court decision in *Isaac Lupari v. Sir Michael Somare & Ors* support that view. At paragraph 30 of His Honour's judgment stated in summary the core of the reasons for this line of authorities as follows:

> *"(a) the fundamental principle of fairness requires all issues concerning any matter before a court must be first presented to the court below before raising it on appeal;*
>
> *(b) adhering to (a) above enables, the opposing parties to present their arguments on those issues before judgment;*
>
> *(c) the trial Judge is given the opportunity in fairness to consider the issues on their merits and come to a decision;*
>
> *(d) The appeals process concerns the errors and omissions of a trial Judge and not that of either or both of the parties. Hence, it would be unfair to raise in the appellate court an issue that was not in fairness presented in the court below;*
>
> *(e) Public policy requires finality in litigation with no allowance for "second bites at the cherry" so to speak;*
>
> *(f) Better case management requires all related issues be raised and*

dealt with once in one proceeding in the interest of saving time and money for the parties as well as the courts; and

(g) The appellate court has no original jurisdiction except for a rehearing based on the record of proceedings in the court below and nothing outside that."

7. To this His Honour at paragraph 31 added:

"Allowing an issue to be raised in the appellant court without it being first raised and considered in the court below, would deny the right of an aggrieved party his or her right of appeal or a review of the decision on the issue. One might argue that an application under the 'slip rule' could take the place of one's right of appeal or review. Unfortunately, that cannot be right, because of the rule's limited application compared to an appeal or review process."

8. His Honour then went into a detailed consideration of the line of cases following the *Van Der Kreek v. Van Der Kreek* as well as authorities on the relevant principles governing departure from the Supreme Court's earlier decisions. Then at paragraph 51 His Honour concluded:

"In the final analysis on the issue of whether a matter not raised in the Court below can be allowed on review, I am persuaded to follow the James Pupune line of cases for the reasons that line of cases give as outlined in paragraph 30 above. At the same time, I note that this Court has no choice but to follow the James Pupune line of cases because of the five (5) member bench decision in the Isaac Lupari case, unless and until another 5 member bench Court overturns that decision and line of cases for good reason."

9. We agree this is a correct statement of the law. Unless the decision in the *Isaac Lupari* case and those following the *James Pupune* line of cases gets changed by a 5 or more member Supreme Court for good reason, the law is now well settled.

10. In the present case, we note that the parties agreed upon the issues they were going to trial for. The issues raised in appeal grounds 7, 8, 9, 10, 18, 23, 33, 34, 35 and 36 were not on the list of issues agreed upon. Additionally, the record of the trial per the transcript of proceedings in the National Court bears no witness of RH raising any of these issues in the National Court. No doubt RH is raising these issues for the first time in this appeal without first raising them in the Court below. This, it cannot do for reasons outlined above. Additionally, for ground 23, RH offers no arguments or submission.

Accordingly, we order grounds 7, 8, 9, 10, 18, 23, 33, 34, 35 and 36 be dismissed.

11. We are also of the view, that where a party includes in his notice of appeal grounds or issues not first raised in the Court below could render the appeal incompetent. Competency is always an open issue in all matters before this Court before final decision on a matter. That being the case, the issue is open for us to consider in this case. We are persuaded by what His Honour Kandakasi J said in his judgment in the matter of *Michael Kuman & Ors v. Digicel (PNG) Limited* (2017) SC1638. There His Honour, succinctly summarized the case law on objections to competency of appeals and concluded:

> *"The import of the long line of case authorities I set out above and the principles they stand for, make it clear. Even if a person gets everything right but for one requirement such as the form, timing, not sufficiently and properly pleading a ground, or raising an issue not raised in the Court below, or seeking leave when not required, renders the appeal or the process before the Court not properly before the Court. Instead it would be incompetent and could be dismissed on that basis. The Coca Cola Amatil (PNG) Ltd v. Yanda (supra) decision does not address this aspect and why all the years of making through the various decisions of the Supreme Court must now be abandoned. In my respectful view, the decision in Coca Cola Amatil (PNG) Ltd v. Yanda (supra) does not offer any good reason to depart from the well-trodden road of objections to competencies of appeals and other process before the Supreme Court and in particular, the principles that have been developed and applied throughout the years to the present. In these circumstances, I am not prepared to depart from the established practice and procedure in our jurisdiction. The principles upon which they stand are still sound and not demonstrated otherwise by the decision in Coca Cola Amatil (PNG) Ltd v. Yanda ..."*

12. However, since we did not raise this competency issue with counsel at the time of the hearing of the appeal, we will not have this appeal determined on the basis of its incompetence.

Issue 2 - Properly naming and plead Moga as the party making the claim

13. Issue 2, is raised in ground 35 of the Notice of Appeal. This ground pleads:

> *"The trial judge erred in so far as he gave judgment in favour of the Moga Clan of Loupom Island Abau District, Central Province in that the*

clan is not a legal entity, the proceedings were not constituted as a representative action, the members of the clan were not named in the proceedings, and there was no evidence that any of them had duly authorized the named plaintiff or his lawyer to commence or maintain the proceedings on their behalf."

14. We already decided to dismiss this ground of appeal for RH failing to first raise the issue in the Court below before raising it in this Court. At the same time, we note, there is a further reason to dismiss this ground.

15. The further reason is this, all documentation in the National Court and from there this appeal from the writ of summons to the Supplementary Notice of Appeal, makes it clear that the claim against RH was for and on behalf of the Moga Clan. Initially, it was Ibi Enei who was making the claim for himself and his Moga Clan as a member and leader of the Clan. Following Ibi Enei's death his administrator, Ina Enei substituted him and continued to pursue the proceedings in the National Court, secured the Judgment and now opposes this appeal. If there was a problem with that, RH had the duty to properly raise the relevant issues with Moga's lawyers and in the proceedings in the National Court.

16. The decision of the Supreme Court in *Philip Takori & Ors v. Simon Yagari & Ors* is on point. This case stands for the proposition that, without first raising with a plaintiffs lawyers problems attending a class or representative action, a defendant is precluded from moving for dismissal of a plaintiff's claim for a failure in meeting such technical requirements. The Court was of the view that, these are technical problems which do not go into the substantive merits of the case. They are problems that can be fixed by appropriate Court orders and directions upon a defendant raising them.

17. In the present case, RH did not raise this issue in the Court below. Further, there is no evidence or record of RH raising the issue with Moga or Moga's lawyer for Moga to take the appropriate steps. These failures of RH and the way in which the documentation were attended to, makes it clear that this was clearly a claim for and by the Moga Clan and there were no issues with it. It is now too late for RH to raise this as an issue after a decision has been made on the substantive merits of the case.

18. Additionally, the suggestion that Moga was not incorporated is mischievous. When RH was dealing with Warata, it did not insist, require, ensured Warata was incorporated into an ILG first. As will be elaborated later, RH had the obligation to have the correct land owning clan identified, incorporated and organised properly before entering, occupying and conducting its business on the Land. Instead of doing that, it chose to deal with Warata in

the way it did. This is thus a hypocritical argument. Additionally, we note that, there is no requirement for a clan or a landowning group to first have itself incorporated before it can give it the necessary locus standi to sue or be sued. Put it another way, there is no law prohibiting a landowning clan or group or indeed any group of persons pursuing a claim unless they are incorporated. Instead, it is a well-accepted practice that such groups can sue and be sued without being first incorporated for that purpose. There is of course the *Land Groups Incorporation Act (Chapter 147) consolidated to No 29 of 2009* (ILG Act). This legislation provides for customary land groups to have themselves incorporated for the purposes specified in the Act in s. 1 of the Act. Incorporating a land owning clan or group for the purpose of issuing court proceedings is not one of the purposes. However, only when a customary landowning group is incorporated, s. 11 (1) (c) grants them power and capacity to sue and be sued in their own name.

Issue 3 - Finding trespass and illegal use of the Land by RH

19. This now leads us to the core of the issue in this case, trespass and illegal use of the Land. The relevant grounds of appeal raising this issue are; 2, 5 and 6. They respectively read:

> *2. "The National Court erred in law and in fact and law in failing to find that the first and/or second respondent, at no material time, had been in possession of the land such as would or did give rise to any liability in its favour in the appellant for trespass or illegal use."*
>
> *5. "The National Court erred in law in finding that a Memorandum of Understanding under seal of the Magarida Land Court in proceedings 6/94 was void and of no effect."*
>
> *6. "The National Court erred in law and in fact and law in finding that the appellant was trespassing or illegally using the land at the material times, especially having regard to the fact that it had the consent of the party, and a contract with such party, as the land court then recognized as the owner of the land."*

20. These grounds require a consideration of what was before the National Court and how the learned trial judge came to his decision. As already noted, Moga's claim was for alleged trespass and illegal use of the Land the subject of the proceeding. The trespass was for a period of 8 years from 1988 to 1996 for storing and loading of logs from its logging operations, onto ships for export overseas. Moga claimed they suffered loss and injury due to destruction to their land, including damage to the foreshore area, especially to the seabed, marine and other aquatic life. Moga therefore, claimed damages for trespass,

continuous trespass and illegal use of the land and special and exemplary damages.

21. The parties agreed that Moga is the owner of the land. However it appears this fact was not clear to RH when it moved onto the Land in 1988. But there existed a dispute between a Warata Clan and the Moga Clan over the ownership of the Land. On 04th November 1984, the Kwikila Local Land Court awarded ownership of that land to Warata. Moga appealed against that decision. On 18th December 1996, the Kwikila Provincial Land Court determined the appeal in favour of Moga, quashed the decision of the Local Land Court and remitted the ownership question back to the Kwikila Local Land Court for rehearing and determination. The Kwikila Local Land Court heard the matter and on 12th November 1997 it determined the ownership question in favour of Moga. At the same time, the Court ordered royalties or rental fees for the use of the Land be paid to Ibi Enei, the leader and representative of Moga. The orders were to be effective forthwith.

22. There is also no dispute that, when RH moved onto the Land, Warata made representations to RH that it was the owner of the land. Based on that, RH entered into an MOU with Warata. RH relied on that MOU to make agreed rental payments of K500 per month. This was despite Moga's Court actions and repeated representations it made to RH that it was the owner of the land and RH should not deal with Warata. Also, there is no dispute that, RH did not seek and Moga did not give its consent or approval for RH to enter the Land and use it in the way RH did. At the trial, RH admitted these facts through its only witness, Pia Dometa.

23. The learned trial judge at paragraph 23 of his learned judgment found:

> *"There is overwhelming evidence that the plaintiff is the owner of the land, this view is based on the clear and unequivocal admissions made by the defendant in its amended Defence and the steps it took on two occasions when it tried to pay the plaintiff for the use of the land. So the only determinative issue left really is whether the use and occupation of the land by the defendant amounted to trespass and continuous trespass or was the use and occupation of the land by the defendant justified by the MOU and the decision of the Kwikila Local Land Court, as claimed by the defendant? In this regard it is quite plain that the defendant cannot rely on the Order or the decision made by the Kwikila Local Land Court because that decision was subsequently quashed on appeal. It is also plain that the defendant cannot reply (sic) on the MOU because the MOU is void of any legal effect because when Warata clan signed the MOU, it was not the owner of the land as such it had no legal capacity and*

authority to sign the MOU. The defendant's use and occupation of the land was as a result unlawful and it amounted to trespass and continuous trespass."

24. In support of its appeal, RH argues the learned trial judge fell into error in finding for trespass because there was no pleading and evidence of Moga being in continuous possession of the Land at the relevant time. Reliance is placed on the works of the learned authors of *Bullen & Leake and Jacob's Precedents of Pleadings*, Twelfth Edition, page 879 and Fleming, *The Law of Torts*, Ninth Edition, page 49. This is for the proposition that "in order to maintain an action for trespass to land the plaintiff must have present possessory title" and not persons without possession at the relevant time.

25. These arguments appear to ignore one very important historical fact in Papua New Guinea (PNG). It has been long acknowledged and accepted by as early as the first colonial masters of PNG that, no land is waste and vacant in PNG. Hence, if the administration or the government wanted to acquire land, it had to first establish that the land it proposes to acquire is indeed "waste and vacant". A detailed examination of the land law, policy and practice during the colonial times is in the pre-independence Supreme Court case of *In Re Era Taora Land* (1971) FC18. This position has been carried over into the present day PNG by s.5, of the *Lands Act* 1996. These provisions specify how the State can acquire customary land from customary landowners. Two ways are specified, either by agreement or by compulsory acquisition. These provisions require the State to make its intention known by notice published in the National Gazette and invitations to treat with an allowance of three months for responses. These notices are to ascertain if the owner of the land proposed to be acquired, after diligent search and inquiry cannot be located when proceeding under the compulsory process. If the acquisition is under the agreement process, the notices are necessary to ascertain if the "land is not required or likely to be required by the customary landowners or by persons on whom the land will or may devolve by custom". This means the presumption in PNG is that no land in PNG is ownerless, even if there is no physical presence. Given the hunter gatherer kind of life style traditional Papua New Guineans had and still is the case in some parts of the country, they would have large portions of land reserved for hunting and gathering. They would be owned by somebody, even if there was or is no sign of any dwelling, gardening or clearly visible signs with clearly established territorial boundaries.

26. Some legislation, such as the *Oil and Gas Act* 1998, do require developers of oil and gas projects to first carry out land owner identification and social mapping studies. The purpose of this is to ascertain the correct owners of land that are proposed to be taken up by an oil or gas exploration through to full development. The National Court per Kandakasi J, in his decision in *Alex*

Bernard & P'Nyang Resources Association Inc. v. Hon. Nixon Duban, MP, Minister for Petroleum & Ors, discussed this requirement in detail at paragraph 30 and 31 of his judgment. His honour then concluded, the requirement for land owner identification and social mapping was a condition precedent to any oil and gas development in the country. This was necessary in order for the developer to obtain their social license to operate and for short and long term security of any oil or gas project. At paragraph 30 and 31 His Honour referred to two sources and defined social license to mean:

> *"'Social license' generally refers to a local community's acceptance or approval of a company's project or ongoing presence in an area. It is increasingly recognized by various stakeholders and communities as a prerequisite to development. The development of social license occurs outside of formal permitting or regulatory processes, and requires sustained investment by proponents to acquire and maintain social capital within the context of trust-based relationships. Often intangible and informal, social license can nevertheless be realized through a robust suite of actions centered on timely and effective communication, meaningful dialogue, and ethical and responsible behaviour."*
>
> ....
>
> *"On occasions, the Social License can transcend approval when a substantial portion of the community and other stakeholders incorporate the project into their collective identity. At this level of relationship it is not uncommon for the community to become advocates or defenders of the project since they consider themselves to be co-owners and emotionally vested in the future of the project, such is the strength of self-identification."*

27. In our respectful view, what all these means in PNG in the context of the question before us is this. It is not necessary to prove possession. The common law requiring possession may be relevant and applicable in England and the rest of the common law world. However it is not the law in PNG. The colonial masters made a deliberate decision and correctly arrived at the view that no land is waste and vacant and ownerless in PNG. Hence, the onus is on the administration or indeed anyone claiming any such land exists to prove it. This position at law has been carried over into current PNG by the Lands Act. In other words, there is a presumption that there is no waste and vacant land in PNG. The duty is therefore, upon the State or any other person which may include foreign investors or developers who wish to enter any land in PNG and more so customary land, to first make it their business to ascertain who the true and correct owners are. Once they have done that, they would then be in a better position to enter into meaningful discussions and negotiations with them and get

their free and informed consent or approval before entering, occupying and using their land. In this context, we endorse, Kandakasi J's views in his recent judgment in *Kanga Kawira & Ors vs. Kepaya Bone & Ors*, (2017) N6802 that the State and any developer have an obligation to properly identify and organise the customary landowning group that owns any land they might be interested in, as part of their obtaining their social license to operate.

28. In the present case, there was a duty on RH to exercise care and put some time, money, effort, meaningful energy and other resources to first ascertain who were the true and correct land owners or the persons who claimed ownership to the Land. In other words, RH had a duty to carry out its due diligence and establish the true and correct owners and deal only with them. If it did that, it could have ascertained that Moga owned the land. It would also have ascertained Warata's competing claim. This could have presented RH with either of two options to take. The first would have been to encourage the competing land owning groups to go to the process of resolving customary land ownership and related issues and have those resolved first before proceeding with its intention to enter and use the Land. That would have taken much time. If RH was well informed and a fair and reasonable business which appreciates the prompt resolution of disputes, it could have encouraged and enabled the disputing landowning groups to have their dispute resolved by mediation facilitated by a well-trained, accredited, experienced and impartial independent third party mediator. This could have taken the form of funding the process and generally providing all the support the process needed to complete the task on hand competently and in a satisfactory and timely manner. Taking that option would have been more conducive for its business and purpose as it could have resolved the matter promptly and finally. Letting the parties to sort their problem on their own in the traditional Court process resulted in no prompt and expedite outcome but prolonged Court proceedings which came to an end when RH had finally helped itself to the Land and vacated without properly and fairly dealing with the landowners.

29. What happened here is in fact a sad story that is repeated throughout the country over a long period of time from the colonial administration in the name of opening up wild frontiers for various so called developments and projects. The so called projects and development covers from logging, prospecting for minerals and oil and gas to actual mining, to oil and gas developments to other customary land base developments like the famous or infamous Special Agriculture Business Development Leases (SABLs). What is happening in most cases is that, developers and the State alike are failing to either deliberately or by inadvertence to first ascertain, then properly organise, empower and deal with the properly identified and confirmed customary land owners. Rather than taking this most important first critical step, the State and the developers are entering customary land and are proceeding with their

activities and in so doing, choosing to and are indeed dealing with persons who claim to be landowners when in fact they may not be the true and correct landowners, as this case bears testimony and clearly demonstrates beyond doubt. The State to the extent that it is doing nothing about this practice is encouraging this improper and illegal approach by so called developers which in fact is a large scale fraud committed against the true and correct landowners by the so called developers with the support of the State and in collaboration with persons claiming to be owners when they are not.

30. Kandakasi J., in his decision in the *P'Nyang* and *Kanga Kawira* cases correctly calls them "fraudsters and thieves." As was noted by his honour in his judgments, the PNG LNG project presents a clear case on point. In this project, despite s. 47 of the *Oil and Gas Act*, both the State and the developers have failed to properly identify the true and correct landowners, properly organising them into ILGs, enable the landowners to fairly and meaningfully enter into negotiations with the developers and the State and for the developers and the State to seek and secure from the true and correct landowners through their duly elected or appointed leaders the landowners free and informed consent and approval and ultimately, their social license to operate. The contracts or agreements and the deals the State and developers enter into with persons not properly identified and appointed by the landowning clans, or groups, remain null and void *ab initio* or void and of no effect from the very beginning. Given that, when the true and correct owners eventually assert their ownership rights and exercise their rights, challenging the contracts or deals with the fraudsters and or thieves, they must give way. Such contracts do not bind the true and correct landowners. If need be, the State and or the developer concerned need to enter into completely new contracts with the true and correct landowners on terms that are fair and reasonable with reasonable compensation being paid for the earlier illegal entry, occupation and conduct of their businesses.

31. In the present case, RH produced no evidence of carrying out its due diligence in searching for and establishing the identity of the true and correct owners of the land. Having failed in that regard, RH chose to deal with Warata only upon Warata presenting themselves as owners of the land and entered into its MOU with Warata without requiring more of them in terms of prove of their ownership through a public and open process witnessed by all affected persons and RH itself or RH taking its own steps to verify Warata's ownership claim. To make matters worse, the ownership question eventually ended up in the Local and Provincial Land Courts, a fact well within the knowledge of RH. Yet RH chose to recognise and deal with Warata and make rental payments in accordance with the MOU. If RH did not know about the Moga's ownership of the Land earlier, at least when the Court proceedings were issued, they were notified and had reason to know that Warata's claim was in question. This should have caused RH to opt for either of two choices. The first option was to

freeze its operation on the land until the ownership issue was determined in Court so it could deal with the legitimate owners. However, this could have operated against its operations. Hence, there would have to be another workable option. That would have been the second option. The second option open to RH was for it to get the disputing parties to the negotiating table, enable them to discuss their dispute with the facilitation of a well-trained and experienced mediator, appropriately support and enable the process to help resolve the problem promptly. The first option in part is what RH went for in that, it appears to have allowed the parties to fight it out in Court and at the same time, honour its commitment to Warata. When it did that, it did so at its own risk and in total disregard and disrespect for the fact that there was serious claim against the group RH chose to deal with and the issue was in the Court process.

32. In these circumstances, we find that the learned trial judge was undoubtedly correct when he found as he did. The Kwikila Local Land Court on remittance from appeal to the Provincial Land Court found Moga was the owner of the Land. The Waratas did not challenge that final decision. Obviously, RH dealt with the wrong party or a fraudster, with full knowledge that their claim of ownership was under challenge. Hence, the MOU RH entered into with Warata and the payments RH made under that MOU to Warata could not be taken into account against Moga's claim as was correctly found by the learned trial judge. Similarly, since RH entered into the Land without the expressed or tacit consent and approval of Moga, RH's first entry and remaining on the Land until the end of its operations was clearly trespass and continuous trespass. In other words, RH's entering the Land, remaining and carrying out its operations on it without the approval of Moga was clearly illegal and the illegality continued until RH vacated the Land at the end of its operations. We endorse the learned trial Judge's findings that, RH's conduct was disrespectful and in total disregard of Moga's ownership rights and interests in the Land and in any case the ownership issue was in Court. We add, this was a serious breach of Moga's rights as owners of the Land which is guaranteed by s. 53 of the *Constitution* in the context of providing against compulsory acquisition of land except as permitted by law. We reiterated that, in the particular legal and factual setting in PNG, possession cannot and is not a requirement or essential element in finding trespass. The English or common law position is thus inappropriate and inapplicable to the circumstances of PNG. Hence, the fact that Moga was not physically in possession does not matter. On these basis, we dismiss grounds 2, 5 and 6 of the Appeal as having no merit.

Award of damages – Issues 4 to 10 (Rest of the grounds of Appeal)

33. Having found that the learned trial Judge was correct in finding trespass against RH, it is now necessary to turn to a consideration of how his honour dealt with the question of damages. Issues 4 to 10 or appeal grounds 24, 31, 25,

26, 27, 7, 8, 9, 10, 17 13, 14, 11, 12, 15, 16, 29, 1, 3, 18, 19, 20, 28, 4, 10, 32, 33, 34 and 23 concern this question, by reason of which we will deal with these issues together.

34. As noted and in summary, RH argues that the learned trial Judge erred in not applying the principle that "in general the purpose of an award of damages in tort is to place the plaintiff in the same position he would have occupied if the tort had not occurred." At the same time, RH accepts that "in trespass to land, damages may be assessed by reference to the benefit the defendant derived from the use of the land". Then citing *McGregor on Damages* and a few English cases like *Whitwham v Westminster Brymbo Coal Co* and others, RH further argues that, it is important to identify what the benefit was. In this case, the use of the Land and hence, the benefit to RH was storage and stockpiling of logs that came from elsewhere and shipping of the logs from the Land. RH argues that, the learned trial Judge erred in taking into account and proceeding to assess damages based on the total benefits to RH. Further RH argues, the learned trial Judge used wrong basis and facts from inadmissible evidence to arrive at an award that was excessive. Additionally, RH argues, the learned trial Judge erroneously included assessment of substantial damages for a road access which was not pleaded and supported by any evidence adduced for RH at the trial.

(a) Relevant Principles

35. We agree that, the principle generally is to restore a plaintiff though not exactly to the same position but, as best as money can, to the position he or she would have been had it not been for a defendant's tortious action. Assessing damages is not matter of mathematical or scientific precision. It however, requires a careful consideration and weighing of all evidence presented before the Court and Court arrives at an award it considers will best compensate a plaintiff who suffers loss or damage on account of a defendant's tortious actions. In the case of assessing damages for trespass in our country, there are a number of National Court judgments. One of the most significant ones is the decision of Bredmeyer J., in the case of *Madaha Resena & Ors v. The Independent State of Papua New Guinea*. There, Bredmeyer J., quoted the following passage from *McGregor on Damages*, 15th ed. (1988), Ch. 32 at paragraph 1421 and applied it to the case before him:

> *"Nevertheless, on the strength of these decisions as establishing the principle, it was held in Whitwham v. Westminster Brymbo Coal Co. [1896] 2 Ch. 538 at 542, where the defendant had trespassed on the plaintiff's land by tipping soil from his colliery upon it, that the principle of the wayleave cases applied so that the damages were not to be assessed merely by taking the diminution of the value of the land but the higher value of the user to which the defendant had put it. Lindley L.J.*

said the law was settled by Jegon v. Vivian, (1871) L.R. 6 Ch. App. 742. He put the matter thus: "The plaintiffs have been injured in two respects. First, they have had the value of their land diminished; secondly, they have lost the use of their land, and the defendants have had it for their own benefit. It is unjust to leave out of sight the use which the defendants have made of this land for their own purposes, and that lies at the bottom of what are called the wayleave cases". In the result, it was held that as to so much of the plaintiff's land as was covered by the soil tipped thereon by the defendant, the value of the land by using it for tipping purposes was the correct measure, this value being much greater than the diminution in the land's value since it was the only land procurable for tipping purposes. And in more modern times the courts have applied Whitwham v. Westminster Brymbo Coal Co. to reach a similar result. In Penarth Dock Engineering Co. v. Pounds [1963] 1 Lloyd's Rep. 359, the defendant, having bought a pontoon or floating dock from the plaintiffs failed to have it removed within a reasonable time from the dock premises of which the plaintiffs were lessees and which were in the course of being closed down by their lessors. In the plaintiffs' action, which was framed as trespass or breach of contract, Lord Denning M. R. assessed the damages at the benefit obtained by the defendant by having the use of the dock premises after he should have removed the pontoon, although the plaintiffs had lost nothing since the dock premises were of no use to them and their lessors had not required them to pay extra rent".(Underlining supplied)

36. As can be seen from this passage, in *Whitwham v Westminister Brymbo Coal Co* (supra), the Court assessed damages measured by the benefit derived from the defendant's use of the claimant's land for tipping soil. Similarly in *Penarth Dock Engineering Co. Ltd v. Pounds*, the Court assessed damages measured according to the benefit the defendant had obtained in using a berth on the plaintiff's dock without permission. These two cases have been widely cited in many other English and Australian cases and texts books. A recent example of that being done are the English cases of *Star Engery Weald Basin Limited & Anor v. Bocardo SA* and *Attorney General v. Blake & Anor*.

37. The learned trial judge adopted these principles with emphasis and said these principles supported his view that "damages for the plaintiff should be decided on the basis of the total benefits the defendant derived from using the land." Then applying these principles, His Honour found Moga was injured in two respects. The first was the damage done to its land which resulted in diminution of the value of the Land. The second was in terms of Moga being deprived from using and benefiting from the Land for the period RH occupied and used the Land illegally. The learned trial Judge further found that, the passage was also fitting to the gravity of the damages or injuries suffered by

Moga. In this regard, His Honour noted that Moga adduced evidence showing RH brought in through an access road round logs in large volumes, stored them, used big machinery like loaders and a giant crane to move and load logs from the log pond onto pontoons, barges and tugboats berthed not far offshore which were used to carry logs to ships. This, his honour found had the support of an affidavit evidence adduced for Moga, which amongst others, annexed cuttings taken from the Post-Courier newspaper dated 28th January, 1992. As his honour found, this evidence was admitted without any challenge from RH.

38. We make three observations. Firstly, land use varies from country to country and more so from economy to economy. A landlord who is deprived of his property in a developed economy or in the cities and towns could easily be measured and remedied in monetary terms. City and town land could easily be used for a variety of purposes if the original state cannot be restored or if the land has been completely lost, the land could be replaced by the purchase of an alternative land from damages awarded. However, a landowner in a rural setting as is the case for most of the people of PNG, the harm and loss done to a landowner may be immeasurable and irreparable. This is because, it is from the land itself in their natural setting in most cases, provide survival supplies to the people, for food, accommodation and other basic needs that sustain them. Such land support hunting, gathering and even gardening. When the original state of the land is changed with its natural habitat and vegetation and other natural properties lost, it becomes totally useless for a rural dweller. Depending on the size of the land and the nature and extend of the damage done, the landowner will no longer be able to hunt, gather, garden or otherwise use his land in the same way before. These cannot be re-established easily within a short space of time or at less costs and in any case if possible, not back to its original position. This is why we say damages for such land is immeasurable and might be continuous for many generations to come for the landowners. Given these, the way damages are calculated in the developed economies and or in cities and towns, cannot be used to assess damages done to a land situated in a rural setting.

39. Secondly, we note that, none of the English cases as followed and applied in PNG and elsewhere appear to discuss and take into account the principle that a person cannot be allowed to gain from his or her illegal or criminal conduct. A number of Supreme and National Court decisions in PNG have spoken of and or applied this principle in the context of other settings. One of the cases on point is this Court's decision in *PNG Deep Sea Fishing Ltd v. Luke Critten*. That was in the context of two different views on upsetting a title to land on the basis of fraud as represented by the decisions in *Emas Estate Development Pty Ltd v. John Mea & Ors* and *Koitachi Ltd v. Walter Schnaubelt* on the one side and *Mudge v. Secretary for Lands* and cases that follow it on the other side. At paragraphs 24 and 25 of the judgment the Court tried to make sense of these

deferent positions in the following way:

> *"In our view, sense can be made out of the decision in Mudge and Kotachi on the one side and Emas on the other. The decision in Mudge and Kotachi could work well with one complimenting the other. Where title in certain property has passed a number of hands and or a considerable period of time has passed and is hard to trace back what has happened, the need to bring fraud home to the eventual title holder is sensible and could apply. However, where title in a property has not passed hands or the circumstances leading to either grant or transfer of title can easily be traced and established, the requirement to bring fraud as determined by Mudge and Koitachi home to the eventual title holder may be inappropriate. The title holder knowing this position of the law may well have deliberately or by his conduct facilitated a breach or otherwise a failure to follow all relevant processes and requirements for a proper, fair, and transparent grant or transfer of title over State Leases, which may fall short of fraud as held by Mudge and Koitachi to gain from his own illegal, improper, unfair and questionable conduct. This would no doubt run into conflict with well-established principles of law which say that, no one can be permitted to gain from his or her own illegal conduct. Against such possibilities, Emas does make sense.*
>
> *In our view, the principle enunciated in Emas is a necessary safe guard against the abuse of the process prescribed for the proper, fair, transparent and legal allocation of State Leases. In a jurisdiction like PNG where there is ready abused of legislatively prescribed process particularly over a much sought after resource like land, and other regulatory requirements for safety and well fare of the nation, the decision in Emas becomes very important. The situation in PNG is not the same as in England, Australia or elsewhere, where the state owns most of the land and there is a large supply of land. Also, unlike Australia and England, there is in PNG, a ready resort to abusing legislatively prescribed process particularly in relation to land as much as other important resources. Under Mudge, people who either deliberately or by their own conduct chose not to follow the proper process laid for applying for and being granted State Leases and eventual registration to gain from their own illegal and improper conduct or failures, which cannot be allowed. Hence it makes sense to qualify the application of the decision in Mudge and those following.* (Emphasis supplied)

40. Trespass is clearly an illegal activity, which is both a criminal and a civil wrong in nature which can result in criminal prosecution and a civil claim for damages. Following the English common law or case law approach as adopted

and applied in PNG already, effectively allows a trespasser to gain from his or her own criminal or unlawful conduct and get away with it save only for the small amount of damages as assessed in the past cases. We are of the view therefore that, any assessment of damages must have a clear reflection of the extent of a trespasser's gain out of his or her illegal entry and use of another's land, and not the rate that applies to rental of city and town land areas or indeed any such rate in terms of price per square meters. Both fairness and equity demand that the damages that ultimately get assessed against a trespasser should indeed reflect the gains the trespasser has made out of his or her illegally using another's land as in this case, which may far exceed the price per square meter.

41. Thirdly, we observe that a landowner would be hard placed to access any evidence on the specifics and more so the full nature and extent of a trespassers gain or benefits from the use of the land. Naturally, a trespasser would be in possession of such information. The onus should be on the trespasser therefore to fully disclose all relevant information or evidence. Such disclosure should be made upon the landowner making a claim against a trespasser to enable an expedited settlement through direct negotiations, mediations or a form of ADR and only failing that, resolution by trial. Any failure to disclose or produce the kind of evidence in question, should result in any secondary or tertiary evidence being allowed to overcome the lack of any direct evidence, as a practical application of the best evidence rule principle. The emphasis worldwide now is on the need for the parties to settle their disputes and reserve the Courts for cases in which there is a question warranting resolution only by judicial determination. Kandakasi J, in *Able Construction Ltd v W.R. Carpenter (PNG) Ltd*, refers to this position and provides at paragraph 18 of his judgment a useful guide as to the kinds of cases inappropriate for resolution by mediation in the following terms:

> "*This worldwide focus on mediation is not surprising as mediation is suitable for all cases. The only exception to this would be cases in which mediation is inappropriate because:*
> - *a real possibility of setting a legal precedent through a judicial determine which would clarify the law or inform public policy is presented;*
> - *any settlement out of court is not in the public interest;*
> - *protective orders such as injunctions are required immediately;*
> - *there is a clear case warranting summary judgment;*
> - *a genuine dispute requiring the Court to give a declaratory relief is presented;*
> - *family disputes especially involving child abuse, domestic violence, etc, is presented;*
> - *the parties are in a severely disturbed emotional or psychological state, such that they cannot negotiate for themselves or others;*

- *a genuine dispute requiring interpretation of a constitutional or other statutory provision is presented;*
- *there is a genuine dispute over the meaning and application of a particular provision in a contract or an instrument, a determination of which will help finally determine the dispute;*
- *a preliminary issue such as questions on jurisdiction, condition precedents, statutory time bar and the disclosure of valid cause of action requires determine before anything else; or*
- *a public sanction as in a criminal case is needed for public health, safety and good order."*

42. This means, unless a case falls into any of the kinds of cases listed, all cases should be resolved by the direct negotiations of the parties and failing that by mediation or a form of ADR. Hence, both for expedited settlement purposes and failing that an expedited trial and a resolution of a dispute on the substantive merits of a case having regard to all of the facts surrounding and or the facts giving rise to a dispute, a party that is in possession or should be in possession of the relevant evidence should readily provide them without waiting for requests and orders for discovery. The traditional way of putting a party to his prove and force on a trial is not acceptable, just, appropriate or warranted in this modern day and age where the emphasis is on expedited and effective dispute resolution at less costs and time.

43. Having regard to all of these, we are of the view that the amount to be awarded in damages in the case of trespass and illegal use of another person's land, it would depend on the extent of damages caused to the land and gains made by the trespasser. This could be measured against the degree and value added to the trespasser's business or gain against the total gross income and not on the profit figures and before deducting the trespassers expenses to produce the income or gain before tax. Such an approach is dictated by the fact that, damages to the land would have already occurred as the trespasser incurs expenses for businesses conducted on the land. There is also the risk of a trespasser inflating his or her expenses to produce no profits or negative profit figures and the landowner not being compensated at all.

(b) Present Case

(i) General Damages

44. Taking into account all of the foregoing, we note in this case, the learned trial Judge found on the basis of uncontested evidence and RH's own pleadings that, RH trespassed and continuously occupied Moga's land for 8 years. Also on the basis of uncontested evidence before him, the learned trial Judge decided to accept assessment of damages by two different organisations, namely

Partners with Melanesia and Environmental Science and Community Development Foundation for the foreshore land used by RH for access road and log pond. The rate used by these two organizations was K1.90 per square meter. The formula these organisations used was Rate x Area x Years. Using that formula for the access road, damages were calculated at K1.90 x 337,590m^2 x 8 years producing a total of K5, 131, 368.00. For the log pond, it was K1.90 x 129,000m^2 x 8 years which produced a total of K1, 960, 800.00. At the same time however, the learned trial Judge found that no specifics were provided as to the particular kind of damages done to the land except only that there were damages generally caused to the land. As noted, RH did not take any issue with these evidence and made no submissions against the learned trial Judge accepting these evidence and acting upon them. Also, RH did not adduce any evidence of the income generated from illegal use of the Land or for that matter, any other evidence rebutting or contradicting the only evidence before the Court. In those circumstances, the learned trial Judge decided to award half of the value of damages given by the two organizations and arrived at a total award of K4, 046, 084.00 in general damages.

45. Before the learned trial Judge were also evidence of records of log exports adduced by Moga for the Bonua Magarida timber project. Going by the 'Shipments Checks' which showed the F.O.B prices for volumes of logs exported. As his honour found, according to these records, which are not disputed, in 1991, 1992, 1993 and 1994, K32, 216, 827.88 worth of logs were exported to Asian markets. For 1996, only one shipment of logs valued at K547, 984.45 was recorded. That was for 13th August 1996. No records for export of logs were presented for the years 1989, 1990, 1995 and 1996, except for the single shipment recorded for 13 August, 1996. The volumes and prices of logs exported in those four years were thus unknown. His honour therefore, chose to use the volumes of logs exported in 1991, 1992, 1993 and 1994 to estimate the volume and value of export of logs for the years 1989, 1990, 1995 and 1996 and arrived at an average of K7 million worth of logs in each of those years producing a total amount of K28 million. His honour then calculated the average total value of logs exported and arrived at K60 million as the F.O.B prices for the 8 years period.

46. The learned trial Judge relied on a number of earlier cases to assist him in working out the prices for the logs. The main one was *Central Province Forest Industries Pty Limited v. Rainbow Holdings Pty Limited*, which went to the Supreme Court and is reported as *Rainbow Holdings Pty Ltd v. Central Province Forest Industries Pty Ltd*. The others included *United Timber (PNG) Ltd v. Mussau Timber Development Pty Ltd*, and *Mauga Logging Company Pty Ltd v. South Pacific Oil Palm Development Pty Ltd (No.1)*.

47. As we noted earlier, RH neither objected to the evidence adduced for Moga, nor did it adduce any evidence in rebuttal and presented the actual position on the number of log shipments and their value. No doubt, RH was in a position to adduce into evidence the correct and relevant records but it failed to do so and failed to object to the only evidence Moga was able to adduce into evidence. Now with the Courts worldwide encouraging more settlement through direct negotiations, or mediation or a form of ADR as we already noted above, all parties should be dealing with each other in a fair, frank and open manner. Again as already noted, the days of a party putting his foot down and forcing a plaintiff to his prove are long gone now in light of the Courts these days requiring and prompting more out of Court settlement through direct negotiations, mediation or a form of ADR. This means necessarily that, a party who is in possession or is required and or expected to have in his possession any relevant information, documents or such other evidence, which hold the key to resolving a dispute, must disclose them, unless such a party is precluded by an order of the Court or any clear legislative provision from doing so. Where there is a failure to so disclose, the Court is entitled to admit into evidence whatever evidence the opposing party is able to produce and make use of such evidence in order to do justice on the substantive merits of the case.

48. Here, RH was the party which had or should have had in its possession the relevant records or evidence of the volume of logs exported and their market value for the whole of the 8 years it was in occupation of Moga's Land. If RH did not have in its possession such evidence or record, the duty was on RH to provide a reasonably convincing explanation as to what became of the evidence. RH neither produced the relevant evidence, nor did it provide any reasonable explanation for not being able to produce them. In those circumstances, the learned trial Judge did the best he could to arrive at a decision. Now on this appeal, RH tries to do what it failed to do in the Court below in terms of taking issue with the admission into evidence and the Court making use of evidence adduced in the Court below. On Moga's objection, we decided against RH's belated attempt at raising arguments or raising issues it should have raised in the Court below. The evidence and the pleadings were thus before the learned trial Judge for him to consider, unopposed as they were. Unlike in a criminal case, all that the learned trial Judge needed to be satisfied with was the question of, did Moga as the plaintiff, establish its claim on the balance of probabilities. The learned trial Judge decided to make use of the evidence before him in the light of no objections or argument against him doing so and arrived at his decision.

49. It is trite law that where damages cannot be assessed with certainty it does not relieve the wrongdoer of the necessity of paying damages. Where precise evidence is available the court expects to have it. However, where it is not, the Court must do the best it can. The Supreme Court restated this position in its decision in *Rex Lialu v. The State*:

"The position of the judge is analogous to that of a civil jury who are called upon to award damages for a breach of contract, or a tort, in relation to goods which have no market value, and for the assessment of the value of which no generally accepted measure exists. The jury must do the best they can; and so must the judge."

50. In the end in this case, the learned trial Judge decided to award damages using a formula used by the two organisations which separately calculated or assessed Moga's damages. This does not reflect the actual gain to RH by the use of the Land illegally for 8 years, which on a very conservative estimate his honour found came to K60 million. If there was a cross appeal by Moga, we would have reversed the award and substitute it with an award that reflects the actual amount of gain. The substituted amount would be about K20 million, being one third of the estimated income generated from the use of the Land. However, since there has been no cross appeal, we will leave the award by the learned trial Judge unaffected. In these circumstances, we fail to see how the learned trial Judge fell into error as argued for RH. Accordingly we dismiss all of the appeal grounds and arguments against the award of general damages.

(ii) Exemplary damages

51. Turning then to the award of K150, 000.00 in exemplary damages, we note the relevant principles are clear. In *Abel Tomba v. The State*, the Supreme Court considered the circumstances in which exemplary damages could be awarded. Relying on *McGregor on Damages*, 5th Edition, Amet CJ (as he then was) expressed the view that exemplary damages may come into play "whenever the defendant's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like." This easily covers cases in which a defendant acts illegally and is in breach of clear legislative provisions and other requirements in total disregard and disrespect for the rights and interests of others. This is why as the learned trial Judge noted, "exemplary damages are vindictive and punitive in nature" to punish the party against whom the award is made. It is usually at the discretion of the Court to award such amounts as the Court considers appropriate in exemplary damages having regard to the conduct of a defendant in the particular circumstances of each case. The main purpose of awarding exemplary damages is dual in purposes. The first is to punish and the second is to deter the party against whom the award is made as well as others from engaging in future and further such conduct or behaviour.

52. In the present case, the learned trial Judge took into account these relevant principles as well as the relevant cases on point and the kinds of awards made in past cases before deciding to make the award. His honour also took

into account a number of factors against RH to arrive at the award. In particular, his honour found RH:

(1) was aware that there was a dispute over the ownership of the Land when it signed the MOU with the Warata;

(2) deliberately breached Clause 4 of the MOU when it continued to pay the monthly rental fees for the land to Warata when ownership was yet to be resolved. Clause 4 of the MOU expressly stated that in the event of a dispute over ownership of the land, the monthly rental fees for the land were to be paid into a Trust Account;

(3) breached ss. 144 and 145 of the *Land Act* when it committed trespass from the first date of its entry to every day of its occupation until it vacated the land and illegally made use of the Land; and

(4) breached s. 46 of the *Forestry Act* and the scheme of the Act which requires a full recognition and respect for the rights of the customary owners of a forest resource in all transactions affecting the resource.

53. Also, his honour found that the deliberate breach of the MOU was a factor in aggravation against RH and amounted to reckless disregard of Moga's rights and interest as the true and correct landowner. Then his honour eventually concluded:

> *"From the evidence it is clear that the defendant was more interested in its logging activities, including exporting logs for its own enrichment than being concerned with the interests of the landowners, hence its reckless disregard of the rights and interests of the plaintiff. As I said, the defendant carried on its logging activities unabatedly on the land for eight years without meaningfully addressing the plaintiff's concerns. Such an attitude requires deterrence: Mark Hosea Sinai Customary Legal Representative of Buekau clan v. Kei Buseu Kampani Pty Ltd & Ors N935. The defendant is a well-established and well known logging company which is extensively involved in logging businesses throughout Papua New Guinea and such unscrupulous logging practices should be met with equally strong punitive damages against the defendant. The damages awarded should also provide general deterrence to other logging companies from engaging in similar practices."*

54. His honour was in fact striking a now well recognized cord in doing or conducting business ethically. Businessmen and businesses, domestic or

international, who mean well and want to succeed often pay a lot of attention and invest quality time and resources to seeking out and securing the endorsement and approval of the community in which they wish to set up and operate. The technical term used to describe this is "social license to operate". As already noted, Kandakasi J., in his decision in *Alex Bernard & P'Nyang Resources Association Inc. v. Hon. Nixon Duban, MP, Minister for Petroleum & Ors* (supra), defined "social license" in the following terms:

> *"'Social license' generally refers to a local community's acceptance or approval of a company's project or ongoing presence in an area. It is increasingly recognized by various stakeholders and communities as a prerequisite to development. The development of social license occurs outside of formal permitting or regulatory processes, and requires sustained investment by proponents to acquire and maintain social capital within the context of trust-based relationships. Often intangible and informal, social license can nevertheless be realized through a robust suite of actions centered on timely and effective communication, meaningful dialogue, and ethical and responsible behaviour."*
>
> (Emphasis supplied)

55. Good governments and or States make the need to seek and secure the social license to operate a condition precedent for any major development. A legislative expression of this in PNG is in the *Oil and Gas Act* 1998. The relevant provision is section 47 which requires developers in the oil and gas industry to first carryout social mapping and landowner identification studies (SMLIS). Again Kandakasi J., discussed the effect of s. 47 in the same judgment as follows:

> *"Clearly, subsections (1), (2) and (3) stipulate in no uncertain terms that a SMLIS [social mapping and landowner identification studies] is a condition for each of the three licenses. The rest of the provisions of s. 47 make it clear that, the requirement for a SMLIS is a condition precedent to any of the three licenses, PPL, PRL and PDL and land to be taken up by pipelines and facilities. Subsection (4) requires at the commencement of these licenses, namely at the PPL stage, which would be the first ever time anyone interested in a petroleum exploration and eventual development enters any customary land, to meet the requirement for a SMLIS. Subsection (5A) makes it clear that any application for a variation of any of the licenses must be conditional on a SMLIS. Hence, in my view, the requirement for a SMLIS is a condition precedent to any petroleum license under the OGA, their extension or any variation. This is a necessary condition precedent because it is through this process the real customary landowners and those who are by custom connected to them get identified for all purposes under the OGA. This necessity is*

dictated by a need for the customary landowners on whose land the development is going to take place giving their permission to prospectors and developers to enter their customary land, consider and approve any petroleum project, participate at the appropriate levels, including a development forum and sign petroleum development agreements and participate in benefit sharing with other landowners and the State."

(Emphasis supplied)

56. More recently, in *Kanga Kawira & Ors v. Kepaya Bone & Ors* (supra) Kandakasi J., had reason to refer to these principles and the need to apply this prerequisite. There, his honour emphasised the need for businesses interested or involved in the extractive industry based on customary land with the support of the State to properly identify and organise the correct land owners of the land they are interested in and organise them into properly incorporated land groups (ILGs) under the *Land Groups Incorporation Act*. After outlining a possible transparent and open process to incorporate ILGs, his honour stated:

> *"Both the State through the office of the Registrar and a developer need to appreciate the problem that exists and make it their number one priority to get the customary land owners properly identified and organised in accordance with the process just described above before any major development can take place on any customary land. In this way, as I said in my decision in the P'Nyang case, the developers will be able to secure their social licenses to operate and thereby avoid avoidable project security risks. This I noted was "a critical prerequisite for any project especially, in the natural resources extractive industry." Given that, many international businesses accept the need to obtain their "social licenses" and keep them current during the currency of their projects."*

57. At paragraph 45 of his judgment, his honour went on to say, the need to properly identify and organise customary landowners into properly organised ILGs and get their consent and approval for developments on their land is not peculiar to the oil and gas sector. Instead, it applies to the whole of the natural resource extractive industry that are based on customary land. His honour then suggested:

> *"I suggest strongly that, the developers who enter customary land with the support of the State and the State who have the means, resources and ability and want to access the peoples resources must first ensure that the landowners are properly identified and organised into proper ILGs, through a fair, open, transparent and public process as the one described above and where the correct landowning clans are identified and organised in properly incorporated ILGs that are truly for and by*

the members of each of the clans or land groups. A failure in this respect would be asking for the same kind of fate that followed in the Leo Maniwa & Ors. v. Aron Malijiwi & Ors (supra) case, a nullification of developments or projects which could prove too costly for developers and the State."

58. In the present case, there is no evidence of RH spending any time or resources at all to identify the correct landowners, organise them properly and then seek and secure their free and informed consent on terms fair to RH as well as the landowners. It was incumbent on RH to, but it did not produce any evidence of how it first entered the Land and sought and secured the consent and approval of the true and correct landowners to enter, continue to occupy and conduct its business on it. As already noted, it is clear from the evidence that was before the Court below that, RH choose to deal with Warata upon that clan making representations to RH. Again as already noted, upon that representation, RH should have conducted its own due diligence to ensure that Warata was indeed the true and correct owner of the Land. There is no evidence of RH having conducted such due diligence. From this, we can infer that RH entered the Land without first identifying, properly organising and ascertaining the true and correct owners of the Land and thereafter seeking and securing their approval for it to enter, remain and conduct its business on the Land as it did for 8 straight years. Again as already noted, it is also clear from the evidence before the Court that, when Warata made its representation and therefore its claim, Moga took issue with that claim. This resulted in the ownership issue landing in the Local Land Court, the District or Provincial Land Court and back from there to the Local Land Court which finally determined in favour of Moga. Further, despite being well aware of the dispute and the Court proceedings, RH continued to deal with Warata and as the learned trial Judge found, even in breach of clause 4 of the MOU between itself and Warata. Furthermore, while the dispute was going on and the matter was in the Court process, RH continued its business operations until it reached the end of its operations. During this period, a lot of logs were brought in, stored and eventually shipped out of the Land. Clearly therefore, RH substantially gained financially as discussed in paragraph 44 and 45 above. We are of the view that, RH could not have gained in this way without the illegal entry, occupation and use of Moga's land in the way it did.

59. All persons, incorporated or natural, including businesses, local or foreign as well as the State are required to recognize and respect the rights and interests of customary landowners before entering any land, occupying and making use of it. Before doing that, especially on any customary land, a person wishing to do so must first exercise care by carrying out due diligence to correctly identify the customary landowners through a transparent and open process as described by Kandakasi J in his decision in *Kanga Kawira & Ors v.*

Kepaya Bone & Ors (supra). Once the owners are properly identified, they should then be properly organized into ILGs in accordance with the ILG Act. This is necessary to ensure there is a properly organised legal identity with a proper structure in place to deal with the interested party and properly receive, manage, distribute and account for the funds received for the landowners. Thereafter, through the duly appointed or recognized leader of the landowners, the interested party should then legally seek and secure its "social licence" to enter, occupy and conduct its business on the relevant customary land. Any failures should be met with damages representing the value added or contributed to the trespasser's business by the use of the customary land.

60. We repeat the, onus to prove the value should be on the trespasser who would be in possession of the relevant information and or evidence. Alternatively, if this is not possible, a percentage of the total income generated by the business or activity conducted on the land having regard to the various other important components contributing to the income would do. That should form the basis to assess damages due to the customary landowner. Again, repeating what we already said, generally speaking, there should be three main components. The first component should be the expenses of extracting and shipping the resources with its full operational costs, the second should be selling the product be it logs or gas or oil or whatever might be the resource extracted while the third component should be the use of any customary land illegally. Using these factors, the landowners should be entitled to one third of the overall income before tax and before allowing for the expenses. In addition to damages, there should be an award of exemplary damages that is reflective of the trespassers gain from the illegal use of land both to punish and to deter the particular offenders and others who might be inclined to repeating such conduct and behaviour for one's commercial or other interests. If general damages already represent one third of the total income generated from an illegal entry, occupation and use of any customary land, exemplary damages should reflect the amount assessed in general damages.

61. Having regard to all of the above, we are of the view that the learned trial Judge could have awarded more in exemplary damages. His honour however, decided to award K150, 000.00. Again, there is no cross appeal against this award. We are of the view that, such an award if not more was called for. In these circumstances, we do not see any basis let alone any merit in the various appeal grounds against the award of exemplary damages. Accordingly, we order a dismissal of these grounds.

(iii) Special damages

62. This leaves us to now deal with the remaining two grounds of appeal namely, grounds 33 and 34, which concerns an award of K5, 000.00 in special

damages. We have already decided against these two grounds of appeal on the basis that they are raised for the first time in this Court. In any case, a relook at what transpired in the Court below, clearly reveals that, Moga pleaded and claimed special damages, to which RH did not object or argue against. Hence, it was clearly an uncontested item before the Court and the Court decided to award these damages. By reason of that, this part of the appeal should be dismissed.

63. There is an additional reason to dismiss this part of RH's appeal. This comes from the reasons for the learned trial Judge's decision. In arriving at his decision, his honour took into account the relevant and correct principles governing the assessment and award of special damages. That included the judgment in *Roselyn Cecil Kusa v. MVIT*, which adopted and stressed the principle stated by Lord MacNaghton in *Strom Bruks Aktie Bolag v. Hutchinson*. There his Lordship said:

> "*Special damages on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary cause. They are exceptional in character and therefore they must be claimed and proved strictly."*

64. But as the learned trial Judge noted, in our jurisdiction, the above principle has been applied with a qualification. The qualification is in cases "where the plaintiff is illiterate or in cases where it is shown that there were expenses incurred but it was not possible to keep records of the expenses." His honour correctly noted that in "such cases the Courts have, after satisfying themselves from evidence that there were expenses incurred, made reasonable estimates of expenses incurred." His honour then found the case before him was one such case and found further that Moga "did incur expenses to attend the hearings, despite the lack of any receipts supporting the claim. In particular his honour noted the proceeding commenced on 25th October, 2005 and it took two years and two weeks to complete. This meant Moga who came from a remote village in the Abau District of the Central Province, would have travelled to Port Moresby from its village to instruct its lawyers and would have from the date of filing of the writ visited Port Moresby many times to attend to the case. In those trips, Moga would have incurred costs in transport to and from Port Moresby, either by canoe or PMV. His Honour also found that, Moga would have also incurred food and accommodation costs. Given that and in the light of no direct evidence by way of receipts confirming the expenditure, the learned trial Judge decided to award K5,000.00 which he considered was reasonable.

65. Strictly speaking, the damages the learned trial Judge awarded would have been costs of the proceedings. His honour's order for costs could cover these expenditure. However, it makes no difference in the end result. The

liability remains for RH to discharge. At the trial, RH neither produced any evidence nor did it present any argument in rebuttal. Additionally, we do not consider the award excessive or totally inappropriate. On the taxation of Moga's costs, under the costs order, the items allowed under the special damages should be excluded.

Decision on the appeal

66. Having regard to all of the foregoing discussions and decisions, the final decision of this Court on this appeal is obvious. Since, we dismissed all the grounds of the appeal, there is no ground on which the appeal can survive. Consequently, we order a dismissal of the appeal. Costs will follow that event against RH, the Appellant to be taxed, if not agreed.

Warner Shand Lawyers: *Lawyers for the Appellant*
Yandeken Lawyers: *Lawyer for the Respondents*