

PAPUA NEW GUINEA
IN THE SUPREME COURT OF JUSTICE

SCA 84 OF 2011

BETWEEN:

LOUIS MEDAING and 1083 others

Appellants/Cross Respondents

AND:

RAMU NICO MANAGEMENT (MCC) LIMITED

First Respondent/Cross Appellant

AND:

THE INDEPENDENT STATE OF PAPUA NEW GUINEA

Second Respondent/Cross Appellant

AND:

DR WARI IAMO in his capacity as the Director of the Environment

Third Respondent/Cross Appellant

Waigani: Davani, Hartshorn and Sawong JJ.
2011: October 4th, 5th
: December 22nd

Appeal and Cross Appeal

Cases cited:

Sedleigh-Denfield v. Callaghan [1940] AC 880

Pride of Derby and Derbyshire Angling Association Ltd v. British Celanese Ltd [1953] ch.149

Ibeneweka v. Egbuna [1964] 1 WLR 219

Samal Holdings Pty Ltd v. Vhorns [1971] 1 NSWLR 192

Government of Papua New Guinea v. Barker [1977] PNGLR 386

Lewis v. The State [1980] PNGLR 219
Bean v. Bean [1980] PNGLR 307
Dent v. Kavali [1981] PNGLR 488
Reference by Simbu Provincial Executives [1987] PNGLR 151
Rundle v. Motor Vehicles Insurance (PNG) Trust [1988-89] PNGLR 20
B Fortunaso Ltd v. Bank of South Pacific Ltd [1992] PNGLR 275
Jan De Nul (UK) Ltd v. N. V. Royale Belge [2000] EWHC 71
PNGBC v. Jeff Tole (2002) SC694
Lister v. Hong [2006] NSWSC 1135
Peter Mokeng v. Timbers (PNG) Ltd (2008) N3317
Tigam Malewo & anor v. Keith Faulkner & ors [2009] PGSC3 SC960
Pastor Johnson Pyawa v. CR Andake Numwa (2010) N4143
Ramu Nico MCC PNG Ltd v Tarsie (2010) SC1075
Barr & Ors v. Biffa Waste Services Ltd (No. 3) [2011] EWHC 1003

Counsel:

Ms. T. G. Twivey and Ms. G. Topa for the Appellants/Cross Respondents
Messrs C. Scerri Q.C., I. R. Molloy and G. Gileng for the First Respondent/Cross Appellant
Mr. T. Tanuvasa for the Second and Third Respondents/Cross Appellants

22nd December 2011:

1. **DAVANI J:** (*Dissenting*) This is an appeal arising from decision of 26th July, 2011 in proceedings WS 1192 of 2010 filed in the National Court Madang, decision, delivered after a very lengthy trial.
2. The appellants appeal the part of the National Court's decision that refused to grant a permanent injunction to restrain the Ramu Nico Management (MCC) Limited ('Ramu Nico') from allowing discharges into the sea through a deep sea tailings placement system ('DSTP').
3. All respondents opposes the appeal and also cross-appeal the Trial Judge's findings in relation to Declarations he ordered, that the appellants had established causes of action in private and public nuisance and that the operation of the DSTP is contrary to National Goal No. 4 of the Constitution.
4. All respondents also cross-appeal on questions of facts.

Orders sought in appeals

5. The Notice of Appeal filed by Twivey Lawyers on 27th July, 2011 contains 20 grounds which seek the following orders;

- that the appeal be allowed;
- that the costs order was made that the parties bear their own costs;
- that the respondents shall not allow mine tailings or waste to be discharged into the sea through the DSTP or at all;
- that the respondents to pay the appellants' costs of and incidental to the appeal, including that of the National Court;
- any other orders.

6. The Notice of Cross-Appeal filed on 5th September, 2011 by Posman Kua Aisi Lawyers contains 18 grounds and which seek the following orders;

- An order quashing the Declaratory Order made in the National Court that the cross-respondents have established a cause of action in private nuisance in respect of the operation of the DSTP;
- An order quashing the Declaratory Order made in the National Court that the cross-respondents have established a cause of action in public nuisance in respect of the operation of the DSTP;
- An order quashing the Declaratory Order made in the National Court that the operation of the DSTP will be contrary to National Goal No. 4 (National Resources and Environment) of the *Constitution*;
- The cross-respondents to pay the cross-appellants' costs of the appeal and cross-appeal in the National Court;
- Any other orders the Court considers appropriate.

7. In this appeal, the cross-appellants include the Independent State of Papua New Guinea and Dr Wari Iamo in his capacity as the Director of Environment.

Grounds of Appeal

8. Both the Notice of Appeal filed by the appellants and the Amended Notice of Cross-Appeal filed by the cross-appellants outline several grounds which I summarise below.

(i) *The Appeal*

In summary, the appellant's grounds of appeal, are that the Trial Judge erred;

- (i) That because he had already found there to be causes of action in private and public nuisance, that the plaintiffs are entitled to an injunction;

- (ii) When he refused to order a permanent injunction on the ground of unreasonable delay;
- (iii) When he found that there would be no objection to the DSTP when there was clear community opposition to the project;
- (iv) When he held that the operation of the DSTP was not unlawful even when there was already a finding in private and public nuisance;
- (v) When, having already found that there was a reasonable probability of harm to the environment that he should have granted the permanent injunction;
- (vi) When he expressed and emphasized on the aspect of costs occasioned by the project when there was no evidence before the Court;
- (vii) When he held that there was an alternative method of tailings disposal;
- (viii) When the Trial Judge placed too much weight on the drastic economic consequences to PNG if the DSTP did not proceed, especially when there was no evidence before the Court of these drastic economic consequences;
- (ix) That a permanent injunction should have been granted because the Trial Judge had already found that National Goal No. 4 would be breached;
- (x) When, having already found that the appellants had acted in good faith, then refused the injunction;
- (xi) When the Trial Judge took into account irrelevant considerations;
- (xii) That the respondents should have been ordered to pay the appellants' costs because 3 causes of action had been proven.

(iii) The Cross-Appeal

9. All the respondents' cross-appeal by amended Notice of Cross-Appeal filed on 12th September, 2011 by Posman Kua Aisi Lawyers, seeking the following orders;

- (i) An order quashing the Declaratory Order made in the National Court that the cross-respondents had established a cause of action in private and public nuisance in respect of the DSTP;
- (ii) An order quashing the Declaratory Order made in the National Court that the operation of the DSTP will be contrary to National Goal No. 4 (National Resources and Environment) of the *Constitution*;
- (iii) That the cross-respondents pay the cross-appellants' costs of the Appeal and Cross-Appeal and costs occasioned in the National Court;

- (iv) Any other orders the Court considers appropriate.

10. The cross-appellants' grounds are summarised as follows;

- (i) The Trial Judge erred when he made a finding that the appellants had established a cause of action in private nuisance when;
- no such orders have been sought by the cross-respondents/appellants ('appellants');
 - that the appellants had not alleged that the DSTP was or had been in operation;
 - that the claim of private nuisance related to alleged future acts or omissions and consequences;
 - that the appellants have not suffered any losses or damages as a consequence of the operation of the DSTP and that the essential element of the cause of action in private nuisance is loss or damage which was also not alleged or pleaded;
- (ii) The Trial Judge did not have jurisdiction to make a finding or make findings in relation to ownership of customary land;
- (iii) The Trial Judge's findings in relation to public nuisance when no such orders had been sought by the appellants;
- (iv) The appellants' claim is related to alleged future acts or omissions;
- (v) The appellants have not pleaded that there was an interference or loss or damage sustained as a result of the DSTP's operation;
- (vi) That the Trial Judge did not properly consider findings in relation to serious environmental harm and erred when he made such findings;
- (vii) That because the respondents had the approval to construct and operate the DSTP under the *Environment Act 2000*, that these activities were lawful and that therefore the Trial Judge's findings in relation to private or public nuisance cannot be made out because there is no cause of action;
- (viii) That the Trial Judge should not have made orders in relation to National Goal No. 4 because those orders were not sought and also because National Goal No. 4 is non-justiciable.

Common grounds in Notice of Appeal and Cross-Appeal

11. Because similar grounds are raised in both the Notice of Appeal and Cross-Appeal, that I will discuss together, the grounds pleaded in the Notice of Appeal and Cross-Appeal under the various sub-headings raised by the respective parties.

12. The common grounds I see are;

- (i) Customary ownership to land;
- (ii) Environmental findings;
- (iii) Refusal of injunctions (the Trial Judge's findings in relation to private and public nuisance will be discussed together with his findings on Quia Timet Injunctions);
- (iv) National Goal No. 4;
- (v) Statutory authority.

Discussion of the common grounds of appeal in the Notice of Appeal and Cross-Appeal

(i) Customary ownership to land

13. The cross-appellants raise these grounds at par. no. 3(d), (e) and (f) of the Notice of Cross-Appeal.

14. The common submissions in relation to this ground is that the appellants had not yet been declared as customary owners of the land and so therefore should not have come to Court in the manner they did, as **landowners** to the land in question.

15. In the Further Amended Writ of Summons filed on 11th February, 2011, the plaintiffs (appellants) plead at pars. 1(a) and (b) of the Statement of Claim that they are customary landowners on the Rai Coast and have customary land rights over land at Rai Coast and the waters in Astrolabe Bay.

16. In the Defences filed by Posman Kua Aisi Lawyers on 15th October, 2011 and by Stevens Lawyers on 14th December, 2010, the defendants deny these assertions by the plaintiffs pleading that these claims are disputed by the defendants '*and other persons who are not parties to these proceedings*'. The Defences plead that the resolution of these disputes falls exclusively within the jurisdiction of the Land Titles Commission.

17. The Defences plead further that the National Court did not have jurisdiction to determine claims in relation to customary ownership because this is dependent very much on the Land Titles Commission. The plaintiffs on the other hand have filed extensive affidavit material demonstrating their interests in the land the subject of these proceedings and their connections over that.

18. The Trial Judge considered these affidavits and their verbal evidence and made findings in relation to the plaintiffs standing to be before the Court. He said under the heading *'Nature of the plaintiff's interests and concern'* at pg.27 of his published reasons (pg.9670 of Appeal Book) that he was satisfied that the plaintiffs and the people they represent have a physical connection with the coastline of the Madang Province. He acknowledges that there may be some who are not customary landowners, however, that all the plaintiffs have a genuine interest in the operation of the DSTP system and have a genuine concern as to the environmental effect of the DSTP operation. The plaintiffs express their concerns in the affidavits they filed where they depose, amongst others, that the tailings will contain chemicals or poisons that will affect fish stock and other marine resources and that these tailings will be washed by sea currents towards their fishing grounds and villages, deposing to this relying on their local knowledge of the currents.

19. The Trial Judge considers further the issue of standing at pg.63 of his published reasons (pg.9706 of Appeal Book). His Honour noted the respondents' contentions in relation to the dispute over these portions of land and said this;

"I do not think I am in danger of offending against it and I fail to see its relevance to the question of whether an injunction should be granted in the terms sought. I have already found as a fact that the plaintiffs have a genuine interest in the subject matter of these proceedings. They are concerned that the tailings will contain chemicals or poison, that this will affect fish stock and other marine resources, that the tailings will be washed by sea currents towards their fishing grounds and villages. They have a sufficient legal interest. They have standing to be granted an injunction."

(my emphasis)

20. Although the respondents assert that the National Court did not have jurisdiction to deal with this issue, I note the Trial Judge's acknowledgement of the fact that it is indeed a well established principle of land law in Papua New Guinea that the National Court does not have jurisdiction to determine disputes involving ownership of customary land. That is an obvious legal fact. However, to be able to file the National Court proceedings, the appellants had to show that they had legal standing. To do that, they had to file authorities to show that they were authorised by villagers from their area to bring this action to put a stop to the DSTP from progressing any further. In fact, the Trial Judge notes that that is their main concern, that they want to stop the DSTP. They do not want tailings dumped into their ocean.

21. This is not a case where the National Court needed to be satisfied that the plaintiffs were in fact the customary landowners. If this was a case where the plaintiffs were out to prove ownership to the land, then the Court would concern itself with the plaintiffs claim to be the landowners. In this case, all the plaintiffs needed to do was to put before the Court authorities showing that the plaintiffs were properly authorised by people living along the land that will be affected by the tailings to be dumped. That is sufficient in itself. (See Tigam Malewo & anor v. Keith Faulkner & ors [2009] PGSC3 SC960) The issue of ownership to that land was not before the National Court for its determination.

22. I will dismiss the respondents' grounds of appeal in relation to that.

(ii) Environmental findings

23. This ground of appeal is dealt with together with the Trial Judge's refusal to grant a permanent injunction.

24. For the appellants, these are pleaded at ground 3(i), (j), (k), (l), (m), (n), (o), (p).

25. For the respondents, this is pleaded at ground 3(a), (n), (s), (t).

26. The appellants submit that because the Trial Judge had found that there was a real potential of environmental disaster, that he should have granted the permanent injunction. The respondents on the other hand submit that the Trial Judge was incorrect or erred when he found that there was a high likelihood that the DSTP would cause serious environmental harm and he did that without giving proper and adequate consideration to experts evidence called, namely the evidence of Dr. Tracey Shimmield, Ian Hargreaves, Dr Philip Towler, Stewart Jones and John Trudinger.

27. The respondents submit that the Trial Judge erred when he found that the tailings would very likely be toxic or that there would be serious and adverse effects on the benthos at Basamuk Canyon or elsewhere in Basamuk Canyon or Astrolabe Bay when there was no detailed or sufficient evidence as to the nature and effect of the Benthos in Basamuk.

28. The respondents submit also that there was no evidence before the Trial Judge that serious environmental damage had occurred and this was because the DSTP had not commenced. This evidence is related directly also to the Trial Judge's findings on private and public nuisance which I will discuss later below.

29. As to environmental damage, the Trial Judge summarises the plaintiffs or appellants' concerns that the DSTP will have a serious and adverse effect on the marine environment, on their land, environment, livelihood and the quality of life (pg.11 of Trial Judge's decision and pg.9654 of Appeal Book, volume 21).

30. The Trial Judge noted, after consideration of all the evidence that it was indeed difficult to predict with certainty what the environmental effect of the DSTP will be and this was balanced against the appellants' concerns that the consequences of the DSTP are seriously adverse and will cause damage to the environment.

31. However, the defendants or respondents say that a significant amount of study has been conducted and expert evidence presented to show that this will not be the case.

32. Having pointed out these two extremes, the Trial Judge then proceeded to make his findings relying on the evidence before him. His findings or a summary of his factual findings is found at part 5 of his reasons at pgs. 41, 42 and 9685 of the Appeal Book, vol. 21. It reads;

“1. Nature of plaintiffs’ interests and concerns: *The plaintiffs and the people they represent are concerned that the tailings will contain chemicals or poisons, that this will affect fish stocks and other marine resources and that the tailings will be washed by sea currents towards their fishing grounds and villages. They are not motivated by a desire to stop the project. They just want to stop the DSTP.*

2. Statutory approvals: *The approval that currently authorises operation of the DSTP is the environment permit, originally granted in 2000 and most recently amended by the Director of Environment on 10 August 2009. The permit is subject to 52 conditions. The plaintiffs and the people they represent are concerned that the tailings will contain chemicals or poisons, that this will affect fish stocks and other marine resources and that the tailings will be washed by sea currents towards their fishing grounds and villages, one of which is that the OEMP be approved by the Director. At the time of trial, it had not been approved.*

3. Environmental effect of operation of the DSTP: *It is likely to be serious and adverse, in that:*

- (a) *There will be a smothering of benthic organisms over a wide area (at least 150 square km) and this will inevitably alter the ecology of Astrolabe Bay, which is a hotspot of biodiversity.*
- (b) *It is very likely that the tailings will be toxic to marine organisms. The sea-waters in the Madang area are home to some of the most diverse coral reef communities in the world, and depositing 14,000 tonnes of tailings per day into a part of Astrolabe Bay will have an adverse impact on the ecology of the Bay.*
- (c) *There is a real danger that the tailings will not behave as predicted by the defendants but instead will be subject to significant submarine canyon upwelling as well as wind-driven upwelling and be subject to plume-shearing, and that substantial quantities of tailings liquor will enter the upper 100 metres of the water column (the mixing zone) and from there they will be transported by strong currents shoreward and in the direction of Madang town and the north coast area of Madang Province.*

(my emphasis)

33. The potential environmental harm as submitted by the respondents, are three fold, being;

- the effect on the benthos;
- toxicity
- the behaviour of the tailings.

34. The issue before me is whether the Trial Judge properly considered all the evidence that was before him because the respondents submit that he did not.

35. His Honour deals with the environmental effect of the operation of the DSTP system at pgs. 35 to 41 of his reasons (pgs.967 to 9684 Appeal Book, vol.21). I discuss these findings under the 3 sub-headings stated above.

36. The effect on the benthos; His Honour said after consideration and hearing of all the evidence, more particularly from the experts on environmental damage, that;

"It is very difficult to predict with certainty what the environmental effect of the DSTP will be. Both sides of the case agree on that but disagree as to the nature of the likely environmental effect." (pg.35 of Trial Judge's reasons; pg.9678 of Appeal Book, vol.21)

37. The respondents submit that the Trial Judge erred when he found that smothering of the benthic organisms at a depth of 1,100 metres would have serious and adverse effect on other parts of the ecology of Basamuk and consequently Basamuk Bay and Astrolabe Bay. The respondents submit that the evidence is that the smothering of benthic organisms on the sea floor at 1,100 metres will not have any effect upon the water column at 50 to 150 metres, which is the zone of human activity.

38. In my view, the Trial Judge did meticulously compare the scientific evidence of witnesses brought by both the appellants and the respondents. Having considered all their evidence, the Trial Judge preferred the opinions and qualifications of the appellants' experts. For example, at pg. 9682, the Trial Judge said;

"The evidence of Messrs Hargreaves, Jones and Trudinger was useful and each of them gave generally impressive testimony. But none of them is sufficiently qualified and experienced to effectively challenge the evidence of an expert witness on eco-toxicological issues. Dr Towler, a geochemist, fits into the same category, as does Dr Wang, a chemist-metallurgist. I accept the evidence of Dr Reicheldt-Brushett and find as a fact that it is very likely that the tailings will be toxic."
(my emphasis)

39. Again, at pg.39 of the Trial Judge's reasons (pg.9682 of the Appeal Book) on the evidence of Dr Luick, the plaintiffs oceanographer;

"The plaintiffs have proven that these concerns are well founded. I base this finding principally on the expert evidence of Dr Luick and Dr Brunskill. Dr Luick, an experienced and highly qualified professional, was the only oceanographer to give evidence at the trial."

(my emphasis)

40. This finding is supported and re-amplified at pg.40 of the Trial Judge's reasons (pg. 9683 of the Appeal Book) where he states that whilst the plaintiffs witnesses were experts, the defendants' witnesses were generalists;

"Mr Scerri made detailed and helpful submissions that drew together the purported flaws in the bases of the opinions of Dr Luick and Dr Brunskill exposed, it is argued by the evidence of Mr Hargreaves, Mr Trudinger and Mr Jones. I have carefully examined their evidence, which cannot be dismissed as ill-considered, outlandish or ignorant, but it is evidence of scientists who are generalists, not specialists. They are not as expert in the fields of oceanography and sedimentation and marine geochemistry as Dr Luick and Dr Brunskill are." (my emphasis)

41. Although the respondents submit that it was not possible to discern from the Trial Judge's reasons, how he comes to the view that this effect on the benthos would constitute a private nuisance and public nuisance and that there is no evidence that the smothering of some benthos organisms at a depth of 1100 metres would have "...serious and adverse effects on other parts of the ecology of Basamuk Canyon and consequently Basamuk Bay and Astrolabe Bay", my view as stated above is that the Trial Judge considered the evidence as he saw and heard it. He was not mistaken or misled nor did he misinterpret or miscalculate the evidence on benthos. As he said and as I pointed out above, the evidence from all the experts is that they are all unable to predict with certainty what the environmental effect of the DSTP will be, but that the Trial Judge found the evidence of the plaintiffs expert witnesses, to be more reliable.

42. Toxicity: The respondents submit that the Trial Judge was wrong or erred when he found that the tailings will be toxic to marine organisms. They submit that there was a lot of evidence at trial that demonstrated that steps will be taken to ensure that the tailings will not be toxic to marine life, outside the mixing zone. (my emphasis)

43. The respondents submit that the Trial Judge when analysing the issue of toxicity, did not recognise that there is no evidence to suggest that the toxicity or the environmental effect of the diluted tailings, even if any, will be outside the mixing zone or in other words, appear to be in breach of the conditions of the statutory approval.

44. The respondents submit that although the learned Trial Judge referred to the evidence of experts, that there was no proper logical reasoning that led to his findings because his reasons in relation to that are only a page long.

45. I note that Dr Shimmiel deposed in her affidavit that further studies should be done because the studies before the Trial Court are not conclusive evidence of whether there will be environmental damage or not. In fact, in the part below which is my discussion on the behaviour of the tailings, the respondents submit that their experts reports suggest otherwise (par. 2.18 of first respondent's submissions dated 5th October, 2011).

46. The respondents submit also that if something does go wrong contrary to technical evidence and the tailings do not behave as predicted by the scientific studies or are toxic, that there are plans in place to prevent any material environmental harm or any nuisance.

They rely on the evidence of Dr James Wang sworn and filed on 19th September, 2011 which was tendered to the Supreme Court as fresh evidence, consented to by the appellants. The affidavit of Dr Wang demonstrates that the first respondent relies on a state of the art emergency response facility and programme for the DSTP which is capable of automatically shutting down the whole system in an emergency to avoid significant debilitating impact to the environment.

47. What is obvious to me is that a large amount of tailings including acid used in the extraction process, the neutralisation agents and the seed water used to make the tailings liquid will be discharged into the sea. Putting aside the scientific technicalities, the end result will be that the tailing solids will sink and according to the respondents' experts, all the tailings will separate and stay on the sea floor. In totality, this evidence I find, is all so unpredictable and uncertain. The respondents themselves do not know what the result of this dumping will be. That is why they have prepared themselves for the unexpected. And in the event an environmental disaster does occur, what then of the flora and fauna in the sea in its richness and bio-diversity, what will become of them? What about the coastlines; what about the clear, clean seawater. Nobody knows. Only the future will tell, a fate that is both foreboding and grim.

48. The Trial Judge has considered all these and his conclusions, in my view, are the correct conclusions, based on the uncertainty of the evidence.

49. *The behaviour of the tailings*; The currents in the sea will obviously move the tailings. Despite what I have seen and heard from the respondents, my view is that the fate of the tailings is essentially unknown because the behaviour of the currents will determine their final resting place. That alone is very unpredictable despite what the respondents experts say

50. I have also heard that the respondents do not know what is in the sea in terms of sea life and the species of sea life and organisms contained in Astrolabe Bay from 150 to 1,100 metres. The common knowledge is that it is an area high in marine bio-diversity and a site of many as yet undiscovered species. And with this knowledge, a decision has been made to dump acid and unclean foreign substances into a huge area of the ocean floor. My concern, as is the concern of the landowners and those who dwell in that area, and who live off that land and sea, is of the effect of this dumping.

51. The experts reports are all so uncertain. Dr Greg Brunskill in his affidavit sworn on 26th September, 2010 and filed on 27th September, 2010, (Tab 85, vol. 9) confirms this uncertainty where he deposes, amongst others, that;

- (i) That it seems unlikely that the Ramu Nickel Mine Refinery Tailings will function as described in the Environmental Plan (par.7).
- (ii) That it is more likely that the tailings will accumulate in the near shore canyons and inter canyon platforms and be transported as a turbid mass with high concentration of iron, sulphate, magnesium and enhanced metal

concentration of Nickel, and 5 other metals, toward Madang in the west, flowing with the current (par.7).

- (iii) These refinery wastes, either in solid form or liquid, and either hot or cold, will later leave the canyon and move to deep water, depending on the current (pars.7 and 8).
- (iv) Many consultants have prepared reports on their experiences in DSTP operations and some of these DSTP experiences have resulted in human and environmental damage/nuisance, particularly at Lihir, Misima, and in other countries. (par.10).
- (v) Environmental damage at these other sites have been published in science journals which Dr Brunskill has referred to, to then make this critique or conclusions. The Ramu Nico mining consultants reports more specifically demonstrate that the mines operations will cause environmental harm by the use of these tactics, e.g blasting of coral for an undersea pathway for the pipeline; the discharge of construction and refinery plant waste materials into Astrolabe Bay; the smothering or burying of marine ecosystems in the Basamuk Canyon and Vitiaz Strait; a reduction in mid and deep water fish abundance and diversity; all other mine waste. (par.11).
- (vi) Similar and severe environmental harm has been published for the Lihir and Misima DSTP mine operations (par.11).
- (vii) Reports prepared by Cardo Acil (2007) and Dames & Moore (1999) suggest a need for caution and additional better information, in order to avoid potential environmental damage (par.11). (my emphasis)
- (viii) That studies suggest that these mine waste piled on the sea floor affects life in that region even some 12 years after mine closure (par.13).
- (ix) The Report of the Scottish Association of Marine Science ('SAMS') describes the environmental impact of deep sea tailings placement refinery wastes on the sea floor at 500m to 2000m at Lihir and Misima islands. The SAMS Report should be adopted by the PNG Government as Environmental Guidelines for DSTP (par.21) (my emphasis)
- (x) The SAMS Report found, amongst others, that;
 - At Lihir, the descending DSTP liquid mud was carried away by currents. These particles had high concentration of heavy metals derived by mine waste plume. This will most likely happen to the Basamuk Bay DSTP operations (par.22(e)).
 - The SAMS Report criticizes Ramu Nico's consultancy studies because of Ramu Nico's use of inappropriate methods and

equipment. And this is because those studies were written by mining geologists. Preparation of these reports will require advanced oceanographic ships, experienced technical and scientific crew and specialized sampling equipment to perform adequate studies par.22(e)(f) (my emphasis).

- The present data is not adequate to make statements about upwelling in the Basamuk canyon.
- (xi) That Dr Brunskill's interpretation of the SAMS Guidelines/Report suggest that PNG does not have the regulatory, monitoring, scientific expertise or oceanographic ship capability to monitor DSTP materials in Basamuk Canyon, Astrolabe Bay and Vitiaz Strait (par.22(b)).

52. It is amidst all these uncertainty, that the Trial Judge ruled as he did. And Dr Brunskill's report is just one of the many reports that Ms Twivey for the appellants tendered into evidence to show the need for the government to reflect on its actions and to review the decision already made for commencement of the DSTP.

53. As with many rural dwelling Papua New Guineans, the sea and the land is their garden or shopping mall, if I can put it that way. And that is common knowledge amongst all Papua New Guineans, both educated and uneducated. It is from the sea and the land that these villagers/people rely on for their survival and existence. The miner, in this case, Ramu Nico, wants to profit from the mining activities presently ongoing. Should any government of the day allow this to happen when the resulting consequences are unknown or as in this case, deep sea mining is a banned activity, e.g as submitted by the appellants at par.156 of Twivey Lawyers' written submissions filed in the National Court, that deep sea tailings disposal is banned in Canada, United States and China and is never to be used because that tailings disposal method is the complete contrary of worlds best practice.

54. Amidst these certainties and uncertainties, the plaintiffs' lawyer raised very pertinent submissions which in my view, placed on the Trial Judge a very heavy responsibility, which was to make a decision which would, if the injunction were refused, meant that the local people would continue to languish in uncertainty, although benefiting under the 'development' programmes offered by Ramu Nico. Or if granted, as the Trial Judge himself said, *"The multiplier effect on the provincial and national economy of commencement of a project of this magnitude, would be delayed. Investor confidence in PNG would be impaired."* (page.41 of Trial Judge's reasons; pg.9684 of the Appeal Book). That is a statement that can be made by anybody, let alone a Judge, without the need for evidence and in my view, were made based on the present economical and political climate of this country, which is common knowledge and also based on the general understanding that if this project is not given the go ahead, the country stands to loose revenue. I discuss this further under the title '*refusal of injunctions*', focusing on the governments contractual commitment to waive and relax Ramu Nico's legislative and contractual obligations to pay tax.

55. My view is that there is substantial evidence of likely environmental harm which would be caused by the dumping of tailings by Ramu Nico. There are in fact extreme gaps in the scientific knowledge. Also, studies have not been done to collate data so therefore there is no proper identification of risks or analysis. Further, the approval/permit allowing the dumping was given on the basis that no environmental harm other than smothering would occur which is and was impossible to conclude.

56. I find the Trial Judge did not err.

(iii) Refusal of injunctions (including private and public nuisance);

57. In grounds 3(a) to (d) of its Notice of Appeal, the appellants submit or plead that the Trial Judge erred in that;

- (a) Having found the appellants had established causes of action in private and public nuisance, ought to have found the appellants had a *prima facie* entitlement to an injunction.
- (b) Should only have refused an injunction if special circumstances existed to displace the alleged *prima facie* entitlement.
- (c) Should have found a *prima facie* entitlement and no special circumstances existed.
- (d) Erred in finding no entitlement to relief.

58. The law in relation to the grant of permanent injunctions is summarised in the text Spry, Equitable Remedies, Injunctions and Specific Performance, Seventh Edition (1980). At pg.392, Spry (supra) states;

"In all cases, it is a matter of discretion whether an injunction will or will not be granted; but the manner of exercise of that discretion depends on the precise nature of the particular rights that it is sought to protect and on all other material circumstances."

(my emphasis)

59. Spry (supra) quotes further at pg.393 from the case Pride of Derby and Derbyshire Angling Association Ltd v. British Celanese Ltd [1953] ch.149 at 189, which states;

"An injunction may nonetheless, be refused, as a matter of discretion, should it appear to be unjust or 'highly unreasonable' to grant it, by reference to established equitable considerations such as laches, hardship, acquiescence, the absence of clean hands or such other matters. Further, statutory rights must be taken into account by the Court."

(my emphasis)

60. The claim in the National Court by the appellants was effectively, for a quia timet injunction. This is an injunction seeking to restrain future conduct in respect of which different considerations apply.

61. Murphy, the Law of Nuisance, par.6.20 states;

"As in the case of mandatory injunctions, the Courts grant quia timet injunctions very sparingly. That this should be the case is understandable when one bears in mind that such orders are granted before a complete cause of action has vested (that is, before any actual harm has actually been occasioned). In line with this, it is generally accepted that harm must be imminent before the Court will grant a quia timet injunction. Thus, in one case in which the claimants were fearful of encroaching roots, the Court of Appeal was unprepared to grant an injunction since the damage that was feared was insufficiently imminent." [Lemos v. Kennedy Leigh Development Co. Ltd (1961) 175 EG 119].

62. Again, at pgs.379 and 380 of Spry (supra), the author states;

"[A]s has been seen, the degree of probability that the material injury will occur must be weighed together with its gravity and likely consequences, as well as with any other matters that may affect the balance of hardship or justice between the parties; and the observation of Russell LJ [in Hooper v. Rogers [1975] Ch.43 at page 49] should be noted, that the use of the word "imminent" in this context merely indicates "that the injunction must not be granted prematurely."

63. A quia timet injunction was considered by the National Court in Pastor Johnson Pyawa v. CR Andake Nunwa (2010) N4143. That was a representative action and concerned an ex parte application for orders to restrain the defendants and their respective tribesmen from entering the Simakin tribe's customary land and provoking, threatening, intimidating or declaring war on the plaintiffs' tribe. Makail J quoted extensively from F H Lawson, Remedies of English Law, Butterworths, Second Edition, (1980), held and concluded;

"11. From these discussions, I summarise the principles of quia timet injunctions as follows;

- 1. There must be proof of imminent danger to the plaintiffs' rights.*
- 2. There must be proof of prospective damage which is substantial or irreparable.*
- 3. The violation of the plaintiffs' rights is inevitable."*

64. At pg.64 of his reasons (vol.21, pg.9707), the Trial Judge cited Pyawa's case, and dealt with the probability of harm and the nature and extent of it. After considering these submissions, the Trial Judge concluded (at pg.65, vol.21, pg.9708);

"However, it is also relevant that all the defendants appear to be making genuine efforts to put in place effective monitoring protocols to ensure that any problems with the operation of the DSTP will be quickly remedied. The engagement of SAMS, though criticised as 'green wash' by Dr Luick, is a positive step towards prevention and mitigation of excessive harm. If the environmental harm of the type reasonably apprehended by the plaintiffs does actually occur the plaintiff will be able to commence fresh proceedings at short notice and seek the type of relief sought in these proceedings."

65. The first respondent submits that it is clear from the above passage that the granting of a quia timet injunction would be premature. They submit this relying on the evidence before the Trial Judge that there was no proof of imminent danger to the appellant's rights; that there was no proof of prospective damage which is substantial and irreparable; and that violation of the appellant's rights is not inevitable.

66. I agree with that, that at this point in time, there is no danger because Ramu Nico has not commenced the dumping of tailings. But when it does, it does so amidst this environment of uncertainty. Ramu Nico's position is that the dumping of the tailings into the ocean must be allowed to happen, notwithstanding the air of uncertainty about the effects of the dumping, notwithstanding that this is a practice that is banned in other developed countries, notwithstanding that this country stands to lose a great deal in the destruction of its ocean and its contents and its people's way of life, in the event there is a disaster. Of course, Ramu Nico has presented evidence of the steps it will take to prevent a catastrophe, but implementation of these steps is also a novelty to Ramu Nico. It has never had to prevent an environmental disaster of immense proportions. What is the guarantee the system will work, a question I am sure that troubles Ramu Nico's management also. Should this government of the day take such a high risk and should a responsible Court allow this to happen? Of course not. The Trial Judge considered and addressed all these, though not in the terms expressed above, and made findings in relation to the effect on benthos, toxicity of tailings and the behaviour of the tailings.

67. History has shown that scientific opinions have been negated by other scientific opinions and theories at the expense of others. In this case, it will be at the expense of the plaintiffs and villagers residing along the affected coastline. The Trial Judge, in my view, did consider those scientific studies and evidences. (pgs. 9678 to 9684 of the Appeal Book and pgs.36 to 41 of the Trial Judge's reasons).

68. I am not satisfied that the Trial Judge acted upon a wrong principle or that he allowed irrelevant or extraneous matters to guide him or that he did not take into account material considerations, amongst others (see Rundle v. Motor Vehicles Insurance (PNG) Trust [1988-89] PNGLR 20; Lewis v. The State [1980] PNGLR 219) for me to then make a finding substituting the Trial Judge's findings.

69. And the Trial Judge was influenced by these factors when he ruled on public and private nuisance.

70. The elements of public and private nuisance are as stated by the Trial Judge at pg.43 of his reasons (pg.9686 of the Appeal Book). He referred to Halsburys Laws of England 4th Edition Volume 34 Butterworths 1997 and The laws of Torts John G Flemming Law Book Company 1977 which states that the elements of private nuisance are;

- the defendants conduct will interfere with the use and enjoyment of the plaintiff's land; and
- the conduct of the defendant is unlawful, unwarranted or unreasonable.

71. These texts also state that the elements of public nuisance are;

- the conduct of the defendant causes inconvenience, damage or harm to the general public; and
- the plaintiff is a member of a class of persons who incur some particular or special loss over and above the ordinary inconvenience and annoyance suffered by the general public; and
- the conduct of the defendant is unlawful, unwarranted or unreasonable.

72. In relation to private nuisance, His Honour considered two issues;

- (i) Will the operation of the DSTP interfere with the plaintiff's use and enjoyment of their land?
- (ii) Will the operation of the DSTP be unlawful, unwarranted or unreasonable?

73. In relation to issue no. (i), the Trial Judge found the element of private nuisance to have been proven because he was satisfied on the findings of fact which I refer to above, that the operation of the DSTP will interfere with the plaintiff's use and enjoyment of customary land including the sea. I agree with that.

74. In relation to issue no. (ii), the defendants/respondents argue that the operation of the DSTP is lawful by virtue of the permit granted to Ramu Nico; basically, that a permitted activity is lawful and not subject to challenge in a Court. The respondents further submit that s.129(4) of the *Environment Act*, the provision in contention, does not apply because the DSTP has not yet commenced operation. But that according to s.44(3) of the *Environment Act*, the appellants cannot succeed because the activities to be undertaken by Ramu Nico, have been authorised to commence under an Environment Permit.

75. SS.44(3) and 129(4) of the *Environment Act* read;

"44. OBLIGATION TO HAVE A PERMIT AND RIGHTS OF PERMIT HOLDERS

...

(3) *an environmental permit confers on the holder the right to carry out the activities specified in the permit in accordance with the conditions imposed under the permit.*

..."

"129. DAMAGES AND RECOVERY OF COSTS ON COMMENCEMENT

...

(4) *Nothing in this act shall affect the right which a person may have at law to restrain, or obtain damages in respect of environmental harm."*

76. His Honour found that;

- (i) Serious environmental harm will be caused to Astrolabe Bay and other parts of the sea waters of Madang.
- (ii) That the plaintiffs/appellants, being coastal people, depend on the sea for maintenance of their livelihood and way of life.
- (iii) That the operation of the DSTP will be unlawful, unwarranted and unreasonable for the reasons raised above.

77. I agree wholeheartedly with the Trial Judge that the Defence of statutory authorisation does apply here. However, with these findings of public and private nuisance, should the Trial Judge have refused the injunctions?

78. My view is that having meticulously covered all the issues leading up to nuisance, that when the Trial Judge found there to be a claim to be in private and public nuisance, that he erred when he refused the interim injunctive orders. Being a discretionary power, the injunctions, both *quia timet* and permanent, should have been granted. I say this based on the principles of *quia timet* injunctions and permanent injunctions.

79. In relation to permanent injunctions, the Trial Judge said this at pg.66 of his published reasons (pg.9709 of the Appeal Book);

"2. CONCLUSION RE PERMANENT INJUNCTION

Of the seven factors identified, three (standing, likelihood and extent of environmental harm, National Goal No.4) favour a permanent injunction. Three do not (delay by plaintiffs, lawfulness of DSTP, economic consequences). One (good faith of parties) is equally balanced. I have decided that the substantial factors favouring an injunction are outweighed by the opposing factors. This is a borderline

case. The plaintiffs have marshalled a compelling body of scientific evidence that the Director of Environment has approved operation of a very risky activity that could have catastrophic consequences for the plaintiffs and the coastal people of Madang Province. But I am satisfied that he has made that decision in good faith. If an injunction were to be granted at this late stage the economic consequences would be MCC and for the people of Madang Province will be very damaging. Needless to say, if these proceedings had been commenced much earlier, the result may well have been different. My conclusion therefore is that the application for an injunction is refused."

(my emphasis)

80. The Trial Judge refused the injunctions on 3 grounds. These are, firstly, the delay by the plaintiffs, secondly, the lawfulness of DSTP and thirdly, the economic consequences. I address these below.

81. (i) *Delay*, the plaintiffs submitted at trial that they had done everything they could to be heard on the tailings issue but the government and Ramu Nico had ignored them for years. The plaintiffs coming to Court was a last resort. This evidence is contained at pg.9656 to 9657 of the Appeal Book which is a table showing affidavits filed by the plaintiffs, e.g Louis Medaing's affidavit, (Tab 57 of the Appeal Book) deposes that since 1999, he has been writing letters to the Government about these issues but had not received a response. He annexed copies of 11 of his letters to that affidavit. He first came to know about the DSTP in 2008 but did not initiate proceedings until 2010, because he had already commenced proceedings in 2005 regarding the customary land issues. It was later in 2010 when a Mr Eddie Tarsie withdrew his case against Ramu Nico that Mr Medaing commenced these proceedings.

82. I find that is not intentional delay but delay caused by the lack of a response or interest to his plight and that of other villagers. This lack of interest by the then Government of the day including the Department of Environment and Conservation demonstrates to me that the Government and its servants and agents, supposedly there to represent the local people and their interests, should have balanced these against the investors interests, then, eventually, to make a fair decision. However, in this case, the decision in favour of Ramu Nico is a reflection of the then Government's preference to generate revenue and income, as it claims, for this country but, based on the evidence, at the expense of its peoples land and environs.

83. I find delay was sufficiently explained by the plaintiffs.

84. (ii) *Lawfulness of the DSTP*: After the Trial Judge found that the plaintiffs had established causes of action in public and private nuisance, the next step would have been to find that the DSTP was an unlawful activity. His Honour found that to be so because he reasoned that an aggrieved person can still bring a claim for damages. He reasoned after consideration of the respondents submissions in relation to statutory approvals and the law of nuisance including ss.44(3) and 129(4) of the *Environment Act*, that;

"...First the Environment Act does not extinguish the right of a person aggrieved by actual or apprehended environmental harm to bring a common law action aimed at preventing continuance of harm. There is no provision of the Act that expressly extinguishes common law or underlying law rights of action. And on its proper construction I detect nothing in the scheme of the Act that impliedly excludes common law actions. Secondly, under the law of nuisance it is not necessarily a defence for a defendant to say 'I have a permit to do this, the law allows me to conduct this activity'. The law of nuisance says that statutory authorisation to conduct an activity that gives rise to a nuisance will provide the defendant with a defence only if the nuisance is the inevitable consequence of conducting that activity. Lord Dunedin stated the principle in Manchester Corporation v. Farnsworth [1930] AC 171, at 183:

When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is for the inevitable result of the making or doing so authorised.

That principle was cited with approval by the House of Lords in the leading case Allen v. Gulf Oil Refining [1981] AC 1001 and there is no reason to conclude (and no argument to this effect was put before the Court) that it is unsuitable to the current circumstances of PNG. It is properly regarded as part of the underlying law.

The question therefore becomes: is the nuisance that the plaintiffs are concerned about, the inevitable consequence of the activity, ie operation of the DSTP, as approved? Put another way: are the types of environmental harm or the types of interference in the use and enjoyment of their land and seawaters the inevitable consequence of operation of the DSTP, as it has been approved? The answer is no. Operation of the DSTP will cause three types of nuisance:

- (1) smothering of the benthos;
- (2) toxicity to marine organisms in Astrolabe Bay, with a resultant adverse impact on the ecology of the Bay; and
- (3) movement of tailings, caused by upwelling, outside the mixing zone, on to the shore and along the coast to Madang town and perhaps beyond. Only the first type – to the extent that the benthos is smothered in the 150 square km tailings identified in the 1999 environmental plan – can be regarded as the inevitable consequence of operation of the DSTP. The smothering of benthos outside the anticipated tailings footprints and the toxic effect of the tailings and the movement of the tailings outside the mixing zone are not the inevitable consequence of operation of the DSTP, as it has been approved. The environment permit was granted on the presumption, arising by virtue of condition No. 1, that the only

environmental harm caused by operation of the DSTP will be what was set out in the 1999 environmental plan, i.e smothering of the benthos within the tailings footprint. That means the other types of environmental harm have not been authorised and cannot be regarded as the inevitable consequence of the approved activity. The defence of statutory authorisation does not apply. The second element of private nuisance is established.

...” (pgs. 45 and 46 of Trial Judges reasons; pg.9688 and 9689 of Appeal Book).

85. The Trial Judge’s findings were made after consideration of ss.44(3) and 129(4) of the *Environment Act*, findings that agree with and which I will discuss further under the topic *‘Statutory Approvals’*.

86. (iii) *Applicants financial ability*; it is not disputed that they are villagers. The land and the sea are their only means of earning an income, which resources will be destroyed if not protected.

87. The Trial Judge also considered the overall interests of justice and bona fides. The respondents submissions are that Ramu Nico the miner, claims that it will loose thousands of Kina if the DSTP is not commenced. In relation to environmental harm, the Mining Development Contract Amendment Agreement Ramu Nickel Project (the ‘Agreement’) of 10th August, 2006, states at clause F of its Recitals section, Clause E(b), that;

“The State wishes to ensure that the development of any commercial mineral deposits and associated processing facilities will secure the maximum benefit for, and adequately contribute to the advancement and the social and economic welfare of the people of Papua New Guinea, including the people in the vicinity of the Joint Ventures’ operations, in a manner consistent with their needs and the protection of the environment.”

(my emphasis)

88. That clause provides for a commitment by the State to ensure the protection of the environment, amongst others, for the people of Papua New Guinea. Based on expert evidence in the Trial Court, I agree with the appellants that it is in everybodys interests that the company cease all mining activity until after proper studies have been concluded on the effects of the dumping of tailings. I say this because the evidence is that the only Environmental Impact Assessment that has been done was completed by NSR, paid for by Highlands Pacific in 1999 for lodgement as the Environmental plan for the Environmental approval and the Lutheran Commissioned Report, concluded that there was unacceptable risk.

89. The Agreement is explicit and clear, that the development of the mine must be consistent with the needs of the people and the protection of the environment.

90. Obviously, it is in the interests of justice and for this country and the affected peoples benefit, that further studies be carried out first before the DSTP commences operations. Ramu Nico acknowledges that in the agreement as expressed in Recital E(b) above.

91. What of the economic consequences for Papua New Guinea? I ask this because the respondents submissions are that the State and the country will loose out financially if the injunction is granted. I have had to peruse the Agreement between Ramu Nico and the State to understand why the appellants submit that this is not correct.

92. For Ramu Nico, the terms of the Agreement are such that it will not loose any revenue to Papua New Guinea as the Agreement provides for that. The Government of the day then, gave tax holidays to Ramu Nico, provided for in the Agreement. I set out some relevant clauses which I have summarized;

A. Clause 6.3 Import and Excise duties

(a) The State shall ensure that:

(i) For the life of the project, Ramu Nico will not pay import and excise duties on all hydro carbon projects to be used or consumed as fuel, other types of oils and diesel. (my emphasis).

(ii) Prior to the end of the fifth anniversary of the commencement of the tax holiday, there will be no import and excise duties on all implied consumables with the exception of those listed in Schedule III of the Agreement.

- However, with these items listed in Schedule III, the Contractor can apply for exemptions from payment of duty under the *Customs Tariff Act 1990* and the *Excise Tariff Act, Chapter 107*.

- If the Joint Venturers under the Agreement, pay duty and later these exemptions come into force, the Agreement provides that "The State covenants to reimburse the joint ventures for any import or excise duty paid on the goods covered by this clause." (my emphasis)

(b) Clause 6.6 Stamp Duty Exemption

(i) "The State shall ensure that stamp duty will not be imposed in respect of"

- Transfer of interests in the Exploration Licences or other mining leases and easements arising from the Agreement.

- The transfer of or issue of shares to any Chinese party, who, 1 year from the date of the Agreement, becomes a shareholder in Ramu Nico.
 - The transfer of interests in Exploration Licences or other stated mining licences and easements in that clause, owned by the Chinese Government to be transferred by a Chinese party, (which is not defined in the Agreement).
- (ii) *"If necessary, the State shall procure amendments to the Stamp Duties Act to provide for the exemptions contemplated by this clause." If the exemptions are not in force and the party pays the stamp duty, then "...the State covenants to reimburse the relevant party upon whom the liability has been imposed for such stamp duty."*

93. There are other clauses in the Agreement which are demonstrative of the then Governments desire to have Ramu Nico operate in this country without having to pay the taxes/duties specified in the Agreement or to meet the lawful obligations normally required for foreign companies.

94. The other exemption clauses are;

- Clause 7 Goods and Services Tax
- The Joint Venturers may apply for a refund of the GST *"paid or borne"*, GST due under the Goods and Services Tax 2003.
- Clause 27.2 Stabilisation
- From the date of the Agreement for a period of 10 years, the State agrees to indemnify the Joint Venturers by *"Material Adverse Change"* (which is not defined in the Agreement) arising as a result of the National Government or Local-Level Government or any Government Agencies legislative or administrative action. (my emphasis)

95. So, for Ramu Nico to say that it will stand to loose a lot in economic terms if the injunction is granted, leaves a lot to be desired. In my view, it is Papua New Guinea that will stand to loose out in the way of revenue if the injunction is not granted because of the many exemptions in the Agreement favouring Ramu Nico.

96. The documentary evidence before the Trial Court and now before us in the Appeal Books, in the form of the Original Joint Venture Agreement of 2000 (see Tab 71 of the Appeal Book) and the present Agreement of 2006 (Tab 72 of the Appeal Book) show that in the Original Joint Venture Agreement of 2000 between the Highlands Pacific and the State then, that there were reasonable economic benefits for this country. With another

change in Government, this was all changed in the 2006 Agreement between Ramu Nico and the State then, who essentially gave all the benefits that were to come to this country, back to Ramu Nico, some of these changes which I have set out above.

97. What of the law on Quia Timet Injunctions? As I have already seen, a permanent injunction could have been imposed but was not. I am of the view that it should have been. Is that an appropriate remedy?

98. The law on Quia Timet injunctions in Papua New Guinea is as held in Pastor Johnson Pyawa v. CR Andake Nunwa (supra). I deal with the 3 elements for quia timet injunctions in the following manner;

99. (i) Is there proof of imminent danger to the plaintiffs rights? There are expert reports before this Court and before the Trial Judge which demonstrate the air of uncertainty in relation to the viability of the DSTP and the long and short term environmental effects. This principle should be read together with the principles on the grant of permanent injunctions, being possible hardship, inconvenience or prejudice to either party.

100. (ii) Possible hardship, inconvenience or prejudice to either party; It was found by the National Court that the appellants families and future generations will risk suffering devastating consequences from the nuisance if this dumping is allowed to commence and of course continue. Deep sea tailings disposal is effectively banned in Canada and the United States and China and is recommended by the World Bank never to be used in these circumstances because the tailings disposal method is the complete contrary of worlds best practice.

101. (iii) Is there proof of prospective damage which is substantial or irreparable; The evidence is that the plaintiffs were ignored by Ramu Nico and the Government of the day. The evidence is also that it is predicted that their families and future generations will risk suffering devastating consequences from the nuisance if the blasting and dumping is allowed to commence.

102. In my view, the appellants have credible scientific reports and affidavits predicting that there will be serious environmental harm as opposed to reports from career mine consultants/geologists presented by the respondents. The appellants submit that if Ramu Nico is not restrained now from constructing further and commencing mine operations, the very rights that the *Environment Act 2000* and the *Constitution* seek to protect, will be irreparably forfeited.

103. The appellants submit that the objects of the *Environment Act 2000* in s.5 include protecting the environment while allowing for development in a way that improves the quality of life and maintaining the ecological processes on which life depends. No doubt, the DSTP goes completely against that. The objects of the *Environment Act* also mandate at s.5(h) that a **precautionary approach** to the assessment of risk of environmental harm be adopted and that all stakeholders including Ramu Nico, must ensure that all aspects of the environment which will be affected by environmental harm are considered in decisions relating to the environment.

104. It is necessary to ensure that a precautionary approach is adopted so that all aspects of environmental harm are considered. I have seen from the experts reports and heard that proper oceanographic studies MUST be done first, as well as a proper identification of what is actually at risk – the life, the food chain and the effect on the ecology of Basamuk Bay. A proper risk assessment has never been done.

105. The evidence is that both the Government and Ramu Nico knew of all the community concerns and the Lutheran report. The report by the Government was commissioned in mid 2008. Ramu Nico knew this. Nonetheless Ramu Nico decided that in spite of all of these, it would still go ahead and construct the mine without waiting for the outcomes.

106. In my view, if Ramu Nico suffers prejudice, then it accepted that risk by its own actions, i.e by planning the DSTP system.

107. (iv) The violation of the plaintiffs rights is inevitable; As I see it, these environmental concerns are matters of "national importance" within the meaning of the *Environment Act 2000*. The Court is effectively measuring an alteration to a tailings disposal method and a delay for the defendants against losses for the future generations. That is incomparable.

108. This Court is faced with these very serious, in my view, life threatening issues. If the appellants are right and there is no injunction, the tailings dumping commences in the sea along with the raw sewerage and waste, soil and rock. There is scanty and uncertain evidence of what will occur if the dumpings commence. Parties are guessing and speculating. Obviously, these questions will arise.

- (i) What happens if the gradual build up of the sediments creates conditions for a tsunami and that occurs?
- (ii) What happens if the tuna migratory track changes to get away from the putrid water of the tailings?
- (iii) What happens if the metals get consumed by the benthic organisms and they die leaving a gaping hole in the food chain and fish die?
- (iv) What happens if fish species are toxic and humans consume them?
- (v) What happens if 50% of the coral from Basamuk to Karkar stop breeding because they are sensitive to the metals in the tailings?
- (vi) What if thousands of new species of fish, etc are destroyed before they are discovered?

109. Will monetary damages be enough? Even if monetary damages are sufficient, which is arguable, how do you get them from a State entity in China? I say this noting that obtaining compensatory damages from Barrick in Canada or BHP in Australia is

possible due to the common law system, however, to obtain damages from an entity in China and the enforcement thereof, the people stand a very slim chance, or none at all.

110. Ramu Nico knew of the many studies that were being conducted including the independent Lutheran scientific report. It knew that there was widespread community opposition to the DSTP. It knew that the Government had commissioned an independent report and guidelines on submarine tailings disposal, but it continued with its plan for submarine tailings disposal, nonetheless.

111. I find that environmental damage is imminent; that this damage will be substantial and irreparable and finally, that violation of the appellants rights is inevitable. The Quia Timet Injunction must be awarded to the appellants.

(iv) National Goal No. 4

112. The appellants submit that s.25 of the *Constitution* places on all Governmental bodies, including the Court, to give effect to the National Goals and Directive Principles ('NGDP'). The relevant NGDP is Goal No. 4. It reads;

"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."*

113. The respondents submit that the Trial Judge's Declaratory Order that the operation of the DSTP will be contrary to National Goal No. 4 of the *Constitution* was made without jurisdiction and contrary to s.25(1) of the *Constitution*.

114. S.25(1) provides that except to the extent provided in sub-sections (3) and (4), the NGDP are non-justiciable. They submit further that s.25(2) provides that nevertheless it is the duty of all Governmental bodies to apply and give effect to the NGDP as far as lies within their respective powers. S.25(3) provides that the Legislative, Judicial and other powers should be exercised so as to give effect to the NGDP.

115. The whole of that provision reads;

"25. Implementation of the National Goals and Directive Principles

- (1) *Except to the extent provided in Subsections (3) and 4), the National Goals and Directive Principles are non-justiciable.*
- (2) *Nevertheless, it is the duty of all governmental bodies to apply and give effect to them as far as lies within their respective powers.*
- (3) *Where any law, or any power conferred by any law (whether the power be of a legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised or enforced, without failing to give effect to the intention of the Parliament or to this Constitution, in such a way as to give effect to the National Goals and Directive Principles, or at least not to derogate them, it is to be understood, applied or exercised, and shall be enforced, in that way.*
- (4) *Subsection (1) does not apply to the jurisdiction of the Ombudsman Commission or of any other body prescribed for the purposes of Division III.2 (Leadership Code), which shall take the National Goals and Directive Principles fully into account in all cases as appropriate."*

116. The respondents submit that the Trial Judge's Declaratory Order that the operation of the DSTP will be contrary to National Goal No. 4 of the *Constitution* was made without jurisdiction and contrary to s.25(1) of the *Constitution*.

117. The respondents submit that none of these provisions create any substantive rights hence there is no cause of action created. They submit that the Trial Judge's decision is in direct contradiction of the express non-justiciability of the NGDP and that therefore the Declaratory Order must be overturned because it is wrong.

118. At pg.9702 of his reasons, the Trial Judge, after examining s.25(3) of the *Constitution*, found that he had a duty to give effect to the NGDP and that meant he had a duty to express an opinion on whether the DSTP was contrary to NGDP No. 4.

119. The appellants submit that this is an appropriate method of giving effect to the NGDP as required by the *Constitution*. They submit that to lessen the impact, would render the NGDP nugatory.

120. The Trial Judge discussed this at pgs.58 to 62 of his reasons (pgs.9701 to 9705 of Appeal Book, vol.21). At pg.61 of his reasons, the Trial Judge said;

"The National Goals and Directive Principles are in the preamble to the Constitution. They underlie the Constitution. They are the proclaimed aims of the people. Core values. All persons and bodies are directed by the Constitution to be guided by them and the Directive Principles in pursuing and achieving the aims of the people. They cannot be ignored.

I therefore feel obliged to state that my considered opinion as a Judge, having heard extensive evidence on the likely environmental effect of the DSTP and made findings of fact on that subject, is that the approval of the DSTP and its operation has been and will be contrary to National Goal No. 4. It amounts to an abuse and depletion of Papua New Guinea's natural resources and environment – not their conservation – for the collective benefit of the people of Papua New Guinea and for the benefit of future generations, to discharge into a near-pristine sea (a widely recognised hotspot of biodiversity), mine tailings at a rate of 5 million tonnes of solids and 58.9 million cubic metres of tailings liquor per year. It constitutes unwise use of our natural resources and environment, particularly in and on the seabed and in the sea. It amounts to a breach of our duty of trust for future generations for this to happen. It is a course of action that shows deafness to the call of the people through Directive Principle 4(2) to conserve and replenish our sacred and scenic marine environment in Astrolabe Bay. It puts other coastal waters of Madang Province at risk. Inadequate protection has been given to our valued fish and other marine organisms."

121. It is the respondents submissions that the Trial Judge should not even consider whether the approval or operation of the DSTP breaches the NGDP and to hear them, would offend against s.25(1) and the Court would be exceeding its jurisdiction. I do not agree with the respondents that the Trial Judge's decision is in direct contravention of the express non-justiciability of the NGDP. S.25(3) is the qualifying provision. The Trial Judge said that it is open to the Court to consider making a determination to the effect that the approval and operation of the DSTP will be contrary to National Goal No. 4. He said this relying on s.25(3) of the Constitution.

122. However, the Trial Judge said that neither the Constitution nor Parliament has indicated that the question of whether the DSTP will be contrary to the NGDP, is beyond the National Court's jurisdiction. It was on that basis that the Trial Judge then found that he was obliged, especially in light of the extensive evidence put before the Trial Court and the nature of the findings of fact that he made, to then exercise his Judicial powers under s.25(3) and in such a way as to give effect to the NGDP and the best and most appropriate way of doing that was by expressing an opinion on the proposition that the plaintiffs had advanced (pg.61 of Trial Judge's decision; pg.9704 of Appeal Book, vol.21), which was to issue a Declaration.

123. Was the Trial Judge correct in the manner in which he interpreted s.25 of the Constitution?

124. Schedule 1.5 of the Constitution will assist in that regard. It provides;

"Sch 1.5 Fair meaning to be given to language used

- (1) *Each constitutional law is intended to be read as a whole.*
- (2) *All provisions of, and all words, expressions and positions in, a constitutional law shall be given their fair and liberal meaning."*

125. In the Reference by Simbu Provincial Executives [1987] PNGLR 151 Barnett J said;

"When interpreting the actual provisions of constitutional laws which confer those powers, the Courts also are directed by s.25 and Sch. 1.5(2) and by other guide posts in the Constitution to find fair and liberal meaning which are consistent with the spirit of the Constitution. This spirit is to be sought in the National Goals and Directive Principles, in the debates of the Constituent Assembly and in the Constitutional Planning Report itself?"

126. S.25(3) of the *Constitution* cannot be any clearer. If given its fair and liberal interpretation, states in no uncertain terms that a Judicial power, which includes the power to issue any declaration by a Court and which is also a judicial power to issue administrative relief being a Declaration, is issued to give effect to the National Goals and Directive Principles because it must be enforced in that way. (s.25(3) of the *Constitution*).

127. No doubt, the Trial Judge had jurisdiction to make these orders. He exercised this power, in my view, knowing full well the responsibility upon him and of course, after consideration of the extensive evidence that was before him and the findings of fact that he made, to then give effect to the National Goals and Directive Principles. His discussions under the part **"Duty to express opinion"**, states that.

128. It is in fact a matter of discretion to grant declaratory orders. In Ibeneweka v. Egbuna [1964] 1 WLR 219 at 225, a decision of the privy counsel on appeal from Nigeria, Viscount Radcliffe, speaking for the Board, said;

"After all, it is doubtful if there is more of principle, than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that called for their making. Beyond that, there is no legal restriction on the award of a declaration."

129. Again, in the matter of discretion, Mason JA said in Samal Holdings Pty Ltd v. Vhorns [1971] 1 NSWLR 192 at 203;

"The question whether the Court should have exercised its discretion to grant relief in favour of the appellant is more difficult. As I have already said, Viscount

Radcliffe in Ibeneweka v. Egbuna expressed the view that, subject to the power being exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making, there is no legal restriction on the power to award a declaration. The discretion is to be exercised according to the circumstances to the exercise of the individual case and the considerations which may be material to the exercise of the discretion are so numerous that it is not possible to enumerate them."

130. I agree with the Trial Judge's findings that he is not contradicting or contravening the non-justiciability of the NGDP. The power to issue a Declaration is discretionary, subject to s.25(2). He proceeded under s.25(3) of the *Constitution*, which provision in my view is an exception to the general rule on the non-judiciability of s.25 of the *Constitution*.

131. As to the respondents submissions that the appellants cannot seek those declarations because it was not pleaded, I note that this is sufficiently pleaded in par.20 of the Amended Writ of Summons and Statement of Claim (Tab 5 of Appeal Book vol.1 pg.48).

V. Statutory Authority

132. Although, I agree with the Trial Judge, I will discuss this component further as it is very relevant to the issue of whether nuisance both public and private are permitted and are lawful.

133. The respondents submissions in the National Court on statutory approvals is extensively covered by submissions by Ramu Nico's lawyers which are contained at Tab 123, vol. 21 of Appeal Book, pgs.9487 to 9629.

134. Basically, the respondents submit that the Court has no power to restrain an activity which legislation has declared to be lawful and which by definition cannot give rise to any cause of action. They submit that a Court of Law on the other hand, has power to restrain an unlawful activity in order to prevent harm that would be actionable when it occurs.

135. The respondents further submit that the appellants have no cause of action because the activities sought to be restrained is expressly permitted and lawful. They submit that there is no right to restrict or restrain an activity that is expressly permitted by law. This is because an injunction lies to restrain an unlawful act and not a lawful act. They submit that this is not a case of acting, or threatening to act outside the terms of the permit or negligently. They submit that the legislative intent for the *Environment Act* as amended is that a permitted activity is lawful and not subject to challenge in the Court.

136. The respondents discussed s.136(3) of the *Environment Act*, clause 3(3) of the *Environment (Permit Transitional) Regulation 2010* and other relevant provisions of the *Environment Act* and *Regulations*.

137. The respondents submit that because proceedings have been brought before any tailings have been discharged, that it follows that the appellants claim must be dismissed.

138. The respondents maintain these submissions at the hearing of the appeal. I have set out in full, above, the Trial Judges reasons in response to these submissions. Basically the scheme of the act does not exclude Common Law actions. The Trial Judge went further by asking himself whether the types of environmental harm or interference in the use and enjoyment of land and sea waters are the inevitable consequence of the operations of the DSTP as it has been approved. He answered 'no' and he made findings in relation to both private and public nuisance.

139. The respondents in the Cross-Appeal submit that the Trial Judge erred when he made those findings in both private and public nuisance because the complaints were about future conduct. That an obvious essential element of the cause of action in private nuisance was not established.

140. In relation to public nuisance, the respondents submit that the obvious essential element of the cause of action were established and the declaration as to public nuisance should not have been made. They submit also that these were not pleaded in the appellants' claim in the National Court.

141. In relation to private nuisance, I have already found that the Trial Judge did not err and stated my reasons above.

142. In relation to public nuisance, as to pleading, I find these claims are sufficiently pleaded at pars. 23 and 24 of the Writ of Summons and Statement of Claim (pgs. 48 and 49 of Appeal Book, vol. 1). My other findings in relation to public nuisance are that the alleged nuisance does not fall within the parameters of the permit issued to Ramu Nico under the *Environment Act*, hence are unlawful activities.

143. I find the Trial Judge did not err.

Conclusion

144. As the majority of the grounds of appeal have been made out, I find that the Appeal must be upheld, for the appellants. In relation to the Cross-Appeal, I find that the Trial Judge did not err in his findings and so dismiss the Cross-Appeal.

Costs

145. As costs is also a ground of appeal, it is my view that costs must always follow the event. However, the Court has a discretion in the manner in which he orders, relying very much on the circumstances before him. The Trial Judges orders in the Court below are no different.

Formal Orders

146. These are my formal orders;

- (1) The Appeal is upheld;
- (2) The respondents shall not allow mine tailings or waste to be discharged into the sea, through the deep sea placement system or at all;
- (3) The Cross-Appeal is dismissed;
- (4) The respondents must pay the appellants costs of the Appeal, the Cross-Appeal and the National Court proceedings, to be taxed if not agreed.

147. **HARTSHORN and SAWONG JJ:** This appeal and cross appeal concern the Ramu Nickel Mine Project in Madang Province. Specifically they concern the operation of a deep sea tailings placement system (DSTP) through which waste or tailings from the mine will be discharged into the sea. The appellants appeal that part of the National Court decision that refused to grant a permanent injunction to restrain the respondents from allowing discharges into the sea through a DSTP.

148. The respondents oppose the appeal and cross appeal against the trial judge's declarations that the appellants had established causes of action in private and public nuisance and that the operation of the DSTP would be contrary to National Goal No. 4 of the *Constitution*. The respondents also cross appeal on questions of fact, having obtained leave to do so.

149. We consider the cross appeal against the declaratory orders first.

Cross-appeal

Error in making declaratory orders - grounds a), g), and p)

150. These grounds of cross appeal concern whether the trial Judge erred in making declaratory orders that the cross respondents had established causes of action in private nuisance and public nuisance in respect of the operation of the DSTP, and that the DSTP's operation will be contrary to National Goal No. 4 of the *Constitution* when no such orders had been sought by the cross respondents.

151. Counsel for the cross respondents conceded that although the cross respondents had sought declaratory relief, they had not sought the declarations that were made by the trial judge. It was submitted however, that s. 155 (4) *Constitution* gives the National Court the power to fashion a remedy to do justice and that Order 12 Rule 1 *National Court Rules* more particularly allows the National Court to make such orders as the nature of the case requires. Further, s.158 *Constitution* provides that the Courts shall give paramount consideration to the dispensation of justice.

152. As to s. 155 (4) *Constitution*, it is settled law that its provisions are to be utilised to enforce a primary right in the absence of other law. It is not to be utilised to render a

result that is inconsistent with an existing law, such as the *National Court Rules*. An example of this is the decision of Injia CJ in *Peter Makeng v. Timbers (PNG) Ltd* (2008) N3317. Order 12 Rule 1 *National Court Rules* provides inter alia, that a court may make such order as the nature of the case requires, on the application of any party. It is conceded by the cross respondents that no application was made to the trial judge by any party for him to make the declaratory orders that he did. The making of those declaratory orders by the trial judge in the absence of any application being made for them, is not in accordance and is inconsistent with Order 12 Rule 1 *National Court Rules*. In such circumstances, s. 155 (4) *Constitution* is not able to be relied upon, as to do so would render a result that is inconsistent with Order 12 Rule 1 *National Court Rules*.

153. As to s. 158 *Constitution*, we note that counsel for the cross appellants submitted that the trial judge did not indicate during the trial that he was proposing to make the declaratory orders that he did and so the parties were not given any opportunity to make submissions in that regard. Counsel for the cross respondents did not disagree with this submission. All parties are entitled to the dispensation of justice by the courts. To make orders that are not sought, without giving a party, especially a party that will be adversely affected by such orders, the opportunity to be heard in respect of such orders, is not in our view, a proper dispensation of justice.

154. The cross appellants submit that the declaratory order is specific relief which a plaintiff may claim in originating process: *Dent v. Kavali* [1981] PNGLR 488; *B Fortunaso Ltd v. Bank of South Pacific Ltd* [1992] PNGLR 275. Further, Order 4 Rule 7 (1) *National Court Rules* provides that an originating process shall state specifically the relief claimed and that a plaintiff is restricted to what has been included in his originating summons or writ of summons and statement of claim: *PNGBC v. Jeff Tole* (2002) SC694. We agree with these submissions. We are satisfied that by making declaratory orders that were not sought in the pleading of the cross respondents, that were not applied for during the trial and in respect of which no notice was given to the parties that it was contemplated that such orders were to be made, the trial judge fell into error.

Whether causes of action in nuisance were established – grounds b), c), h) and i)

155. In these grounds of cross-appeal, the cross appellants contend that the trial Judge erred in making declaratory orders that causes of action in private and public nuisance had been established when the cross respondents' complaints concerned causes of action that might or might not arise in the future. It was not alleged by the cross respondents that there had been any discharge of tailings or mine waste through the DSTP.

156. The cross respondents submit that a private nuisance is an unreasonable interference with the use and enjoyment of land, as is a public nuisance, and in addition, a public nuisance is widespread and affects much of the community. The cross respondents do not specifically address the issue of whether the interference about which complaint is made has to have occurred or have begun or that damage has been suffered. The trial judge in his consideration of private and public nuisance did not consider the issue in depth. He states that a discussion of the subject in *Halsbury's Laws of England* 4th edition, Volume

34, Butterworth's, 1977 and *The Law of Torts*, John G. Fleming, Law Book Company, 1977 demonstrates that one of the elements of private nuisance is that the defendant's conduct will interfere with the use and enjoyment of the plaintiff's. There is no consideration by the trial judge of whether the occurrence the subject of complaint, should have commenced and damage occasioned, for a cause of action in both private and public nuisance to be established.

157. The cross respondents made further submissions concerning when a quia timet injunction should be awarded. These submissions however, do not address the issue raised by these grounds of cross appeal which is whether causes of action in nuisance were established, as declared by the trial judge.

158. The cross appellants submit that, "the gist of private nuisance is an interference with an occupier's interest in the beneficial use of his land": *Fleming, The Law of Torts*, Ninth Edition p.464. Further, the cross respondents have not proved or even alleged that there has been any interference. Their complaints concern future conduct only. Similarly with public nuisance, the cross appellants submit that an essential element of the cause of action is interference with a public or common right and that the claimant has "incurred some 'particular' or 'special loss' over and above the ordinary inconvenience or annoyance suffered by the public at large": *Fleming, The Law of Torts*, Ninth Edition, p. 460. Here, submit the cross appellants, there has been no interference with any public or common right, and none of the cross respondents had suffered "particular", special, or any loss.

159. Other learned authors have stated the following on this issue:

a) "In nuisances... causing physical damage to land, actual damage is essential to a cause of action.": *Clerk & Lindsell on Torts* 11th Ed, Sweet & Maxwell, 1954, p. 568, and at p. 569, "A public nuisance is only actionable at the suit of a private person on proof of special damage."

b) "If the nuisance is a public one, it has long been settled that the plaintiff must prove damage. In the case of a private nuisance, however, although it is said that damage must be proved, the law will often presume it. In *Fay v. Prentice* (1845) 1 C.B. 828, a cornice of the defendant's house projected over the plaintiff's garden, and it was held that the law would infer injury to the plaintiff without proof of it. This inference appears to apply for any nuisance where the damage is so likely to occur that it would be superfluous to demand evidence that it has occurred": *Winfield and Jolowicz on Tort*, 11th Ed, Sweet & Maxwell, 1979 p.383,

c) "The plaintiff's cause of action is made out on proof of material damage to his or her property": *Torts, The Laws of Australia* 2nd Ed, Thomson Law Book Co, 2007 p. 434.

160. We have also had recourse to Australian and English decisions, which are of persuasive value in our jurisdiction. They support the position contended by the cross appellants. In *Sedleigh-Denfield v. Callaghan* [1940] AC 880 at 896, a decision of the

House of Lords, Lord Atkin said: “... as long as the offending condition is confined to the defendant's own land without causing damage it is not a nuisance, though it may threaten to become a nuisance. But where damage has accrued the nuisance has been caused.” In *Lister v. Hong* [2006] NSWSC 1135, a decision of the New South Wales Supreme Court, it was stated at para 23; “The cause of action in nuisance arose when the damage first occurred....” and at para 30; “In (*State of South Australia v. Simionato & Ors* [2005] SASC 412) the Full Court held that the cause of action in nuisance does not arise until the damage first occurs....”

161. In *Barr & Ors v. Biffa Waste Services Ltd (No. 3)* [2011] EWHC 1003 at para 213, a decision of the English and Welsh High Court, it was stated as to private nuisance; “As the editors of *Clerk and Lindsell* make plain, a neighbour has a cause of action on the first occasion of damage” and in *Jan De Nul (UK) Ltd v. N. V. Royale Belge* [2000] EWHC 71 at para 44, “The valuable analysis of the earlier authorities carried out by Scholl J. supports the conclusion that an individual may pursue an action based on a public nuisance if he has suffered some substantial, that is, more than merely trivial, injury over and above that suffered by the public at large. Whether the plaintiff has suffered such an injury is essentially a matter of fact....”

162. Consequently, having regard to the above authorities and in the absence of any specific authority on point to the effect that private and public nuisance causes of action can successfully be established before the interference about which complaint is made commences or before damage has occurred, we are satisfied that an essential element of the cause of action of private nuisance is that there has been interference with the occupiers interest in the beneficial use of his land and that for the cause of action of public nuisance an essential element is interference with a public or common right. Further, in respect of public nuisance, the claimant must have incurred some particular or special loss over and above the ordinary inconvenience or annoyance suffered by the public at large. There is no evidence of interference or damage in this instance. Indeed, it is conceded, if we understand correctly, that there has not been any interference or damage. In such circumstances, we are satisfied that the trial judge fell into error when declaring as he did, that the cross respondents had established causes of action in private and public nuisance.

National Goal No 4 declaration – grounds q) and r)

163. The cross appellants contend that the trial Judge erred in making a declaratory order that the operation of the DSTP will be contrary to National Goal No. 4 of the *Constitution*. This is because s. 25 (1) *Constitution* provides that the National Goals and Directive Principles are non-justiciable except to the extent provided in subsections (3) and (4) which have no relevant application, and that the trial judge misconstrued s. 25 (3) in finding that it authorised or obliged him to make such a finding or order. None of the provisions of s. 25 create any substantive rights and no cause of action is created, the cross appellants submit.

164. Section 25 *Constitution* is as follows:

“25. Implementation of the National Goals and Directive Principles

- (1) Except to the extent provided in Subsections (3) and (4), the National Goals and Directive Principles are non-justiciable.
- (2) Nevertheless, it is the duty of all governmental bodies to apply and give effect to them as far as lies within their respective powers.
- (3) Where any law, or any power conferred by any law (whether the power be of a legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised or enforced, without failing to give effect to the intention of the Parliament or to this Constitution, in such a way as to give effect to the National Goals and Directive Principles, or at least not to derogate them, it is to be understood, applied or exercised, and shall be enforced, in that way.
- (4) Subsection (1) does not apply to the jurisdiction of the Ombudsman Commission or of any other body prescribed for the purposes of Division III.2 (leadership code), which shall take the National Goals and Directive Principles fully into account in all cases as appropriate."

165. Schedule 1.7 *Constitution* provides:

"Sch.1.7. "Non-justiciable".

Where a Constitutional Law declares a question to be non-justiciable, the question may not be heard or determined by any court or tribunal, but nothing in this section limits the jurisdiction of the Ombudsman Commission or of any other tribunal established for the purposes of Division III.2 (leadership code)."

166. Section 25 (4) *Constitution* is not relevant in this instance. The extent provided in s. 25 (3) for the National Goals and Directive Principles to be heard or determined is in relation to whether a law can be reasonably enforced to give effect to or not derogate from the National Goals and Directive Principles. It is not provided in s. 25 (3) that the National Court can give an opinion or make a declaration as to whether a law or power conferred by a law is contrary to a National Goal. By giving an opinion or making a declaration, the trial judge heard and made a determination as to a National Goal to an extent not provided for under s. 25 (3) *Constitution*. We are satisfied that the trial judge erred in making the declaratory order that he did.

167. Given our findings on the grounds of cross appeal considered above, it is not necessary to consider the other grounds to determine the cross appeal. The cross appeal should be allowed.

Appeal

168. As to the appeal, in allowing the cross appeal, we have found that the trial judge erred in declaring that the appellants had established causes of action in private and public nuisance and erred in declaring that the operation of the DSTP will be contrary to *National Goal No. 4*.

169. The trial judge refused to grant the permanent injunction sought by the appellants even though he had held that causes of action in private and public nuisance had been

established. Grounds a) to e) and h) of the appeal are based upon the trial judge finding that causes of action in nuisance had been established. As we have found that the trial judge erred in so finding, the bases for these grounds of appeal are no longer available.

170. As to ground f), that the trial judge erred in refusing, "... to make the permanent injunction on the grounds of unreasonable delay", from our reading of the trial judge's decision, he did not refuse an injunction on such grounds. The issue of delay was one of the grounds for refusing to grant an injunction and not the ground. As to the trial judge's consideration of the issue of delay, the time of the commencement of the proceedings is not in dispute and is clearly a primary factor warranting consideration. We are not satisfied that the trial judge erred in his consideration of this issue.

171. As to ground g), again the issue the subject of this ground, that, "... the First Respondent made their (sic) investments and plans on the reasonable assumption that there would be no objection to the DSTP in the form of nuisance litigation...", was not the, but a ground for refusing to grant an injunction. As the trial judge found that statutory approval had been obtained, a consideration of the first respondent's assumption was appropriate and we do not consider that the trial judge erred in his consideration of this issue.

172. As to ground i), it does not identify any error of law, or mixed fact and law and in our view is clearly without merit.

173. As to grounds j) to p) they are all concerned with whether the trial judge gave too much weight to some factors or not enough weight to others. This court will not lightly interfere in discretionary judgments of the National Court and will do so only in limited circumstances. For this court to interfere in a discretionary judgment of the National Court, it must be shown that the trial judge exercised his discretion upon a wrong principle, or allowed extraneous or irrelevant matters to guide or affect him, or has mistaken the facts or failed to take into account some relevant consideration, or that the decision is plainly unjust: *Government of Papua New Guinea v. Barker* [1977] PNGLR 386; *Lewis v. The State* [1980] PNGLR 219; *Bean v. Bean* [1980] PNGLR 307; *Ramu Nico MCC PNG Ltd v Tarsie* (2010) SC1075 (per Sawong J).

174. As to delay in respect of a project that is the size of the Ramu Nickel Mine Project, that it would have a multiplier effect upon the provincial and national economies, in our view is clear and that it is not correct as the appellants contend, that it was not open to the trial judge to make such a finding on the evidence. We are satisfied that the trial judge was entitled to make the finding that investor confidence in this country would be adversely affected if a permanent injunction was issued at such a late stage in respect of a project of this size. In the circumstances we are not satisfied that the trial judge exercised his discretion upon a wrong principle or allowed extraneous or irrelevant matters to guide or affect him or that he mistakenly considered facts or failed to take into account some relevant consideration or that the decision not to grant the injunction was plainly unjust. Further, we are not satisfied that the trial judge erred by giving too much weight to some factors or not enough weight to others.

175. As to ground q), this ground is based upon the trial judge finding that National Goal No. 4 was and would be breached. We have already determined that the trial Judge erred in this regard and so the basis for this ground of appeal is not available.

176. As to grounds r) and s), that the trial Judge erred in finding that the respondents had acted in good faith and took into account irrelevant considerations when refusing to grant an injunction, we are not satisfied that the trial judge did so err as contended. The trial judge was entitled to make the findings that he did.

177. Given the above, the appeal should be dismissed.

Orders

178.

- a) the appeal is dismissed and the cross appeal is allowed.
- b) the declaratory order made in the National Court that the cross respondents have established a cause of action in private nuisance in respect of the operation of the deep sea tailings placement system (DTSP) is quashed.
- c) the declaratory order made in the National Court that the cross respondents have established a cause of action in public nuisance in respect of the operation of the DSTP is quashed.
- d) the declaratory order made in the National Court that the operation of the DSTP will be contrary to National Goal No. 4 (Natural Resources and Environment) of the *Constitution* is quashed.
- e) the cross respondents shall pay the cross appellants costs of the appeal and cross-appeal and in the National Court.

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