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Foreword

I have the privilege to launch the second edition of the Attorney General's Law Journal.

Our intention is for the Journal to be an annual publication where Government lawyers and law practitioners in the public law space can publish on developing trends in the law.

The Office of the Attorney General and the Department of Justice can use the Journal to connect with the legal fraternity, government and stakeholders on legal policy and trends in our sector.

In encouraging lawyers to publish articles, I hope fundamental skills in legal research and critical analysis can be maintained amongst government lawyers and all our lawyers in the jurisdiction.

The lawyer who has no time or appetite for writing well researched and articulated articles or arguments can be likened to the salt that has lost its taste.

This Journal is intended to cause a stirring of a culture of publishing by lawyers in our jurisdiction.

I have not sighted the MLJ for many years and I have no idea what the next volume of the PNG Law Report will be. Pardon my ignorance.

So if you, like me and many others, see the challenge to rekindle literary flame in our profession then this second edition begins the bigger challenge to maintain the Journal and to expand the readership over time.

I thank the Editorial Board under the leadership of Dr Eric Kwa PhD, Attorney General and Secretary of the Department of Justice and for turning an idea into this second edition of the Attorney General's Law Journal.

I also commend those who have contributed to this second edition. I dedicate the Journal to government lawyers in our country who remain true to our noble calling to defend the rule of law and uphold our Constitution and laws, always, without fear or favour.

With God's help we can be part of the change that our nation deserves in this hour.

HON. BRYAN KRAMER, MP

Minister for Justice

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Setting Aside Default Judgments, Assessment of Damages and Negotiated Settlements

Kaiyoma Akeya*

Introduction

When acting for the State where a matter has been entered into default judgment against the State, the task of a State lawyer is to determine whether:

(1) there are grounds to set aside the default judgment; and

(2) if there are no grounds to set aside the default judgment, what arguments can be raised to limit the State's liability in the Court's assessment of damages.

It is therefore, important to know and understand the way damages are assessed in the circumstances of a default judgment and the different types of damages that are available.

What is a default judgment?

What is a default judgment? It is a judgment entered in favour of the plaintiff when the defendant defaults in either entering an appearance or in filing a defence. Division 3 of O12 of the *National Court Rules* (NCR) deals with default judgements. Default judgments only apply to proceedings commenced by a writ of summons (O12 r24). This rule does not apply to matters commenced by originating summons or any other type of initiating process.

When is a defendant in default?

Order 12 rule 25 of the NCR sets out three circumstances in which a default judgement may be entered. It does this by specifying the circumstances in which a defendant shall be in default. These circumstances are:

1. where the originating process bears a note under O4 r9 (that is, the defendant must file a notice of intention to defend in the prescribed form or otherwise he shall be liable to suffer judgement or an order against him), and the time for the defendant to comply has expired (but the defendant has not given the notice); or
2. where he is required to file a defence and the time for him to file his defence has expired (but he has not filed his defence); or
3. where he is required under O8 r24 to verify his defence (that is, to file an affidavit verifying his defence to a claim for a liquidated demand) and the time for him to verify his defence in accordance with that rule (that is, within the time allowed for filing his defence) has expired (but he has not so verified his defence).

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What are the terms of a default judgment?

Once a defendant is in default, the plaintiff may then apply for default judgment. The terms of that judgment will depend upon the type of claim that the plaintiff has filed. Most actions against the State seek damages as a remedy. Where a matter enters into a default judgment, a separate trial is usually held to determine the assessment of damages. Most claims against the State are for unliquidated damages as opposed to liquidated damages[1] (that is, there is not an express amount of debt claimed only in the Statement of Claim). The court has no power to make a default judgment that also determines the quantum of damages payable unless the claim is for a debt only. Section 12(3) of the *Claims By and Against the State Act* 1996 provides that:

> Where in a claim against the State the State is in default within the meaning of the National Court Rules, then notwithstanding that a plaintiff's claim for relief is for a liquidated demand, judgement shall not be entered against the State for the sum claimed unless the claim relates to a debt only, and in all other cases judgement shall be entered for damages to be assessed and, where appropriate, for costs.[2]

If a default judgment has been entered against the State for a sum of money and also for the further assessment of damages, the party must seek to have the default judgment either corrected through the exercise of the court's powers under O8 r59(1) of the NCR or set aside for irregularity.[3] Unlike the rules under O12 r31, it is not possible for a default judgment to be entered against the State for a mixed claim, that is, partly assesses the amount of damages and partly leaves damage to be assessed.[4]

What action can be taken to set aside a default judgment?

Order 12 rule 35 gives the court a very wide discretion in deciding whether to set aside a default judgment. The provision reads:

> The Court may, on such terms as it thinks just, set aside or vary a judgment entered in pursuance of this Division.

Principles for setting aside default judgments

In considering whether to set aside a default judgment, there is a distinction to be made between[5]:

- a default judgment entered regularly;
- a default judgment entered irregularly in acting under a rule; and
- a default judgment obtained irregularly independent of the NCR (a nullity)

The case law on how to distinguish between the different circumstances in which a default judgment may have been entered, is confusing and, is not a settled area of law in PNG, notwithstanding the various attempts by the courts to clarify the position.

The importance of making this distinction, is in how, counsel can argue, the court should dispose of the default judgment. Regularly entered default judgments, and default judgments entered irregularly

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1 For the Supreme Court's consideration of the meaning of liquidated damages see the case of *Dempsey v Project Pacific Ltd* [1985] PNGLR 93.

2 Order 12 rr 27, 28, 29 of the NCR govern the scope of the Court's power to make awards of damages in default judgments generally in matters where the State is not a party.

3 See *State v Josiah* (2005) SC792 and *Rose v State* (2007) N3241.

4 Supra.

5 For the principles of setting aside default judgments see the following PNG cases: *Hannet and Hannet v ANZ Banking Group (PNG) Ltd* (1996) SC505; *Yamanka Multi Services Ltd v National Capital District Commission* (2010) N3904; *Megeria v Romanong, Provincial Administrator, Southern Highlands* (2001) N2131; and the UK cases of *Anlaby v Praetorius* (1888) 20 QBD 764 and *Re Pritchard decd. Pritchard v Deacon and Ors* [1963] Ch 502.

in acting under a rule, are subject to the court's discretion as to whether they should be set aside. The discretion is exercised in both cases in accordance with the same general considerations, but there is arguably a distinction in the starting point for the court:

- for regularly entered default judgments, there is a heavy onus on the defaulting party to demonstrate why the default judgment should be set aside; and
- for default judgments irregularly entered in acting under a Rule, the defaulting party seeks to set aside the judgment *ex debito justitiae* (as of right). But O1 r8 has the effect of giving the court the discretion to maintain the default judgment where the interests of justice would be served.

A default judgment obtained irregularly independent of the NCR ***must*** be set aside by the court as the proceedings are a nullity.

Judgment entered regularly

A judgment entered regularly is a judgment that has been entered in accordance with the NCR and, arguably, within the court's jurisdiction. Where there has been a regularly entered judgment there should arguably be that there is no question that the court had jurisdiction to enter the default judgment. The party in whose favour default judgment has been awarded has complied with all relevant rules and procedural laws.

There are a large number of cases that have consistently set out the considerations the court must take into account in setting aside regularly entered default judgments.[6] The matters that an applicant must show for the court to exercise its discretion to set aside a regularly entered default judgment are:

- there must be an affidavit stating facts showing a defence on the merits;
- there must be a reasonable explanation why judgment was allowed to go by default; and
- the application to set aside the default judgment must be made promptly and within a reasonable time.

There is judicial commentary that the first consideration is the principal consideration[7], but it seems quite settled that a court is to take into account the other factors to determine whether, in the interest of justice, the default judgment can be set aside. In other words, no one criteria is given precedence over the other. However, it is essential that there exists a defence on the merits. Even though a party may be able to establish a defence on the merits, a delay in bringing the application to have a default judgment set aside without reasonable excuse or no reason for letting a matter go into default will likely result in the court refusing the application.

Judgment entered irregularly in acting under a rule

A judgment can be entered irregularly under the NCR in non-compliance with a rule or court procedure. The irregularity normally occurs where the party seeking the default judgment has made an error in complying with the NCR prior to seeking the default judgment, which in turn, may have resulted in the other party being in default.

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6 See *Green & Co. Pty Ltd v Green* [1976] PNGLR 73; *Barker v The Government of Papua New Guinea & Ors* [1976] PNGLR 340; *The Government of PNG & Davis v Barker* [1977] PNGLR 386*; George Page Pty Limited v Malipu Bus Balakau* [1982] PNGLR 140; *Provincial Government of North Solomons v Pacific Architecture Pty Ltd* [1992] PNGLR 145; *Hannet and Hannet v ANZ Banking Group (PNG) Ltd* (1996) SC505*; Leo Duque v Avia Andrew Paru* [1997] PNGLR 378; *Smith v Ruma Constructions Ltd* (2002) SC695; *Totamu v Small Business Development Corporation* (2009) N3702 and *Yamanka Multi Services Ltd v National Capital District Commission* (2010) N3904.

7 See for example *Tomatu v Small Business Development Corporation* (2009) N3702.

For example, a plaintiff may fail to effect proper service against the defendant, such as by personally serving the wrong representative of the defendant. If the respondent fails to file a defence in time, the court may still enter a default judgment. The default judgment entered is done so irregularly, but under the NCR. Notwithstanding the plaintiff's error under the NCR, the default judgment stands until such time that action is taken to set it aside.

Where the irregularity is because of non-compliance with a rule, O1 r8 has the effect of not invalidating the proceedings. Order 1 r8 provides:

> Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void, unless the Court so directs, but the proceedings may be set aside, either wholly or in part, as irregular, or may be amended or otherwise dealt with, in such a manner, and on such terms, as the Court thinks fit.

The courts have consistently found that because O1 r8 does not void any proceedings commenced in accordance with the NCR notwithstanding that a procedural error was made under the NCR, any consequent irregular default judgment can only be overturned in the circumstances provided by O1 r9. Order 1 r9 provides:

> An application to set aside any proceeding for irregularity shall not be allowed unless it is made within a reasonable time, or if made after the party applying has taken any fresh step with knowledge of the irregularity.[8]

For a judgment that has been obtained irregularly where the irregularity falls within O1 r8 of the NCR, the considerations for the court are:

- the applicant asking for the judgment to be set aside must show a defence on the merits (adopting the opinion of Greville-Smith J in *Page Pty Ltd v Malipu Bus Balikau*[9] that the practice in relation to judgments obtained regularly should apply to judgments obtained irregularly);
- the applicant must not have taken a fresh step in the proceeding with knowledge of the irregularity (a requirement of O1 r9);
- the application is made within a reasonable time (O1 r9); and,
- the several objections intended to be insisted on as to the irregularity must be stated in the notice of motion seeking to set aside the default judgment (O1 r10).

Where a party is aware that there is a procedural irregularity in the way proceedings have been brought against the State under the NCR (to meet the requirements of O1 r9) it is prudent for State counsel to:

- immediately bring a motion to have the matter set aside or struck out; and
- not proceed any further with the substantive matter until such time as the issue of the irregularity is resolved.

Judgment obtained irregularly independent of the Rules

In the *Hannet* case[10], the Supreme Court relied on the UK Court of Appeal decision in *Re Pritchard*[11] to arguably confine default judgments that are a nullity to circumstances where there was no ability for the proceedings to have been commenced by the plaintiff – for example, the plaintiff was dead or non-existent at the time of commencing the claim. In drawing this conclusion, the court emphasized the effect of O1 r8 of the NCR and the broad discretion to correct defective proceedings under the NCR.

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8 See cases in n7.
9 Supra.
10 Followed by the National Court in *Yamanka* case, supra.
11 See n5, supra.

The *Hannet* case does not clearly identify what circumstances amount to a nullity as opposed to an irregularity acting under the NCR. The court in *Hannet* quoted the minority judgment of Denning LJ in *Re Pritchard*, which is misleading as the leading judgment in *Re Pritchard* was that of Upjohn LJ (with Danckwerts LJ agreeing).

A real question is raised by proceedings that are infected with errors for non-compliance with a legislation that governs court procedure rather than the NCR. This is particularly the case for claims against the State, which are governed by both the *Claims By and Against the State Act* 1996 (CBASA) and the NCR. For example, a plaintiff may fail to effect proper service against the State in accordance with section 7 of the CBASA. This would also include matters where no notice has been given in accordance with section 5 of the CBASA), but default judgment has been entered. It is well settled that a section 5 notice is a condition precedent to the commencement of proceedings against the State.[12]

Other legislation can give rise to procedural errors in the commencement of proceedings where the action is commenced after the expiration of statutory limitations.[13] For example, a party may commence proceedings outside the statutory time limits dictated by section 16 of the *Frauds and Limitations Act*. Notwithstanding the statutory time limits, the party still has the ability to commence the proceedings in accordance with the relevant NCR. Even though the claim was brought outside the statutory time limits, the claim itself is still "alive". The defendant is entitled to either plead in a defence that the court had no jurisdiction because of the statutory time limit or make an application to strike out the matter on the basis that no reasonable cause of action was disclosed (again because of the statutory time limit). If the defendant fails to take either course of action, the court may enter default judgment in accordance with the NCR.

However, does the plaintiff's failure to comply with the statutory procedural requirements – that is, to make a claim before the statutory limitation - render the proceedings a nullity? It is arguable both ways. The claim itself was made within the NCR and if a default judgment is made within the NCR, it is arguably a regularly entered default judgment. However, it is also arguable that such a default judgment was made irregularly acting outside the NCR and contrary to a procedural law and is therefore a nullity. Due to the failure to file the claim within the statutory limitation, the proceedings should and could never be brought.

In the *Re Pritchard* case, Upjohn LJ distinguished between defects in proceedings which could and should be rectified by the court and those which were so fundamental that they made the whole proceedings a nullity. Upjohn LJ identified that the classes of nullity are:

- Proceedings which should have been served but have never come to the notice of the defendant at all (not including cases of substituted service, service by filing in default or where service has properly been dispensed with);
- Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; and
- Proceedings which appear to be duly issued but fail to comply with a statutory requirement.[14]

Based on Lord Upjohn's assessment of the classes of nullity, there are strong arguments that a plaintiff's failure to comply with a *statutory* procedural requirement (as opposed to a rule) renders the proceedings a nullity and the State should have a right to have any default judgment set aside.

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12 *Tohian, Minister for Police and the State v Tau Liu* (1998) SC566. See also *Uriap v Tokivung* (2008) N3444 for an example of where the National Court dismissed proceedings because of the plaintiff's failure to file a section 5 notice. Similar arguments can be raised that the proceedings are a nullity and any default judgment entered must be set aside as of right.

13 For example, section 16 of the *Frauds and Limitations Act* 1988 and section 84 of the *Workers' Compensation Act* 1978.

14 *Re Pritchard case*, n5, supra, at pp523-524.

Assessment of Damages

If there are no arguments that can be raised for setting aside a default judgment, a party's task is to either:

1. negotiate down a reasonable settlement amount and make a recommendation to the Attorney-General to settle the matter by way of consent judgment; or
2. defend a trial on the assessment of damages.

Principles for assessing damages

The Supreme Court ruled in *Mel v Pakalia*[15] that where default judgment is granted, for damages to be assessed on a given set of facts *as pleaded* in a statement of claim, the evidence must support the facts *pleaded*. No evidence will be allowed in support of facts that are not pleaded. A party cannot obtain relief which has not been requested or sought in the pleadings.[16]

The Supreme Court's decision in the Mel case[17] sets out the following principles that apply to a trial on assessment of damages following entry of default judgment:

1. The judgment resolves all questions of liability in respect of the matters pleaded in the statement of claim. Once default judgment is entered, the facts *as pleaded* and their legal consequences in terms of establishing the cause of action *as pleaded* must be regarded as proven.
2. Any matter that has not been pleaded but is introduced at the trial is a matter on which the defendant can take an issue on liability.
3. The plaintiff has the burden to produce admissible and credible evidence of his alleged damages and if the court is satisfied on the balance of probabilities that the damages have been incurred, awards can be made for the proven damages.
4. A plaintiff is only entitled to lead evidence and recover such damages as may be pleaded and asked for in his statement of claim.

The Supreme Court also elaborated on these key principles with the following important considerations which may give rise to good arguments for limiting the State's liability or avoiding liability altogether:

1. The plaintiff has the onus of proving his or her loss on the balance of probabilities. It is not sufficient to make assertions in a statement of claim and then expect the court to award what is claimed. The burden of proving a fact is upon the party alleging it, not the party who denies it. If an allegation forms an essential part of a person's case, that person has the onus of proving the allegation.[18]
2. Corroboration of a claim is usually required and the corroboration must come from an independent source.[19]
3. The principles of proof and corroboration apply even when the defendant fails to present any evidence disputing the claim.[20]

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15 (2005) SC790.

16 See also *MVIT v Tabanto* [1995] PNGLR 214; *Waima v MVIT* [1992] PNGLR 254; *MVIT v Pupune* [1993] PNGLR 370; *Tabie Mathias Koim and 28 Others v The State and Others* [1998] PNGLR 247; *Pokau v Wettie* (2010) N4086.

17 Adopting and expanding on the principles enumerated in *Coecon Ltd (Receiver/Manager Appointed) v National Fisheries Authority* (2002) N2182.

18 See *Yooken Pakilin v The State* (2001) N2212.

19 See *Albert Baine v The State* (1995) N1335, and *Kopung Brothers Business Group v Sakawar Kasieng* [1997] PNGLR 331.

20 See *Peter Wanis v Fred Sikiot and The State* (1995) N1350.

4. The same principles apply after default judgment is entered and the trial is on assessment of damages – even when the trial is conducted ex parte. A person who obtains a default judgment is not entitled as of right to receive any damages. Injury or damage suffered must still be proved by credible evidence.[21]
5. If the evidence and pleadings are confusing, contradictory and inherently suspicious, the plaintiff will not discharge the onus of proving his losses on the balance of probabilities. It is conceivable that such a plaintiff will be awarded nothing.[22]
6. Where default judgment is granted, for damages to be assessed on a given set of facts as pleaded in a statement of claim, the evidence must support the facts pleaded. No evidence will be allowed in support of facts that are not pleaded.[23]
7. The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages. Where precise evidence is available the court expects to have it. However, where it is not, the court must do the best it can.[24]

When deciding on damages to be assessed, the affected party must produce primary evidence of injuries sustained, for example, hospital admission records and medical treatment records; information that will go towards determining the injuries sustained at the date of the accident and treatment rendered. It is not sufficient for a party to produce secondary materials, for example medical reports prepared some years after the incident describing injuries received at the date of the incident.[25]

Non-compliance with Rules as to pleading of damages

It is also important to note that Order 8 Division 2 of the NCR sets out the requirements for pleading particulars in certain circumstances. As regards particularising damages, O8 rr33 and 34 are the only rules that specify requirements for particularising damages and they relate to claims for damages in tort, or breach of statutory duty in respect of death or personal injuries (O8 r33), or a common law claim for damages relating to out of pocket expenses (O8 r34).

In addressing arguments that damages needed to be particularized when claimed in judicial review proceedings, the National Court in *Sausau v Kumgal* held that:

> Except as expressly stipulated in respect of specific type of cases in O8 Div. 2, there is no requirement for a person claiming damages in tort or contract to plead in a Statement of Claim particulars of damages. If such were intended, the rules would have expressly said so as is the case with r33 and r34. Particulars of damages are normally supplied in response to a request for particulars or upon order for particulars under r36, made upon application by a party or on the Court's own motion.[26]

Where a case falls within O8 rr33 and 34 and the plaintiff has failed to particularise his damages in accordance with the NCR, it is arguable that the plaintiff is not entitled to have those damages assessed. The exception to this is if the plaintiff can establish that they meet the circumstances of O8 r35(2), which removes the need for the plaintiff to plead particulars in the Amended Statement where:

- the necessary particulars of debt, expenses or damages exceed three folios;

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21 See *Yange Lagan and Others v The State* (1995) N1369.
22 See *Obed Lalip and Others v Fred Sikiot and The State* (1996) N1457.
23 See the cases in n16, supra.
24 See *Jonathan Mangope Paraia v The State* (1995) N1343.
25 See *Pokau v Wettie*, supra. Note the pleading requirements for special damages as identified in *Papua New Guinea Banking Corporation (PNGBC) v Tole* (2002) SC694 (discussed below under "Special Damages").
26 (2006) N3253.

- the necessary particulars of debt, expenses or damages have, before the date on which the pleading is filed, been given to the party on whom the pleading is required to be served; and
- the pleading shows the date on which the particulars were given.

Types of damages

There are five main types of damages that can be awarded:

- Nominal damages;
- Special damages;
- General damages;
- Aggravated damages; and
- Exemplary damages.

Nominal damages

The purpose of nominal damages is not to compensate the plaintiff, but to record the fact that their rights have been infringed. For example, a trespass to a person or trespass to property may not result in any loss or damage. As the plaintiff has not suffered any loss that requires compensation in such a case, it is inappropriate to award compensatory damages. The court awards a small, nominal sum as damages to record the fact that the defendant infringed the plaintiff's rights.

Special damages

Special damages are a form of compensatory damages. Special damages are awarded where monetary loss has been suffered and expenditure has actually occurred. Special damages compensate for losses that can be proved with relative precision. They are also referred to as liquidated damages because they are damages that are capable of arithmetic calculation.

The loss is only calculated up until the actual date of verdict and the loss must be able to be precisely calculated. For example, if a plaintiff is seeking damages in a civil claim as a result of being punched in the face by a police officer, the plaintiff may have had his or her glasses broken in the assault. If the glasses have been replaced by the time of the trial, the cost of the replacement glasses would be an item of special damage. Medical expenses incurred as a result of the assault would also fall within special damages that would be claimed. The plaintiff should be able to prove in evidence exactly how much money he or she has spent on replacement glasses or hospital or medical expenses between the assault and the date of the trial. If not, the defendant must argue that the award of special damages is nil. As observed by the Supreme Court in *PNGBC v Tole*:

> It is clear law that, where a plaintiff's claim is special in nature, such as a claim for loss of salaries or wages, they must be specifically pleaded with particulars. Unless that is done, no evidence of matters not pleaded can be allowed and relief granted. That is apparent from the judgements in the *James Pupune* and *John Etape* cases. These cases adopted and applied the principles enunciated in those terms in authorities such as *Ilkiw v Samuel* [1963] 2 All ER 879, per Diplock L J at pp. 980-891 and *Pilato v Metropolitan Water Sewerage and Drainage Board* (1959) 76 WN (NSW) 364, per McClemens J at 365. This follows in turn from the fact that, our system of justice is not one of surprises but one of fair play. Reasonable opportunity must be given to each other by the parties to an action to ascertain fully the nature of the other's case so that, if need be, a defendant can make a payment into court.

In the abovementioned case, the plaintiff pleaded that as a result of his unlawful termination, he had been deprived of salary, allowances and benefits, of which "particulars would be provided after discovery and prior to trial." The failure to properly plead the particulars of the special damages and consequently not amending the Statement of Claim prior to the entry of default judgment resulted in the court assessing damages of K0. The court held that:

> The onus remained with Mr Tole to properly plead and then prove what was in fact pleaded by way of damages. The moment he stepped outside the pleadings he went outside what was resolved by the default judgement. The Court in my view was therefore, left with only one of two options to take. The first was to proceed to assess damages and grant such relief as was properly pleaded for which default judgement was entered. The second was to allow an amendment to the pleadings and then adjourn the hearing to allow Mr Tole to notify PNGBC of the additional claims and give PNGBC the opportunity either to admit or deny liability for that….
>
> It is the duty of a plaintiff to plead his claim with sufficient details or particulars. It is a breach of the Rules and it complicates claims unnecessarily by practices such as, was the one adopted by Mr Tole in paragraph 6 of his statement of claim. There he pleads in a way making it necessary for PNGBC to seek discovery or better particulars by pleading "*Particulars will be provided after discovery and prior to trial*." Such a pleading gives no advantage to a plaintiff, since he cannot add to his statement of claim without an actual amendment to his statement of claim. Also, such a pleading casts no onus or obligation on a defendant to clarify or enlarge a plaintiff's case and it simply has no foundation in the Rules.[27]

A default judgment can be entered against the State that specifies an amount of special damages only without proceeding to a separate trial for assessment of damages.[28] A default judgment against the State cannot have a mixed amount of special damages and also order the further assessment of other damages.[29]

For personal injuries or death cases, including medical negligence, by a public hospital or a trespass to a person (assault) by the police, O8 r33(1)(g) of the NCR requires the special damages claimed to be particularised. For claims involving money or a debt which has been paid or is liable to be paid, the details of the money paid or debts owing up to the date of the trial must be particularised in the plaintiff's Statement of Claim (O8 r34).

Where the NCR require damages to be particularised (per either or both O8 rr33 and 34 as relevant to the particular case), it is possible that if a plaintiff fails to particularise those damages in the pleadings, the court's discretion to award those damages is excluded.[30]

General damages

General damages are also a form of compensatory damages. Some losses do not lend themselves to exact arithmetic calculation, but must be assessed by a court. General damages are awarded to compensate for losses that cannot be proved precisely and include compensation for loss of amenities, pain and suffering and future economic loss. A court must take into account all of the relevant facts and circumstances in making an award of damages.

There are a number of categories of general damages:

- **Loss or damage to part of the body:** This may be serious, such as loss of a limb or paralysis, or may be less serious, such as a scar.
- **Loss of function or use of the body:** This may take the form of an inability to walk, climb stairs, the inability to have sexual intercourse, brain damage or loss of sight.
- **Pain and suffering:** This takes many forms, for example, muscle pain, back pain, arthritis, headaches, etc.
- **Psychological injury:** Compensation for this form of general damage is available pursuant to section 36 of the *Wrongs Miscellaneous Provisions Act*.
- **Loss of amenities:** This refers to a diminishment in one's ability to enjoy life. It can take many forms, for instance, the inability to sleep through the night, the inability to enjoy a

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27 See also the National Court's decision in *Horope v Baki and Ors* (2011) N4423.
28 See section 12(3) of the CBASA.
29 Compare O12 r31 of the NCR which applies to default judgments made against parties other than the State.
30 See the *Sausau v Kumgal case*, supra.

hobby, the loss of the enjoyment of playing a sport or the inability to drive a car because of the effects of an injury.

- **Loss of expectation of life:** Where an injury results in the loss of expectation of life, that may be taken into account in awarding general damages.
- **Future loss of income or ability to earn an income:** This is something that commonly results from physical injuries that leave a permanent disability. Even a partial diminishment of an ability to earn an income is compensable. This type of loss may result from business or employment.
- **Other losses which will be incurred in the future:** This may include the cost of rehabilitation, medical care or other expenses which the plaintiff will incur in the future as a result of the defendant's wrong. In *Dingi v Motor Vehicles Insurance (PNG) Trust*[31], a claim pursuant to the *Wrongs Miscellaneous Provisions Act* by parents for the wrongful death of their daughter, the court included an award for loss of expected bride price according to custom.

The main objective in assessing general damages is to put the plaintiff in the position they would have been in if the contract had not been breached or the tortious action had not occurred.[32] One of the principles noted in *MVIL v Kol* is that courts often make reference to awards of general damages in cases of a similar nature. A counsel will need to research cases dealing with similar injuries to the one he or she is dealing with to determine a range of appropriate compensation and to either challenge the plaintiff's claim for general damages or assist the court to make an award.

Aggravated damages

Aggravated damages are also a form of compensatory damages. Aggravated damages may be used to compensate for injury to the plaintiff's feelings such as for fear, indignity, humiliation or public disgrace. These may be awarded, for instance, where the actions of a defendant amount to an unprovoked assault. In *PNG Aviation Services Pty Ltd v Somare,*[33] the Supreme Court said:

> Aggravated damages differ from other types of damages and exemplary damages. They are not designed to punish a defendant or to act as a deterrent. They are compensatory in nature. There are the normal or ordinary compensatory damages but there are those which are aggravated: see *Rooks v Barnard* (1964) AC 1129. Lord Devlin in that case said an injury done to the plaintiff may be exacerbated by the conduct of the defendant, thereby attracting higher compensatory damages. Where the conduct of the defendant has been "high handed, malicious, insulting or oppressive" the award may be at the highest of the range "that could fairly be regarded as compensation."…Furthermore, aggravated damages are awarded where the defendant's conduct has lacked bona fides or is somehow improper or unjustifiable: See *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) CCH Australian Torts Reports Case No. 728 pp. 69,220….[In this case] the Court held that:
>
> 1. Aggravated compensatory damages are awarded where either the circumstances of both the publication or the defendants conduct then or subsequently make the injury to the plaintiff worse.
> 2. They are usually only awarded in relation to the injury to the plaintiff's feelings, but may also be awarded in respect of conduct which has the effect of increasing injury to the plaintiff's reputation.
> 3. Conduct relevant to the issue of aggravated damages must be capable of amounting to conduct which was in some way unjustifiable, improper or lacking in bona fides.

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31 [1994] PNGLR 385.

32 See the Supreme Court's discussion of the principles for assessing damages in *Motor Vehicles Insurance Limited v Kol* (2007) SC902. The assessment of general damages is often an imprecise "art".

33 (2000) SC658

In considering an award for aggravated damages, the court must ensure that it does not duplicate elements of compensation contained in general damages. The assessment of the amount of aggravated damages is also done by looking at cases of a similar nature, taking into account the circumstances of the particular case.[34]

Exemplary damages

Exemplary damages are a form of punitive damages. They are to punish a defendant for high-handed disregard for the plaintiff's rights and to deter the defendant (and others) from repeating the action. The damages mark the condemnation of the court for the defendant's conduct.

Under section 12(1) of the CBASA, no exemplary damages may be awarded against the State unless it appears to the court that, regardless of the nature of the claim, there has been a breach of Constitutional rights so severe or continuous as to warrant an award of exemplary damages. Claims for exemplary damages against the State most often arise in claims involving the police, for example, where the plaintiff claims that the police raid was illegal. The courts have taken a consistent line in refusing to award these damages against the State[35].

In *Kolokol v Amburuapi,*[36] Cannings J, in the National Court said:

> Since the Supreme Court's decision in *Abel Tomba v The State* (1997) SC518, the courts have been reluctant to award exemplary damages against the State for abuse of police powers. The question to ask is whether the breach of the law by police officers is a technical breach or whether it involves a significant and unwarranted departure from the proper exercise of police powers eg where a police operation is unauthorised and individual police officers are not named as defendants. If the facts fit into the first category, exemplary damages may be payable by the State. If the facts fit into the second category of cases, exemplary damages are not payable by the State. A plaintiff is expected to seek such redress from the individual police officers who breached the law.

The exact same statement of the law was made again by Cannings J in the National Court case of *Kunnga v Independent State of Papua New Guinea*.[37] In *Pole v Independent State of Papua New Guinea*[38], the National Court said:

> As to the plaintiffs' claims for exemplary damages, the raids were unauthorised. Therefore, the raids were not done in the execution of the lawful duties of the six policemen. The State cannot be vicariously liable for those unlawful actions of the six policemen because they acted outside of their lawful duties.

Negotiated settlements

Where a State counsel conclude that the State is liable for a default judgment and that the matter should be settled, you must obtain the Attorney-General's instructions. If the counsel fails to get proper authority to settle a matter, he or she may be liable for disciplinary action under the *Public Services (Management) Act* 1995, which potentially includes dismissal. Deeds of settlement and consent orders permitting the applicant to enter a notice of discontinuance must not be agreed to

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34 For the court's approach to awarding aggravated damages see *Kala v Kupo* (2009) N3677.

35 Exceptions are *Lagan & 58 Ors v State* (1995) N1369 where Injia J. (as he then was) awarded, proportionate to the respective extent of loss, various amounts for each plaintiff ranging from K50, K200 and K300, and *Peter Kamane & 66 Ors v Police and State*, WS No. 233 of 1994 (unreported) where Kapi DCJ (as he then was) awarded K600 per plaintiff in exemplary damages. Both *Apa & Ors v Police & State* [1995] PNGLR 43 and *Lagan & 58 Ors v State* were decided prior to the Act coming into operation. In *Peter Kamane & 66 Ors v Police and State*, the award of exemplary damages was fixed by consent of the parties. Consequently, section 12(1) was never raised. Also, *Kim Pai v State* (2002) N2207 where Jalina, J awarded K5,000.00 as exemplary damages each for the plaintiffs in 2002. Kirriwom, J also awarded K2,000.00 as exemplary damages for each plaintiff in *Tony Wemin & or v State* (2001) N2134. In both cases the applicability of section 12(1) was not discussed - probably because it was not raised.

36 (2009) N3571

37 (2005) N2864.

38 (2008) N3500. See *Able Tomba v The State* (1997) SC518.

unless the Solicitor-General acting on instruction from the Attorney-General agrees to that form of settlement.

Agreeing to enter into a deed of settlement (including without instruction from the Attorney-General) can be a breach of the *Public Finances Management Act* 1995 and offend the Supreme Court's rulings in *Polem Enterprise Ltd v Attorney General*[39]; *Independent State of Papua New Guinea v Gelu, Solicitor General*[40], and *National Capital District Commission v Yama Security Services Ltd*.[41]

In accordance with the decisions of the National Executive Council (NEC) in 2003 and 2006, **all settlements over K1 million** must be approved by the NEC. Any settlement below K1 million can be settled by the Solicitor-General with instructions from the Attorney-General. There are special rules for settling by way of Deed of Settlement.

Minute to the Attorney-General from the Solicitor-General recommending settlement

To arrange settlement, the State counsel must draft a minute for the Solicitor-General's signature to the Attorney-General recommending settlement. The minute should set out:

- the reasons why the default judgment cannot be set aside,
- what a reasonable assessment of damages would be; and
- what the terms of the settlement should be.

The counsel must attach to the minute the proposed consent judgment to be made by the court and a covering letter of settlement to the plaintiff. For lawyers from the Solicitor General's Office, to assist them to obtain instructions, a template minute is saved in the shared precedents folder on the J: drive. This includes a template covering letter and consent orders.

Form of settlement

All negotiated settlements should be by way of a consent judgment made by the court following the filing of consent orders signed by both parties. The only exception to this is where the State counsel must have express approval from the Solicitor-General and consequent instructions from the Attorney-General to settle by way of deed, release or some other agreement.

Consent orders

The consent orders must separate out any agreement as to an amount in payment of damages, pre-judgment interest and costs. Separating out the agreement as to these heads of payments is very important so that post-judgment interest can be calculated in accordance with the *Judicial Proceedings (Interest on Debts and Damages) Act* 1962.

Pre-judgment interest

Section 1(1) of the *Judicial Proceedings (Interest on Debts and Damages) Act* gives a court the discretion to award interest on an award of damages (commonly referred to as pre-judgment interest). Pre-judgment interest is to be distinguished from post-judgment interest, which is payable as of right where the State fails to make payment of a judgment debt in the time prescribed by section 3 of the *Judicial Proceedings (Interest on Debts and Damages) Act*.

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39 (2008) SC911.
40 (2003) SC716.
41 (2005) SC835.

The court's power to award pre-judgment interest is discretionary, and the discretion should be exercised only where the plaintiff has been kept out of money which ought to have been paid to him.[42] The discretion should not be exercised automatically by analogy with the normal rule that costs follow the event.[43]

As it is a discretion of the court in its assessment of damages payable, it is not appropriate nor in the State's interest for negotiations between the parties to be made on what pre-judgment interest could be awarded by the court. No settlement should be agreed to that includes a sum of pre-judgment interest without approval from the Attorney-General, which will need to be justified and explained through a written minute.

The base position for all settlements by the State is that an award of pre-judgment interest is a statutory discretion for a court and is not for the parties to negotiate. If the plaintiff wants to pursue a claim for pre-judgment interest, it will need to proceed to trial on assessment of damages. The State will seek to rely on any settlement offer it makes to dispute an award of costs (see Calderbank offers below).

Covering letter of settlement

The consent orders should be attached to a covering letter of settlement to the plaintiff. The letter of settlement to the plaintiff should succinctly put the State's offer to the plaintiff. Do **not** provide a detailed explanation for why the State is making the offer as it is (that is, do not go into the detail in the Solicitor-General's minute to the Attorney-General). To include those details risks waiving the State's right to claim legal professional privilege should settlement negotiations fail.

Calderbank offer

The covering letter of settlement must be in the form of a Calderbank offer and have "Without Prejudice Save as to Costs" at the top of each page. "Without Prejudice" communications between lawyers cannot normally be admitted into court. The exception is where a party has made a settlement offer on a "Without Prejudice" basis but has expressly identified in the offer that should the offer be rejected, the fact of the settlement offer may be used in court to dispute an award of costs.

These principles are derived from the English case of *Calderbank v Calderbank* [1976] Fam 93 and settlement offers in these terms are commonly referred to as "Calderbank offers". A Calderbank offer means that the court considers the offer as relevant to costs after the substantive issues are resolved. It is relevant only where the terms of the offer are more favourable or equal to what the successful party was awarded in a judgment. Any additional costs incurred after the rejection of the offer can be ordered ***against*** the ***successful*** party. A typical order would be that the unsuccessful party pay the costs up to the date of the offer and the costs incurred subsequently be paid by the other party.

The Calderbank principle has been adopted into PNG law in the case of *Kapi v Pacific Helicopters*.[44] The policy behind this is to encourage early settlement of matters. The principle is very important for the State in terms of reducing the award of costs made against it and potentially arms State counsel with good arguments for why an award of costs should be limited, if a settlement offer had been made by the State earlier in the proceedings, but rejected by the plaintiff's lawyers.

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42 *London, Chatham and Dover Railway v The South Eastern Railway Company* [1893] AC 429 at 437 applied in *Jefford v Gee* [1970] 2 QB 130.

43 *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 2 All ER 741.

44 (2002) N2275.

THE INFLUENCE OF CUSTOM ON ADMINISTRATIVE LAW*

Dr. Eric Kwa PhD** and Ms. Lucy Mathew***

Introduction

The customs of Papua New Guinea (PNG) is recognised as one of the sources of the laws under Section 9 of the *Constitution*. This recognition is amplified by Schedule 2 of the *Constitution* and the *Underlying Law Act* 2000. Prior to independence, it is the *Customs Recognition Act* that provides the avenue for the recognition and utilisation of custom in the formal legal system.

Customary law has been applied sparingly by the Supreme and National Courts in various cases since independence in 1975. It deals with various aspects of community life and ranges from matrimonial law to succession law. In 2016, the courts were challenged to ascertain the impact of custom on administrative law in relation to the functions of the legislative arm of government. This is the first time that the courts were invited to review an administrative action of Parliament and declare the action invalid on the basis of custom. The case, *Somare v Zurenuoc*[1], signals the court's ability to expand its inherent jurisdiction under Section 155(4) of the *Constitution* to administer justice to an aggrieved party. Section 155(4) is in the following terms:

> Both the Supreme Court and the National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case.

This paper examines the application of custom in administrative law. It shows that the utilisation of custom in resolving administrative law cases is slowly gaining momentum. The aim of the paper is to highlight the ingenuity of the National Court to use custom to stop an administrative decision of the National Parliament.

The paper provides a short analysis of the *Somare v Zurenuoc* case and its effect on other areas of the law. We begin by presenting the facts that give rise to the case and then assess the manner in which the court dealt with the legal issues. We then focus on the approach the court adopted to apply custom in respect of the case. We conclude by presenting some potential challenges that may arise as a result of this case.

The Question of Customary Belief

The *Somare v Zurenuoc* case involves the use of customary beliefs of the people of PNG as a justification in suppressing the execution of an administrative decision by the court.

The brief facts of the case are that in October 2012, the Permanent Parliamentary Committee called the House Committee headed by the first defendant, the then Speaker, Hon. Theo Zurenuoc, resolved in a meeting to remove unworthy images (carvings depicting nude images) from the precinct of the Parliament. The second plaintiff, - the Director of the National Museum and Art Gallery, Dr. Andrew Moutu, became aware of the committee's resolution and the plans to remove and dismantle the objects of cultural significance, and wrote to the House Committee, in October 2013, advising to

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1 (2016) N6308.

stop the destruction of the cultural objects. The defendants[2], however, refused the advice of the second plaintiff and proceeded to desecrate the cultural objects. The primary reason for the decision was that the Parliamentary House Committee deemed the nude carvings and objects of cultural decorations as contradictory to the country's Christian beliefs.

The third defendant (L&A Construction Ltd), a local company, was engaged by the Parliament to implement the resolution of the Parliamentary House Committee. The third defendant commenced work at the Parliament in November 2013. On the 26th of November 2013, the company removed the lintel containing 19 masks.

The next morning, the plaintiffs[3] became aware of the destruction of the carvings. The plaintiffs immediately approached the first defendant urging him not to remove the totem pole, which was the next cultural object to be removed. Despite the expostulation at the defendants' conduct by the plaintiffs, the defendants maintained that the sculptures, carvings and portraits were contrary to the Christian belief consequently, the removal is justified.

The matter became a national controversy resulting in the then Prime Minister, Hon. Peter O'Neill, intervening and requesting the defendants to shelf the project. The plaintiffs sought the National Court's intervention on the 23 December 2013. The first plaintiff commenced the proceedings by originating summons in the National Court, seeking orders to permanently restrain the Speaker from completing the removal exercise. An ex parte injunction, is granted on 31 December 2013, restraining the defendants:

> …from moving, removing and destroying any cultural property including artefacts, artworks, adornments, totem poles from the National Parliament building until further orders of the court.

The plaintiffs then proceeded with the application for the substantive relief in 2014. On 8 March 2014, the plaintiffs commenced the substantive proceeding with an originating summons in the National Court seeking:

1. An order pursuant to Section 155(4) of the *Constitution* and Order 14, Rule 10 of the National Court Rules that the first, second, third and fourth defendants and their employees, servants and/or agents are restrained from moving, removing and destroying any cultural property including artefacts, artwork, adornments, totem poles from within the National Parliament building until further orders of court.
2. A declaration pursuant to Section 45 of the *Constitution* that the removal and destruction of cultural objects from the National Parliament building violates the right to freedom of thought, conscience and religion.
3. An order that the first and second defendants repair all disfigured artefacts and return them to their original places/locations in the Parliament building and premises.

The defendants on the other hand argued that the reliefs should be denied on the following grounds:

1. The plaintiffs lack standing;
2. There is no evidence that anyone's religious rights or freedoms are infringed.
3. The objects of cultural decoration, the subject of this proceeding, are not objects of *"national cultural property"* as they are neither declared nor proclaimed as such under the *National Cultural Property (Preservation) Act;* and
4. There is no breach of copyright.

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2 The Speaker of Parliament, Hon. Theo Zurenuoc; the Chairman of the Parliamentary House Committee; L&A Construction Ltd; and the State.

3 Sir Michael Somare, the country's founding father and Dr. Andrew Moutu, the Director of the National Museum and Art Gallery.

Challenging Customary Beliefs

The National Court, presided by his honour, Justice Cannings, identified five main issues for the court to address. These were:

1. Do the plaintiffs have standing to commence and maintain the proceeding?
2. Is there any breach of the right to freedom of conscience, thought and religion under Section 45 of the *Constitution*?
3. Is there any breach of the *National Cultural Property (Preservation) Act* Chapter No 156?
4. Is there been any breach of the *Copyright and Neighbouring Rights Act* 2000?
5. What declarations or orders should the Court make?

On the first issue of the plaintiffs' locus standi, the counsels for the defendants argued that the entire proceedings should be dismissed because the plaintiffs did not have standing to seek such relief. The defendants argued that the plaintiffs lacked standing because they were not able to prove that they represented a group of people or an organisation that was affected by the actions of the defendants, as such they did not have any direct or personal interest in the outcome of the matter.

His honour rejected these arguments for two reasons: (1) the application is not a representative application; and (2) the issue of personal or direct interest in the outcome of the matter varies for different applications and is determined according to the nature of the proceedings that have been commenced. The rules on locus standi have been judicially developed over time. Hence, different applications for different reliefs sought have different requirements for one to have locus standi. His honour therefore, found that the plaintiffs had standing to seek such relief.

In relation to the issue of violation of Section 45 of the *Constitution*, the court held that the actions of the defendants were in breach of the right to freedom of conscience, thought and religion. The court's finding and reasoning on this issue is discussed in detail as this is where custom is involved in determining the outcome of the issue.

As to whether there was a breach of the *National Cultural Property (Preservation) Act*, the plaintiffs had to establish that the artefacts, artworks, adornments, totem poles were '*national cultural property'*. To resolve this issue, the court had to determine whether the objects, the subject of the proceeding fell within the definition of '*national cultural property'*.

The definition of *'national cultural property'* is stipulated under Section 1 of the Act. The definition is provided in full below:

> "national cultural property" means any property, movable or immovable, of particular importance to the cultural heritage of the country, and in particular (but without limiting the generality of the foregoing) includes-
> (a) any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of any of the peoples of the country, past or present; and
> (b) any mineral specimen or fossil or mammal remains of scientific or historic interest to the country; and
> (c) any other collection, object or thing, or any collection, object or thing of a class, declared to be national cultural property under Section 4; and
> (d) any collection of national cultural property.

The court ruled that the artefacts, artworks, adornments, totem poles, the subject of the proceedings, fell within the definition of *'national cultural property'*. Subsequently, the court held that the defendants were in breach of Section 9 of the Act.[4] Section 9 provides that:

[4] It is interesting to observe that the court did not establish whether the objects of cultural decoration where actually 'declared national cultural property' under section 4 of the *National Cultural Property*

(1) A person who, without lawful and reasonable excuse (proof of which is on him) wilfully destroys, damages or defaces any national cultural property, is guilty of an offence.

Penalty: A fine not exceeding K200.00.

(2) A person who, by force, threat, fraud, misrepresentation, undue influence or in any other manner, obtains the destruction, damaging, defacing, confiscation or yielding up of any national cultural property is guilty of an offence.

Penalty: A fine not exceeding K500.00 or imprisonment for a term not exceeding six months.

In its deliberation the court said that the plaintiffs failed to resort to criminal proceedings and the defendants lacked the opportunity to make an application to court to strike out the matter on the grounds of abuse of process. However, the court went ahead and made a civil order in a case where criminal penalty is applied.

The fourth and final issue related to the breach of the *Copyright and Neighbouring Rights Act*. The second plaintiff argued that, the objects of cultural decoration, the subject of these proceedings were protected works under the *Copyright and Neighbouring Rights Act.* Copyright in those works vests in their "authors" (the persons who created them), which gave economic and moral rights, including the exclusive right to authorise "transformation" of the works and the right to object to any "mutilation" of their works. None of those rights were afforded to the authors. Therefore, the transformation and mutilation that occurred was a breach of the Act. The court agreed with the second plaintiff's arguments and found that the defendants violated the Act.

The court, in the end, decided in favour of the plaintiffs. The court, in exercising its powers pursuant to Sections 57(3) and 155(4) of the *Constitution* made the following orders:

1. That the damage, dismantling and removal of the objects of cultural decoration at Parliament House, the subject of these proceedings – the 19 masks on the lintel at the main entrance and the totem pole in the Grand Hall – infringed Section 45 of the Constitution, and were unlawful acts.
2. That the objects of cultural decoration at Parliament House, the subject of these proceedings, were "national cultural property" for the purposes of the National Cultural Property (Preservation) Act and that the damage, dismantling and removal of those objects breached Section 9 of the *National Cultural Property (Preservation) Act* and were unlawful acts.
3. That the objects of cultural decoration at Parliament House, the subject of these proceedings, were protected works under the Copyright and Neighbouring Rights Act and that copyright in those works vested in their "authors", which gave them or their descendants economic and moral rights, including the exclusive right to authorise "transformation" of the works and the right to object to "mutilation" of their works; which rights had not been afforded to them or their descendants; and that accordingly the transformation and mutilation of those works was unlawful.
4. That the first, second and third defendants and all other persons are restrained forthwith from further damaging, dismantling and removing the objects of cultural decoration at Parliament House, the subject of these proceedings, or similar objects of cultural decoration at Parliament House.
5. That the first and second defendants shall, within six months after the date of judgment, at the cost of the National Parliament, and in consultation with the persons who created, curated and installed the objects of cultural decoration at Parliament House, the subject of these proceedings (or their descendants) and in consultation with the plaintiffs, repair, return or replace the objects of cultural decoration at Parliament House, the subject of these proceedings.
6. That the first, second and third defendants and all other persons are permanently restrained from further damaging, dismantling and removing the objects of cultural decoration at

(Preservation) Act. Section 4 of the Act provides that a 'national cultural property' must be declared by the Head of State in the National Gazette.

> Parliament House, the subject of these proceedings, or such objects as are created, curated and installed to replace those objects or similar objects of cultural decoration at Parliament House, unless the question of destruction, damage or removal of such cultural objects is decided by the Parliament, at a meeting of the Parliament, in accordance with Section 114 of the *Constitution,* having regard to and respect for the rights and freedoms conferred by Section 45 of the *Constitution* and the restrictions imposed under the *National Cultural Property (Preservation) Act* and the *Copyright and Neighbouring Rights Act.*

The defendants appealed these orders to the Supreme Court. In October 2017, the Supreme Court refused the appeal for want of prosecution.

Before we turn to the issue of custom, it is important to observe that the court made a glaring error when it interpreted sections 1, 4 and 9 of the *National Cultural Property (Preservation) Act*. According the scheme of the legislation, for a cultural decoration to fall within the meaning of 'national cultural property', it must meet the requirements under section 1 of the Act. To be a protected 'national cultural property' the item must be declared as such by the Head of State, through a gazettal notice as stipulated by section 4 of the Act. Once a cultural decoration is **declared as a national cultural property**, its destruction, damage or defacement is a violation of section 9 of the Act.

Thus, where a cultural decoration is not declared as a national cultural property by the Head of State, its destruction, damage or defacement is not an offence under the Act. In this case, the court readily accepted that the sculptures, carvings and portraits were never declared as a national cultural property. How then could the defendants be guilty of violating section 9 of the Act? It is our view that the court failed in finding that the objects were national cultural property based on their history. This is clearly wrong in law as they were never declared as national cultural property by the Head of State as required by section 4 of the Act.

The Position of Customary Beliefs in Law

The court resorted to custom in dealing with the second issue in the case. That is, whether the removal of the masks on the lintel and the totem pole violated the plaintiffs' right to the freedom of conscience, thought and religion set out in Section 45 of the *Constitution*. The plaintiffs' argument raised a number of pertinent questions including:

1. Whose freedom of conscience, thought and religion were violated?
2. How were these rights violated? and
3. Which religion?

Justice Cannings answered these questions by relying on the evidence provided by the plaintiffs. His honour concluded that the first defendant's action interfered with the religious freedoms of the creators and curators of the objects of cultural decoration, the subject of the proceeding, contrary to section 45(1) of the *Constitution*. The creators and curators are Papua New Guineans. They manifest their culture, beliefs, custom and religion in the objects of cultural decorations. The *Constitution* recognises the manifestation of customs and the practice of customary beliefs. Thus, the removal of the masks and totems influenced by Christian principles is in breach of the constitutional right to the freedom of religion.

Obviously, there are two religious rights at play in this case: right to Christian belief versus right to traditional beliefs. If the right of the creators and curators of the cultural masks and totem poles are violated, what about the Christian belief of the Speaker and the members of the Parliamentary House Committee?[5] Unfortunately, this and other relevant issues were not properly argued in this case. Maybe if the appeal in the Supreme Court had proceeded, these would have been resolved.

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[5] For a brief discussion on the right to Christian religion, see *State v Gotama* (2006) N3156. See also Evens, R, Haley, May, R, Cox, J, Gibbs, P, Merlan, F and Rusmsey, A; "Purging Parliament: A New

Mr Zurenouc in his capacity as the Speaker of Parliament and through the House Committee, made an administrative decision to remove the masks on the lintel and the totem pole. His intention was to reform the Parliament, the building that houses the legislative arm of government.

The reform exercise at Parliament was driven by the Christian religion to reflect the Christian principles. However, the court ruled that the action violated the right to freedom of religion in the *Constitution.* The religion in this case refers to the customary beliefs and practices of the creators and curators of the objects of cultural decoration. The creators and curators manifested their customary beliefs of spirits etcetera in the carvings. It follows that a citizen has the right to manifest his or her customary beliefs. Therefore, the court declared that the administrative decision of the legislative arm was in breach of the right to freedom of religion, thought and conscience.

As discussed briefly, what about the right to freedom of the Christian religion? Which religious right is greater? Western Christian religion or traditional customary beliefs? Without the results of the Supreme Court appeal, the resolution of this issue will remain unresolved.

Potential Challenges

The *Somare v Zurenuoc* case is a triumph for custom in administrative law matters. For the first time in an administrative law case, the court allowed the constitutional right to embrace custom to influence an administrative decision. The case however raises a number of challenges for future administrative decisions. We raise only four:

1. What happens in sorcery cases where the accused raises the ground that they committed a crime because of their right to a traditional belief?
2. What other customary rights can be accommodated under our Bill of Rights, example, the right to the freedom of movement, the right to employment, etcetera?
3. Does this case extend standing to third party individuals who are unknown or out of reach of litigants?
4. How will this outcome affect decisions of incorporated land groups (ILG) under the *Land Registration (Customary Land) (Amendment) Act* 2009 and the *Land Groups Incorporation (Amendment) Act* 2009 relating to land allocation?

We will briefly consider these. In relation to the first issue, the increasing incidences of sorcery related violence is a major concern for the country. The level of violence associated with this belief is frightening. As a matter of belief, will perpetrators of sorcery relate to a violence claim under Section 45 of the *Constitution* as a defence? This line of argument may be far-fetched, but it is worth the debate.

Can Papua New Guineans claim customary belief in something to pursue an illegal act? For instance, can customary belief in some ritual purification be used as an excuse to engage in an illegal sexual conduct, or the abuse of children?

In the present case, the creators and curators of the artefacts, artworks, adornments, totem poles, were not identified and brought before the National Court to substantiate the arguments by the plaintiffs. Can it be argued that because the creators and curators were engaged by the Parliament on certain terms and conditions which may have included monetary benefits, the copyright now belonged to Parliament and not the creators and curators? Therefore, did the Parliament have the right to destroy these items?

We make a slight reference to the ILGs because these are customary clans which are now given formal recognition by law. Although ILGs are now regulated by statute, their operation and management are largely governed by custom. If the ILG Committee makes an administrative

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Christian Politics in Papua New Guinea" SSGM Discussion Paper-2014/1, ANU at academic-edu (accessed 20.10.20)

decision to allocate property, disburse monetary benefits or disciplines a member of the ILG, can a dissatisfied member resort to judicial review for help?[6]

These and other legal issues may however have to be resolved by the courts in the future, as litigants explore the impacts of this precedent on their cases. Apart from other legal issues such as the right to copyright and the right to the freedom of religion, it is encouraging to note that the courts are confident in looking beyond the formal rules of administrative law and adopt relevant custom to do justice in appropriate cases.

[6] See *Kawira v Bone* (2017) N6802; *Natto v Sakai* (2019) N7866 and *Moio v Kaeka* (2020) N8204.

Major Transactions by PNG Companies requiring Shareholder Approval

David Frecker* and Kingsford Wamp**

Introduction

One of the objectives of Papua New Guinea's (PNG) *Companies Act* of 1997 (PNG Act) is to give greater shareholder control over the direction and management of companies. This legislation is based closely on the New Zealand (NZ) *Companies Act* 1993 (NZ Act) which is also aimed at providing recognition of the circumstances in which the interests of existing, and in particular, minority shareholders, need special protection.

Thus, we have, in the PNG Act, section 110 under which "major transactions" require approval by a special resolution of shareholders, and section 91 under which shareholders who vote against a major transaction have a right to be bought out; and then there is section 152, a provision of more general application, under which prejudiced shareholders can seek relief. This paper explores the application and effect of these provisions in PNG. As they are largely adopted from NZ, the comparative NZ provisions are considered and also the relevant NZ cases on their interpretation. Although they do not have direct or binding effect on the PNG courts, they do have high persuasive value.

Statutory provisions

Section 110 of the PNG Act is in the following terms:

(1) A company shall not enter into a major transaction unless the transaction is-
  (a) approved by special resolution; or
  (b) contingent on approval by special resolution.

(2) In this section-
"assets" includes property of any kind, whether tangible or intangible;
"major transaction", in relation to a company, means-
  (a) the acquisition of, or an agreement to acquire, whether contingent or not, assets the value of which is more than half the value of the assets of the company before the acquisition; or
  (b) the disposition of, or an agreement to dispose of, whether contingent or not, assets of the company the value of which is more than half the value of the assets of the company before the disposition; or
  (c) a transaction which has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities, including contingent liabilities, the value of which is more than half the value of the assets of the company before the transaction.

(2A) In assessing the value of any contingent liability for the purposes of Paragraph (c) of the definition of "major transaction" in Subsection (2), the Directors-
  (a) shall have regard to all circumstances that the Directors know, or ought to know, affect, or may affect, the value of the contingent liability; and
  (b) may rely on estimates of the contingent liability that are reasonable in the circumstances; and
  (c) may take account of-
    (i) the likelihood of the contingency occurring; and
    (ii) any claim the company is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability.

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(3) Nothing in Paragraph (c) of the definition of the term "major transaction" in Subsection (2) applies by reason only of the company giving, or entering into an agreement to give, a floating charge secured over the assets of the company the value of which is more than half the value of the assets of the company for the purpose of securing the repayment of money or the performance of an obligation.

(4) Nothing in this section applies to a major transaction entered into by a receiver appointed pursuant to an instrument creating a charge over all or substantially all of the property of a company.

This provision is almost identical to Section 129 in the NZ Act. Subsection (2A) is the result of an amendment in 2014 and follows a similar amendment in NZ.

Part III, Division 4 of the PNG Act gives minority shareholders who vote against certain company actions, the right to have their shareholding bought out. The key section is as follows:

Where-

(a) a shareholder is entitled to vote on the exercise of one or more of the powers set out in-
  (i) Section 88(1)(a), and the proposed alteration imposes or removes a restriction on the activities of the company; or
  (ii) Section 88(1)(c) or (d); and

(b) the shareholders resolved, pursuant to Section 88, to exercise the power; and

(c) the shareholder-
  (i) casts all the votes attached to shares registered in the shareholder's name and having the same beneficial owner against the exercise of the power; or
  (ii) where the resolution to exercise the power was passed under Section 103, did not sign the resolution, or refrained from signing it in respect of all the shares registered in the shareholder's name and having the same beneficial owner,

that shareholder is entitled to require the company to purchase those shares in accordance with Section 92.

Section 92 sets out the procedure for a shareholder who wants to initiate a buy-out of the shareholder's shares in the company. These provisions apply to a shareholder who votes against a major transaction under section 110 (by virtue of section 88(1)). The provisions are modelled on similar provisions in the NZ Act. Section 152(1) of the PNG Act provides that:

> A shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity or in any other capacity, may apply to the Court for an order under this section.

Section 152(4) specifically provides that a failure to comply with section 110, is one of the actions by a company, which are prejudicial to its shareholders. The term "entitled person" as used in section 152(1) is defined in section 2 to mean, "a shareholder and a person upon whom the constitution (if the company has one) confers any of the rights and powers of a shareholder". So, section 152 is of limited application as it only applies to shareholders or others who can exercise the powers of a shareholder. But within that context, and so long as the person making the claim is a shareholder or is treated as a shareholder in the company's constitution, that person should be able to seek redress for oppressive conduct against him *in that capacity or in any other capacity*, so long as the conduct relates to the affairs of the company.

These provisions follow closely the provisions in the NZ Act. These and other relevant provisions of the PNG Act are substantially the same as in the NZ Act. For ease of reference, we list below the relevant provisions of the NZ Act and the equivalent provisions in the PNG Act.

NZ Companies Act	**PNG Companies Act**
Section 17 (Validity of actions)	Section 18
Section 18 (Dealings between company and other persons)	Section 19
Section 110 (Shareholder may require company to purchase shares)	Section 91

NZ Companies Act	PNG Companies Act
Section 114 (Court may grant exemption)	Section 95
Section 115 (Court may grant exemption if company insolvent)	Section 96
Section 129 (Major transactions)	Section 110
Section 164 (Injunctions)	Section 142
Section 170 (Actions by shareholders to require directors to act)	Section 148
Section 172 (Actions by shareholders to require company to act)	Section 150
Section 174 (Prejudiced shareholders)	Section 152(1) – (3)
Section 175 (Certain conduct deemed prejudicial)	Section 152(4) – (5)

What are major transactions under Section 110?

Major transactions are defined in section 110(2) as set out above. In short, a major transaction is where a company buys or sells assets, or enters into an agreement to do so, or enters into a transaction which has, or is likely to have, the effect of the company acquiring rights or interests, or incurring obligations or liabilities, that has a value of greater than half of the value of the company's existing assets. In this context, "assets" include property of any kind, whether tangible or intangible. Rights under contracts are included and their value needs to be considered. The definition of assets does not make clear whether it is gross or net assets.

In the 2013 NZ case of *Jacomb v Wikeley*[1], Justice Kós reasoned that the better view is that they are gross assets. We agree with this proposition because it is consistent with the more literal meaning of the term "assets" and because a "net assets" reading would require one to read in the concept of "assets minus liabilities". This is discussed further below where we consider the concept of "value equation".

The definition of major transaction is subject to the exclusions in subsections (3) and (4) of section 110. Subsection (3) follows an amendment to Section 129 of the NZ Act, although it should be noted that the NZ provision was amended in 1997 to omit the word "floating". The provision was considered in *Fighter Trainers Limited v McCormick*[2] in which the question arose as to whether the giving of a company charge (or "debenture") over all of its assets to secure finance (a very common occurrence) would be a major transaction under Section 129(2)(b). On this point, Salmon J said:

> There are two reasons why I conclude that the definition of "major transaction in para (b) is not intended to catch debentures. The first is that a charge secured over the assets of the company is specifically provided for in para (c) of the definition and subsection (2A). The second reason is that given the prevalence of debentures securing the assets of a company it cannot have been the intention of the legislature to require that all such transactions be approved by special resolution.

Section 110(4) excludes transactions entered into in the name of the company by a receiver appointed under a charge of all or substantially all of its assets. This makes sense because a receiver of all or substantially all of the company's assets will control, and will usually have power to sell those assets for the benefit of the creditor or creditors whom the receiver represents, and the shareholders will only have a residual interest in those assets. In those circumstances, it would be a parody if the shareholders could block a transaction initiated by the receiver.

[1] [2013] NZHC 707.
[2] (1999) 8 NZCLC 261,998.

Value equation

The concept of major transactions and the restriction on them under section 110 are best analysed in terms of an equation stated as follows:

[Transaction Value] is greater than [50% of Company Asset Value].

We call this the value equation. The two key factors can then be considered.

Transaction Value

The Transaction Value in the value equation is one of three things:

1. the value of the assets being acquired by the company;
2. the value of the assets being disposed of by the company; or
3. the value of the rights being acquired or the liabilities being assumed by the company.

The value under 1 or 2 would prima facie be the value placed upon them in the transaction, provided that it is being undertaken at arm's length between unrelated parties. If that proviso does not apply, an independent assessment of market value of the assets may be required before the directors of the company can make the assessment required by the value equation.

The determination of the value under 3 is more difficult. If the transaction involves the acquisition by the company of rights, for example through the assignment of a contract, the present value of those rights may be a matter of judgment. If the transaction involves the assumption of obligations, for example the obligation to repay a debt, the value may be more finite if the debt has a present monetary value; but should that value be discounted if the debt is not payable until sometime in the future? The answer is probably yes. If indeterminate liabilities are assumed, then again, the value of those obligations may be a matter of judgment.

Contingent liabilities are specifically included; and the factors to take into account in determining the value of them are described in subsection (2A), which was introduced by an amendment in 2014 but follows language in the definition of "solvency test" in Section 4(1). Although they are not directly applicable to the meaning of major transactions, it may also be helpful to draw upon the subsections (2) and (4) of section 4 which are in the following terms:

> (2) Without limiting Sections 50 and 53(3), in determining for the purposes of this Act (other than Sections 234 and 235 which relate to amalgamations) whether the value of a company's assets is greater than the value of its liabilities, including contingent liabilities, the directors-
>
> (a) shall have regard to-
>
> (i) the most recent financial statements of the company that comply with Section 179; and
>
> (ii) all other circumstances that the directors know or ought to know affect, or may affect, the value of the company's assets and the value of its liabilities, including its contingent liabilities; and
>
> (b) may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances.
>
> (4) In determining, for the purposes of this Act, the value of a contingent liability, account may be taken of-
>
> (a) the likelihood of the contingency occurring; and
>
> (b) any claim the company is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability.

Take a practical example. If (as is not uncommon) a parent company is agreeing to borrow a large loan for group purposes and the lenders require, as a condition of the loan, a guarantee from each of the subsidiary companies in the group supported by a floating charge over its assets. One of those subsidiary companies is not wholly owned by the parent company but has a 30% minority shareholder which is opposed to the loan. If the amount of the loan is more than half the value of the assets of the partly owned subsidiary, both the guarantee and the charge are potentially major transactions of that company requiring approval by a special resolution which the minority

shareholder could block. The directors of the subsidiary company must then determine the transaction value of the guarantee and the charge. If the parent company has assets of high value and few other liabilities, the judgment may be made that the loan is most likely to be repaid by the parent company in the normal course and the subsidiary's guarantee is very unlikely to be called upon. In these circumstances, the guarantee may be given a transaction value which is considerably less than the face value of the loan it is guaranteeing. The floating charge should be excluded from the transaction value by virtue of Section 110(3).

Company Asset Value

The Company Asset Value in the value equation will be the same whether 1, 2 or 3 in the definition of "major transaction" is being considered. By its terms, it means the value of the assets of the company before the transaction, without taking into account liabilities: that is gross assets and not net assets. There may appear to be some logic in looking at the net assets of a company, because in company balance sheets that generally equates to shareholders' equity, it may be said that the requirement for shareholder approval under section 110 is designed to protect shareholder equity in a company. However, that is not what the definition states when the clear language of it is interpreted literally.

Furthermore, there is no suggestion (or wording to suggest) that liabilities should be taken into account when determining the transaction value of an acquisition or disposal of assets. If an acquisition involves the grant of a mortgage or charge over the asset being acquired, then there are two transactions: the acquisition of the asset by the company and the grant of security to the mortgagee or charge, each of which needs to be assessed under the value equation. It stands to reason, however, that if the acquisition does not require approval then the grant of security will not require approval because the security is not going to have a higher value than the asset. Further, one has to query the value of a "personal covenant" in a mortgage or charge and whether that needs to be assessed under 3 in the same way as a guarantee. Similarly, if there is a disposal of company assets which are subject to a charge or mortgage, the value of the assets being disposed of should be assessed without taking into account the secured liabilities to be discharged out of the proceeds. Reducing the liabilities of a company is not a transaction within the definition.

So, if liabilities are not to be taken into account in determining the transaction value for an acquisition or disposal of assets, it would be a distortion of the value equation to take into account liabilities when determining the company asset value.

Another important question is, how is the company asset value determined? Initially, it was thought that one needs to only look at the most recent annual accounts or financial statements of the company and take the value of the assets from the balance sheet or statement of financial position. However, this is an inadequate measure of the current value of assets because company accounts are based on the historical value of assets (usually the amount expended to acquire them) adjusted in accordance with accounting principles and standards. Even when accounts are diligently prepared and audited in accordance with those standards, accounting values of assets may differ from "real" value. Valuations are particularly difficult with intangible assets, and where past expenditure is brought to account to represent the value of an asset (as is the case with exploration expenditure in mining companies which is used to value exploration licences).

These difficulties were broadly recognised by the New Zealand Court of Appeal in *Cudden v Rodley*[3]. After considering arguments to the effect that value of assets for the purposes of section 129 should be based on historical cost less depreciation, the court stated categorically that:

> Section 129 is undoubtedly concerned with the market value of the company's assets – value must mean value in the accepted sense of that word, and there is nothing in the context of s.129 to read it in any other way. Shareholders who are concerned with any such issues will be fully aware that accounts which have historical cost as a method of showing book value of assets are not holding that out as reflecting market values. Furthermore, if a dispute arises as to the application of s.129 to

[3] [1999] CA 67/99 – the case does not appear to have been reported elsewhere.

a particular sale, there can be no doubt the enquiry would be to ascertain market value, which would be established from all relevant evidence.

We submit that the same reasoning applies equally to the determination of the value of company assets under section 110 of the PNG Act.

Applying the value equation

When the directors of a company are considering whether a contemplated transaction needs shareholder approval under section 110, or can be decided upon by the board under governance procedures otherwise applicable, they must apply the value equation (even if they do not ostensibly use the terminology we have used above). The determination of transaction value will be straight-forward in many cases, but the determination of company asset value will often present difficulties. In some cases, where directors for good reasons do not want to seek shareholder approval, it may be necessary for them to obtain professional valuation assistance to justify a decision not to seek shareholder approval.

The New Zealand case of *Re Fletcher Challenge Forests Limited*[4] has made it clear (if there were any doubt) that this test applies to each individual company separately and not to a group of companies collectively. A transaction may be a major transaction for a subsidiary although it is not a major transaction for the holding company. There should be no difficulty in obtaining shareholder approval for a subsidiary's transactions unless there are minority shareholders holding 25% or more.

Consequences of a major transaction being approved under Section 110

Under section 91 of the PNG Act, shareholders who voted against approving a major transaction under section 110, have the right to elect to be bought out by the company. Under section 92, the board of the company may then agree to the purchase of the shares by the company or arrange for some other person to purchase those shares. The price for the purchase of the shares is to be agreed as set out under section 93.

There may be instances where the company would not be able to purchase the shares because doing so would not be in the best interest of the company. In such cases, the board of the company can apply to the court for an order under section 95 or section 96. Both provisions are set out in full below.

95. Court may grant exemption.

(1) A company to which a notice has been given under Section 92 may apply to the Court for an order exempting it from the obligation to purchase the shares to which the notice relates on the grounds that—
(a) the purchase would be disproportionately damaging to the company; or
(b) the company cannot reasonably be required to finance the purchase; or
(c) it would not be just and equitable to require the company to purchase the shares.

(2) On an application under this section, the Court may make an order exempting the company from the obligation to purchase the shares, and may make any other order it thinks fit, including an order—
(a) setting aside a resolution of the shareholders;
(b) directing the company to take, or refrain from taking, any action specified in the order; or
(c) requiring the company to pay compensation to the shareholders affected; or
(d) that the company be put into liquidation.

(3) The Court shall not make an order under Subsection (2) on either of the grounds set out in Subsection (1)(a) or (b) unless it is satisfied that the company has made reasonable efforts to arrange for another person to purchase the shares in accordance with Section 92(2)(b).

[4] (2004) 9 NZCLC 263,447.

96. Court may grant exemption where company insolvent.

(1) Where—
(a) a notice is given to a company under Section 92; and
(b) the board has resolved that the purchase by the company of the shares to which the notice relates would result in it failing to satisfy the solvency test; and
(c) the company has, having made reasonable efforts to do so, been unable to arrange for the shares to be purchased by another person in accordance with Section 92(2)(b),
the company shall apply to the Court for an order exempting it from the obligation to purchase the shares.

(2) The Court may, on an application under Subsection (1), where it is satisfied that—
(a) the purchase of the shares would result in the company failing to satisfy the solvency test; and
(b) the company has made reasonable efforts to arrange for the shares to be purchased by another person in accordance with Section 92(2)(b),
make—
(c) an order exempting the company from the obligation to purchase the shares; or
(d) an order suspending the obligation to purchase the shares; or
(e) such other order as it thinks fit, including any order referred to in Section 95(2).

Under section 95, the company can ask the court to exempt it from being obligated to purchase the shares because to do so would be disproportionately damaging to the company, or because it would be unreasonable to require the company to finance the purchase, or because it would not be equitable or just for the company to do so. Under section 96, the company can apply to the court to exempt or suspend any obligation of the company to purchase those shares because doing so would result in the company failing to satisfy the solvency test under the PNG Act. These provisions have yet to be tested by the courts in PNG.

Notwithstanding the possibility of relief under these provisions, the existence of minority buy-out rights where a major transaction needs approval under section 110 is a major factor for consideration by directors when proposing a major transaction which may not have unanimous shareholder support. This is also the primary reason why a determination that a transaction is not a major transaction, through a proper application of the value equation and independent evidence of asset value, may be critical.

Consequences of breach of Section 110

If a company enters into a major transaction without shareholder approval, or without the transaction being contingent on shareholder approval, there will be a breach of the statutory prohibition under section 110. This will have a number of consequences directly under the PNG Act (many of which mirror provisions in the NZ Act) and more broadly under the general law.

Consequences under the PNG Companies Act

There are a number of provisions in the PNG Act which could apply and under which action might be taken where a company is about to undertake or has undertaken a major transaction without shareholder approval. These include:

(a) If there is a breach of the statutory prohibition under section 110, an offence is committed by the company (see section 416) and by any director who agrees to the company's action (see section 114 and section 413(2)) for which penalties can be imposed. To this extent, the prohibited transaction is illegal under the Act, but the meaning and broader consequences of this are considered below. The applicable penalties are relatively small.

(b) An affected party could seek an injunction to stop the prohibited transaction (see section 142) but, practically speaking, only if action was taken in advance of or in anticipation of the prohibited transaction.

(c) It is one of the duties of a director not to agree to the company acting in a manner that contravenes the PNG Act (see section 114)[5]. A shareholder or former shareholder could bring an action against directors for breach of this duty (see section 147).

(d) An action by a shareholder against the directors (under section 148) or against the company (under section 150), seeking an order requiring the directors (individually) or the board of the company (collectively) to take the action of submitting a major transaction for shareholder approval, might also be possible. The court needs to be satisfied that it is just and equitable to make such as an order, and given the availability of other statutory remedies, the circumstances in which such an order may be obtained are probably limited.

(e) Application by a shareholder or other entitled person under section 152 for one of the orders set out in subsection (2) is likely to be the best available cause of action by a shareholder affected by a breach of section 110.

There is no provision in the PNG Act which expressly renders certain contracts and transactions void for failure to comply with section 110. In contrast, there are other provisions of the Act which expressly render certain contracts and actions void for failure to comply with the provision (for example, sections 41, 48, 64, 133 and 140). It also renders other contracts and actions voidable (for example, section 119). In addition, the Act provides for a range of different penalties for offences. In short, the PNG Act is an elaborate scheme providing specific consequences for breaches of specific provisions.

Analysis of Section 152

The remedies under section 152 are set out in as follows:[6]

> Where, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this subsection, an order—
>
> (a) requiring the company or any other person to acquire the shareholder's shares; or
> (b) requiring the company or any other person to pay compensation to a person; or
> (c) regulating the future conduct of the company's affairs; or
> (d) altering or adding to the company's constitution; or
> (e) appointing a receiver of the company; or
> (f) directing the rectification of the records of the company; or
> (g) putting the company into liquidation; or
> (h) setting aside action taken by the company or the board in breach of this Act or the constitution of the company.

Section 152 was considered in the case of *Sabatica Pty Ltd v Battle Mountain Canada Ltd*[7]. In that case, the Supreme Court comprising Amet CJ, Kapi DCJ and Los J adopted and applied the leading New Zealand case of *Thomas v H W Thomas Ltd,* in which the term "oppressive, unfairly discriminatory or unfairly prejudicial" was discussed. The Supreme Court adopted the following wide meaning given to the expression as being applicable to PNG:

> While the New Zealand legislation has significant variations, the use of the words "oppressive, unfairly discriminatory or unfairly prejudicial" is common. In *Thomas and HW Thomas Ltd* [1984] 1 NZLR 686, at page 693 Richardson J said:
>
> > "In employing the words 'oppressive, unfairly discriminatory or unfairly prejudicial' Parliament has afforded petitioners a wider base on which to found a complaint. Taking the ordinary dictionary definition of the words from the Shorter Oxford English Dictionary: oppressive is 'unjustly burdensome'; unfair is 'not fair or equitable; unjust'; discriminate is 'to make or constitute a difference in or between; to differentiate'; and prejudicial, 'causing prejudice, detrimental, damaging (to rights, interests, etc). I do not read the subsection as referring to three distinct alternatives which are to be considered

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5 Note that section 114 is not specified, as one of the duties, which is owed to the company, and not to shareholders.

6 See section 152(2) of the PNG Act.

7 (2003) SC 709.

> separately in watertight compartments. The three expressions overlap, each in a sense helps to explain the other, and read together they reflect the underlying concern of the subsection that conduct of the company which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only is a legitimate foundation for a complaint under s 209. The statutory concern is directed to instances or courses of conduct amounting to an unjust detriment to the interests of a member or members of the company. It follows that it is not necessary for a complainant to point to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith towards him on the part of those in control of the company.

This passage is helpful in indicating the nature of the cause of action under section 152 of the Act and we would adopt it.

The shareholder bringing the claim under section 152 for breach of section 110 must satisfy the court that the breach of Section 110 was a conduct that was "*oppressive, unfairly discriminatory or unfairly prejudicial*" to that shareholder. Section 152(2) empowers the court, where it considers it just and equitable to do so, to "make such orders as it thinks fit" including by making an order 'setting aside action taken by the company or the board in breach of this Act'. The existence of this power makes it plain that contracts entered into in breach of section 110 are not void. Rather they are voidable and only voidable where that consequence is just and equitable.

Two NZ cases are illustrative of the other orders which may be made under section 152 (the equivalent of which is section 174 in the NZ Act where a company has proceeded with a major transaction without obtaining shareholder approval through a special resolution. In *Zhao v Yang*[8], the judge decided to make an order for substantial monetary compensation in favour of the prejudiced shareholder under section 174(2)(b); and in *Kim v Pink Nails Limited*[9], the situation represented such a breakdown in the relationship between shareholders in a private company that the judge considered that the most appropriate form of remedial relief was to make an order under section 174(2)(g), placing the company in liquidation.

General consequences of breach of a statutory prohibition

A contract or transaction made in breach of a statutory prohibition can have both a statutory consequence (which turns on the construction of the statute itself) and a common law or equitable consequence, limited to withholding, or imposing conditions on, the grant of a remedy to enforce the contract or transaction at the suit of one or more of the parties (the application of which turns on considerations of public policy).

The High Court in Australia has considered the consequences of breach of a statutory prohibition, or statutory illegality as it is otherwise called, in a few cases in recent years. Although these cases are not binding authority in PNG, they should have high persuasive value as they enunciate an evolving position.

In *Equuscorp Pty Ltd v Haxton*[10], the majority (French CJ, Crennan J, and Kiefel J) in their joint judgement stated (based on earlier High Court decisions) that:

> an agreement may be unenforceable for statutory illegality where:
>
> (i) the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute;
>
> (ii) the making of the agreement is impliedly prohibited by statute. A particular case of an implied prohibition arises where the agreement is to do an act the doing of which is prohibited by the statute;

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8 [2013] NZHC 1323.
9 [2010] NZHC 1446.
10 (2012) 246 CLR 498 at 513 [23]; [2012] HCA 7.

(iii) the agreement is not expressly or impliedly prohibited by a statute but is treated by the courts as unenforceable because it is a "contract associated with or in the furtherance of illegal purposes.

This threefold categorisation was endorsed by the majority (French CJ, Kiefel J, Keane J and Nettle J) in the next leading Australian High Court case of, *Gynch v Polish Club Limited*[11], in which it was held that a lease entered into in contravention of certain provisions of the *Liquor Act 2007* (NSW) was not for that reason rendered void and unenforceable.

The separate judgement of Gageler J, in which he concurred with the majority in reaching this conclusion, is the most comprehensive recent analysis of the consequences of statutory illegality and warrants close attention. Gageler J identified the statutory consequences of a breach of a statutory provision as follows:

> The nature and extent of any statutory consequence of breach of a statutory prohibition on making, or on some step in making, an agreement is a question of statutory construction which is distinct from the question of statutory construction which determines the scope of that prohibition (if the prohibition is express) or the existence and scope of that prohibition (if the prohibition is implied). A statutory consequence of making an agreement in breach of an express statutory prohibition is sometimes set out in exhaustive terms in the statutory text. Almost inevitably in the case of an implied prohibition, and sometimes in the case of an express prohibition, the statutory consequence is left in whole or in part to statutory implication.

Justice Gageler also added that:

> There is no reason why an implied statutory consequence cannot stop short of rendering an agreement made in breach of a particular statutory prohibition wholly unenforceable by all parties in all circumstances. An implied statutory consequence might be limited, for example, to rendering an agreement unenforceable by a contravening party in the occurrence or non-occurrence of particular events.

The few PNG cases are generally consistent with this analysis. In *New Ireland Development Corporation Ltd v Arrow Trading Ltd*[12] the National Court had to determine whether it could enforce a lease entered into at a time when the lessee was not certified as a foreign enterprise under the *Investment Promotion Act* 1992. Lay J, first considered whether the consequence of a breach was expressly provided for in the statute and as there was one, it was unnecessary for the court to consider whether there was any implied consequence.

In applying these principles to section 110 of the PNG Act, while the section is itself silent as to the consequence of a breach of the requirement for shareholder approval of major transactions, the PNG Act as a whole is not. This is demonstrated by the list of consequences, and potential action by various parties, set out above under the heading 'Consequences under the PNG Act'. The prescription and availability of these statutory consequences renders it less likely that a contract or transaction would be deemed to be unenforceable or even void simply because it is entered into in breach of the statutory prohibition. Such a result may be the consequence of one or more orders under section 152, but only after the rigours of a judicial process instigated by a shareholder who has been affected prejudicially. Unless and until that power is exercised, it is reasonable to conclude that a contract or transaction entered into in breach of section 110 is binding on the parties and effective in dealing with property.

Common law or equitable consequences

Historically, the consequence at general law of a contract being illegal, was that it was unenforceable, in the sense that a court will not recognise or enforce it, and therefore, there is no ability to recover money or property under the contract. In colloquial terms, any loss lies where it falls. Of course, this being the consequence, confirms that the transaction itself if carried out was effective to pass title to property and put into effect other legal acts; that is, the transaction is not and

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[11] [2015] HCA 23 at [35] although Gageler J in his separate judgement said that this "tripartite classification" was useful but not comprehensive – see [60].

[12] (2007) N3240 at paragraph 24.

never has been void at common law. In any event, as Gageler J demonstrated in *Gynch v Polish Club Limited*, the more modern position is that not every prohibited contract will be unenforceable:

> An agreement which is not denied legal operation by statutory force may still be unenforceable at the insistence of one or both parties by operation of the common law by reference to considerations of public policy. The cases in which that might occur, however, must now be closely confined.
>
> It is important to identify the considerations of public policy that might be in play in such cases. Although other considerations might arise in some circumstances, two overlapping considerations have generally been recognised in the decided cases to predominate. One of those considerations has long been identified in terms that a person ought not to be permitted by law to base a cause of action on an immoral or illegal act. The other, more focussed, consideration has been identified in terms that a person ought not to be assisted by law to benefit from an immoral or illegal act. That other consideration is reflected in what has been described as "the more specific rule that the court will not enforce the contract at the suit of a party who has entered into a contract with the object of committing an illegal act.[13]

It is not immoral or contrary to public policy for a person to enter into a transaction with a company which is a major transaction for that company. Rather, the rationale is to give shareholders a say and to give them remedies in the event that they vote against the transaction, but the special resolution is passed and the transaction proceeds.

Gageler J explains further:

> The consideration of public policy that a person ought not to be permitted by law to found a cause of action on an immoral or illegal act is the product of an earlier age. The broader consideration of public policy is now rarely recognised by the common law to have application in relation to illegality which arises under a modern regulatory statute. That is the import of the observation by Mason J in Yango that "[t]here is much to be said for the view that once a statutory penalty has been provided for an offence, the rule of the common law in determining the legal consequences of commission of the offence is, thereby diminished". It is not the function of the common law to seek to improve on a regulatory scheme by supplementing the statutory sanctions for its breach. If a statute itself does not operate to deny legal operation to an agreement made in breach of one of its prohibitions, or to render that agreement unenforceable by reason of that breach, the coherence of the law is best served by a court respecting and enforcing that legislative choice.[14]

In the case of section 110, in the broader context of the PNG Act, it is reasonable to conclude that Parliament's intention was for the general law not to apply; that is, contracts entered into in breach of section 110 should be enforceable unless and until the court determines otherwise under section 152. There is simply no room within this regulatory regime for common law or equitable principles to apply.

Gageler J also recognized the importance of whether or not the party seeking to enforce a prohibited contract was aware of the breach of the prohibition:

> A court examining the application of that consideration of public policy to the enforcement of an agreement made in breach of a statutory prohibition will examine the intention of a person in entering into the agreement and in seeking to enforce the agreement. The court will recognise that, "whilst persons who deliberately set out to break the law cannot expect to be aided by a court, it is a different matter when the law is unwittingly broken". The court will weigh the consequences of withholding a remedy to enforce the agreement in light of the objects or policies which the statute seeks to advance and the means which the statute has adopted to achieve that end. Ordinarily, it would be open to the court to conclude that withholding a common law remedy from a person whose intention was, and remained, to flout the statute was justified by reference to the narrower consideration of public policy only if the consequence of withholding the remedy could be determined by the court to be both proportionate to the seriousness of the illegality and not incongruous with the statutory scheme. The moulding of an equitable remedy, if sought, might involve other considerations and permit of greater flexibility.[15]

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13 [2015] HCA 23 at 71.
14 [2015] HCA 23 at 73.
15 [2015] HCA 23 at 75.

In summary, therefore, there should be no common law or equitable consequence as the PNG Act itself prescribes the consequences of a breach of section 110.

Papua New Guinea cases

There is only one PNG case which deals with the consequences for a transaction entered into in breach of section 110: *Madang Cocoa Growers Export Co Limited v National Development Bank Ltd*.[16] In that case, Cannings J observed that:

> Section 110 does not require the conclusion that the agreement becomes illegal or unenforceable or that its existence cannot be taken into account for the purposes of an assessment of damages.

We do not entirely agree with this statement. The agreement was illegal in that it was entered into in breach of a statutory prohibition and an offence was thereby committed. However, as analysed above, the agreement is not necessarily unenforceable as a result, nor was the agreement void, so that it could not be considered for other purposes, such as, damages.

In *Rainbow Holdings Pty Ltd v Central Province Forest Industries Pty Ltd*[17], the Supreme Court was required to consider whether a contract to sell logs was enforceable when the seller had obtained the logs without the requisite statutory authorisation. The court referred to *Yango* and *Archbolds (Freightage) Ltd v S Spangler Ltd*[18] in holding that, even if the relevant statute did not expressly or impliedly prohibit the relevant contract, the court should consider whether having regard to public policy, the contract should not be enforced, if it could only be performed in breach of the statute or was intended to be performed for an illegal purpose. The court concluded that given the scope and purpose of the relevant statutory prohibition, and given that this purpose would not be advanced by declining to enforce the contract, that the relevant contract for sale of the logs was enforceable.

The same approach was adopted in *New Ireland Development Corporation Ltd v Arrow Trading Ltd.*[19] In that case, the court had to determine whether it could enforce a lease entered into at a time when the lessee was not certified as a foreign enterprise under the *Investment Promotion Act* 1992. Lay J held that because the Parliament had provided for an express remedy in section 41A, enabling a court to set aside a contract entered into by an uncertified foreign enterprise, it would be wrong for the court to render the contract unenforceable by applying common law public policy concepts. That is similar to the position applying in relation to section 110 of the PNG Act given the remedy available under section 152.

Effect on dealing with third parties

The overall scheme of the PNG Act is to validate corporate action notwithstanding any failure to comply with the Act (sections 18 and 19). In particular, a company cannot assert, against a person dealing with the company or a person who has acquired property, rights or interests from the company, that the PNG Act has not been complied with, unless that person was aware of, or by virtue of his position, ought to have been aware of, the non-compliance. So in the absence of any knowledge of a breach, it would be inequitable for a court to give the party bringing a claim a remedy because by doing so, that party would be granted the benefit of a remedy which the PNG Act expressly denies it.

In relation to the question of whether a party (not a shareholder) dealing with a company can take action to overthrow a major transaction entered into by the company in breach of section 110, based on our analysis, the only way a transaction made in breach of section 110 can be overthrown is by way of an application made under section 152. As only a shareholder or former shareholder (or an "entitled person") can make an application under section 152, it follows that it is not open to a party

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16 (2012) N4682.
17 [1983] PNGLR 34.
18 [1961] 1QB 374.
19 (2007) N3240.

that is not a shareholder who is dealing with a company to take action to declare void a major transaction.

In this regard, under section 78, a shareholder means a person who is entered in the share register as the holder of one or more shares or, until a person's name is entered in the share register, a person who is named as shareholder in an application for the registration of a company at the time of registration of the company, or a person who is entitled to have that person's name entered in the share register under a registered amalgamation proposal, as a shareholder in an amalgamated company. The meaning of shareholder in section 78 appears to exclude a person who is named as a transferee in a share transfer instrument or a share sale agreement in relation to shares in the company but whose name is yet to be entered on the share register of the company.

Section 18(1) of the PNG *Companies Act* provides that:

> No act of a company and no transfer of property to or by a company is invalid merely because the company did not have the capacity, the right, or the power to do the act or to transfer or take a transfer of the property.

This is not materially different from section 17(1) of the NZ Act. In *Hansard v Hansard*[20], a case in which the failure to obtain shareholder approval under section 129 was one of the issues, the New Zealand Court of Appeal said that:

> Failure to comply with the requirements of s.129 does not, however, affect the validity of the transaction for present purposes. Section 17(1) of the *Companies Act* provides that no transfer of property by a company will be invalid merely because the company did not have the capacity, the right or power to transfer that property. That is so even where the transfer is not in the best interests of the company.

Section 19(1) of the PNG Act provides that:

> A company, or a guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired property, rights, or interests from the company that:
>
> (a) this Act or the constitution of the company has not been complied with; or
>
> …
>
> unless the person has, or ought to have, by virtue of his position with or relationship to the company, knowledge of the matters referred to in any of Paragraphs (a), (b), (c), (d), or (e), as the case may be.

This is not materially different from section 18(1) of the NZ Act. It follows that a breach of section 110 does not enable the company to assert against a party dealing with the company that Section 110 has been breached unless the counterparty was aware of the breach. Put another way, the failure of a company to comply with section 110 (by not seeking the approval of shareholders to enter into the contract), does not mean a contract is invalid and of no effect in the company's dealings with other parties. On the contrary, it infers that the contract is effective according to its terms and the company cannot assert a breach of section 110 to resist enforcement, unless the counterparty was aware of the breach.

This interaction between a company's contract which is illegal because it is in breach of the PNG Act, and the section of the Act preventing the company asserting this illegality in dealings with other persons, was considered in a New Zealand case in 1997: *Waller & Anor v. Paul*.[21] This case was about a company with a sole director and a sole shareholder, and an agreement whereby that person sold intellectual property to the company in return for an issue of shares. It was held that the issue of shares was in breach of the NZ Act because it did not adhere to the procedures in Sections 40 (Contracts for issue of shares) and 47 (Consideration to be decided by the Board). The liquidators of the company were seeking to recover from the shareholder the amount for which the shares were deemed to have been issued. It was held that the agreement was an illegal contract, and therefore

[20] [2014] NZCA 433.
[21] (1997) 8 NZCLC 261.

could not be relied upon by the shareholder to resist the liquidator's claim. Master Faire, in his judgment, said that:

> This agreement, being an agreement to issue shares, is an illegal contract because the defendant, as the board of the company, has not complied with s.47 of the Act. In short, the statutory basis for holding an illegal contract in this case has been made out for the purposes of s.40 of the *Companies Act* 1993.

And further:

> This case involves a defendant who is the sole director and sole shareholder of the company. He alone has the power to comply with the constitution of the company and for that matter the obligations cast on him both as director and shareholder under the provisions of the *Companies Act* 1993. For that reason, it seems to me that the prohibition contained in s.18(1) from asserting that the constitution of the company and the provisions of the *Companies Act* have not been complied with, do not apply in this case by reason of the concluding words contained in s.18(1). This is because the defendant clearly is a person who ought to have, by virtue of his position with the company, knowledge of the non-compliance with the constitution and the *Companies Act* requirements. There is simply no other person who is obliged to carry out the obligations specified in s.47(3), (4) and (5) of the *Companies Act* 1993. If the provisions of s.47 alone are considered, i.e. without reference to the concluding part of s.18(1) of the *Companies Act* 1993 then, in my view, non-compliance will not by itself make the contract of no effect….

The concluding words of the quotation above from the judgment in *Waller v Paul* do indicate that the qualification about knowledge at the end of section 18(1) [i.e. section 19(1) in the PNG Act] is of paramount importance. The Master's statement is that, if that qualification is not applicable, non-compliance with a provision of the NZ Act will not, by itself, make the contract or transaction of no effect.

A further consideration in the circumstances might be whether there is any application of the rule in *Turquand's* case and the "indoor management rule" derived from it. These rules are generally applied in circumstances where the board of directors or management of a company have not complied with provisions in the company's constitution or memorandum and articles of association, or where there has been some irregularity in the convening or holding of shareholder or board meetings at which approval or authorisation is given. In those circumstances, a third party (an outsider) dealing with the company is entitled to assume that inside the company everything has been done in accordance with the requirements of its public documents, unless the third party has knowledge to the contrary or there are suspicious circumstances putting the outsider on inquiry. The question is whether a third party can rely upon this rule in respect of a requirement for shareholder approval prescribed by statute.

In answering this question, the facts of *Turquand's* case are quite helpful. There was, for the company in that case, a registered deed of settlement under which the board of directors were authorised to borrow on bond such sums as should from time to time be authorised by a resolution of the company in a general meeting. The board borrowed money from the bank on a bond bearing the company's seal. It was held that, even if no resolution had in fact been passed by the company in a general meeting, the company was nevertheless bound. Jervis CJ said:

> We may now take for granted that the dealings with these companies are not like dealings with other partnerships and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done.

The *Turquand's* case was decided at a time when modern company law was in its infancy, and the registered joint stock company had only recently been distinguished from a partnership as an entity through which to conduct business. Its authority today may therefore be questioned. However, the statements made by Jervis CJ still appear to be sound in principle: that a third party dealing with the company is bound to read the governing statute, but is not bound to check that conditions found in

it have been satisfied by the company; and that the third party may infer the fact of a resolution required to satisfy a condition and authorise "that which on the face of the document appears to be legitimately done". We submit there is no valid distinction in this regard between a requirement for a shareholders' resolution in the company's public document (as in *Turquand's* case) and a requirement for a shareholders' resolution in a section of the PNG Act. In both cases, the requirement is overt, but the compliance with it is a matter inside the company which is not apparent in any public document or disclosure.

The application of the rule in *Turquand's case* and the indoor management rule was discussed by Cannings J in *Raikos Holdings Ltd v Porche Enterprise Ltd*[22], where His Honour commented:

> What effect does that have on enforceability of the agreement? This depends on whether the rule in Turquand's case (Royal British Bank v Turquand (1856) 119 ER 886) applies. Where a person dealing with a company acts in good faith and with no notice of reasonable grounds for suspicion of irregularity or impropriety, he is not affected by any actual irregularity or impropriety in a matter of internal regulation. It is incumbent on a person seeking the protection of this rule to prove absence of reasonable grounds for suspicion of irregularity or impropriety (Sangara (Holdings) Ltd v Hamac Holdings Ltd (In Liquidation) [1973] PNGLR 504; AGC (Pacific) Ltd v Woo International Pty Ltd [1992] PNGLR 100; New Ireland Development Corporation Ltd v Arrow Trading Ltd (2007) N3240; Kui Valley Business Group Inc v Kerry Wamugl (2009) N3667). The defendant has failed to discharge that onus. It was aware of the dispute as to ownership and control of the plaintiff as it and its then managing director, Tony Tai Tung Chi, were parties to the proceedings regarding disputed ownership and control of the plaintiff. The defendant was reasonably expected to know of the reasonable possibility that the persons who approved and executed the agreement were in fact unauthorised. It cannot in these circumstances gain the protection of the rule in Turquand's case.

As this case demonstrates, the state of knowledge of the other party dealing with the company is paramount. That party cannot rely upon the indoor management rule if he or she knows that the company is not dealing with external transactions in accordance with its own proper internal procedures.

Conclusion

The requirement in section 110 of the PNG Act that major transactions must be approved by a special resolution of shareholders (or be conditional upon such approval) certainly presents some interpretative challenges, not least of all in determining in diverse circumstances what is a major transaction. Ultimately, such determinations may come down to difficult evidentiary questions of value.

Difficult as these issues may be, directors will ignore them at their peril. Proceeding with a major transaction without the requisite approval means that the transaction and any associated contract entered into by the company is illegal. It involves statutory illegality if not illegality at common law. But that does not, in our view, render the transaction and any contract unenforceable or void. The statute, the PNG Act makes detailed provision for the consequences of the breach which displace the application of unenforceability under the general law; and illegal transactions are not void as a matter of course. They are still valid for the purposes of an outside party unaware of the illegality.

But the statutory consequences are serious, and may make the company and its directors liable under direct action by any shareholder, or may result in orders under section 152 at the behest of a prejudiced shareholder. These might include an order for compensation, or an order that the transaction be set aside, or in a dire case, an order that the company be placed into liquidation.

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[22] (2012) N4776.

Office of the Public Solicitor

Leslie Mamu*

Introduction

Legal aid, just like health and education, is one important service that the Government is required to provide to its people. It is a unique form of service because it extends to rendering assistance to individuals in cases against the Government itself. To a large extent, this can be an exception to the aphorism "Do not bite the hand that feeds you!"

But how can a governmental body or State Service provide legal assistance to the public against itself as a government? Can it master the art of exercising restraint when confronted with conflict of interest between itself and the person it represents? From another analogy, how can the Office of the Public Solicitor represent a person who is suing the Public Solicitor for professional negligence concerning a previous case which got dismissed whilst being represented by the Public Solicitor's Office?

Even in a case where a judicial officer is taken to task to establish his neutrality in a case of perceived biasness, it is not so much whether the judge can maintain impartiality; rather, the public perception when becoming aware of the prevailing facts relating to the conflict at hand. It is for this very reason that a special and peculiar arrangement needed to be made so that whilst attending to its obligation to provide a vital service, the Government remains at bay, allowing for justice to be served in its uncompromised state.

This is where the Public Solicitor was identified and elevated to hold an office created by the *Constitution*. Whilst the Office enjoys a constitutional status, the mandate of legal aid is also a constitutional function. The same *Constitution* also guarantees the independence of the Public Solicitor in the discharge of his duties.

As such, the Public Solicitor and his Office must remain separate from the Government. This is to ensure integrity in the dispensation of legal aid to individual persons seeking justice. It is important to understand these introductory remarks before reviewing the decision of the Supreme Court in *SCR 3 of 2018; Special Reference by Public Solicitor of the Jurisdiction of PSC., Section 19(1), In re* [2019] SC1871 (13 November 2019) which clarified the status and position of the Public Solicitor in the public service.

The Public Solicitor and the Office of Public Solicitor

The two-word phrase *"Public Solicitor"* appears 20 times in the *Constitution*. All those provisions deal with the function, responsibilities, appointment, removal, and office of the Public Solicitor. The Public Solicitor is the person who occupies the office created by the *Constitution* called the Office of the Public Solicitor. In fact, he is one of a few prescribed persons who hold constitutional institutions as stipulated in section 221 of the *Constitution*. These constitutional office-holders include:

1. A Judge
2. The Public Prosecutor
3. The Public Solicitor
4. The Chief Magistrate

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5. A member of the Ombudsman Commission
6. A member of the Electoral Commission
7. The Clerk of the Parliament
8. A member of the Public Services Commission
9. The Auditor General

The Office of the Public Solicitor is a constitutional institution established by section 176(1) of the *Constitution*. The Public Solicitor is appointed by the Judicial and Legal Services Commission (JLSC) for a period of 6 years. The JLSC is a constitutional office established by the *Constitution* and is chaired by the Minister for Justice. The Commission includes the Chief Justice, the Deputy Chief Justice, the Chief Ombudsman and a Member of Parliament.

The two primary functions of the Public Solicitor are spelt out in section 177(2) of the *Constitution*. These are:

1. To provide legal aid, advice and assistance for persons in need of help by him, and in particular to provide legal assistance to a person in need of help by him who has been charged with an offence punishable by imprisonment for more than two years; and
2. To provide legal aid, advice and assistance to any person when directed to do so by the Supreme Court or the National Court;

The Public Solicitor is one of three Law Officers of PNG, the other two being the Attorney General and the Public Prosecutor. The significance of being a Law Officer can be seen from the provisions of the *Constitution*. Firstly, the Public Solicitor plays an important role as part of the National Justice Administration of the nation as specified by section 154 of the *Constitution*.

Secondly, being a Law Officer, the Public Solicitor is part of an exclusive group of individuals and entities identified in section 19 of the *Constitution*, who enjoy standing to seek the Supreme Court's opinion on constitutional provisions and the constitutionality of enactments.

Thirdly, as a Law Officer, the Public Solicitor is specially called upon under section 57 of the *Constitution* to take interest in the protection and enforcement of human rights of citizens. Fourthly, the Public Solicitor, being a Law Officer, is covered by the express injunction of section 155(6) of the *Constitution* which states that:

> Subject to any right of appeal or power of review of a decision, it is the duty of all persons (including the Law Officers of Papua New Guinea and other public officers in their respective official capacities), and of all bodies and institutions, to comply with and, so far as is within their respective lawful powers, to put into effect all decisions of the National Judicial System.

From these provisions, one can clearly appreciate that the Public Solicitor plays an even greater role than merely the provision of legal aid, advice and assistance to persons in need of his help. The Public Solicitor stands equal in matters of national interest and development agendas of Papua New Guinea. In fact, our founding fathers and mothers clearly envisaged additional roles and functions to be performed by the Public Solicitor. This is clearly set out in section 177(6) of the *Constitution*:

> An Act of the Parliament may confer, or may provide for the conferring of, additional functions, not inconsistent with the performance of the functions conferred by Subsections (1) and (2), on the Public Prosecutor or the Public Solicitor.

The exercise of the powers and functions of the Public Solicitor highlighted above were questioned and clarified by the Supreme Court in two cases which are discussed below. These two decisions have empowered the Public Solicitor to confidently perform his role as a Law Officer of the country.

SCR 1 of 1978; Re Ombudsman Commission Investigations of the Public Solicitor [1978] PNGLR 345

This was a special reference that centered on the more conventional functions of an Ombudsman Commission, that is, the investigation of, and reporting on, maladministration by government and government officials. Two questions were referred to the Supreme Court:

1. Does the Ombudsman Commission have jurisdiction (a) on its own initiative or (b) on complaint by a person affected, to investigate any conduct of the Public Solicitor or an officer or employee of the Public Solicitor's Office?
2. Can the Ombudsman Commission require the Public Solicitor to produce to the Ombudsman Commission any documents, relating to any matter being investigated by the Ombudsman Commission that are in the possession or control of the Public Solicitor.

In answering these questions, the court had to first, review the roles and functions of the Ombudsman Commission.

The Ombudsman Commission is established by section 217 of the *Constitution*. The Commission comprises the Chief Ombudsman and two Ombudsmen. The purposes of the Ombudsman are: (a) to ensure that all governmental bodies are responsive to the needs and aspirations of the people; (b) to help in the improvement of the work of governmental bodies and the elimination of unfairness and discrimination by them; (c) to help in the elimination of unfair or otherwise defective legislation and practices affecting or administered by governmental bodies; and (d) to supervise the enforcement of the Leadership Code.

The Ombudsman Commission is empowered under section 219 of the *Constitution*, to investigate, on its own initiative or on complaint by a person affected, any conduct on the part of:

1. Any State Service or provincial service, or a member of any such service.
2. Any other governmental body, or an officer or employee of a governmental body.
3. Any local government body or an officer or employee of any such body.
4. Any other body set up by statute appointed by the National Executive or an officer or employee of any such body.
5. Any member of the personal staff of the Governor-General, a Minister or the Leader or Deputy Leader of the Opposition.

In answering the questions, the Supreme Court, by majority (Prentice CJ, Wilson J) held that:

- The Public Solicitor is not a State Service whose conduct the Ombudsman Commission has jurisdiction to investigate by reason of section 219(1)(a)(f) of the *Constitution*.
- The Public Solicitor does not fall within the description "other governmental body" whose conduct the Ombudsman Commission has jurisdiction to investigate by reason of section 219(1)(a)(iii) of the *Constitution*.
- The powers of investigation of the Ombudsman Commission to investigate conduct under section 219 of the *Constitution* are limited to investigation of conduct of an administrative kind.
- The Ombudsman Commission does not have jurisdiction under section 219 of the *Constitution,* (other than in relationship to a *Leadership Code* matter involving the Public Solicitor's personal conduct) to investigate any conduct of the Public Solicitor or an officer or employee of the Public Solicitor's Office, on its own initiative or on complaint by a person affected.
- The Ombudsman Commission cannot require the Public Solicitor to produce to the Ombudsman Commission any document, relating to any matter being an investigation of the conduct of the Public Solicitor or an officer or employee of the Public Solicitors Office,

whether on its own initiative or on complaint by a person affected, that are in the possession or control of the Public Solicitor.

A closer examination of the decision of Prentice CJ highlights the following important attributes of the Public Solicitor and his Office:

- The Public Solicitor is not an arm of government.
- The Public Solicitor, by Section 176(1), is a creature of the people not of Parliament.
- The Public Solicitor is appointed by the Judicial and Legal Services Commission, a creature of the people and not of the Parliament.[1]
- The Public Solicitor is not subject to direction or control by any person or authority, in the performance of his functions under the *Constitution*.[2]

Wilson J noted section 188 of the *Constitution* (which establishes four State Services, that is: (a) the National Public Service; (b) Police; (c) Defence Force; and (d) Parliamentary Service) and made this significant observation:

> It is to be noted immediately that the Public Solicitor is not included as one of the State Services thereby established, and no Act of the Parliament has made provision for or in respect of the Public Solicitor as a State Service. The Public Solicitor could hardly be said to be a member of the National Public Service and therefore a member of a State Service (see s. 188 (1)(a)). It is to be noted that his office is established by, the manner of his appointment is laid down in, his functions are set out in, and the circumstances of his removal from office, are specified in s. 176 to s. 178 of the *Constitution*. It would have been unnecessary to have spelt out such matters if the Public Solicitor was a public servant, because such matters are covered in the legislation appertaining to public servants.

The status of the Office of the Public Solicitor and the power and functions of the Public Solicitor remained unchallenged for almost 30 years, until 2018, when the Supreme Court was again asked to review the role of the Public Solicitor.

SCR 3 of 2018; Special Reference by Public Solicitor re Jurisdiction of PSC (2019) SC1871

This reference was filed by the Public Solicitor following a review by the Public Service Commission (PSC) on a personnel matter involving a senior legal officer of the Public Solicitor's Office who was disciplined and dismissed from the office. The PSC reviewed the decision of the Public Solicitor and set aside the dismissal and ordered reinstatement and back-dated payment of salaries and allowances for the officer. The Public Solicitor contended that the jurisdiction of the PSC did not extend to bodies falling outside the National Public Service including his Office. This view was based on the Supreme Court decision in *SCR 1 of 1978; Reference by Ombudsman Commission re review powers of the Ombudsman over the Public Solicitor*.

The Public Solicitor referred the following question to the Supreme Court:

> Does the Public Services Commission have jurisdiction under Sections 191 and 194 of the *Constitution* to review any decision of the Public Solicitor or an officer or employee of the Public Solicitor's office?

As it did in 1978, the Supreme Court began by reviewing the role of the PSC. It noted that the PSC is established by section 190 of the *Constitution*. The PSC, like the Ombudsman Commission, consists of three members appointed by the Head of State on the advice of the Public Services Commission Appointments Committee. According to Section 191 of the *Constitution*, the PSC has three primary functions:

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1 See section 183 of the *Constitution*.
2 See section 176(5) of the *Constitution*.

1. The review of personnel matters connected with the National Public Service.
2. The continuous review of the State Services (other than the Defence Force), and the services of other governmental bodies, and advising the National Executive Council and other responsible authorities on organizational matters.
3. Providing recommendations and views through a process of consultation regarding decisions on appointments, revocation of appointments and suspension from office of some senior public office-holders, including Departmental Heads, the Commissioner of Police and the Commander of the Defence Force.

As mentioned above, the *Constitution* establishes four State Services under section 188. These are:

1. The National Public Service.
2. The Police Force.
3. The Papua New Guinea Defence Force.
4. The Parliamentary Service.

The PSC's jurisdiction to review personnel decisions is confined to those connected with the National Public Service. The *Constitution* does not define "National Public Service". The *Public Services (Management) Act* 1995 fills this void. This legislation is aimed at implementing section 195 of the *Constitution* and to govern the operation of the National Public Service. Section 20 of the legislation is pertinent. It states that:

(1) There shall be-
  (a) a Department of the Prime Minister and National Executive Council; and
  (b) a Department of Personnel Management; and
  © such other Departments and Offices deemed as Departments as are established under Subsection (2).
(2) The Head of State, acting on advice, may, by notice in the National Gazette-
  (a) establish a Department or an Office deemed as a Department; or
  (b) abolish a Department or deemed Department; or
  (c) alter the name of a Department or deemed Department other than the Department of Prime Minister and National Executive Council and the Department of Personnel Management.

The National Public Service therefore consists of:

1. The Department of the Prime Minister and National Executive Council.
2. The Department of Personnel Management.
3. Such other Departments and offices deemed as Departments as are established under the *Public Services (Management) Act*.

So, the key question is: Does the PSC have jurisdiction over the Public Solicitor and his Office? The Supreme Court (*Salika CJ, Kandakasi DCJ, Kirriwom J, Cannings J, Yagi J*), in a unanimous decision held that the PSC does not have jurisdiction under sections 191 and 194 of the *Constitution* to review any decision of the Public Solicitor or an officer or employee of the Public Solicitor's Office.

The court ruled that the Office of Public Solicitor is neither a Department nor a deemed Department. Therefore, it is not part of the National Public Service. Furthermore, officers and employees of the Office of Public Solicitor are not members of the National Public Service. Labelling lawyers and other officers and employees in the Office of Public Solicitor as "public servants" does not assist in determining the jurisdiction of the PSC. The term "public servant" is not a legal term. It is a colloquialism. It can refer to any person employed by a public body.

It is therefore, only proper that the terms and conditions of employment of officers and employees of the Office of Public Solicitor are set by the Public Solicitor at his discretion. As emphasised by

the Court, the Public Solicitor is under no legal or administrative obligation to adopt the terms and conditions applying in the National Public Service.

Conclusion

The Office of Public Solicitor is not a "governmental body" and stands outside the investigative jurisdiction of the Ombudsman Commission under Section 219(1) of the *Constitution* and the *Organic Law on the Ombudsman Commission*, as well as the review jurisdiction of the PSC.

The Public Solicitor, as Wilson J pointed out in *SCR 1 of 1978; Reference by Ombudsman Commission re review powers of the Ombudsman over the Public Solicitor*, is also a Law Officer of PNG (see s.156 of the *Constitution*) and a constitutional office-holder. The Office of the Public Solicitor is neither a State Service nor a member of any State Service; it is not a member of the national public service nor is it required to be.[3] The Office is not a governmental body.

This decision is very significant and accords the Public Solicitor and his Office the real nature and true position it ought to maintain. The Public Solicitor is an important figure in the National Administration of Justice in PNG. The Office of the Public Solicitor plays an even equal role to that of the Ombudsman Commission. It holds government and its various agents and instruments to account to the law and its people. As pointed out by Cannings J:

> The Public Solicitor is a constitutional office-holder. He is one of the three Law Officers…He has an inherent and constitutionally recognized interest in the protection and enforcement of human rights. He is an integral part of the National Justice Administration. He has a great measure of independence.[4]

A passage from the CPC Report is apt and gives some relevant background to the position taken by the Supreme Court in both cases.

> We do not consider that private practitioners will be able to provide legal services on the scale and of the nature required by our people in the future, nor do we think they can be expected to do so. We are convinced that the Office of the Public Solicitor is the best institution to provide legal assistance to the great majority of our people.
>
> No-one should be denied legal assistance by reason of his financial circumstances or the fact that he or she is unable to establish contact with persons of authority or influence. Law courts we believe should be available to all persons, not just to persons who have money.
>
> We have found public opinion throughout the country to be in favour of making the Public Solicitor's Office constitutionally independent of the executive government. We ourselves believe that this independence is essential in order to provide legal services to the majority of our people and to protect the rights of individuals and small groups.[5]

The decisions of the Supreme Court bolster the independence of the Public Solicitor in the conduct of his office and functions. It now paves the way for the Public Solicitor and his management to take steps to put in place the appropriate machinery to reflect its constitutional status.

However, while the clarity provided by the Supreme Court on the character of the Office of the Public Solicitor and the Public Solicitor is a victory for the Public Solicitor, it is also imperative to heed the caution by Brunton AJ:

> The Public Solicitor's Office is, nonetheless, part of the National Government in a broad sense. Accordingly, the Independent State of Papua New Guinea is vicariously liable for the negligence of lawyers in the course of their employment with the Public Solicitor.[6]

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3 See *Organic Law on Certain Constitutional Office-holders* and section 223 of the *Constitution*.

4 *Enforcement of Basic Rights* (2014) N5512.

5 Constitutional Planning Committee, *Final Report of the Constitutional Planning Committee* (Port Moresby: Government Printer, Konedobu, 1974) 108-110.

6 *Martha Limitopa v The State* [1988-89] PNGLR 364.

As pointed out in the introduction, legal aid is one crucial service any government ought to provide to its people. In PNG, this service is provided by the Government through the Public Solicitor. Hence, funding for legal aid service comes from the Government. Equally so is any payment of damages for negligence on the part of the lawyers in the employ of the Public Solicitor.

PERSPECTIVES ON MISINFORMATION AND RELATED CYBER LAWS

Hezron Wangi Jnr*

Introduction

In war, truth is the first casualty,[1] in a bio-crisis like the recent novel corona virus, the same adage also applies. At the outbreak of the pandemic, the world took to the internet to express their views. Speculations such as, a laboratory experiment gone wrong, a weaponized bio threat released from Wuhan, the viral effect of 5G internet, anti-Sino slurs and other trending topics on blogs, vlogs and posts flooded the net.

The pandemic has shown the vital need for the provision of authentic information to assist first responders in their timely response in curbing the spread of the virus. In times of crisis, the press and the government also have an increased responsibility in providing reliable information to the public for purposes of awareness, and at times, to serve as a warning.[2] Good comprehension by the general public of a country's state of affairs reduces the risk for panic and fosters people's understanding and compliance to necessary restrictions.[3]

Traditionally, the press has been the main medium in reporting and disseminating information. However, the internet has paved way for ease of convenience in communicating online. This in turn has made it convenient for individuals to readily exercise their freedom of speech and expression online, and in so doing, provides a challenge to the conventional role of the media in society.

The internet has made it easy for individuals to readily express their views without restraint. The anonymity provided by the internet means that a user could publish content without verification or credibility. The excessive use of the internet to publicize, share and manipulate information without any attribution to credible authorities is causing, what is known as, information pollution.

It comes with no surprise that internet users are susceptible to false information spread by the internet, especially on social media. Although seemingly harmless, more issues arise daily because of the misuse and abuse of social media. At times, fake news or information, has a malicious effect if relied upon by the general public. Various questions may arise as to how our legal system captures that concern? Is there sufficient legislation in place to address false information online? And would the presence of these pieces of legislation stifle free speech? These questions will be discussed as this paper.

The Laws on Information

The Freedom to Disseminate and Freedom for Information

Section 46 of the *Constitution* operates to accommodate free speech in Papua New Guinea (PNG). The *Constitutional Planning Committee* (CPC) Report also makes it clear that free speech is a right that must be upheld and protected. However, the exercise of this right may be restricted or regulated by law.[4]

With regards to access to information, section 51 of the *Constitution* provides that every citizen has the right to information, insofar as, it is guided by section 38 of the *Constitution*.[5] The critical

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1 *Aeschylus*, Agamemnon, (reprinted) November 6th 2003, Cambridge University Press, U.K.

2 *Freedom of Expression and Information in Times of Crisis,* Council of Europe Portal, <https://www.coe.int/en/web/freedom-expression/freedom-of-expression-and-information-in-times-of-crisis (accessed on 28/5/2020).

3 Ibid.

4 See section 38 of the *Constitution*.

5 General qualifications on qualified rights may restrict or regulate the right guaranteed by this section.

component of this provision is that it confers the right of reasonable access to official government documents only.[6]

Section 38 of the *Constitution* provides that qualified rights such as the right to freedom of and to disseminate information may be regulated or limited. The regulation and restriction of these rights is deemed necessary when national security is concerned with regards to public interest in defense, public safety, public order, public welfare, public health, the protection of children etc.

The restriction of such rights must be in a manner that is reasonably justifiable in a democratic society so as not to derogate the substance of the rights conferred to citizens. Section 38 provides that for a law or an act to be reasonably justifiable in a democratic society, it must have proper regard to the rights and dignity of mankind determinable in the circumstances obtaining at the time when the decision on the question is made.[7]

With regards to internet use, section 46 of the *Constitution* (on the freedom of expression) by extension, enables freedom of press and freedom of expression by people and news agencies online. This is in terms of publication or creation of audio-visual material in conveying their idea, message or expression.

Information Technology law does not consist of an entirely new branch of law on its own, it includes aspects of other laws such as intellectual property law, privacy law, contract law and other areas of law stemming from different acts and transactions facilitated by computers. The focus of this paper will only be on free speech and the dissemination of information online.

Freedom of Expression and Free Speech Online Is Challenging the Traditional Role of the Press and Credible Agencies

The freedom of expression under section 46 of the *Constitution* provides the foundational basis for press freedom in PNG. However, broadcast or print media in our society must adhere to stringent protocols to ensure responsible and accurate reporting.

Some of the ethical principles which must be upheld generally in the media are truth and accuracy (the facts must be correct). These principles must influence dissemination of information, particularly reporting. Also, a degree of fairness must be observed and there must be objective reporting without bias. Equally important, the content of the report must not contain malice, and reporters must be responsible and accountable in their reporting.[8]

These regulations and ethical standards ensure content of reports do not incur ramifications both legally and socially. In-house editors review content and ensure that they comply with standards. The vetting process disallows mere busybodies from reporting without having regard for standards.

Apart from press and broadcasting media, the internet has expanded the ambit to which rights pertaining to freedom of expression and speech can be exercised. What was once a conventional platform where the right is exercised, technology has established a new platform and regulation and ethical standards have to be adjusted to address dissemination of information on technological platform. The convenience of the new platform, the internet has also resulted in news content being digitized and vulnerable to be manipulated at will by internet users.

General distrust in authority coupled with varying other factors has made social media a hotbed for lies, speculation and manipulative content being shared with exponential frequency. With technological convenience and also digital anonymity, digital news content is susceptible to being copied or shared by internet or social media users with no attribution to credible sources.[9]

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6 *Yasangi v Padura* (2015); N5871 – this right does not extend to private documentation; there is no specific Act governing the freedom of information in PNG.

7 Section 39(1) of the *Constitution*.

8 The 5 Principles of Ethical Journalism, https://ethicaljournalismnetwork.org/who-we-are/5-principles-of-journalism (accessed 28/05/20).

9 *The Contradictory Influence of Social Media Affordances on Online Communal Knowledge Sharing,* accessed https://academic.oup.com/jcmc/article-abstract/19/1/38/4067499 by guest on 07 May 2020.

The traditional role of the press in society is somewhat challenged because of the peer to peer sharing and general distrust in authority. Government departments and authorized bodies tasked with the dissemination of information are also faced with the challenge of refuting false information circulated by social media and micro boggers online. The internet is being cluttered by too much unnecessary information - it is being polluted.

Information Pollution And False Information Online

Information pollution is the contamination of the information supply with irrelevant, redundant, unsolicited, hampering, low value and at times harmful information.[10] Digital content on topics ranging from social, financial, health, education, health and etc., pollute the internet. As with most pollutants, the information shared may have perfidious effects.

The effects of false information online are concerning, even the United States President, Donald Trump and Brazilian President, Jair Bolsonaro seem to have fallen prone to this trend. They have, on occasions, advised their constituents that hydroxychloroquine could be medically used to prevent covid-19 despite having no scientific basis for such a claim.[11] Political correctness cannot dampen the fact that people – even political leaders and persons of influence, are also likely to fall victim to false information disseminated on social media and messaging applications which they may rely on for news.[12]

PNG is no exception to the growing trend of misinformation online. A digression to our recent news headlines will explain why:

- Police storm treasury building in Tari, Hela over Facebook post;[13]
- Air Niugini Refutes False Information on Recruitment;[14]
- Police Commissioner, Manning concerned about the abuse and misuse of social media during State of Emergency;[15]
- Health Department condemns speculation on social media about corona virus;[16]
- Bank of South Pacific Refutes Claims on Social Media about fee increase.[17]

A brief glimpse of the above would lead one to the conclusion that false information breeds well in social media. Although, the above headlines provide no revelations, it does not take much imagination to deduce the financial losses individuals, businesses and the government may have incurred due to the effects of misinformation.

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10 Orman, L. (1984). *Fighting Information Pollution with Decision Support Systems*. *Journal of Management Information Systems, 1*(2), 64-71. Retrieved May 26, 2020, from www.jstor.org/stable/40397792.

11 R. Goodman & C. Giles, *Coronavirus and hydroxychloroquine: What do we know?, 27/05/20,* BBC News https://www.bbc.com/news/51980731) (accessed at 28/05/20).

12 Navigating the CronavirusInfodemic, https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/Navigating-the-Coronavirus-infodemic.pdf (8/05/20).

13 R. Kuku, *Police Storm Treasury Building,* 21/05/20, The National, at https://www.thenational.com.pg/police-storm-treasury-building/ (accessed at 27/05/20).

14 *Advertisement on Facebook false: PX,* The National, 3/01/2020. https://www.thenational.com.pg/advertisement-on-facebook-false-px/.

15 *Abuse of social media concerning.* The National, 6/05/20 at https://www.thenational.com.pg/abuse-of-social-media-concerning/ (accessed at 27/05/20).

16 *Health Department condemns speculation on social media,* 28/01/20, The National, accessed 27/05/20 at https://www.thenational.com.pg/health-department-condemns-speculation-on-social-media/.

17 *Fleming responds to social media claims: No Fee increase*, 13/01/20 The National, https://www.thenational.com.pg/fleming-responds-to-social-media-claims-no-fee-increase/.

It is necessary that a brief is provided about the different variations or types of misinformation, as the latter term is usually conflated to mean fake news. There are varying nuances to the term that necessitate distinction.

These categories include:[18]

- Misinformation: information that is false but not created with the intention of causing harm – e.g., false connections and misleading content;
- Disinformation: information that is false and deliberately created to harm a person, social group, organization or country, e.g., false content, imposter content, manipulated content and fabricated content; and
- Mal-information: information that is based on reality that is used to inflict harm on a person, organization or country, e.g., *leaks, harassment and hate speech*.

These categories are provided in the Council of Europe's Information Disorder Report. The report is dedicated to understanding information disorder as perpetuated by contemporary social technology, and further assessing information pollution.[19] These definitions may be parallel to alternatives in law.

Translating the Distinctions into Legalese

With the distinctions provided above, there emerges a basis by which these definitions could be translated into legalese. Wrongs arising from false information online could either fall under the sphere of civil or criminal law depending on the nature of the wrong committed.

As far as civil law is concerned, civil actions may arise from tortuous grounds or from issues that arise from contractual relationships. Such an offence could attract civil action to protect or compensate the right of the victim that has been breached. Libellous acts are more likely to be instituted as civil proceedings.

Because an act of disinformation, mal-information or misinformation stems from the creation of false content with (whether with or without deliberate intention to cause harm), most of the wrongs committed in cyberspace is captured in the *Cybercrime Code Act.* State prosecution may be instituted if criminal culpability is proven upon the laying of a formal complaint.

Acts of disinformation, misinformation and mal-information are captured under the *Cybercrime Code Act* 2016. Examples include:

i. Identity theft: section 15

ii. Cyber Extortion: section 24

iii. With intent to commit fraud: (Electronic Fraud) Section 12;

iv. The intentional leak of confidential information: Unlawful Disclosure; Section 25;

v. Harassment; Cyber harassment Section 23 (1) and (2); and

vi. Spam: section 26

A closer look at section 23 (4) reveals that this provision creates an offence relating to the use of imagery and audio-visual material that is obscene, profane or vulgar and which grossly offends acceptable standards of society. The provision caters for online "public" indecency, but only within the confines of that provision. It does not elaborate on what actions would constitute as profane, vulgar or obscene.

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18 C. Wardle, PhD, H. Derakshan, *INFORMATION DISORDER: Toward an interdisciplinary framework for research and policy making,* Council of Europe Report, DGI (2017) at https://rm.coe.int/information-disorder-report-november-2017/1680764666 (accessed: 19/05/20).

19 Ibid.

The *Cybercrime Code Act* is quite recent in the sphere of cyber law, a topic that is fairly new in our jurisprudence and leaves much room for development. This is a challenge which will undoubtedly be addressed in the development of our jurisprudence as it evolves over time.

The data and statistics used in drafting this article is from a research by the American Poynter Research institute which could be accessed online at their official website. A perusal of the comprehensive layout of data in that research would be necessary for the reader's appreciation when reading this article.[20]"

What other Governments Are Doing

Like PNG, Governments around the world also face the same predicament concerning false information online. Many governments hesitate to introduce legislation that would regulate information online and thereby limiting free speech by their people. Various international human rights groups are relentless and staunch in their position against such legislation.

That being said, it is noteworthy to mention what some governments are doing in terms of tackling the growing infodemic[21] to protect their constituents. Comparison will only be drawn from democratic countries who have, in one way or another, taken action to resolve this growing issue.

In May 2019, the Singaporean government passed a legislation criminalizing the dissemination of misinformation online.[22] The *Protection from Online Falsehoods and Manipulation Act* 2019 makes it illegal for individuals and entities to spread false statements of facts that compromise security, public tranquillity, public safety and the country's public relations with other nations.[23] If a malicious actor spreads misinformation, the new legislation imposes heavy sanctions which include:

- $37, 000 or 5 years in prison – Mere dissemination of false information.
- $74, 000 or 10 years in prison – If the misinformation was shared using an inauthentic online account (fake accounts) or a bot.[24]
- $740, 000 or 10 years in prison – Social platforms that play a role in disseminating misinformation.

Canada has taken a more liberal approach towards combating false information online by launching its digital charter. The charter necessitates the willing participation of government institutions to sign up to it. Its vision is to defend the freedom of expression and protect against online threats and disinformation designed to undermine the integrity of elections and democratic institutions. Although, the charter expresses its vision, it does not provide a clear definition on what fake news is nor the sanctions that would be imposed for offenders. A lot has been left unsaid in the charter.

Certain countries are also making strides in creating agreements with major social media corporations such as Facebook. The Brazilian government has entered into an agreement with Facebook and Google to combat disinformation created by third parties.[25] The focus, however, is only placed on applying that legislation during election periods.

Germany has also taken a more severe approach by introducing legislation that directly holds social media platforms accountable for facilitating misinformation. The German government is focused on

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20 https://www.poynter.org/ifcn/anti-misinformation-actions/.

21 Information pandemic – an influx of information or misinformation rendering difficult the actions towards resolving an issue.

22 https://www.poynter.org/ifcn/anti-misinformation-actions/.

23 J. Russell, Singapore passes controversial fake news law which critics fear will stifle free speech, https://techcrunch.com/2019/05/09/singapore-fake-news-law/ (accessed: 10/05/19).

24 An automated program or robot (bot) that is coded especially for a specific use.

25 *Brazil Preparing to Fight Fake News During Elections,* The Rio Times, https://riotimesonline.com/brazil-news/rio-politics/brazil-preparing-to-fight-fake-news-during-octobers-elections/.

eradicating hate speech and is legislating for severe sanctions to support its vision. Currently, the German government is planning to sue Facebook for breach of that legislation.

With regards to most governments, bills introduced and legislation passed are dedicated only towards setup of cyber task forces to protect the integrity of their elections. After perusing the annexed table, the reader would deduce that most governments fear foreign powers influencing their election.

The American electoral history is riddled with instances where foreign and domestic powers have been alleged to have meddled with the turnout of their election. Leaked emails, recordings and audio-visual content have been used with malicious intent to influence and sway public opinion when voting.

The different American states have different approaches to addressing this issue ranging from proposed federal laws, media literacy laws, failed state advisory groups to state lawsuits. There are many vested political and corporate interests which may complicate plans for a federal bill to be passed.

Most democracies around the world have yet to develop legislation that work to effectively combat online misinformation. The hesitance in doing so arises from concerns that the introduction of such legislation would give the government unfettered powers which may be abused.

There are vehement criticisms against such a move by any government, as it may limit free speech and give the government broader powers that may be abused. An analysis of the annexed tabulated report shows that governments which have effectively controlled the dissemination of online misinformation exhibit tendencies akin to totalitarianism. This is evident in countries where false charges are laid resulting in the arrest of outspoken journalists and activists in countries such as Egypt, Cambodia and Rwanda.

As jurisdictions around the world develop, time and circumstance will only tell if governments will legislate against misinformation. Circumstances may differ by country due to their respective history and culture, but freedom of expression and free speech is universal and is embedded and exercised universally in most democratic countries.

PNG currently has no legislation dedicated to combating misinformation online. Although, such legislation would prove useful in governing and regulating the dissemination of information, an in-depth research is needed to understand whether such a law would be beneficial to the framework of our democracy or otherwise.

Assessing the Papua New Guinean Predicament

Much of PNG's laws concerning misinformation is captured under the *Cybercrime Code Act.* Similar to other criminal matters, breaches constituting a cybercrime is instituted in the legal system by first laying a complaint with the Royal Papua New Guinean Constabulary (hereinafter RPNGC). The RPNGC is the only mandated authority responsible for prosecuting offences under the *Cybercrime Code Act.*

In 2018, the National Information and Communication Technology Authority (NICTA) initiated a response team to deal with cyber complaints. The Papua New Guinea Computer Emergency Response Team (PNGCERT) has authority to address all cyber related incidents; however, it is not mandated to enforce the *Cybercrime Code Act* but only to assist RPNGC in their investigation.[26]

Moreover, NICTA does not have any specific powers to order any internet service provider to prohibit sites that breach PNG cyber laws. Unlike NICTA's counterparts in foreign jurisdictions, it does not have the power to effectively address cybercrimes.

[26] The PNGCERT Website, accessed https://www.pngcert.org.pg/ (accessed on 29/05/20).

The RPNGC attests that it has a cyber-unit based in the Nation's Capital. However, in 2017, both NICTA and RPNGC admitted that they lacked the capacity to effectively enforce cybercrime laws.[27] It was also admitted that both departments lack the technical expertise to enforce the *Cybercrime Code Act.*

The integrity of a cyber-unit embedded with the RPNGC is also a cause for concern as it may be exposed to political influence. In the 2019 case of *Mark v Neno*[28], the plaintiff – a journalist, made a formal complaint to the Police against a Member of Parliament for allegedly breaching the *Cybercrime Code Act.* The complaint arose from publication of an alleged material defaming her on social media by the politician.

The defendant (a Provincial Police Commissioner) advised the plaintiff to consider pursuing her grievance through civil proceedings. The reason being that the Member of Parliament was also the Police Minister during the time of the proceeding in court. The RPNGC was not able to investigate her complaint due to the accused being the Police Minister. It seems that in certain instances such as in *Mark v Neno,* the Police responsibility to conduct independent and impartial investigations on cyber complaints may be influenced and even waived due to political considerations.

PNG's cyber laws are also silent on hate speech, which is a growing concern. Hate speech within Papua New Guinean ethnicities may incite violence and perpetuate stereotypical behaviour. Hate speech against Pacific island neighbours and the world at large would damage the country's reputation. Having this concern captured under our cyber laws would go a long way to protect the integrity and reputation of our country.

A more practical approach towards resolving this issue, would be for government agencies, to disseminate information through its channels in a timely manner. Without proper awareness and directions from government departments, there will be confusion and social anxiety. Withholding vital information and lying to people in times of crisis would have irreparable repercussions when people lose trust in authority.

As exhibited in the Chimbu province, at the height of the pandemic, rural hospitals were not given any instructions nor were there any proper awareness. The latter resulted in the hospital closing its doors; the unfortunate result was the death of a woman who was in need of medication.[29]

Thoughts to Consider

Would these reforms to combat misinformation infringe the liberties of persons?

Without going into much jurisprudential banter, it is necessary to state that every human society has some form of social order, some way of making and encouraging approved behaviour, deterring disapproved behaviours and resolving disputes if conflict arises from a behavior.[30] In making laws, it is important to weigh out what is moral and what is legally and socially acceptable in different societies amongst other circumstances. The tension created by the different factors – if not considered would mean that legislating a law that is detached from the realities of the people, may lead to abuse.

The formulation of a legislation limiting or regulating free speech is one such topic subject to much debate. If factors such as political history, culture and other circumstances are not weighed in through research, such a law may be proficient in promoting abuse. International human rights

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27 M. Arnold, *Lack of Capacity to Enforce Cybercrime,* 14/06/17, Post Courier https://postcourier.com.pg/lack-capacity-enforce-cybercrime/.

28 (2019) N8115.

29 *Panic over lack of covid info in rural PNG risks lives,* Radio New Zealand, https://www.rnz.co.nz/international/pacific-news/413394/panic-over-lack-of-covid-info-in-rural-png-risks-lives, (accessed 01/06/20).

30 *Legal Positivism*, Stanford Encyclopedia of Philosophy, 3/01/03 https://plato.stanford.edu/entries/legal-positivism/#DeveInfl.

groups such as Amnesty International, Human Rights Watch and the United Nations actively oppose the enactment of such laws.

However, with respect to human rights, it is unwise and impractical to allow freedom without restraint or limitation. The free reign of information dissemination by individuals who are not equipped or trained in the ethics of journalism on social media has and will continue to bear significant repercussion to the masses.

Lessons learned from history and from our analysis of the data in our tabulated report, show that most governments use such legislation to attack their opponents. Given both sides of the argument, it is safe to say that without consultation and proper research, the creation of such legislation may not be in the best interest of PNG at this point in time.

Taking Action

There are, however, practical steps already undertaken by democratic nations around the world that deserve recognition and can be adopted and practiced in PNG. Our existing cyber laws may be bolstered through amendments to support already existing bodies who are conferred powers to enforce our cyber laws.

Where our legislation is silent on certain cyber wrongs such as hate speech and holding internet service providers responsible for malicious content, changes may be introduced by way of amendments. Such amendments may also accommodate for the setting up of a separate independent and impartial cyber unit with prosecutorial powers.

This can be achieved by legislatively conferring more powers to the PNGCERT and setting it as an independent unit under NICTA. The unit would be occupied by officers from NICTA and other pertinent agencies who are technically equipped, skilled and dedicated towards investigating cyber related offences.

Also, most people may not know that some of their actions online would have constituted a cybercrime. Some may not even know of the existence of the cyber laws; therefore, priority must be given to educating our people on the existing cyber laws and carrying out cyber-literacy campaigns around the country. Embedding this as an education reform within the curriculum in our education system would also be effective in educating our young generation on proper online etiquette.

Conclusion

False information online will continue to be a problem in PNG if proper steps are not taken to enforce provisions of our cyber laws. A dedicated legislation to combat misinformation online, although enticing, may require further research and consultations from experts to understand its effects on the liberties of our people. As for enforcement, before the imposition of cybercrime laws are sanctioned, there is a strong need for a nationwide cyber literacy program to educate people on proper online use and the sanctions for breaching these laws. The PNGCERT must act as an independent body in order to efficiently enforce cyber laws and also conduct impartial investigations on cyber related allegations. As PNG jurisprudence evolves many of these developments will occur to reflect our changing times.

CASE NOTES

CLAIMS BY AND AGAINST THE STATE ACT – THE APPLICATION OF SECTION 5 NOTICE ON HUMAN RIGHTS PROCEEDINGS – THE ROGER BAI CASE

Troy Mileng*

This paper stems from a collection of ideas and discussions amongst lawyers from the Police Team within the Office of the Solicitor General[1] which formed the foundations of the State's submissions in the Supreme Court Case of *Independent State of Papua New Guinea v Nimbituo.*[2] This paper also draws on the observations of Kirriwom J in the Roger Bai case relating to Section 5 Notice of the *Claims By and Against the State Act* 1996 (CBASA).

The Application of Section 5 Notice

It has long been held since the case of *Paul Tohian v Tau Liu*[3] that no claim can be made against the State unless Notice under Section 5 of the *CBASA* is given. However, in the last couple of years, there has been an increase in the number of Human Rights cases before the Human Rights court which have been commenced without the parties giving notice to the State under Section 5 of the CBASA. This practice had been endorsed by the courts on the basis that Section 5 is only mandatory for certain types of cases. Questions have been asked particularly on whether notice is required to be given under Section 5 of the CBASA for proceedings commenced by way of Human Rights Applications pursuant to Section 57 of *Constitution* and Order 23 of the *National Court Rules*.

To answer some of these questions, I begin by looking at the legislative intent of Section 5 of the *CBASA*. In the case of *Kaurigova v Perone*[4] the Supreme Court considered this issue and said:

> With respect to the question of whether Ms. Ephraim was a proper person to receive the notice by the appellant under s. 5(3), we consider that the question needs to be determined in the context of the legislative intent behind s.5 by taking a purposive approach to the Section. The scheme and purpose of s. 5 in our view is akin to that of s. 54(6) of the MVIT Act, thus the purpose of a s. 5 notice is to ensure that the notice of intention to make a claim by a claimant against the State gets to the notice of the State through the officers mentioned in Subsection (1) viz. Attorney General the (Secretary for Justice) or the Solicitor General as the case may be within the time stipulated under Subsection (2) so that, the State is put on early notice and is made aware of an impending claim against it. The purpose of a notice under s. 54 (6) of the MVIT Act, was first discussed in (sic.) *Graham Rundall v. Motor Vehicles Insurance (PNG) Trust (No.1)* [1988] PNGLR 20 at 23 where Bremeyer J, said:
>
> "The purpose of s.54(6) is to give the Trust early notice of the claim so that it can make its inquiries. Obviously, inquiries as to the driver, the owner and the insurance details of the vehicle become more difficult as time passes. Drivers change addresses and sometimes in Papua New Guinea their names, witnesses disappear, expatriates leave Papua New Guinea and police accident reports and insurance certificates get lost."….

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1 I want to thank and acknowledge the contribution of my learned colleagues Mr George Akia, Ms Charity Kuson and Ms Apolonia Kajoka of the Office of the Solicitor General.

2 (2020) SC1974. The decision on the case was handed down on 2 July 2020.

3 (1998) SC566.

4 (2008) SC964.

Then in *Daniel Hewali v. Papua New Guinea Police Force and The Independent State of Papua New Guinea* N2233, Kandakasi J, considered the issue of sufficiency of a notice of intention to make a claim against the State by a claimant under s.5 of the CBAS Act. This his Honour did by reference to s.54(6) of the *Motor Vehicle Insurance (PNG) Trust Act*, and said:

"The wording in this section (s.5 of CBAS Act) is identical to section 54(6) of the MVIT Act. There are two differences between the two sections. First, there is no guidance has (sic.) to what form a notice under section 54(6) of the MVIT Act, should take, whereas under the CBASA (CBAS Act), it provides that the notice must be in writing. Akuram J (as he then was) spoke of this difference in *Kamapu Minato & Anor v The State* N1768. Secondly, it prescribes the manner in which the notice must be served.

In *Kamapu Minato & Anor v The Independent State of Papua New Guinea* N1768, Akuram J, compared s.5 of the CBAS Act, to s.45(6) of the MVIT Act, and said:

"..The purpose of Section 54(6) was explained in Rundle's case by Bredmeyer J at p. 23 is to give the Trust early notification of the claim so that it can make its own enquiries as to the driver, owner, witnesses, police accident reports and insurance certificates. Section 54(6) is designed to give the Trust prior notice of the claim within six months.

I would apply the same reasoning here and say that the purpose of Section 5(1) & (2) of the *Claim By and Against the State Act*, 1996, is to give the State early notification of the claim so that it can make enquiries. Obviously, enquiries as to, as in this case, the raid itself, the policemen involved, the properties damaged or destroyed, their value, the witnesses and whether the action is time barred. Section 5(1) & (2) is therefore designed to give the State and its agents or servants sufficient prior notice of the claim within six months.

All these cases affirm that the purpose of a notice of an intention to make a claim under s.5 of the CBAS Act, is the same as a notice of an intention to make a claim under s.54(6) of the MVIT Act."

It can be drawn from the case of *Kaurigova* and the list of authorities referred to in this case that the purpose of section 5 is to give early warning to the State about an impending claim against it by a claimant so that it can make its own investigations regarding the claim. It has the same intent as section 54(6) of the MVIT.

Section 5(1) of the *CBASA* states that:

> No action to enforce any claim against the State lies against the State unless notice in writing of intention to make a claim is given in accordance with this Section by the claimant to- the Departmental Head of the Department responsible for justice matters; or the Solicitor-General.

The question that is posed is whether a section 5 notice is a prerequisite before a Human Rights application can be pursued against the State. The answer to this question can partly be gleaned from Section 2(2) of the *CBASA* which states that:

> The provisions of this Act apply to applications for the enforcement against the State of a right or freedom under section 57 (Enforcement of guaranteed rights or freedoms) of the *Constitution* and for damages for infringement of a right or freedom under section 58 (Compensation) of the *Constitution*.

It is evident that Section 2(2) unequivocally declares that all provisions of the *CBASA* including Section 5 apply to proceedings commenced by way of Human Rights applications under Section 57 of the *Constitution*.

The Definition of a "Claim" under Section 5 of CBASA

The Supreme Court has over the years established that a claim under Section 5 of the CBASA includes a claim for breach of Constitutional Rights as defined under Section 2(2) of the CBASA. Section 2 of CBASA provides that:

> 2. SUITS AGAINST THE STATE.
>
> (1) A person making a claim against the State in contract or in tort may bring a suit against the State, in respect of the claim, in any court in which such a suit may be brought as between other persons.

> (2) The provisions of this Act apply to applications for the enforcement against the State of a right or freedom under Section 57 (Enforcement of guaranteed rights and freedoms) of the *Constitution* and for damages for infringement of a right or freedom under Section 58 (Compensation) of the *Constitution*.

In the case of *Frederick Martins Punangi v Sinai Brown as Minister for Public Service, Sir Michael Somare as Chairman of the National Executive Council and The State*[5], His Honor Deputy Chief Justice Injia (as he then was), defined the term "claim" and the application of Section 5 of the CBASA as follows:

> In ordinary usage, the word claim generally is 'a right that somebody believes they have to something especially property, land, etc.': Oxford Advanced Learner's Dictionary (2000 ed.). The word "claim" has wide meaning in law. It means the "assertion of a right": Osborne's Concise Law Dictionary (1976 ed). Therefore, assertion of "a right" is the gist of a "claim" in law.
>
> Section 2 of the Act actually defines the ambit of a "claim" against the State for which the State may be sued under the Act. Subsection (1) defines "claims" to mean "claims" "in contract or in tort". These are usually all personal actions in law for damages in tort or contract under principles of common law and equity as modified by statute, such as claims for debt in money, goods or property; or compensatory damages for breach of statutory duty: *Awabdy v German* [1971] PNGLR 68. Claims against the State in tort is also governed by statute: see the definition of "tort" in s.1 of the *Wrongs (Miscellaneous Provisions) Act* (Ch. No. 297). The procedure for enforcing a claim in contract or tort is set out in the National Court Rules. The entire National Court Rules, except O 16, (Judicial Review) sets out rules of procedure for commencing actions for damages in tort or contract or for breach of statutory duty. This procedure also applies to proceedings commenced against the State.
>
> Subsection (2) then adds applications for enforcement of constitutional rights made under s.57and claim for damages under s.58 of the *Constitution*, to the list of "claims" under Subsection (1). The procedure for application for enforcement of Constitutional rights is separate from the procedure for instituting actions in tort or contract. Currently, the procedure under s.57 and s.58 of the *Constitution* is still in its development stages. Many persons are in fact using the same procedure under the National Court Rules because the breaches of Constitutional rights sometimes also constitute torts.
>
> Reading subsection (1) and (2) together, all claims against the State in contract or tort or an application under s.57 and s. 58 of the *Constitution* for which a suit may be brought against the State in "any court" of law of competent jurisdiction (s.1), are covered by the Act. Conversely, an application in the nature of a prerogative writ under Order 16 is not included in s.2. Therefore, by implication, application for Orders in the nature of prerogative writs are excluded from the definition section in s.2., hence the notice provisions in the Act does not apply to such application.
>
> Under s.5(1) of the Act "no action to enforce any claim" must be by necessary implication, refer to bringing a suit against the State as defined in s.1, in "any claim" on contract or tort and enforcement of constitutional rights under s.57 and s.58 of the *Constitution*, as defined in s.2. A notice of claim must be given for such claim.

The issue was addressed by the Supreme Court in *Asiki v Zurenuoc, Provincial Administrator*.[6] In this case, the Supreme Court dealt with the question of whether an applicant for judicial review proceedings should comply with the mandatory requirements of the CBASA. The court also dealt with the issue of enforcement of rights and freedoms under Section 57 of the *Constitution* and

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5 (2004) N2661.
6 (2005) SC797.

Section 2 of *CBASA*. The three men bench, comprising Jalina J, Cannings J, and Manuhu J, held (inter alia) that:

> The notice requirements of the *Claims By and Against the State Act* apply only to actions that are founded on contract or tort or breaches of constitutional rights.

In that Supreme Court judgment, their Honours endorsed the decision and reasoning of Justice Injia in the *Punangi case* and added that:

> We agree with Injia DCJ's reasoning in Punangi v Brown, adopt it for the purposes of the present case and find that:
>
> the notice requirements of the *Claims By and Against the State Act* apply only to actions that are founded on contract or tort or a breach of constitutional rights. Section 5 does not apply to actions seeking orders in the nature of prerogative writs commenced under Order 16 of the National Court Rules, as Order 16 provides a comprehensive and exclusive procedure for judicial review and includes a requirement for giving notice to the State.

The Supreme Court, in the case of *Public Curator of Papua New Guinea v Kara*[7] also dealt with the issue of whether the common law claim of *devastavit* was a claim that can be captured under CBASA. The court did not have any issue as to whether enforcement of guaranteed rights or freedoms under Section 57 of the *Constitution* falls under a "claim" under Section 5 of the CBASA. The Supreme Court said:

> For these reasons, we are of the respectful opinion that the common law claim of devastavit based on negligence is a "claim" within the meaning of Section 2 of the CBASA: see *Frederick Martins Punangi v Sinai Brown* (2004) N2661, *Mision Asiki v Manasupe Zurenuoc* (2005) SC797 and *Morobe Provincial Government v The State* (2007) SCA No. 44 of 2005, Unreported & Unnumbered Judgment, (Hinchliffe, J, Jalina, J & Lay, J) delivered on 28th June 2007 at Waigani on the meaning of the word "claim". These cases confirm that for a "claim" to fall within the meaning of Section 2 of the CBASA, it must be an action that is founded on contract or tort or a breach of constitutional rights under Sections 57 or 58 of the *Constitution*. It follows that the primary judge erred when he found that a claim based under Section 36 of the *Public Curator's Act* was a statutory cause of action and not one founded in contract or tort.

Also, in the Supreme Court case of *State v Downer Construction (PNG) Ltd*[8]*,* the Court comprising their honours, Justice Gavara-Nanu, Justice Kandakasi and Justice Lay, dealt with the issue of whether the terms "suit", "claim" and "action" as defined under CBASA includes arbitration proceedings. Though Kandakasi J (as he then was), (in his dissenting judgment) held that an arbitration, though not a court proceeding, is a claim captured under CBASA*,* it was generally agreed by the majority that any claim against the State that come by way of court proceedings must give notice to the State. The Supreme Court also defined the term "claim" by considering the meaning derived from the whole scheme and context of the CBASA and also the intention of Parliament in coming up with the CBASA. Justice Gavara-Nanu's explanation was that:

> Moreover, a claim for which a notice is given under s.5 contemplates legal proceedings that may be commenced or have been commenced by the claimant in a "suit" or an "action" within the meaning of ss.1, 2(1) and 5(1) and (2). The word "suit" in s.2 is defined by s.1 as including "any action or original proceeding between parties in any court of competent jurisdiction". It follows that the word "claim" in ss. 2(1) and 5(1) when given reasonable construction can only relate to a "suit" or an "action" taken in a court or legal proceedings, bearing in mind that a "suit" means an action taken in a court of law or a lawsuit. In this connection, a "suit" also means "action" taken in court proceedings.

Justice Kandakasi on the other hand, explained that:

> I have searched a number of legal and ordinary English language dictionaries for the meaning of the word "claim". Leaving the everyday English language usage aside, the use of the word in the legal sense leads to this definition. A claim is an assertion, statement, allegation or averment which may be coupled with a demand or request or a call for a remedy or redress of a breach or damage done to one's person or property right or interest recognized, granted or protected by law. Bringing

[7] (2014) SC1420.
[8] (2009) SC979.

> a suit or taking court action is not an essential element in the definition of a claim. Hence, a claim may be made without necessarily having issued a "suit" or a "court action". Clearly, therefore, there is a distinction between, the word "suit" and "claim" with the later forming the foundation for a "suit" since a "suit" is usually an action taken by a party seeking to enforce his or her claim. In other words, a "claim" becomes the basis for a "suit". The whole scheme of the Act under consideration as we noted in the foregoing, appear in my view to go along with this distinction. For these reasons, I accept the submissions by Mr. Egan that, there is a distinction between "suit" and "claim".

From these judgments, it can be concluded that the term "claim" refers to a "claim" as captured under Section 2 of the CBASA. A claim under Section 2 includes a claim for breach of constitutional rights. There is no distinction in the meaning to say that claims commenced as applications under Section 57 of the *Constitution* should be considered in two forms, that is one seeking damages, and the others not.

The Mal and Karo Cases on Section 5 Notice

There are two cases by the National Court which have taken a different approach to that of the Supreme Court as discussed above. They have established that *Section 5 Notice is not required to be served on the State before a Human Rights Application which does not seek monetary, costs or compensation against the State*. The first case is the case of *Mal v Commander, Beon Correctional Institution*[9] and the second is the case of *Karo v Commissioner of Correctional Services*[10] In the Mal case, the applicant, a prisoner, applied for early release on humanitarian grounds**.** The State then filed an application to dismiss the proceedings for failure to give notice to the State. In dealing with the matter his honor, Justice Cannings, firstly dealt with the definition of 'claim'. His honor defined the term 'claim' in section 5 of the CBASA as follows:

> The term "claim" in Section 5 refers to a monetary claim or a claim for an order such as an injunction that would involve direct cost or prejudice to the State. Although Section 2(2) clarifies that the Act applies to applications under Section 57 of the *Constitution* for enforcement of human rights (and the present application is such an application) that does not alter the meaning and effect of the word "claim" in Section 5. It refers to monetary or other similar claims. None is made in this case. The applicant did not have to give a Section 5 notice. Her application will not be refused because of the alleged failure to comply with the Act. There was no failure to comply.

The court then dismissed the State's application. Then in the Karo case, the court also considered the issue of whether a section 5 notice is required before a Human Rights application is filed. In that case, the State filed an application seeking dismissal of the proceedings on the grounds that the applicant failed to give notice to the State before commencing the proceedings. In his judgment, Justice Tamate considered the intention of the Parliament by looking at the explanation by the then Minister for Justice, Hon Arnold Marsipal during debate in Parliament on 20 November 1996 on the Bill. The court then reasoned that the purpose of the Bill and the subsequent passing of the CBASA is for claims that are monetary in nature for actions or suit in court for damages or compensation in contract, tort or for breach of human rights under Sections 57 and 58 of the *Constitution*. His Honour concluded that:

> In determining this question, one has to look at some of the rights that require enforcement which are not monetary in nature so as to require Section 5 Notice. State continues to raise the objection or seek dismissal to such applications or actions when Section 5 Notice has not been served by an applicant or Plaintiff. These are applications such as (but not limited to):
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> Application for parole
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> Application for leave of absence (LOA)
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> Application for transfer to prison close to relatives who can visit
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> Application to correct a due date of release (DDR) from prison
>
> Application for medical treatment and attention

[9] (2017) N6710.
[10] (2018) N7799.

Application for release from unlawful detention

Application for early release on medical grounds

Applications for protection of the law

These are not court actions for monetary claims against the State, but applications for enforcement of human rights. Obviously, such applications cannot be caught under Section 5 of the *Claims By and Against the State Act* as per the purpose and the legislative intent of its passing in Parliament.

In the interest of justice, I would apply common sense when dealing with this issue. The Supreme Court cases discussed above did not consider the issue from this context, where enforcement of human rights, such as those referred to above in paragraph 48 are concerned. These are not claims based on contract, tort or for damages or compensation, where rights of persons have been breached as a result of allegations of Police brutality or similar types of violations by Public servants or agents of the State.

I would agree with the approach taken by Cannings, J in Mal's case where the court dealt with an application for early release from prison on health grounds. There was an objection by the Respondent on the application for non-compliance with notice under CBASA. The Court in considering the application held that the applicant was not making a claim against the State for the purpose of CBASA, therefore it was not necessary to give notice under Section 5 of the Act of her intention to make a claim against the State. The Court defined the term "claim" under Section 5 to mean 'a monetary claim or a claim for an order such as an injunction that would involve direct cost or prejudice to the State.

Conclusion

Based on the above, any proceeding filed as Human Rights proceedings which do not comply with Section 5 Notice requirement is an abuse of process and is at risk of being dismissed. It is a condition precedent and hence must be complied with before instituting proceedings against the State.

Proceedings filed by way of Human Rights applications under Order 23 of the *National Court Rules* are captured under Section 2 of the CBASA as being subject to Section 5 requirement of giving Notice to the State irrespective of whether the reliefs sought are for damages or compensation.

At present, there is no exception to the Section 5 Notice rule, and that it must be strictly complied with, in all proceedings filed under Section 57 and Order 23 of the *National Court Rules* for breach of constitutional rights.

POLICY PAPER

Ministerial Statement on the PNG National Oceans Policy 2020 – 2030

Hon. Davis Steven, MP
Minister for Justice and Attorney General

As a leader from a remote islands electorate, I am pleased to present a very important statement concerning Papua New Guinea's first-ever National Oceans Policy 2020-2030.

After almost 50 years of Independence, PNG now has a national framework to guide sustainable use, management and protection of our country's surrounding waters and natural resources.

The main features of the policy are as follows:

PNG's Sovereignty over its Maritime Waters

By international law standards, PNG is an archipelagic State - meaning that all the oceans around, between, and connecting PNG's islands are subject to national sovereignty.

PNG therefore must exercise its sovereignty accordingly - for the betterment of its people. PNG has done well to ratify the *United Nations Convention on the Law of the Sea (UNCLOS)* in 1997.

UNCLOS is the universal constitution or legal framework that provides the rules regulating the rights and obligations of states in relation to the oceans. The ratification of UNCLOS in 1997 meant that PNG must modernise the principal law governing the use and management of the country's oceans and maritime resources. PNG commenced by enacting the *Maritime Zones Act* in 2015, almost 18 years after ratifying UNCLOS.

The *Maritime Zones Act* now provides certainty to PNG's maritime zones, which are respected by other coastal States, such as our neighbours - Australia, Indonesia, Federated States of Micronesia and Solomon Islands.

The challenge PNG now faces is to balance our international law obligations under UNCLOS and its accompanying internal obligations in order to provide a legal and policy framework governing responsibilities at different levels of government. This National Oceans Policy provides that guidance.

Maritime Boundaries

In regard to international borders, PNG shares maritime borders with Australia, Solomon Islands, Federated States of Micronesia, and Indonesia.

These borders are managed under co-operative arrangements agreed between these countries and PNG. These international maritime boundaries are recognised under international law.

Under UNCLOS, PNG has an Exclusive Economic Zone (EEZ) covering an estimated 3.12 km^2 of marine waters and a coastline estimated at 17,110 km in length, extending along 14 Maritime Provinces.

PNG has the largest EEZ of a Pacific island country. Because of this large ocean space, it is incumbent on the Government to adopt an appropriate policy and legal framework to protect the country's oceans and natural resources and to protect and provide for our people's rights and expectations in the development of PNG's oceans and maritime resources.

I ask why this important work has been forgotten by successive governments? Why has it taken 45 years for the Government to remember the coastal and islands people and the country's vast ocean potential?

Coastal Livelihoods and Food Security

I come from an islands constituency, Esa'ala, in PNG's biggest maritime province, Milne Bay. I understand very well the critical role that the blue oceans play in the lives of PNG's island and coastal peoples. Fisheries, coral reefs, mangroves and sea-grass habitats are all part of the environment in which coastal people's livelihoods have evolved from past generations to the present day.

We have a customary law claim over our oceans that must be recognized and protected.

While we have sadly witnessed exploitation of our resources by outsiders and pretenders, our people have waited since independence for the government in Waigani to stop the destructive and unfair use of our country's marine resources and a real people's government that can provide the opportunity to participate meaningfully in the development of PNG's resources.

This is why I am happy to be a member of a party and government coalition that wants to take back this country from the hands of gullible traders, and reckless and ignorant officials whose actions or omissions benefit a few, to the detriment of the silent suffering majority, the citizens of PNG. I am happy to be a member of a new generation of leaders under Prime Minister, Hon. James Marape, who want to give back this country and its economic wealth to our people and the next generation.

The National Oceans Policy acknowledges and recognises the important role that Papua New Guinea's customs and traditional knowledge contribute to the wise use and management of the country's oceans and resources.

The rights of land and marine resource owners to the oceans and their resources are promoted and strengthened by the Oceans Policy. It is imperative that the development of oceanic and coastal resources must be undertaken with the full prior informed consent of land and coastal resource owners, and that benefits from such developments must be shared fairly and equitably according to the National Goals and Directive Principles in PNG's *Constitution*.

The full potential and economic value of our oceans has never been fully assessed and documented. Such an assessment must be the first step towards making informed decisions about how we deal with our marine space and its resources.

Now, after this policy, Papua New Guineans have a legitimate expectation that Waigani will say no more fishing licences, seabed mining licences, or even oil and gas rigs in our oceans without proper regard to the rights of our people and safety of our oceans and marine life.

The National Oceans Policy recognises and deals with these challenges and many others. For example, the National Oceans Policy acknowledges the interconnectedness between land and mountains and coasts and island ecosystems. The policy provides the necessary tools to protect and support the fragile relationship between the land and sea environments.

Developing the Legal and Policy Framework for PNG's Marine Environment

In developing the legal and policy framework for PNG's maritime spaces, every effort must be made to ensure not to stray from the reality of the context within which PNG is located. There is an international law to which PNG is a party, but, as a sovereign nation, how does PNG apply that law in our national framework, so that they complement each other?

As our stakeholders and partners participated in fashioning the National Oceans Policy, I am happy that our *Constitution* and its Five National Goals and Directive Principles (NGDP) provided the inspiration. The most profound insight into the visionary thinking of our founding fathers on the Constitutional Planning Committee is reflected in the NGDP.

Goal Number 4 of the NGDP provides the basic tenets of our natural resources policies, including the Oceans and their resources. It is not without significance there that all our high- level government policy documents have been framed around this premise.

The *Vision 2050* which provides an overarching policy direction for the country has seven pillars which are anchored in the NGDP. *Vision 2050* calls for the Government to pursue environmental sustainability and combat climate change while pursuing economic development. It mirrors the aspirations of the international community in this area as espoused in the United Nations Sustainable Development Goals.

The *Vision 2050* is complemented by the 'National Strategy for Responsible Sustainable Development for Papua New Guinea' (STaRS). It is, therefore, pleasing to note that the vision, mission and objectives of the National Oceans Policy are aligned with the *Vision 2050* and STaRS.

With the enactment of the *Maritime Zones Act* in 2015, it is now important to define the spaces within which legal and policy gaps are identified and rectified. For example, the definition of land has been amended to include areas covered by water (foreshore). The interests of local communities become relevant here and must be documented if developments are taking place on the foreshore.

The coastal waters have been defined to provide a legal demarcation for provincial interests to be taken into consideration in coastal and islands developments.

For the purposes of environmental conservation and protection, a marine consent regime for the EEZ and continental shelf is proposed under the Oceans Policy.

The maritime sector must be brought under one governance policy framework. There must be transparent processes identifying the activities to which Government gives consent in the marine space and how these activities will be scrutinised from beginning to end.

International Tribunal, Law of the Sea, Advisory Opinion

Now, in order to draw attention to the legal requirements of states like PNG that sponsor mining or other geological activities in their EEZ, I refer to the decision of the International Tribunal on the Law of the Sea in the landmark decision of *Seabed Disputes Chamber*.

This advisory decision of the International Tribunal sets out the state's obligations under international law, including the duty to undertake adequate due diligence before authorising seabed mining. The decision provides guidance on how to develop standards for a national framework before mining of PNG's seabed commences.

The Oceans Policy recognizes the above principles and is drafted with necessary safeguards for marine activities in the deep seabed.

The Blue Economy

Without the Oceans Policy, the important work of development and implementation of the Blue Economy Plan cannot begin. The Blue Economy Plan will focus on the maritime economy in PNG and provide direction on its development and growth, while promoting the principles of sustainable use and management and equity concepts.

This means that economic benefits from PNG's oceans and resources must be developed efficiently in an equitable and sustainable manner. Industries must all be fairly considered in regard to their potential and opportunity to grow and generate revenue. Focusing only on one or two industries without widely planned management and governance mechanisms poses a threat to biodiversity and ecosystem health.

The Blue Economy Plan must strike a balance between utilising the economic potential of PNG's oceans whilst safeguarding their health and integrity so that future generations can also benefit.

As the responsible Minister, I am determined that this policy is not going to collect dust in the corners of offices in Waigani. The people of my electorate have been left out too long, and I refuse to allow this policy to be forgotten and left by the wayside.

In anticipation of the Oceans Policy, the Department of Justice and Attorney-General has already established the Oceans Affairs Office in the Department of Justice, with trained staff working on legislation and other important, related matters.

The next step after this policy launch is to formally establish PNG's Marine Scientific Research Council, which will regulate and license scientific research in PNG's oceans and coastal areas. This technical organisation is critical in that it will facilitate and provide expert scientific advice to government on policy and legislative action relevant to PNG's oceans and marine resources.

Conclusion

In conclusion, let me respectfully implore Leaders to think policy and use policy to drive legislation that will protect PNG's national interests and create wealth for our people in a responsible manner.

We have the opportunity to take back our destiny and move forward to achieve the vision of a prosperous, democratic nation built on the back of our cultural heritage, Christian values and rule of law as envisioned by our founding fathers.

We can build a wise, fair, safe and prosperous nation for our people. We can achieve our 2050 Vision to be a prosperous middle-income country by 2050. We can lay the foundations today for a time when PNG can become the richest black Christian country on earth.

With the abundant resource endowment and potential PNG has, we all know that we can turn these dreams into reality one day.

Today, our vision may seem gloomy. Today, we ask how we can ensure that the majority of our population - the people living in villages in the Highlands, along the coasts, and on the islands - are not left behind.

I am optimistic that we will start to find answers to these and many other questions concerning our journey and experience as a country as we adopt good policies and laws like the Oceans Policy that underpins our nation's untapped potential in our blue economy.

The interest and collaboration of government departments and agencies in producing the Oceans Policy document in a space of 12 months since they were given relevant ministerial direction in March 2019 gives rise to confidence.

This policy was funded by the Department of Justice and Attorney-General, the National Fisheries Authority, and National Maritime Safety Authority. For their contribution and commitment, I thank leaders and officials of the National Fisheries Authority, National Maritime Safety Authority, National Weather Service, and research institutions, both national and international.

I also acknowledge the contribution of all of PNG's maritime provinces, and those from the Highlands region who participated in the process. Initial funding support from the Commonwealth Secretariat and the Pacific Islands Forum Secretariat is acknowledged.

Without the hard work and co-operation of all of the bodies mentioned, it would not have been possible for PNG's first ever National Oceans Policy to be delivered to the National Parliament.

As the Minister responsible for seeing the process through, I am sincerely grateful to everyone involved.

Ministerial Statement on the Draft Organic Law on the Independent Commission Against Corruption[1]

Hon. Davis Steven, MP
Minister for Justice and Attorney-General

This is the third time I present the proposed Organic Law on the establishment of the Independent Commission Against Corruption (ICAC) for the National Parliament's consideration. When Parliament previously considered the proposed law (on 3 June 2020), a number of comments were made. They included concerns that:

- ICAC must have a high-quality case management system, like that of other countries with an ICAC;
- ICAC staff must have integrity and be remunerated well;
- there must be careful selection of people who will run ICAC;
- the *Criminal Code Act* should be amended in order to introduce more severe penalties;
- ICAC must have the power to investigate unexplained wealth;
- ICAC must not affect traditional obligations like giving of gifts, death and marriage ceremonies; and
- qualified foreigners from Commonwealth countries should be brought into the country to head the ICAC.

In response to those commentaries, I must state that ICAC, once established, will have a case management system. The proposed Organic Law on ICAC establishes an Appointments Committee tasked to lead the appointment of the Commissioner and two Deputy Commissioners. In order to ensure the highest integrity and capability of the persons appointed to ICAC, these positions must be required to be advertised and the Appointments Committee must follow a merit-based selection process. This will be essential in order to ensure the highest integrity and capability of the persons appointed to ICAC.

ICAC Members are to be Constitutional Office-Holders. Their salaries, allowances and benefits are to be determined by the Salaries and Remuneration Commission, pursuant to the *Constitution* s216A and the *Salaries and Remuneration Commission Act 1988*. In order to maintain its independence ICAC will set its own terms and conditions for its staff, and these will be gazetted in order to ensure accountability to the public. Members and staff of ICAC must abide by a Code of Conduct, and have a duty to report to higher authority when suspected of corrupt conduct – with reports concerning a Member or staff to be made to the Commissioner, and a report concerning a Commissioner to be made to the Appointments Committee.

Unexplained wealth was among the concerns included in the initial policy proposal and reflected in the original drafting instructions. However, based on legal advice from the Office of the State Solicitor, this provision was removed as it was deemed to be unconstitutional. Strict procedures apply to receiving complaints and assessing them. The proposed Organic Law on ICAC allows foreigners to apply for the positions of Commissioner and Deputy Commissioner, as well as staff of the Service (including investigators and prosecutors) and consultants.

[1] This paper is not a transcript but an edited version of the Justice Minister and Attorney General's speech for the Third Reading for the ICAC Bill in Parliament in the November 2020 Session of Parliament.

As previously directed by the National Parliament, the Parliamentary Committee on Constitutional Laws convened another public consultation on the proposed Organic Law on ICAC. Written and verbal comments were received from only seven members of the public. These comments can be summarized into three categories. The first category demonstrates lack of understanding of the proposed Organic Law on ICAC: the issues raised concerned the independence, roles, powers and functions of ICAC, and were already sufficiently covered by the proposed Organic Law. The second category are comments on procedural matters that will be catered for in the ICAC Regulations that are being developed to come into operation after the proposed Organic Law on ICAC is passed. They concern issues relating to staff of ICAC and codes of conduct. The third and final category of comments relates to issues that will be addressed only after the ICAC is established and the provisions of the Organic Law are fully implemented and tested.

In determining ICAC's jurisdiction, the definitions of the terms 'public official' and 'corrupt conduct' in the proposed Organic Law are key to clearly defining the type of conduct ICAC is empowered to investigate and prosecute or prevent from occurring. These definitions ensure that, when compared to other existing anti-corruption bodies, such as the Ombudsman Commission, the Office of the Public Prosecutor and the Royal Papua New Guinea Constabulary, ICAC's jurisdiction is clearly demarcated. While the Ombudsman Commission deals only with specified leaders, including Ministers and Members of Parliament, ICAC's jurisdiction is much wider: it covers all public servants throughout the country at all levels (not just leaders) as well as persons in the private sector who are direct beneficiaries of public funds through service contracts and might cause public sector corruption. For example, if a voter is causing a Member of Parliament to apply public sector assets dishonestly for personal interests, under the "corrupt conduct" definition that person can also be charged.

The scope of the arrest power under the proposed Organic Law is limited only to indictable offences relating to corrupt conduct as defined in the draft. The power to commence and then to conduct criminal proceedings is limited to indictable offences relating to corrupt conduct. The ICAC will deal with the most serious or systemic cases of corruption and refer other issues, less serious criminal matters or disciplinary matters to other relevant agencies to take action. Another safeguard in the proposed Organic Law is that ICAC can only conduct criminal proceedings upon written consent from the Public Prosecutor. The proposed Organic Law limits the power to prosecute indictable offences relating to corrupt conduct, and requires written consent by the Public Prosecutor. The composition of the ICAC is broad and includes a Commissioner who must, at all times, have a legal qualification, and two Deputy Commissioners, the criteria for whose appointment are broad and not restricted to persons with a legal qualification. These criteria extend to persons with demonstrated experience of at least seven (7) years in fields relevant to ICAC's functions, such as accounting.

Lessons learnt from the consultations and international best practice include that, for an anti-corruption agency like the one proposed to be effective, it must:

- be independent of the executive arm of government (specifically in regard to appointments, operations, decision-making, staffing powers);
- be well-resourced, including high integrity staff;
- have strong whistleblower protections (in order to encourage public confidence to report corruption);
- have strong investigative powers;
- have a strong accountability framework; and
- co-operate effectively with other agencies.

The proposed ICAC will complement – and emphatically not duplicate - the functions of existing agencies. The establishment of the ICAC will assist in bolstering Papua New Guinea's ability to prevent, reduce, and combat corruption. It will assist in restoring institutional integrity and raise public confidence in the various Government institutions and services.

The proposed Organic Law on the ICAC will complement and strengthen the Government's broader anti-corruption efforts while assisting in implementing Papua New Guinea's international commitments to tackle corruption under the *United Nations Convention Against Corruption* (UNCAC).

It is important to bear in mind that the creation of an ICAC will not be a panacea to dealing with corruption in Papua New Guinea. It is a very important initiative to tackle corruption, but it needs to operate in conjunction with other existing institutions, like the Police Force, the Public Service Commission, the Ombudsman Commission, the Auditor-General, and the Public Prosecutor, as well as non-government organizations, such as the churches, civil society, as well as our vibrant media and the human resources both within Government and in our communities.

Preventing corruption is truly a shared responsibility. It is up to every Papua New Guinean to be united in building personal integrity and eradicating corruption. We all owe it to Papua New Guinea's future to do so.

In practice, work has already begun on three fronts in anticipation of the proposed Organic Law on ICAC being enacted into law. Firstly, the Regulation to complement the Organic Law is already being developed by officials and should be ready for approval by Government by mid-2021. Secondly, officials have developed the administrative structure of the Commission, which will be approved by the Department of Personnel Management following passage of the law. Estimates are that the Government will require at least K4 million to kickstart the ICAC. Over the next few years, this figure may increase.

The Government is committed to employing the first six professionally-qualified foreigners from Commonwealth countries to fully establish the ICAC. This is made easier by the fact that the Organic Law on ICAC allows for the employment of properly qualified and competent foreigners to help in ICAC's establishment. The Government intends to implement the ICAC within 12 months after the Organic Law is passed.

A third initiative is that Cabinet has approved the 5-Year Implementation Plan of ICAC, which covers the period 2020-2024. This strategic Plan has been endorsed by all relevant stakeholders.

Everyone is awaiting the enactment of the Organic Law.

The 5-Year strategy includes plans to review and amend other related laws in order to ensure that there is consistency between the Organic Law on ICAC and these laws. This is the next set of reforms the Government is committed to completing before the end of the term of the current Parliament. The passage of the Organic Law on ICAC is, therefore, not the end of the reform process but the beginning of legal reforms that will give confidence to our people in the way that the Government conducts its business in running the country. At this juncture, I also want to assure other elected Leaders that, if there are urgent alterations that need to be made after the passage of the Organic Law on ICAC, I will ensure that we get them done as soon as possible.

Meanwhile, I am very pleased to announce that one of our development partners, the European Union, has approved funding to support the work of ICAC in 2020 and going into 2021 and the next three years. On behalf of the Government, I want to thank the European Union, for having confidence in our Government's efforts to fight corruption through the enactment of this Organic Law.

Finally, let me reassure Members of this Honourable House that the Government, through our Prime Minister, Honourable James Marape, has responded to elected leaders' concerns, by allowing one-on-one and group discussions with Government officials in order to address and allay leaders' fears. I am confident that, with the explanations provided by the Prime Minister as well as officials, our 111 Members of Parliament can enact this law with confidence.

I, therefore, commend the Draft Organic Law to establish the Independent Commission against Corruption to this Honourable House for the third and final vote.

BOOK REVIEW

Leslie Mamu, The Law and Principles of Bail in Papua New Guinea, (Port Moresby: Kairos Press, 2009)

Dr. Mange Matui*

The book, *The Law and Principles of Bail in PNG*, is written by Leslie Benjamin Mamu and covers laws and principles on bail which are declared by the courts, and also covers bail application process from the time of arrest, where a person's liberty is restricted, through to conviction and appeal at the National and the Supreme Courts. In the book, the author covers specific laws on bail and the bail processes in a clear and succinct ways that anyone, including a non- lawyer who picks up the book and reads it, can easily and clearly understand what is written in the book.

The author, Leslie Mamu is currently the Public Solicitor of PNG - the position he has now held for nearly two years. Mr Mamu graduated from the University of PNG with a bachelor of law degree and obtained his practical training at the Legal Training Institute in 2008. He began his career with the Office of the Public Solicitor and the PNG Defence Force, until his appointment as the Public Solicitor. He has been practising law in the National and the Supreme Courts, and dealt with many different cases, both criminal and civil, and he is well placed to write a book on bail in PNG, given his experience and knowledge in the area of criminal law.

The book begins with Chapter 1 that discusses different definitions of bail, under the common law and the *Bail Act* 1977. It is clear from the definition under the *Bail Act* that the definitional ambit is general and broad enough to extend bail to those who are in prison. The author highlights the basis of bail under sections 36, 37 and 42 of the *Constitution* and the different National and the Supreme Courts cases that discussed these provisions. The chapter concludes with highlighting the brief history of bail and the divisions of offences under the Criminal Code Act and the availability of bail under each of the divisions. Chapter 1 sets the foundation for the other chapters.

In Chapter 2, the author identifies and discusses bail authorities, and the bail application processes from the police station, district court registry, and the bail application at the National Court and the Supreme Court. Further, the chapter discusses bail application given in different situations such as bail application when the matter is still pending election by the Public Prosecutor, during committal proceedings, after the accused is committed to trial, and during trial, when the judge is incapacitated, during reverse of arrest judgement, bail application after conviction and before sentence, after lodging an appeal, and bail application during the hearing of the appeal. The chapter points out specific laws with supporting cases and highlights the likelihood of success by an applicant at each stage of the bail application. From reading the chapter, it is clear that a lay person can clearly see where he or she can apply for bail or advise a lawyer to file bail application on his or her behalf.

Chapter 3 specifically looks at bail application prior to conviction or acquittal. It highlights two aspects of bail – which can be based under section 42 of the *Constitution* as a constitutional right or considered under section 9 of the *Bail Act*, given the various considerations under section 9. The chapter goes on to look at different considerations for grant of bail. Each bail consideration is discussed with cases that expound on each of those considerations. The chapter makes it clear on whether a person has a likely chance of success with his or her bail application.

* Dr. Mange Matui is the current Secretary of the Constitutional and Law Reform Commission.

Under Chapter 4, the author looks at bail after conviction. The point is very clear here that bail is not easily given, especially when a person is convicted. But when bail applications are made, they are looked at with care. In determining whether or not to grant bail, the authority applies discretion.

Chapter 5 discusses judicial discretion. Judicial discretion is an important aspect of the law as it gives the judges an opportunity to manoeuvre within the confinements of law to decide on a particular case. At the end, the judges are given wide discretion to ensure that justice is delivered regarding a particular matter, given the facts and evidence presented before the courts. Chapter 5 of the book examines judicial discretion within the context of the *Constitution*, particularly section 42 of the *Constitution*, and the *Bail Act*, and it is clear from the cases that judges apply discretion to grant bail to an accused. The author discusses some of the important cases that considered bail with regard to wilful murder, and how judges were assessing whether or not to allow bail under section 42 of the *Constitution* and section 9 of the *Bail Act*.

Chapter 6 looks at the onus of proof and standard of proof. The paramount consideration in looking at the issue of bail is the dispensation of justice. In granting or refusing bail must ensure justice is achieved at the end of the case. This is an important consideration when looking at the issue of bail. Hence, the onus of proof shifts from one person to another. Any person who is accused of criminal wrong is entitled to bail. The author makes it very clear that bail is available to any person and that means that those who oppose bail have the obligation to prove that one or two considerations are present under section 9 of the *Bail Act* to oppose bail to be given to a person who applies for it. At the committal court, the Police Prosecutor has the onus to oppose bail if there are one or two factors under section 9 of the *Bail Act* are present and proven to the court. At the National or the Supreme Court, the Public Prosecutor has the onus to establish considerations under 9 to deny bail. Once the State, through the Public Prosecutor establishes that one or two considerations under section 9 are present, the onus then shifted to the accused to argue why his or her continuous detention will result in injustice. The author makes it clear that the rules of evidence based on proof beyond reasonable doubt does not apply in a bail application. In other words, the technical rules of evidence do not apply through the application process. The bail authority merely relies on information that is available to it.

In Chapter 7, the author describes the process of bail application provided under the *Bail Act*. He describes the bail process from the police station, District Courts, and the National Court and the Supreme Court. The processes are explained clearly and succinctly that one can easily understand and follow.

Chapter 8 discusses the obligations and conditions that attach to bail when a person is on bail. Bail is not a license to freedom, but it is given to acknowledge the fact that the person is innocent until proven guilty before the court of law. The person is given certain conditions to perform once the bail is given, such as not to leave town or interfere with state witnesses, and observe other bail conditions imposed by a bail authority outlined by the author in chapter 8.

Finally, Chapter 9 discusses distinct processes involved after bail has been given, especially to cater for special needs that arise after bail is granted. Bail conditions, when given, can however be amended given the changing circumstances. An application has to be made to request for change.

The book brings together the laws and principles on bail and clearly explains them at different stages of the bail application processes. The author documents the different requirements under various pieces of legislation and brings them together in the book. Anyone that picks up the book will be able to know, for example, whether bail is available to a person who is arrested by police, and the basis of granting bail or refusing bail. The book holistically presents the law on bail and highlights different stages of the criminal process where bail can be sought.

The author uses many primary sources in his book to discuss bail. These sources range from the Constitutional law, Acts of Parliament and subordinate legislation, such as the *Criminal Practice Rules*, *National Court Rules* and the *Supreme Court Rules*. Further, the writer discusses the National and the Supreme Court cases that cover bail from before Independence in 1975 to present (before the publication of the book). Given his position as a Law Officer, the author manages to include

major cases on bail - these include the *Bernard Juale v The State*, *Re Fred Keating* and others. The author was able to dissect each of these cases and extract the major principles outlined in each of them.

From the number of cases cited and discussed, it is clear that the author has spent some years to read and understand each case and aligned and synergized each case with various provisions of the law. The author tactfully highlights the observations of the judges regarding various laws that they have interpreted, and establishes clearly the position of law on each of the provisions of law on bail.

In terms of structure, chapters are too short. Chapters are meant to be self-contained – they must have an introduction, body and conclusion especially in a non – fiction book. What appears obvious is that the chapters do not have proper introductions and conclusions. And one or two chapters should have been merged with others. For example, chapter 9 on post bail process should have merged with Chapter 7 on procedure on bail application. I can see the intention of the author in separating each chapter to highlight each stage of a bail application, and exhaustively discusses them with statutes and cases. He has done that very well and given prominence to bail process at each stage of the criminal process where bail is sought. Apart from these minor structural issues, this is the first book on bail in Papua New Guinea and must be read by all lawyers and non- lawyers. The author has done a very good job of bringing together laws on bail and outline processes at different stages of bail application.

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