SC805

PAPUA NEW GUINEA

[IN THE SUPREME COURT OF JUSTICE]

SCA. NO. 50 OF 2004

BETWEEN:

DUMAL DIBIASO INCORPORATED LAND GROUP NO.1664 (First Appellant), SAPA KUMALA INCORPORATED LAND GROUP NO.1729 (Second Appellant), KAILAMSO DIBIY ASO INCORPORATED LAND GROUP NO. 1658(Third Appellant),

AND:

KOLA KUMA (First Respondent), NATIONAL FOREST AUTHORITY, (Second Respondent), MAKAPA LANDOWNER COMPANY L TD, (Third Respondent), REX PO RAE - CHAIRMAN OF SPAKAMULA ILG NO. 1729, (Fourth Respondent), VIAKO BIKSI - CHAIRMAN OF KAILAMOSO DIBIASO ILG NO. 1664, (Fifth Respondent), YBORN CHAIRMAN OF DUMALL DIBITASO ILG NO. 1664, (Sixth Respondent), DOLE SOWAI - CHAIRMAN OF SEGENE NADASO ILG NO. 1660, (Seventh Respondent), WESLEY, CHAIRMAN OF DUMALL DIGITASO, ILG NO. 1664, (Eight Respondent), WALUM - CHAIRMAN OF SUPA ILG NO. 1662, (Ninth Respondent) & SIWA DAGUWE, CHAIRMAN OF DUMALI DIBIGTASO, ILG NO. 1664 (Tenth Respondent)

WAIGANI: INJIA, DCJ,
SEVUA, J
KIRRIWOM,J.

2004: 30 NOVEMBER
2005: 3 November

CIVIL - Practice and Procedure - Judgments - Enforcement - Garnishee Proceedings - Trust Funds - Whether Trust Funds may be attached - Definition of *trust funds and principles discussed.*

Statutes - Forestry Act 1991 - *Trust Funds in respect* of *royalty payments received from Project Developers and held for the benefit* of *land/resource owners - Creation* of *Trust- No express provision in the Act-Implied or constructive trust - Fiduciary duty* of *public trustee (National Forest Authority)* to *protect trust funds and* to *ensure they are used for purpose* of *trust discussed - Fiduciary duty* of *representatives* of *incorporated land/resource-owners groups receiving funds*

from National Forest Authority to *be discussed.* *disbursed* to *resource/land owners,*

Equity - *Constructive trust* - *Funds received from project developers by government agency for benefit* of *land/resource owners* - *Paid* to *incorporated body representing land/resource owners* - *Two levels* of *trust createdGovernment agency and management or executive body* of *incorporated body Fiduciary duty* of *office-holders or managers* of *incorporated groups discussedIncludes duty* to *minimize "administrative expenses" or not* to *incur personal expenses or debts* on *account* of *incorporated body* to *be satisfied from trust funds.*

Counsel:
C.Raurela for 1st, 2nd and 3rt! Appellants
S. Reid for the Cross-Appellant/2nd Respondent
B. Nii for the 1st Respondent
Hauna for the 3rd to 10th Respondents

3 November, 2005

BY THE COURT: This appeal and cross-appeal have come to this court from the decision of the National Court delivered on 10th May 2004. There was a debt recovery action in that Court by way of garnishee proceeding. The Judgment Creditor who was the Plaintiff in the action and the First Respondent in this appeal sought and was granted an order for garnishee nisi on 29th April 2004 by Los, J. On the 10th of May 2004 the order nisi went before the Court to be made absolute. This application was opposed by the 1 st, 2nd and 3rd Appellants in this appeal.(hereafter lithe Appellants").

The Appellants were not parties in the original action but the Court so found on 10th May 2004 which is a primary reason for this appeal amongst other grounds which we shall come to shortly in the judgment. Because the Appellants were not parties in the original action, they sought to join this proceeding pursuant to Rule 63 Order 13 of the National Court Rules. This Rule allows third-parties who

had no connection to the original action to appear and to be heard in an action for recovery of debts. Rule 63 provides:

> *"63. Claim by other person. (46/10)*
> *Where it appears to the Court that any person other than the judgment debtor is, or claims to be, entitled to money paid into Court under Rule* 59 *or to the debt attached or to any charge or lien on, or other interest in that money or debt, the Court may make orders for giving to that person notice* of *the proceedings and may hear and determine his claim, and may direct the entry* of *such judgment, or make such order in respect* of *the claim,* as *the nature* of *the* case *requires.*
> [11]

The National Court refused to entertain the Appellants' application under this Rule while accepting the arguments presented on behalf of the Judgment Creditor in that the Appellants were none other than the Defendants, now Judgment Debtors, named in the original proceeding. In other words, they were not total strangers to the action. They were and are the same entities from the start of the proceeding.

We point out at this juncture that the recovery proceeding in this case stemmed from a default judgment that was obtained against the Defendants or Judgment Debtors on 1 ih May 2002. The application itself was filed on the 19th of October, 2001. The trial on assessment of damages was heard by Sakora, J on 8th August 2003. This was a trial ex parte and the court awarded a sum of K181 ,620.00 with interest and costs which was delivered on March 19,2004.

The writ in the action was filed on 14h April 2001 and registered as W.S. No. 793 of 2001 by Kola Kuma as the Plaintiff who is the Judgment Creditor in this case against the following:

- MAP AKA LANDOWNERS PTY L TD, 1st defendant
- LEX POPAE, Chairman of Spakamula ILG #17299-2nd defendant
- YIAKO BIKSI, Chairman of Kalambosos ILG #1664-3rd defendant
- Y. BORN, Chairman of Dimal Dibitaso ILG # 1664-4th defendant
- DOLE SaWAl, Chairman Segene Nadaso ILG #1660-Sth defendant
- WESLEY, Chairman of Dumall Dibitaso ILG #1664-6th defendant

;

· WALUMI, Chairman of Supai ILG #1662-ih defendant

· SIWA DAGUWE, Chairman of Dumali Dibitaso ILG #1664-Sth defendant

>From the descriptions given of each person or landowner representative, Dumal Dibitaso ILG #1664 has altogether three Chair Persons representing it in this group of individuals claiming to be acting for and in the interest of the landowners. They are Siwa Daguwe and two other persons known only as *YBorn* and *Wesley.* The first question that arises is the sincerity of the parties or entities if their full names are not given in the pleadings. Second, the sincerity of this proceeding is also questionable now that the Plaintiff/Judgment Creditor admitted that the entity named as the 1 sl Defendant namely Makapa Landowners pty Ltd is not registered according to the IPA records. This was discovered by search subsequently carried out by the Appellants' lawyers.

These eight Defendants are now the Judgment Debtors against whom the Judgment Creditor proceeded under Order 13 of the National Court Rules to enforce his judgment against them naming the National Forest Authority (NFA) as the Garnishee.

We come to the grounds of appeal shortly but essentially what the Appellants are saying here is that they are not parties to this action and have never been. The trial judge was therefore wrong in her finding that they were the same parties in the original action named therein as the Defendants.

The NFA, the Garnishee, is the 2nd Respondent in this appeal and is also the Cross-Appellant (hereafter "Cross-Appellant"). We will shortly address the grounds of appeal on behalf of the Cross-Appellant but essentially its contention here is that the trial judge ought not have granted garnishee order absolute in favour of the Judgment Creditor because the moneys that NFA holds do not belong to NFA to disburse as it pleases, they are Trust Funds and NFA is only Trustee to those funds which it can only distribute in accordance with specific guidelines. It is therefore only answerable to the landowners and not the Defendants.

BACKGROUND TO THE CASE

The First Respondent (the Judgment Creditor) filed proceedings against the Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth and Tenth Respondents (the Judgment Debtors) on the 14th June 2001 in the National Court in proceedings WS No. 793 of 2001 (see Pages 19 - 22 of the Appeal Book) claiming payment for services rendered in the form of

(a) cash loans;
(b) 145 entertainment beer; (c)
accommqdation in hotel; (d)
entertainment;
(e) loss of business;
(f) a total cost of K185,OOO.00

The facts are that on unspecified dates in 2000 or 2001 several persons claiming themselves as landowners or landowner representatives of Makapa Timber Permit Area were in Port Moresby to collect royalty payments on behalf of landowners and were purportedly accommodated by the First Respondent who allegedly incurred expenses described above amounting in excess of K181 ,620.00. These persons executed an instrument declaring their indebtedness to the First Respondent in a document headed **Declaration** dated 24th January, 2001 and witnessed by one of them a Bili Wame ILG NO.1718 before a Commissioner for Oaths on 26th January, 2001 which has the seal of Port Moresby District Court stamped on it. The document is worded in these terms:

> *'We the undersigned declared that* we *did obtained (sic) cash loan, beer, transport, meals, entertainment and hotel accommodation from Mr. Kola Kumo and Mr. Bob Suna and (sic) further witness and agree the invoice mentioned* as *attached is true and correct in every (sic) particulars.*

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Sianed REX POPAE ILG NO.1729 (Spakamula)	Sianed VIAKO BIKSIILG NO.1658 (Kailamoso Dibiaso)	Sianed YBORN ILG NO.1664 (Dumali Dibiaso)
Sianed DOLE SOWAIILG NO. 1660 (Segene Nagaso)	Sianed WESLEY ILG NO.1664 (Dumali Dibiaso)	Sianed WALUMIILG NO.1662 (Supai)
SiQned SIWA DAGUWE ILG NO.1664 (Dumali Dibiaso)		

A further document purporting to be evidence of debt is **a letter of authority to deduct** addressed to the **General Manager of Innovation (PNG) Pty Ltd** of P.O. Box 3797 Boroko NCD, Papua New Guinea and made attention to: Mr. Oscar Mamalai authorizing the company to deduct from premiums due to the Makapa Forest Resource landowners of which they were part of, for the logging activities that the company was carrying out in Makapa for a total sum of **K226,620** which were to be paid as follows: **K181,620.00** for Mr. Kola Kumo and K45,OOO.00 for Mr. Bob Suna.

These sums were for loan, hotel accommodation, transport hire, meals, beer entertainments and *cause* of *loose (sic)* of *business.* The document lists the above named persons and further purports to indemnify the company from any claims made against it by their respective clans or ILGs. The document is dated 25th January 2001 and is purportedly signed by all the seven named persons

together with one Malo Atima whose name was subsequently added in longhand.

THE APPEAL AND THE APPELLANTS

The Appellants in this appeal are: (1) Dumal Dibiaso Incorporated Land Group (ILG) NO.1664 (2) Sapa Kamula Incorporated (ILG) NO.1729 and (3) Kailamso Dibiyaso ILG NO.1658. National Forest Authority or the Garnishee and the Second Respondent is also the Cross-Appellant in the appeal. The only other party interested in the outcome of this appeal and the proceeding generally is the First RespondenVJudgment Creditor.

The 3rd, 4th, 5th, 6th, ih, 8th, 9th and 10th Respondents have not shown any interest in the appeal as they took no step to be heard in the appeal. This was noted at the trial where none of them ever defended the action at all.

The grounds of appeal pleaded in the appeal and cross-appeal raise issues of both procedural and substantive law which were not addressed at the various stages of the proceeding when they ought to have been addressed in the court below. We set out those grounds below;

.. **THE PRIMARY APPELLANTS' GROUNDS OF APPEAL**

1. The primary appellants' appeal is brought pursuant to leave granted on the 1 ih August 2004. The Appellants' grounds of the appeal are set out in the Notice of Appeal at pages 9 and 10 of the Appeal Book and are as follows:

1.1 (a) The trial judge erred in law and in fact in finding that the Appellants were not intervening parties and were the same persons or entities as the Defendants in the Court below on the basis that:

(i) Each of the Appellants were not named separately as Defendants in the proceedings in the Court below:

(ii) Section 11 of the Land Groups Incorporation act recognizes the legal capacity or personality of a properly incorporated land group as that of a corporation and that it can be sued in its corporate name; and

(iii) That the proper plaintiff rule or principle requires that each of the Appellants be named individually so as to be bound and to suffer any consequences of any judgment of the Court that may follow.

1.2 (b) The trial judge erred in law in not considering the fact that there was no amendment by the First Respondent to the pleadings to join each of the Appellants as parties to the proceedings so as to be bound by the judgment of 19th March 2004.

1.3 (c) The trial judge erred in law and in fact in finding that the Second Respondent owed monies to the Appellants if attached would satisfy the judgment debt owned to the First Respondent by the Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth and Tenth Respondents on the basis that there was no material evidence of admission of liability by the Second Respondent.

1.4 (d) The trial judge erred in law and in fact in not giving due consideration and weight to the fact which was admitted by the First Respondent that the Third Respondent was not a legal entity properly incorporated in law so as to be sued at all which fact demonstrated that the Second Respondent did

not owe or have monies payable to such an entity and the other named Defendants in the Court below.

1.5 (e) The trial judge erred in law and in fact in failing to give due consideration and weight to the evidence of Mr. Mark Kalogo of the Second Respondent which was properly presented in an affidavit form without any rebutting evidence to show that the royalty monies held in trust by the Second Respondent were due and payable to the properly incorporated land grounds of the Makapa Timber Project Area under the Land Groups Incorporation Act of which the Appellants were a part of.

o The First Respondent and Cross-Appellant appeals on these grounds:

(i) Her Honour erred in her application of the law in failing to find that there was a relationship of trust either implied or recognized by law as an implied or constructive trust between the Incorporated Land Groups as Trustees to whom Royalties were due and payable by the Cross-Appellants and/or to whom royalties would be due and payable in the future and the individual Landowners and thei r clan members in the Timber Permit Areas as Beneficiaries.

(ii) Her Honour erred in application of the law in failing to find that there was a relationship of trust either implied or recognized by law as an implied or constructive trust between the Cross-Appellants as Trustees who held or would hold Royalties which were due and payable or which would become due and payable in the future to the Incorporated Land Groups, but solely as a corporate representative and only for and on behalf of the individual Landowners and their clan members in the Timber Permit Areas as Beneficiaries.

(iii) Her Honour erred in law in finding and or ordering "that monies should be paid to the intervening ILG's" in circumstances where those monies were held by the ILGs as Trustees and the monies were trust properties held on behalf of the Landowner Beneficiaries.

(iv) Her Honour erred in law in finding and making orders that "the intervening ILGs are in fact same persons or entities as the defendants herein". The Incorporated Land Groups are incorporated pursuant to the Land Groups Incorporation Act 1974 and by which Act they have independent legal capacity and separate legal personality from their members. As such, ILGs are able to sue (sic) and be sued in their own corporate name and style, and are separate and distinct legal entities from their members.

(v) Her Honour erred in law in finding and or ordering "that monies should be paid to the intervening ILG's" when legal proceedings WS No. 793 of 2001 were not brought claiming debts against those incorporated Land Groups as Defendants and no judgment lay against the ILG's, but rather proceedings were brought against individuals with separate, distinct and, independent legal capacity from the ILGs.

(vi) Her Honour erred in law in finding that the monies held by the Incorporat~d Land Groups were amendable to an Application for Garnishee under National Court Rules, Order 13, when those monies were held under the control of the Incorporated Land Groups and were only held by the ILG's on trust on behalf of a broad group of landowner beneficiaries.

ISSUES

(1) Were the funds owing to ILGs by the NFA (the Garnishee) "Trust Funds"?

'ere the judgment debtors entitled to commit the monies owing to the ILGs by NFA funds towards the debts incurred by them with the judgment creditor?

(3) Did the judgment debtors have the authority, express or implied, of the landowners to commit their money on their expense over and beyond their reasonable expenses for travel and accommodation that had no direct benefit to the landowners?

(4) Was the action commenced in the National Court against the named persons or the ILGs each represented?

(5) Did the trial judge err in finding that the appellants were the same parties who were named in the proceedings against whom there was a validly obtained judgment in force?

(6) Is the default judgment valid and enforceable in law against the Appellants?

APPELLANTS' ARGUMENT ON THE RELATIONSHIP BETWEEN THE PARTIES AND NFA.

Central to the issue in this appeal are the funds that NFA has or receives from the project developer or Logging Company for eventual pay-out to the land owners of Mapaka Timber Resurce Area. This appeal results from an attempt by the Judgment Creditor to attach or be paid his debts from this money on account of debts "Owing to him by the Judgment Debtors who are the 3rd to the 10th Respondents in this appeal. Before this court addresses the question of whether he can or he cannot, we first examine the nature of this money or funds.

If the money are trust monies as argued by the Appellants and Cross Appellants, then we must look at the relationship between the major key players who deal with this trust fund, ie. relationship between NFA and the ILGs and the relationship between the ILGs and the landowners and even the relationship between NFA and the individual landowners if need be. The answer lies in the

peculiarity of this relationship between them. Where the judgment creditor fits inside this circle to be able to benefit from this fund depends on various considerations, principal among which include:

o The terms of relationship between the ILGs and the landowners;

'" The terms of relationship between NF A and the ILGs

o The authority of the ILGs to commit royalty funds even before they are distributed to the landowners;

o The authority of NFA to pay-out funds held on account of royalty payable to the landowners to payees other than the landowners.

The issue of the proper identity of the Appellants or the Intervening ILGs as they are referred to is therefore correctly pursued in this appeal by the Appellants as well. By law, under the Land Groups Incorporation Act, any ILG has the legal capacity to sue and be sued in its own name and style. An incorporated land group has perpetual right of succession as a separate corporate legal entity recognized by law. It follows therefore that if it has to commence legal proceedings or is sued by anyone, it must be named accordingly in or by its name shown in the register of incorporated land groups.

After hearing submission from the Appellants we are of the view that the Appellants are not the same parties as the defendants in the original action who are the Judgment Debtors. A simple reason for this is that the proper plaintiff rule did not permit the ILGs named in the original action to have been joined in that fashion. That was defective pleading in the first place which if the action had been defended, which we note it was not, would have been the end of that case on that technical point of want of proper party, at least as against the primary appellants in this case. Secondly, the ILG named in the proceeding was simply descriptive only of the position that the named defendant was professing himself to be, such as "Chairman of Spakamula ILG #1729" .This was only a description of the person named followed by that title. That was not joining the ILG concerned as party to that proceeding.

We are of the view that the trial judge was wrong in finding otherwise when there was overwhelming evidence filed by the Appellants of a total of 25 ILGs who were the beneficiaries of the royalty payments due from NFA and the Appellants were only three of the 25 ILGs. Certainly three or even eight out of 25 ILGs do not have the mandate of the majority of the ILGs to authorize NFA to pluck out over K220,OOO.00 of the royalty moneys and have that paid over to the judgment creditor on account of credits or debts incurred by landowner representatives of only three or eight ILGs even before they commenced their journey through the normal channel to their ultimate recipients, ie- landowners. This is unacceptable.

The Appellants are therefore not the same parties as the defendants and nor are they the judgment debtors in that original action. They are completely new and different entities who are parties correctly appearing pursuant to Order 13 Rule 63 of the National Court Rules. They have not been joined in this proceeding. The original action is only between the Judgment Creditor and the individual persons named and who executed the agreement with the judgment creditor. If there is any debt relationship between the judgment creditor and anyone, it is with the individuals named and not the ILGs.

Is there any relationship between the individuals named as judgment debtors and the National Forest Authority for purpose of 0.13 Rules 59 and 60 of National Court Rules? We think not. We accept the evidence presented by NFA that it does not have any direct or indirect relationship with the judgment debtors except the ILGs. The ILGs are the landowner vehicles to get to NFA for their royalty money.

THE NATURE OF FUNDS OWING TO ILGS UNDER THE LMA BY NFA

The funds owing to the ILGs under the LMA are funds subject to trust. These are trust moneys that NFA held on behalf of the landowners. The ILGs are only collective entities in whose names the funds were disbursed by NFA in lump sum that was paid out to the ILG for the landowners within that ILG. ILGs received the

monies in trust for the landowners and applying the criteria prescribed in their internal machinery for distribution of the money, distributed them to all the landowners within the ILG.

A trust fund is defined as a fund held by a trustee for the specific purpose of the trust; in a more generic sense, a fund which, legally or equitably is subject to be devoted to a particular purpose and cannot or should not be diverted there from. And a trustee on the other hand is a person or corporation holding property in trust.

It was contended in this appeal that the trial judge erred in her application of the law in failing to find that there was a relationship of trust either implied or recognized by law as an implied or constructive trust between NFA as Trustee who held or would hold royalties which were due and payable or which would become due and payble in the future to the ILGs, but solely as a corporate representative and only for and on behalf of the individual landowners and their clan members in the Timber Permit Areas as beneficiaries. This argument in our view is quite valid and indeed reflects the reality of the entire scheme of arrangement in the timber royalty monies. Generally a trust relationship can arise where someone holds something for or on behalf of another that he or she cannot deal with it otherwise than the purpose for which the property was entrusted in his care and control or possession. It places that person in a fiduciary relationship to the persons to whom he must account to for the property left in his or her care. That relationship can be created by a deed or a written instrument or it .can be implied by operation of the law ie, by statute.. The latter feature of what a trust situation is ought to be quite familiar to lawyers practicing on their own accounts and who hold monies in trust on behalf of clients. There is no written deed or instrument creating this fiduciary relationship between the lawyer and the client. By virtue of client-solicitor relationship, lawyer receives money on behalf of his client that he is not entitled to it without the authority of the client. This is known as constructive trust.

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A constructive trust is a trust raised by construction of law or arising by operation of law, as distinguished from express trust. They do not arise by agreement or from intention of the parties but by operation of the law. Blacks Law Dictionary 6th edition -Centennial Edition (1891-1991) states, *'where the circumstances of* a *transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principles of equity, the court will raise* a *constructive trust, and fasten it upon the conscience of the legal owner,* so as *to convert him into* a *trustee for the parties who in equity are entitled to the beneficial enjoyment'.*

The situation we have in this case is that under the relevant Logging and Marketing Agreement or the relevant Timber Permit provisions, the State is responsible for payment of royalty to the landowners of the resource area from funds made available to it by the developer. In this case it is the logging company known as Innovation (PNG) pty Ltd. Whatever the precise terms of those two instruments are is not before this court but by virtue of these agreements, a channel of transmission of royalty money to the landowners was put into place which is not precisely in the same way as it is found in other timber concession areas where the landowners "mouthpiece" is the landowner or resource owner company.

This was the initial misconception the Plaintiff had who named Mapaka Landowner Company Ltd, as First Defendant, which subsequent search by the Appellants' lawyers at the IPA has shown that this entity is not registered. One could even say that it was pure guess-work if counsel was not quite diligent in the first place by not having ascertained the identities of the parties well before filing proceeding. This is a major contributing factor to the overall competency issue of this entire proceeding.

At the hearing on the return date of garnishee order nisi, the Plaintiff conceded that the entity referred to as Mapaka Landowner Company Ltd was non-existent; an unregistered entity, hence, the judgment against it was thus void. Instead

however, the landowners only have their respective incorporated land groups, which in normal circumstances hold shares in the landowner/resource owner company in the timber concession. area, which acts as their vehicle or means of collective voice or representative on behalf of a clan or group in pursuit of their royalty payments from NFA.

Therefore however one looks at NF A and the funds it administers on account of the landowners, it is a trustee of the money received from the developer and it must pay that money to the relevant ILGs who are also trustees of the money on behalf of their clan members and are not supposed to deal with the money in any way other than distribution to the landowners.

We accept the evidence that there are 25 Incorporated Land Groups (ILGs) in the Makapa Timber Permit Resource area. The persons who incurred debts represented only five of these ILGs and therefore do not represent all the ILGs or the landowners in Makapa Timber Permit area. They therefore cannot be deemed to have the approval of the majority of the landowners to commit the money in the way they purported to do here.

We support the view that if the monies held by NFA on account of royalties for the landowners in the timber concession area was available to be recovered by way of garnishee proceedings on account of debts owing to the Plaintiff/Judgment Creditor by the Defendants/Judgment Debtors, that can only be limited or restricted to royalties due to the ILGs that the Judgment Debtors represented. But that would be contrary to what the law says in Halsburys Laws of England Fourth Edition Vol 17, "Execution" Part 3, "Analogous Proceedings" from paras. 523, 529-539 which clearly state that *trust monies are not* to *be subject* of *any garnishee proceedings on recovery* of *debts against* a *judgment debtor.*

Accepting this to be the correct legal position, the parties described in this appeal as First, Second and Third Appellants now before this Court are trustees on

behalf of the landowners in respect of the funds held by NFA for and on behalf the individual landowners. They have the right to be heard on the disbursement of those funds, especially when strangers or third parties having no right to those funds seek to recover all or part of those funds from NFA for reasons unrelated to the ILGs and the landowners.

There is no dispute that under the *Forestry Act,* NF A receives money from the project developer in the form of royalty and other payments of which a certain proportion is earmarked for the customary resource owners for their benefit. The interest of customary resource owners is required to be represented by a corporate body or by the Local-Level Government in the area. The common practice is that customary resource owners incorporate land groups under the *Land Groups Incorporation Act* and in some cases companies under the *Companies Act* or business groups under the *Business Groups Incorporation Act.* The incorporated body is then required to operate bank accounts through which the funds are paid by the NF A to be distributed by the management of the corporate body to their members. The corporate body is required to expend and invest moneys received by it as it sees fit, but subject to the articles and rules of the corporate body and any reasonable rules and procedures regarding management of bank accounts designed to ensure the payments are invested or expended for the collective benefit of the owners of the project area: see *Regulation* 235 (6). The board is given power to suspend operation of the bank account if in its opinion, there are reasonable grounds to believe that the funds have been expended or invested in breach of the articles and the rules: *Regulation* 235 (7).

It appears that although there is no provision in the Act which creates a public trust to hold those funds received and due to resource owners as is the case with other Statutes dealing with resource development (see. *s.* 168 (4) and *s.* 176 of the *Oil and Gas Act* 1989), this intention is clear from the scheme of the Act that the NF A receives or retains the funds, holds it and manages its distribution. It is also clear that the NF A maintains an interest in those funds paid to the corporate bodies

and not only that, but also in its final disposition by the corporate body, to ensure that they are used for legitimate purposes.

In these circumstances, there is no question as to the status of the funds held by NFA - they are clearly funds held in or under a trust. We accept Mr. Reid's submission that this kind of trust may be more accurately described as a constructive trust - a trust implied by statute. There is another constructive trust implied by the Act and that is the funds received from the NF A by the corporate
body. The corporate body whose activities are conducted by the management of the corporate body is a trustee of the funds received and held for the benefit of the resource owners, collective or otherwise. The body corporate is merely a vehicle to channel funds designated for resource owners. In essence therefore, there exists a trust at two (2) levels and at both levels, the ultimate beneficiary is the resource owners. They are public trusts and the State has an overall interest in ensuring that the funds are expended for their designated purpose - for the benefit of resource owners.

The fiduciary relationship between a trustee and a beneficiary is described by Sevua J in *Mathew Poia v ANZ Bank* (2001) N2049 in the following terms:

> *"The essence of the trust therefore is the fiduciary relationship, that is, the relationship between the trustee and the beneficiary. The trustee is accordingly bound to exercise rights and powers and to act in good faith and in the interest of the beneficiaries. This means that the trustee has a duty of confidence, honesty and responsibility to act for the benefit of the beneficiary. This fiduciary relationship is breached if the trustee acts for his own advantage or for the advantage of a person or persons who are not beneficiaries where the actions of the trustee result$ in some disadvantage to, or detriment suffered by the beneficiaries. A court of equity would not permit a person in a fiduciary position to make a personal profit or to be placed in a conflict of interest situation."*

We would add that in a situation where the beneficiary is a body c()rporate representing resource owners who are usually ordinary people, and the tmstee is a

public body, a court of equity would not pennit or cause a trustee to breach his or her fiduciary duty by requiring him or her to make paYments out of the trust funds to a bank account or to persons who do not represent or genuinely represent the corporate body. The rationale for this principle is simply this. The real beneficiary is not the corporation but the resource owners it represents and until those funds received by the corporate body is paid out to the real beneficiaries, the corporation itself and its management which represents the members are both under a fiduciary duty to ensure the resource owners benefit from the trust funds.

Further, a Court of equity would not cause a public trustee to breach its fiduciary duty by doing anything which would result in paYment of trust funds to a corporate body or its representatives if there are reasonable grounds to find that their activities are clearly not in the interest of the resource owner beneficiaries, for instance where the corporation or its executives are seeking a release of the trust funds by the trustee to meet their own personal debts, genuine or otherwise, incurred by or in the name of the corporate body.

The court's insistence on strict administration of trust funds for benefit of beneficiaries has a long history which goes back to the 19th century common law. Because of real potential for abuse of power and breach of fiduciary duty by trustees of personal and real property and in particular trust funds, the courts in England went to the extent of developing practice guidelines for trustees of funds. Courts imposed a blanket restriction on attachment of trust funds under garnishee order. In the Court of Appeal decision in *Roberts v Death* [1881] QB 319, Lord Justice Brett therein states the practice in the following terms:

> *liThe point* of *practice, however, which* we *hold is that where the money sought to be attached under the garnishee order is trust money, or said to be such* on *any reasonable ground, the cestui que trust is not* to *be damaged because the garnishee will not act, but he has* a *right to come forward (not indeed under rules* 6 *and* 7, *but apart from such rules) and to inform the Court that the money is trust money belonging to him, and that therefore the garnishee order ought not be made, provided* of *course, he does* so *in due time",*

In our view the practice and the principles embodied in the above point of practice is appropriate and applicable to the circumstance of this country and we do not see any reason why they should not be adopted and applied in this country as part of the underlying law by virtue of *Schedule* 2.2 of the *Constitution.* In this country at this point in time, there are many natural resource development projects being undertaken by the government and project developers in fishing, mining, oil and gas, forestry etc under agreements entered into between the State/project developers and resource owners. There are many instances of trust funds due to the resource owners being administered by State agencies. In a few of those, relevant Statutes provide for establishment of trust funds to be managed by named trustees. In many others such as the present case, there are no such provisions. There are numerous instances of trust funds being accessed by so-called representatives of corporate bodies and funds being spent for their own purposes and the funds not reaching the very resource owners they represent. There are many instances of corporate bodies being sued by supposed service providers and court judgments being obtained and sought to be enforced by attachment proceedings. It is time now that public trust funds should be protected and the above point of practice will serve that purpose.

In order for this practice to work, the onus is now on public trustees such as NF A or even corporate bodies who hold funds due to resource owners, to come forth, to the court when they are served with garnishee notice nisi, to say to the Court: *"The funds sought to be attached in this application are trust funds and they cannot be attached"*. The onus is also on the Court dealing with an application for leave to issue garnishee notice nisi or application for orders absolute, to enquire of the applicant or parties if the funds affected are trust funds and if there is reason to believe so, then to require the trustee/garnishee to appear before the Court 10 say if the funds are trust funds.

In the present case, the application for garnishee order nisi against NFA as the garnishee in the first place was wrong as it was based on misconception and

misapprehension of both facts and law. NFA did not owe money to the Defendants named in the writ that the Plaintiff could attach by way of garnishee action. The Defendants named in the writ were those individuals representing the five incorporated land groups and individually they had no direct relationship to or with NFA. NFA only had relationship with the ILGs who were also trustees of the landowners through whom the funds were channeled. Until that flow of transmission of money exchanging hands was completed to the ultimate recipients, the money was not available to be picked up in the middle of its journey by anyone, be he landowner, ILG or executive of ILG. This error on the correct identity of the parties was allowed to go uncorrected at the time the default judgment was entered and even at the hearing on assessment of damages.

In this respect, we must find that the trial judge erred in holding that the Appellants were the same parties as named in the original proceedings when they were not the same parties. The ILGs were separate legal entities to the individuals who went by various descriptions or portfolios relative to the ILGS and ILGs ought to have been separately named as parties quite distinct from the individuals.

In our view, the action by the Plaintiff was not against the ILGs, it was against the individuals who were putting themselves out as spokes persons of the various ILGs concerned. There is no legal basis to take their liability further to a third party, the corporate entity that each claimed he represented. There was no evidence that each one had -the authority of the members of his ILG to bind his group to the liability that he had incurred with the Plaintiff or any other persons in the name of his ILG. The Court never at any time determined the authority of the members of the ILGs. The issue never arose because of the style of pleadings in the writ of summons which did not allow the ILGs to cause separate legal representation.

At the outset, the writ ought to have been struck out for ambiguity and want of certainty. The law does not assume proxy powers or powers of attorney of

another upon another without written instrument of such appointment or delegation of power or authority being first produced. Without clear evidence of such authority, there really was no evidence for the court to conclude that the Defendants had the authority of the ILGs and could be sued in the way and style they were sued. To accede to the argument simply means that anyone can profess himself to be acting for another in his capacity as the agent of his principal and make commitments that will bind the unsuspecting principal.

By analogy of the best plaintiff rule stipulated in section 6 of the Companies Act 1996 and section 11 of the Incorporated Land Groups Act which creates separate legal personality in the incorporated land group with the power to sue and be sued and the fact that as pleaded, the form of pleading was bad for uncertainty.

We are of the view that the trial judge was not very ably assisted at the trial by Counsel for NFA Mr. Dick Korowa. The question of the authority of the Defendants to commit funds belonging to the landowners when applying the proper plaintiff rule given that two distinct legal entities were sued as one party was not properly addressed. As the Chairperson, if the named person really was the Chairperson of the ILG he claimed he represented, were the nature of the expenses incurred within reasonable consideration or expectation of landowners in remote resource areas who were the proper beneficiaries of the money or funds held by NFA for timber royalty payments?

The position now taken by NFA appears to be more sensible, but it was left far too late. It is unfortunate that the assistance given to the Court by Counsel representing NFA in the trial was very poor, careless and negligible. He really was not representing the interest of NF A nor was he of any assistance to the Court at all. He would no doubt have contributed to this fiasco just as much as the lawyer for the Plaintiff.

We consider that the evidence given by Mark Kaloga was very relevant to the case and the issue before the Court and there is no evidence contradicting or

refuting the substance of his affidavit. Therefore even accepting Dick Korowa's submission that Mark Kaloga had no authority to depose to the affidavit before the Court, in the context of the entire case, he was the most relevant witness on the issue before the Court. The fact that he may not have had the approval or consent or authority of the Managing Director of NFA to swear the Affidavit did not dampen, reduce, lessen or mollify the substance of his evidence in his affidavit. Trial Judge therefore erred in rejecting that material evidence without proper consideration except based simply on submission from the bar table.

We are of the view that had the trial judge not disallowed the affidavit of Mark Kalogo, the substance of his evidence was clearly signaling who the rightful beneficial owners of the monies were. Two things immediately came into focus: Firstly, have the defendants got the authority of these ILGs and the individual landowners to commit the fund as they chose? Secondly, seeing that NFA as garnishee was only a medium, through which these monies from the State or the Logging company were channeled to the ultimate recipients via their respective ILGs, was NFA therefore not a *trustee* of these funds in transit on behalf of the landowners? If so, can the Judgment Creditor garnishee trust funds with the trustee for settlement of its debts? The law does not permit it as we have clearly demonstrated.

In our opinion, this disbursement did not include paying for lavish and expensive lifestyle of the executive members of the ILGs on trips to Port Moresby purportedly on behalf of the landowners. Spending nine weeks in Port Moresby and living in hotel at the expense of the landowners is not a sensible way of committing the landowners' funds. On this concern we endorse what Inj ia, DCJ stated in Steven Mendopo v Samson Bora [2004] N2535 as follows:

> "At the hearing, I raised various queries in relation to the documents such as invoices which supported various amounts constituting the settlement amount. I directed the Plaintiffs to file further affidavits explaining or supporting some of the amounts. The reason for this was that I felt I should satisfy myself that the *money held in trust* for the benefit of landowners of the Oil Rich Gobe Oilfields, should be protected from the actions of "their representatives' who it seems to me, tend to procure services away from home, in outside locations like Port Moresby, from service providers in those outside locations, and incur expenses, with or without the knowledge or approval

> of the landowners and which mayor may not be of real benefit to the landowners, which are then charged on the *trust funds* and the landowner beneficiaries of those funds miss out. All too often, we hear of the plight of aggrieved, dissatisfied or disgruntled landowners, unsatisfied at not being paid at all or being lowly paid. Projects get interrupted. Many landowners incur their own expenses in making the long journey themselves to Port Moresby to check on payments. Their representatives must conduct themselves in such a way that they do not abuse the trust placed on them by the landowners by keepina administrative costs at a minimum." (emphasis is ours)

We apply the same reasoning to reject this claim against the ILGs inappropriately dragged into carrying these debts between the First Respondent and the Judgment Debtors.

There are two other related matters which we would like to say something on. We are aware that the National Court especially in Waigani is inundated with all manner of applications by persons claiming to represent incorporated land/resource owning groups such as Incorporated Land Groups seeking orders that the Registrar pays out monies to various contractors on behalf of these Incorporated Land Groups. We consider that those applications are unmeritorious for two reasons. The individual Incorporated Land Groups cannot add any administrative burdens on the Court to act as their paymaster in paying out claims against Incorporated Land Groups by their contractors. The Incorporated Land Groups are legal entities and if they enter into contracts with individual persons or corporations, it is their obligation to settle their debts flowing from such contracts. The National Court shall not be burdened with additional administrative work that is not part of its core function.

Secondly, we have been talking about monies held in trust by trustees in this judgment. The funds are trust funds subject to trust law. Unless proper legal authority is issued by an -individual Incorporated Land Group, no person or trustee has any right to disburse trust monies. Because the individual Incorporated Land Groups are a creature of statute and are legal entities separate from Chairpersons, proper authority which must be under seal of the

. Incorporated Land Groups must be provided to the trustees to disburse the funds held in trust. In the absence of such authority under seal, no trustee shall have

any authority to payout monies to anyone from the funds he holds in trust. Whether it is the Registrar of the National Court, Managing Director of National Forest Authority, Secretary for Department of Petroleum & Energy or Secretary for Finance, the heads of these institutions are subject to the law of trust therefore they have no authority at all to disburse trust monies as they wish without proper and express authority of Incorporated Land Groups.

In the present case we agree with the Appellants' argument that any relationship of debt was between the Judgment Creditor and the Judgment Debtors and that did not include the individual incorporated landowner groups. Therefore the garnishee proceedings against NFA was misconceived because NFA had no debt with the Judgment Debtors and was therefore not a proper party in the proceedings. In any event, the funds held by NFA were trust funds and they were not available for attachment as a matter of law, to pay for those personal debts.

Consequently the appeal is upheld, the garnishee absolute is dissolved, the judgment against the Incorporated Land Groups is set aside ex *debito justitiae* being irregularly obtained and the Appellants are entitled to their costs.

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Lawyers for the 3rd _10th Respondents: