

IN THE SOLOMON ISLANDS COURT OF APPEAL

COURT FILE NUMBER: Civil Appeal Case No: 28 of 2011

DATE OF HEARING: 23rd November 2011

DATE OF JUDGMENT: 24th March 2012

THE COURT: Sir Robin Auld P, Ward JA and Mwanasalua J

PARTIES:

Axiom KB Limited	Appellant
-v-	
SMM Solomon Limited	First Respondent
Alfred Jolo	
(representing the trustees and members	
of the Anika Thai Clan)	Second Respondent
Martin Tango	
(representing the trustees and members	
of the Thavia Clan)	Third Respondent
James Uguru	
(representing the trustees and members	
of the Vihuvunagi tribe)	Fourth Respondent
Ben Salusu	
(representing the trustees and members	
Of Vihuvunagi tribe in respect of the	
Chogea and Beajon land areas	
within Takata)	Fifth Respondent
Mafa Pagu	
(representing the trustees and members	
Of the Thogokama tribe)	Sixth Respondent
Paul Fotamana	
(representing the trustees and members	

of the Veronica Lona clan)

Seventh Respondent

ADVOCATES:

Appellants Mr. Peter E. King and Mr. Michael Pitakaka

Respondent Mr. John Sullivan QC and Mr. Rodney Kingmele

KEY WORDS: Interim injunctive relief; whether serious issues to be tried;
balance of convenience

Dismissed

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JUDGMENT

Introduction

1. This interlocutory appeal arises out of a claim in judicial review by SMM Solomon Ltd (“Sumitomo”), a Solomon Islands public mining company, and certain individuals who claim to be customary landowners, 2nd – 7th Claimants, in respect of land at and in the vicinity of Takata in Isabel Province (“the Sumitomo tendered land”). The claim is brought against the Attorney General representing respectively the Minerals Board and the Minister for Mines, 1st and 2nd Defendants, the Commissioner of Lands, 3rd Defendant, the Registrar of Titles, 4th Defendant, Pacific Investment & Development Ltd (“Pacific”), 5th Defendant, Axiom KB Ltd (“Axiom”), a Solomon Islands public mining company, 6th Defendant, and rival land claimants to the relevant part of Sumitomo tendered land, 7th Defendants. Although the proceedings are in judicial review going to the validity of public acts of the 1st four Defendants in relation to the grant of valuable mineral rights over public land, the main protagonists in these interlocutory proceedings are Sumitomo and Axiom, as rival claimants to those mineral and associated land rights.
2. A notable feature of the proceedings to date is the low profile adopted by and on behalf of the public officers and bodies, 1st to 4th Defendants, whose questioned conduct in relation to the land and mineral rights has given rise to these rival mining and landholding claims, and against whom a wide range of declaratory, quashing and negative and mandatory injunctive relief is claimed.

3. Sumitomo claims that the Government, having awarded it an international tender to prospect for minerals, in particular nickel, over the Sumitomo tendered land and having issued a letter of intent to grant it prospecting rights over that land:

- 1) unlawfully cancelled the award and withdrew the letter of intent, following intervention by the Prime Minister and the Cabinet; and
- 2) then, in some haste, supplanted it with Axiom and Pacific by unlawfully purporting to grant them comparable rights over separate tracts of the Sumitomo tendered land: i) in the case of Axiom, in response to an untendered bid, by the issue of a letter of intent, followed three days later by a grant of a prospecting licence and registration of the 7th Defendants as perpetual owners of that land and of Axiom as their lessee; and ii) in the case of Pacific, the issue of a letter of intent, leaving surface access agreements to be negotiated with the landholding groups.

4. Sumitomo seeks relief in the action:

- 1) against the first 4 Defendants, in effect the Government, to quash its grant of prospecting rights to Axiom and issue of a letter of intent to Pacific, and reinstatement of the tender award and associated letter of intent to Sumitomo;
- 2) consequential declaratory and injunctive relief against Axiom, Pacific and the 7th Defendants; and
- 3) declaratory, quashing and negative and mandatory injunctive relief against the Government to secure for Sumitomo a prospecting licence over the Sumitomo tendered land in accordance with the original letter of intent, and recognition, by rectification of land title or otherwise, of Sumitomo's entitlement to access to the land for the purpose of prospecting for minerals.

5. Axiom appeals against Chetwynd J's grant to Sumitomo on 19th September of an interlocutory injunction effectively restraining Axiom until judgment or further order from:
1) entering on the Sumitomo tendered land for the purpose of exercising mineral rights on the land; and 2) from negotiating with anyone for possession of or access to the land. Sumitomo gave the customary undertaking as to damages, which it subsequently extended to cover the 2nd to 7th Claimants.

6. It is trite law since *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396, a case concerning a threat to infringe a registered patent, that a court should only grant an interim injunction if
1) there is a serious issue to be tried; and 2) the balance of convenience, including the adequacy of damages as an ultimate remedy and other factors special to the case, favours it. Failure to meet either of those main criteria would be fatal to Sumitomo's entitlement to such relief. Axiom maintains that Sumitomo has failed to meet both criteria.

7. The pleadings and evidence filed on both sides disclose two main groups of dispute, referred to by Chetwynd J respectively as “the mining issue” and “the land issue”. They are linked because a successful applicant to the Government for a licence to prospect for minerals over an area of land must, as a condition of its grant, comply with various statutory requirements under the *Mines and Minerals Act* and subordinate legislation¹. These include: 1) identification by the applicant of the owners of, and any others having an interest in the land; 2) under the guidance of the Minister for Mines, negotiation with them of rights of access to prospect for minerals and payment of fees and compensation for any damage caused by such activity;² and 3) where, as here, Sumitomo’s application for a prospecting licence was by way of tender, compliance with statutory conditions applicable to that procedure.³ Once the Minerals Board is satisfied that an applicant has satisfied these requirements and that the applicant has negotiated right of access to the land to which the letter applies, the Minister may issue a “letter of intent” to issue the prospecting licence.

8. The Minister issued a letter of intent to Sumitomo on 23rd November 2010. He subsequently “withdrew” it by letter bearing the date of 17th January 2011, a letter not received, according to Sumitomo, until March 2011. By then Axiom, an unsuccessful bidder in the international tender, had re-appeared on the scene. In remarkably quick order – only two and a half weeks from its - this time - untendered bid, Axiom achieved what Sumitomo had previously expected would flow from the letter of intent it had received, the grant of a prospecting licence (albeit for the moment, over part, not all of the Sumitomo tendered land).

On Axiom’s case before Chetwynd J and before this Court, it quickly began prospecting operations on the land. However, on the evidence before the Court, by September 2011 when Chetwynd J granted the interim relief under appeal, these “operations” had amounted to no more than preparatory steps of engaging labour, purchasing some equipment and undertaking certain financial commitments – no doubt involving substantial expense but no actual prospecting or disturbance of the surface of the land.– contrast the circumstances before Muria J in *Talasasa v Attorney General & Ors* [1995] SBHC 27; HCCC 043 of 1995, on which Mr Peter King, for Axiom, prayed in aid in his submissions.

10. Chetwynd J held that there are serious issues to be tried in the mining and the land issues and that the balance of convenience, including the adequacy of damages as a remedy to Axiom if it ultimately succeeds, favour the grant of interim relief. He accordingly granted a series of appropriately tailored negative and mandatory injunctions against Axiom

¹ *The Mines and Minerals Act* (Cap 42) 1996, Part V, as amended, and the *Mines and Mineral Regulations*, as amended, made pursuant to section 80 of that Act
² S 20(4) and (5) of the Act
³ Ss 19 – 25 of the Act

and the 7th Defendants designed to maintain the *status quo*, against an undertaking by Sumitomo in damages. Axiom now appeals that decision

Locus Standi

11. Mr King put the issue of Sumitomo's *locus standi* at the forefront of Axiom's case on this appeal. It was in effect an application to strike out the whole of Sumitomo's claim in judicial review insofar as it seeks relief against Axiom. To that extent, it overlaps with the first of the two main *Cyanamid issues*, namely whether there is a serious issue to be tried. He maintained that Sumitomo has no *locus standi* to apply for interim relief in judicial review proceedings in the circumstances of this case because it has no arguable "legal or equitable interest meriting protection" in respect of the Sumitomo tendered land or to prospect for minerals over it.
12. There is a distinctly period flavour to Mr. King's argument seeking, in the context of judicial review, to confine the right to relief to claims of an arguably enforceable "legal or equitable interest". Such a restrictive formula is not apt for modern mixed public and private law claims where it is alleged that *ultra vires* or otherwise unlawful state conduct has caused or, unless restrained, will cause serious harm and/or injustice to private persons. Lord Diplock's use of the expression "legal or equitable interest meriting protection" in 1979 in the *Siskina* [1979] AC 210, at 256 was not in the context of a public law issue with associated private law claims for relief. In any event, it predated the dramatic substantive and procedural widening of the remedy of judicial review since then. The same applies to the Solomon Islands authorities cited by Mr, King, namely *Allardyce Lumber Company Ltd & Ano. v Nelson Anjo SBICA* 3 CA-CAC of 1996, and *Guadalcanal Resource Development v Dalsol Ltd* [1996] SBHC 26; HC-CC 102 of 1996. Nor is *Gouriet v HM A-G & Ors* [1978] AC 435 of any relevance on its facts, given the remoteness of Mr Gouriet's personal interest from the issue he sought to raise in that case when compared with the closeness of Sumitomo's keen commercial interest in the matters in issue here.
13. The statutory basis for the Solomon Islands High Court's exercise of its jurisdiction to grant interim relief in judicial review is, we understand, Rule 15.3.5 of the *Solomon Islands (Civil Procedure) Rules 2005* ("the 2005 Rules"). That provision is of a piece with Rule 7.38 of English and Welsh *Civil Procedure Rules*, in providing that the Court may grant an interim injunction in proceedings for judicial review:

"in cases where it is just and convenient having regard to: (i) the nature and the matters for which judicial review is sought; (ii) the nature of the persons against whom such relief may be granted; and (iii) all the circumstances of the case."

As to *locus standi* in judicial review, the Court has not been referred to any Solomon Islands provision comparable to the elastic wording of section 31 of the English and Welsh *Supreme Court Act 1981*, sub-section (3) of which provides that no application may be made without leave of the High Court, and that leave must not be granted unless the Court “considers that the applicant has a sufficient interest in the matter to which the application relates”. “Sufficiency of interest” has not been statutorily defined, but its purpose is clear, namely to eliminate at an early stage hopeless, frivolous or vexatious claims and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration and to ensure representation of relevant interests at a substantive hearing. In *R v IRC, ex p National Federation of Self-employed & Small Businesses Ltd* [1982] AC 617, the House of Lords, by a majority, introduced a uniform and relaxed *locus standi* test for all judicial review claims, so as to include anyone affected by a public decision or action in question. The issue as to standing is to be judged in the legal and factual context of the individual case, not only by the directness or indirectness of the effect on the claimant personally of the matter of which complaint is made. Also relevant are matters such as the apparent strength of the claim and whether it raises important issues – all in all, a pretty low and elastic threshold, which also allows for a form of *representative* standing in the public interest in suitable cases; see *e.g.* the *Pergau Dam* case [1995] 1 WLR 386.

14. In the Court’s view it is plain from the foregoing provisions and jurisprudence in the common law world that an interest capable of protection in judicial review is not necessarily confined to “legal or equitable rights”, but may also apply to other personal interests deserving protection by the courts in their exercise of public law jurisdiction. These may, depending on the circumstances, include statutory rights or legitimate expectations or matters of customary law, especially where, as in the Solomon Islands, they are given constitutional recognition, and, of course, other interests such those of a private injury flowing from a public wrong.
15. In the Court’s view, it is at the very least arguable that Sumitomo’s claim surmounts that threshold on at least two accounts and possibly a third. First, there is its close involvement and strong commercial interest in seeking to exploit the prospecting licence that the Government at one stage went a long way to granting with its letter of intent. Secondly, there is the interest in promoting the integrity of public administration in the Solomon Islands, in particular in the context of dealings in public land, and especially where subject to claimed customary land rights. Thirdly, Sumitomo, having participated and succeeded in securing the award of a major international tender to prospect for minerals and the issue of a letter of intent to grant it a right to prospect for them, is arguably entitled, by way of injunctive and/or other relief to enforce a legitimate expectation of securing the promised

grant, pursuant to section 21 of the *Mines and Minerals Act*. In short, in such circumstances there is no sensible basis for confining relief in this context to a “legal or equitable interest”, as if this were a purely private law matter. In the Court’s view, there is clearly a serious issue to be tried on the issue of Sumitomo’s entitlement to seek injunctive relief case in response to Axiom’s challenge that it has no *locus standi* to pursue its claim.

The Mining Issues

16. Mr King advanced a number of detailed arguments on this issue, turning largely on contentious aspects of construction of requirements in section 20 of the *Minerals and Mines Act* and supporting *Regulations*, and of claimed non-compliance by the Minister and/or by Sumitomo with those requirements. He maintained that each of them vitiated the international tender process, leaving Sumitomo with no arguable case of any right to the grant of a prospecting licence. These arguments included:

1) the Minister’s non-specification in the tender documents of the area of land the subject of the tender, leaving it to each tenderer to define its own “desired” prospecting area - which Sumitomo did;

2) Sumitomo’s alleged non-entitlement as a tenderer - as distinct from an applicant outside a tender process - to apply for a prospecting licence because at the time of its application it already held three or more prospecting licences over other areas without having taken steps to mine in at least one of them, so-called “land-banking”; and

3) failure of Sumitomo to comply with a tender requirement to apply for a prospecting licence within 30 days after receipt of notification of the Mineral Board’s acceptance of its tender.

17. We should also record Mr King’s strong protest before Chetwynd J and before us at suggestions of Mr John Sullivan QC, for Sumitomo, and the Judge of possible bad faith on the part of Ministers, other public officers and/or of Axiom giving rise to the Government’s change of mind.

18. In the Court’s view, it is sufficient to summarise some of Mr Sullivan’s submissions to illustrate that Sumitomo, by its claim and filed evidence, has raised or engendered serious issues meriting trial, both in respect of the Minister’s issue of the letter of intent to Sumitomo and of its compliance with the letter and the relevant statutory provisions as properly construed. The main thrust of his submissions was that letter of intent was valid

and that the Minister, therefore, acted unlawfully in purporting to withdraw it and to grant Axiom a prospecting licence over part of the same land. He submitted:

1) as matter of construction of the *Mining & Minerals Act*, in particular sections 20 and 21, and the Mining Regulations 2010, a number of statutory procedural requirements governing the grant of a letter of intent in respect of which Mr King alleged non-compliance by the Minister and Sumitomo, did not apply to a tendered bid such as Sumitomo's;

2) if and to the extent, that Sumitomo did not comply with all the statutory procedural requirements for the grant of a prospecting licence, such non-compliance was remediable and in any event capable of discretionary ministerial waiver, and were clearly waived here by the Minister in issuing the letter of intent;

3) the Government's subsequent withdrawal of the letter of intent and purported grant of a prospecting licence to Axiom were legally flawed in a number of serious respects, in addition to an abuse of section 60 of the *Land & Titles Act* to vest part of the Sumitomo tendered land in the 7th Defendants for their and Axiom's private advantage, not that of the public;

4) evidence filed by Sumitomo before Chetwynd J, including a Report ("the Kwaiga Report") commissioned by the Prime Minister, to the effect that the then Minister for Mines had misled the Cabinet into authorising him to cancel the letter of intent to Sumitomo, a cancellation for which there was no legal basis, which, when coupled with swift grant of a letter of intent to Axiom in response to its untendered application and unlawful vesting of the land in 7th Defendants, all raised questions of possible misfeasance by Ministers or other public officers; and, in any event

5) on the pleadings and available evidence before Chetwynd J, there was substantial non-compliance with the procedural requirements for the grant of the prospecting licence to Axiom by a number of those involved in the process.

19. Having considered the considerable volume of pleadings, filed evidence and submissions on both sides on the mining issue referred to in brief by Chetwynd J in paragraphs 7 to 10 of his Decision, the Court has some sympathy with the following expression of concern in paragraph 10 of his Decision:

"It is appreciated Axiom say the whole tender process was flawed and we should never have reached the stage where the rights and wrongs of the cancellation are

relevant, but the issues argued on that alone give rise to serious issues to be tried. No matter which way this case is approached there are serious questions to be asked and answered and serious issues to be tried.”

20. We also share the Judge’s concern on the mining issue - expressed in paragraph 9 of his Decision - as to a possible failure of public integrity in public administration in the chain of events leading to the replacement of Sumitomo by Axiom as the successful bidder for a prospecting licence over part of the Sumitomo tendered land:

“The point is whether the situation described by Mr. Kwaiga gives rise to a serious issue or question to be tried, namely the circumstances in which the decision to revoke, cancel or whatever, the Award and the letter of intent was made. If the decision, either by the Minister of his own volition or by the Minister at the direction of the Cabinet, was premised on the wrong information or facts, that would allow the court to exercise its powers of judicial review. Whether or not the situation was as Mr Kwaiga suggested must give rise to a serious issue or question the court has to consider.”

21. The Court is, therefore, of the view that, on the mining issues too, Sumitomo has raised serious issues for trial in support of its claim for permanent injunctive relief of the nature granted by Chetwynd J in interim form.

The Land Issues

22. Axiom maintains, first, that Sumitomo’s claim to a right of access to the Sumitomo tendered land, a pre-requisite of the issue of a prospecting licence, was flawed for a number of reasons:

1) a number of Axiom’s co-claimants, the 2nd to 7th Claimants cannot establish their status as customary landholders and thereby to have had the right to lease the land to it; and

2) Sumitomo had failed to specify the precise areas of the Sumitomo tendered land in its tender, as it had been required to do by section 20 of the *Mines and Minerals Act*; and

3) Axiom, had, in any event, indefeasible title to and exclusive access to the land by virtue of registration of the land in the name of the 7th Defendants as perpetual owners and in its name as lessees of the 7th Defendants, in circumstances in which Sumitomo had no possible remedy of rectification.

23. As to the validity of Sumitomo's claim to access to the tendered land, Sumitomo asserts and relies on the validity of its lease from the 2nd to 7th landowner Claimants, and maintains that, on a proper construction of the *Act*, the tender process was not flawed by want of specification in the tender documents of the precise areas of land to which its bid related.

24. Sumitomo also maintained that, in any event, Axiom had no lawful basis for asserting a contrary title because there had been abuse of the registration procedures set out in Part V, Division 1 of the Land and Titles Act *Cap 233*, including:

1) purported disposal of public land ultimately to Axiom for a private, not a public, purpose, all with witting or unwitting *ultra vires* participation by public bodies or persons; and

2) failure to implement the alleged agreement between the Government and the 7th Defendants so as to vest the land in them as perpetual owners and/or through them, in Axiom as their purported lessee; and accordingly

3) the registration of perpetual title in favour of the 7th Defendants was void *ab initio* and, therefore, neither the 7th Defendants nor Axiom is entitled to the protection of indefeasibility of registration provided by sections 109 and 110 of the *Land and Titles Act*.

24. Mr Sullivan, in his submissions to the Court, acknowledged a possibility of rectification of the register in favour of Axiom under the provisions of section 229 of the Land and Titles Act if it could show that it was an innocent party to the transaction and process. However, he maintained that, on the facts Sumitomo has pleaded and filed in evidence, Axiom would have real difficulty in bringing itself within these provisions. Chetwynd J was equally sceptical about such a possibility, drawing on the reasoning of Kabui J (as he then was) in *Jack Sipisoa v. Acquisition Officer & Ors* [1998] SBHC; HCSI-LAC 8 of 1996, that resort to such indefeasibility provisions for private acquisition of land is an abuse rendering the procedure "null and void". This is how Chetwynd J put it in paragraph 6 of his Decision:

"... There never was registration, the land is still customary land. In any event if I am wrong and it is somehow registered land, given the timing of the registration of the perpetual estate and the lease to Axiom it is difficult to see how the latter can say it was not aware of the problems. It certainly knew of the differences between various land owners in the area and any suggestion it entered into a commercial arrangement costing over one million dollars a year without obtaining professional advice and on the basis its officers 'were impressed' by a document beggars belief."

25. Finally, in the context of the land issues, it is to be remembered that this is a claim in judicial review to which a number of private claims have been attached. It concerns the propriety and probity of public administration and stewardship of dealings in public land, customary rights over it and publicly owned mineral rights under it. It is not just a private law dispute as to which of two parties has the better title to or rights over the land in question.
26. For all those reasons the Court is of the view that Sumitomo has also shown seriously triable questions for trial on the land issues.

Balance of convenience

27. Chetwynd J, having found that Sumitomo had raised seriously arguable issues for trial, went on to consider the issue of balance of convenience, in particular, the preservation, so far as possible, of the *status quo* pending the final outcome of the matter. In paragraph 11 of his Decision, he rejected as a false premise Axiom's stand that that could best be achieved by allowing it and the 7th Defendants to remain in the meantime in possession of "their own land". He reasoned that in the event of Sumitomo winning - which he considered likely - the outcome would be that the land had remained customary land throughout and that the land rights of the landowning Claimants had also to be considered. He commented in paragraphs 11 and 12 of his Decision:

"11. ... The *status quo*, in respect of the land can only be maintained by allowing *all* those who claim to be land owners full and free access to the land as if it were customary land. That would preclude Axiom from exercising any rights or claims based on the lease. It is not so much the use of the land by Axiom which may result in prejudice or harm to the landowning claimants but exclusion from the land by all those entitled in custom to have full and free access to it according to custom. Given the importance of land in custom it is extremely difficult to see how the interference could be compensated for by damages.

12. It is said that Axiom would suffer financially if an injunction were granted. The same could be said for ... [Sumitomo]. There is no doubt that both will suffer financially as a result of this case. However, it is not just a question of weighing up the comparative financial worth of Axiom and ... [Sumitomo] and deciding where the balance of convenience lies. The proper approach is to look at the "wrong" the injunction is sought to prevent. On that basis the balance of convenience is in favour of ... [Sumitomo and the 2nd to 7th Claimants]. In any event, an undertaking as to damages has been given by ... Sumitomo and if it is unsuccessful in this matter and Axiom do suffer financial loss then it will recover those losses."

28. Mr King invited the Court to take a different course. He submitted that, even if Sumitomo has established serious issues to be tried under one or both heads, there are factors tilting the balance of convenience against the grant of interim relief to Sumitomo, namely:

1) Sumitomo does not need the protection of an interim injunction since there is no evidence before the Court that it has suffered, or would suffer, any damage if Axiom, pursuant to the licence issued to it, prospected on part of the Sumitomo tendered land until the outcome of the trial; on the contrary, he suggested that if Axiom's prospecting activities proved to be fruitful, Sumitomo could benefit from them if it wins at trial;

2) If the interim relief stands, it would simply increase Axiom's costs with no overall benefit to either party, since Axiom had already incurred expenses, such as the hiring of expensive expert labour, the purchase of machinery and finance costs, all in the legitimate expectation that that it had a valid prospecting licence and lease of the land – the effect would be to sterilize the land from its primary developable purpose;

3) the balance of convenience favours the preservation of the *status quo*, in particular having regard to whether damages would be an adequate remedy to Axiom pending trial in the event of it succeeding at trial, since Axiom would lose the use of the land which it holds as lessee and within the area of its prospecting licence; and

4) If Axiom succeeds at trial, the 2nd to 7th landholding Claimants, whose interest in the land is merely "cosmetic" and "parasitic", are doubtful supporters of Sumitomo's claim; their interests do not, in any event, entitle them to thwart Axiom's exercise of its mining rights.

29. Mr Sullivan's response was that the balance of convenience favours continuation of the grant of an interim injunction for the following principal reasons:

1) As Chetwynd J. acknowledged in paragraph 12 of his Decision, the two criteria of the existence of serious triable issues and balance of convenience overlap in that the former has input to the latter, and Sumitomo's case is strong on both the mining and land issues;

2) Sumitomo has given an undertaking to Axiom in damages, which it has subsequently extended to cover the applications of customary landholder Claimants, the 2nd to 7th Claimants;

3) Although Axiom has made some preparations to start prospecting activities; it has not actually started them, and to permit it to make a start now and continue with them pending the outcome of the litigation, would irrevocably affect the land and the environment and would interfere with the customary landholder Claimants' rights;

4) the balance of convenience, therefore, favours the maintenance of the *status quo*, under which neither Sumitomo nor Axiom can prospect for minerals on the Sumitomo tendered land until final resolution of this dispute or further governmental order, especially important where, as here, the land in question is, or is likely to be declared, customary land – a special factor of the type allowed for by Lord Diplock in *American Cyanamid*; and

5) payment of damages by Axiom to Sumitomo in the event of failure of Axiom's defence would be an inadequate remedy to both Sumitomo and 2nd to 7th Claimants, given the deprivation of Sumitomo of the opportunity to exploit its investment in the meantime, the difficulty of quantifying the resultant loss of investment opportunity and possibly irretrievably damaging interference with the rights of the 2nd to 7th Claimants, as landholding Claimants.

30 In the Court's view, the submissions of Mr Sullivan, which are of a piece with Chetwynd J's reasoning, are to be preferred to those of Mr King. There is an overwhelming case for the grant and maintenance of the interim relief granted by the Judge. As indicated in the pleadings, filed evidence and submissions summarised in this judgment, Sumitomo's claim clearly raises serious mining and land triable issues. The balance of convenience, regardless of the input from the presence of those issues, is at best neutral to Axiom's case for setting aside the interim relief and at worst against it.

31 Accordingly, the Court dismisses Axiom's appeal. In doing so we deprecate the manner in which the whole issue was put before the Court, with voluminous documentation, prolix and highly repetitive submissions, each descending in into a maze of legal and factual minutiae more appropriate, if at all, to conduct of the case at trial. The costs to the parties and the public are a sad reflection on the legal process. If this litigation is to continue, the Court repeats its suggestion made on the oral hearing of the appeal that the parties should attempt to agree a short list of preliminary and determinative issues for consideration and disposal of the matter at trial.

32. The Court will consider written or oral submissions as to costs at the convenience of the parties and, in the event of oral submissions, also of the Court.

Auld, P

Robi E. Auld

Ward JA

*GJ Withers, Registrar
on behalf of Ward JA.*

Mwanesalua J

F. Mwanesalua
