



# Down by the river\* —

As one of the participants in an ongoing and dramatic litigation process, John Gordon outlines the history of the claims against BHP for the devastating social and environmental impact of its OK Tedi Gold and Copper mining operation.

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**D** *agi & Ors v BHP & Anor*, September 19 1995, Supreme Court of Victoria (unreported); Cummins J presiding for judgment:

“Twenty years and 3 days ago the State of Papua New Guinea achieved its independence. On the evening of 15

September 1975, the flag of Australia was lowered in Port Moresby. The next morning the flag of Papua New Guinea was there raised. Its independent raising signified that the independent authority and validity of the new state derived from its own people, not as a mere transfer of power from another



# the OK Tedi litigation

Thick sediment from tailing built up on the banks of the OK Tedi destroying the sago plantation and tropical forest. Sago was one of the primary sources of protein for the OK Tedi Villagers. The other was fish. Neither is now available.

nation. Papua New Guinea is an independent state. It deserves and receives full comity from this court. This judgment proceeds upon that explicit premise. This judgment is not directed to an independent state. It is directed to a party before this court, the first defendant, Broken Hill Proprietary Company

Limited, in its capacity as a litigant before this court.

The plaintiffs before this court alleged that the first defendant, BHP, in contempt of the integrity of this court's process, has sought to deny the plaintiffs access to this court. The allegation is most serious. The plaintiffs in three of the

four substantive proceedings before this court are owners and occupiers of land adjacent to the OK Tedi river between Tabubil and the D'Albertis junction in Papua New Guinea near its western border. The fourth is a commercial fisherman operating on the Fly River downstream from the D'Albertis junction. ►



At Bige Village, on the OK Tedi, a village elder explains to Slater and Gordon lawyer, John Gordon, how he has had to move his vegetable garden one kilometre back from the river Rex Dagi. One of the plaintiffs in the Supreme Court of Victoria listens in.

The substantive proceedings respectively are brought by Rex Dagi in a representative capacity on behalf of himself and twenty-seven other persons, all members of the Miripki clan, commenced on 5 May 1994; by Barry John Shackles and Daru Fish Supplies Pty Ltd; commenced on 17 May 1994; by Baat Ambetu and twenty-three other persons, all members of the Yelan Marapka clan, and commenced on 11 July 1994; and by Alex Maun and twenty-nine other persons, all members of the Marapka clan, commenced also on 11 July 1994. The plaintiffs claim that their lives and occupations have been grievously injured by devastating pollution from the OK Tedi Copper Mine at Mount Fubilan.

The second defendant OK Tedi Mining Limited, in 1981 commenced construction of the mine and has since 1984 conducted the mine. The first defendant, BHP, has since 1987 been the manager of the mine. The defendants deny the allegations of the plaintiffs and also say they had acted at all times lawfully. The first defendant is incorporated in Victoria and is capable of being sued in Victoria. The second defendant, a subsidiary of the first defendant is incorporated in Papua New Guinea and is capable of being sued in Victoria...

...On the basis of the above findings I am satisfied beyond reasonable

doubt that the first Defendant (BHP) has sought to block the actions of these plaintiffs presently before this court....I'm satisfied that the actions of the first defendant, which I have found beyond reasonable doubt, constitute a clear contempt of this court. I am satisfied that the application by the plaintiffs for a finding of contempt is competent in law. I am satisfied that on the evidence it has been made out ... I have reserved to counsel the right to make submissions in the event that I find, as I have found, a contempt, as to what punishment ought to be imposed."

BHP, then, and now, Australia's biggest company had just been found in contempt of the Supreme Court of Victoria on the motion of some subsistence landowners living in one of the most remote and, until recently, untouched parts of the world. This was one of the defining moments in this extraordinary case.

Three weeks later, armed with a valid business entry visa, I was "detained" at Port Moresby Airport on my way to get instructions in PNG. Despite the issue of a writ of Habeas Corpus, by the PNG National Court, an official, assuming the statutory power which could only be exercised by the Minister by written and reviewable notice, wrote "cancelled" across the Visa, refused to allow me to contact anyone, and six hours later, stuck me

on the first flight out of PNG – to, as it happened, Cairns.

This fight had just got very dirty.

In the Victorian Court of Appeal, BHP had the contempt conviction set aside on the grounds that the recently promulgated *Public Prosecution Act* in Victoria prohibited ordinary litigants from agitating contempt cases [*BHP & Anor v Dagi & Ors* (1996) 2 VR 117], but no appeal was ever brought against the merits of the conviction. I, however, never got to go back to PNG.

### The Claim

The cause of all of this was an environmental damages claim initiated by PNG landowners in the Supreme Court of Victoria in 1994. The claim was ultimately pursued in Australia (1000 further Writs having been lodged in the National Court in PNG) on the basis of negligence causing loss of amenity, and public nuisance. The actions charged that BHP, in operating the OK Tedi gold and copper mine since 1984, had dumped tailings and waste rock, cyanide and heavy metals into the OK Tedi and Fly Rivers, a river system which, by volume of discharge, was the third biggest in the world and which provided sustenance and subsistence for some thirty thousand people living in villages along its one thousand kilometre course from the Star Mountains to the Gulf of Papua and Torres Strait. By 1994, 100,000 tonnes of tailings, including 300 tonnes of toxic copper per day, were being dumped from the mine straight into the rivers.

The answer, the plaintiffs contended, was to discharge the tailings into a tailings dam. Such a dam had been a non-negotiable requirement for the operation of the mine, prior to its commencement. However after construction difficulties and the closing of the mine in 1989 due to the insurrection on Bougainville, an ultimatum was issued by BHP that any requirement to build a tailings dam would see the OK Tedi mine close as well. This led to the mine operating with riverine tailings discharge and consequent destruction of the OK Tedi and surrounding land and, as such, the lives of the villagers who depended upon it.

For years the landowners' pleas and requests for prevention of further damage and compensation went unheeded by BHP, who even ignored condemnation from international tribunals and environmental groups, the Australian Conservation Foundation and the Australian Prime Minister, until it was dragged into court in Melbourne. Even then, they viewed the issue not as a serious environmental and social issue, but as a PR problem that would quickly go away with a bit of litigation pressure, a few threats about costs and contempt, and another cosy deal with the PNG Government.

### The Defence

In the litigation, as in their response to the ACF et al., BHP's primary defence on the merits was that at all times they had complied with the requirements of the PNG Government. The PNG Government, however, was a 20% (now 30%) shareholder in the mine, and the principal beneficiary of the taxes, export income and dividends that flowed from the operation of the mine. The entire OK Tedi/Fly River area returned three of seventy MP's to the National Parliament, and the area and its growing problem was barely noticed in Port Moresby.

Secondly, claimed BHP, the river was fine and if not getting better, at least not getting worse. So if everyone, particularly those interfering Slater & Gordon lawyers, would mind butting out they would get along perfectly well.

### The fight

BHP underestimated the determination of the landowners and their lawyers to see this issue through. Somewhat missing the point, BHP dismissed the environmental issues and the 30 000 people agitating them and focused its attacks on Slater & Gordon, first (unsuccessfully) alleging contempt of court for some radio interviews about the litigation, then publicly and in court, attacking the fee agreements we had entered into (after a long and detailed protocol) with the PNG villagers.

Justice Byrne took a different view of the fee agreement;

"The defendants...[contended] that



**This is of great  
significance to  
subsistence  
people around  
the world  
adversely  
affected by  
development.**

Slater & Gordon, the solicitors for the plaintiffs, are in fact standing behind their clients in the sense that they are funding the proceedings. I was referred to the Fee & Retainer Agreement entered into between the plaintiffs and their solicitors. ... It was put that under these agreements, the solicitors stood to recover, in addition to their costs taxed on the scale fixed by the PNG National Court, a further sum which they, the solicitors, might determine, up to some 29 million kina, a sum which at the current exchange rate represents approximately US\$30m. It was therefore said that the proceedings before this court were brought for the benefit of the solicitors and that there was no evidence that they, the solicitors, could not raise the appropriate security...

In my opinion it is not correct to say that the solicitors are the persons for whose benefit the litigation has been brought. In any litigation the solicitors acting for a plaintiff stand to benefit from its prosecution. This is no less true in the case where the fee agreement is such that the solicitors are entitled to be paid only in the event of success. It cannot be suggested in the former case that the solicitors stand to benefit from the litigation in the sense that a shareholder in a corporate plaintiff does. Solicitors who undertake to act for an impecunious client at risk to themselves are in principle in no different position. Indeed, it has been said that by so acting they are performing a commendable public service, consistent with the best traditions of the legal profession: *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 203-4. The fact that, on one interpretation of the Fee Agreement, it may be possible for a rapacious solicitor

to recoup a substantial and unearned benefit does not in my view require me to conclude that such a result will be or is likely to occur in this case. I decline to draw any such conclusion. I believe that I should, in the absence of any evidence to the contrary, assume that Slater & Gordon will conduct themselves in this litigation in accordance with the highest traditions of the profession in this State and in PNG." [*Shackles & Ors v Broken Hill Proprietary Company Limited & Anor* (1996) 2 VR 427 at 429-30].

Other attempts to knock out the claim on jurisdictional grounds also failed. For various reported judgments, see;

*Dagi & Ors v BHP Limited & Anor* [1996] 2 VR 567;

*Dagi v BHP (No.2)* [1997] 1 VR 428;

*Dagi v A-G (Victoria)* [1997] 70 ALJR 305

See also the discussion in the *Australian Law Journal* comprised by three articles: Lee (1997) 71 ALJ 602-618; Solomon (1998) 72 ALJ 231-239; Davis (1998) 72 ALJ 786-789.

### The word-processing code

Then, with the cases obviously not going away and amid clear evidence of growing support for the litigation along the rivers, BHP entered into an agreement with the PNG government and drafted legislation to criminalise the legal proceedings and those bringing or supporting them. A copy of the draft legislation had been leaked to us and we were astonished to see the word-processing code of BHP's lawyers, Allens, Arthur Robinson, at the bottom of the draft. It was this that ultimately led BHP to being found in contempt of court, which brought international con-

demnation and national opprobrium upon them. At BHP's annual general meeting on 26 September 1995, angry shareholders demanded answers about the OK Tedi problem and one of the plaintiffs, visiting from PNG, dumped a dead fish at the feet of BHP chairperson Brian Loton.

In PNG, BHP offered the villagers an \$80 million package, the first realistic compensation they had ventured in 11 years, but it was conditional on ending the legal actions, and the money was reduced dollar for dollar for every dollar that BHP would be required to spend in tailings mitigation or containment, or in the payment of damages. The landowners "opted out" of the compensation package, electing to pursue their claims in court.

#### The settlement

With constitutional challenges issued to new PNG legislation criminalising the legal proceedings, and facing a fresh set of contempt claims and civil damages actions (later withdrawn) over an alleged attempt to engineer a settlement directly with the lead plaintiffs in PNG, BHP finally came to the settlement table and a settlement agreement was struck in June 1996. The key elements of the settlement were:

- \$110 million compensation (non reducible) for all affected people;
- \$40 million for the worst affected villages around the OK Tedi;
- A commitment to a process aimed at reducing the environmental impact of the mine through an economically and technically feasible tailings mitigation scheme;
- Ongoing payments for garden damage;
- A further 10% of equity purchased by the PNG government to be applied for the benefit of the Western Province;
- Payment of Slater & Gordon's legal costs and disbursements incurred over the 5 years acting for the landowners.

#### The legacy

Other than the matters agreed in the settlement, I believe the four most important matters to result from this

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part of the litigation were;

1. Recognition of the rights of an economically and legally disenfranchised group of subsistence villagers, providing them with some economic werewithal, and recognition of, and hopefully improvement in, their environmental circumstances;
2. Recognition that people from subsistence lifestyles have standing in our courts, which have traditionally viewed standing only on the basis of monetary losses, to pursue damages for the loss of those lifestyles. This is of great significance to subsistence people around the world adversely affected by development.



3. By their own account, recognition by the mining industry of the need to apply the environmental standards of the company's domicile to overseas operations regardless of the environmental standards which may be acceptable to the host nation. This recognition derives, in part at least, from a recognition as a result of this litigation that Australian companies may be held to account for their international operations in the courts of their own country;
4. That the common law as an agent to redress wrong and bring about beneficial change, and independent courts to dispense justice according to law, regardless of the size and influence of parties before it, are

two of the most powerful and honourable institutions we possess. In particular, their utility should not be underestimated in the quest to redress environmental wrongs and social injustices.

### OK Tedi II

It had been, perhaps, too optimistic to think that the OK Tedi issue would conclude with the 1996 settlement. With a lot of hard work from Nic Styant-Browne of Slater & Gordon and goodwill from BHP and the PNG Government, the arrangements for distribution of the forty million dollars for the OK Tedi people was hammered out by the people in Papua New Guinea. The \$110 million began flowing and on the environmental front, BHP came up with a promising alternative to the tailings dam - a pipeline to transport the tailings to storage cells created by dredging sediment from the OK Tedi on the flat land at the base of the mountains.

But something happened and BHP didn't build it. There was certainly no objection from the government, but BHP began saying that they didn't think there would be any environmental benefit in removing the tailings from the river for the next ten years of mining.

### The amazing discovery

Then in August 1999: a bombshell. After years of people telling them that the dumping of tailings in the river would destroy the OK Tedi and Fly Rivers irreparably, BHP finally admitted that this might be true and that their own studies were showing that the impacts on the river were much worse than they (alone!) had anticipated.

As a result of this revelation, BHP contended the only thing they could responsibly do (seemingly ignoring the tailings pipeline option) was to close the mine, unless of course the people of PNG want to keep it open, tailings problem and all.

Clearly BHP wanted out of OK Tedi and wanted out without having to pay another cent in tailings mitigation, let alone the \$170 million or so it would take to build a pipeline. So it was a neat strategy to shift the onus

onto the PNG people, rather than on the company that had caused and created this unholy mess.

But there was one thing that was stopping them. The 1996 settlement agreement, and its provision that rendered any dispute over its terms justiciable only in the Supreme Court of Victoria, and pursuant to the laws of that state.

So, once again, the people of the OK Tedi and Fly Rivers came to Slater & Gordon and said "enforce the commitment to tailings mitigation- don't let this Australian company take its money and walk away from this mess they have created". Thus, on April 12, two writs were issued in the Supreme Court of Victoria against BHP and OTML, seeking to enforce the terms of the 1996 settlement with regard to tailings mitigation and for compensation for the delay in it being implemented. One of the actions, *Gagarimabu & Ors v BHP and OTML* (No. 5003 of 2000) is one of the first actions issued under the new representative proceedings rules of the Supreme Court of Victoria, which came into effect in January this year and recently survived a challenge in the Court of Appeal as to their validity in the Mobil Avgas litigation. Gabia Gagarimabu is the member of the PNG National Parliament for the South Fly and brings the claim on behalf of all of the clans who were parties to the 1996 settlement.

At the time of writing, it looks like the first of the actions - *Dagi v BHP & OTML* (No. 5002 of 2000) is likely to get to trial later this year. Once again BHP will be answerable in their own town for their actions and decisions. Whether they ultimately justify them, or cannot, it will be a fascinating hearing and hopefully an end to a dramatic and important piece of litigation.

On 28 July BHP announced a profit for the previous 12 months of \$2 billion. **PL**

### Note:

- \* Down By The River, Albert Hammond, 1972; A Silver fish lay on its side/Washed up by the morning tide/I wonder how it died/Down by the river.