Mr. Justice Laine

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IN THE SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA

CORAM: PRENTICE, J.

Friday,

17th December, 1971.

THE ADMINISTRATION OF THE TERRITORY OF PAPUA AND NEW GUINEA

Appellant

- and -

EDWARD IORIVE on behalf of the ASIRI, IAROGAHA, KONERI, NAUMANEHA, OGONI GUBINI, VARAGADI and VARU Native Groups

- and -

THE DIRECTOR OF DISTRICT ADMINISTRATION

Respondents

Ex parte SABUSA SAWMILLING CO. PTY. LTD.

Applicant

JUDGMENT

1971

Dec 14 and 17

PORT MORESBY

Prentice, J.

An application has been made on notice herein by Sabusa Sawmilling Co. Pty. Ltd., that it be added as a respondent to this appeal - an appeal which was initiated on 20th February, 1967 but has lain dormant since. The Company considers itself prejudiced by the failure of the appellant (the Administration) to bring on the appeal; its intention, if added as a respondent, is to move to have the appeal dismissed for want of prosecution.

The applicant may be said to have chalked up a "first", in that it has produced a united opposition from the Crown Solicitor and the Public Solicitor representing the appellant and the respondents respectively. Both wish to retain the harmony of mutual dormancy, pending a possible settlement of claims.

The land the subject of the Land Titles Commission's decision appealed from (a decision given in November, 1966) had also been the subject of a timber permit granted by the appellant in 1960. By successive transfers the applicant had become the holder of this permit when on 5th December, 1966 a transfer to it dated 1st October, 1966 was approved by the Administrator. The applicant was on 1st

October, 1966, unaware of the Land Titles Commission proceedings; and on 5th December, 1966 was unaware that a decision adverse to the grantor of the permit had been given. The Company operated the permit and expended monies on the setting up of plant, roads and a bridge. Since the Commission's decision in 1966 the applicant's operations have been harassed and stopped on many occasions by local residents, who may or may not be the native respondents or their agents.

The timber permit expired on 10th November, 1970. Clause 15 of the original permit provided that the holder might remove his plant and effects from the subject land within six months of the termination of the permit. The applicant has not availed itself of this right. It is clear from Sec. 15(3) of the Forestry (Papua) Ordinance 1936-1962 that the applicant could negotiate for, but would have no right to, a renewal of the permit should the appellant succeed in its appeal. A perusal of the Ordinance and Regulations would seem to make it clear that it could not negotiate direct with possible native owners in respect of the timber rights it seeks.

The application to be joined as a respondent can be made, it seems, only under Order III, r. 11 of the Rules of Court. Mr. Kearns suggested that recourse might be had to O. LXX, r. 3; but this rule, providing for the giving of notice to persons not parties to appeals to the Full Court, seems to me inapplicable to the instant situation. Nor indeed is O. III, r. 11 really apt, intended as it obviously is, to prevent the failure of <u>actions</u> on procedural grounds only of non-joinder and misjoinder. However, I conceive that this latter rule must be held to govern this case, it being the only possible available rule, and Rule 2(2) of the Supreme Court Appeal (Land Titles Commission) Rules enunciating that such rules (i.e. the Rules of Court) shall apply so far as applicable.

The applicant asserts it has an interest, a legal interest, in the subject matter of the dispute (the appeal being brought to this Court). Its interest is in knowing which party or parties it is to sue. Should the Administration prove to have been the owner of the land, then the applicant will seek to sue the natives in trespass. Should the natives prove to have been the owners, then it will seek to pin the Administration with liability for breach of warranty of title and breach of contract generally.

Whatever the position may have been prior to 10th November, 1970, it seems clear that the applicant cannot now assert an interest in the land. The land, its ownership and the possible customary rights thereto, are the subject matter of the decision under appeal. The applicant has an interest in there being a decision, an outcome of the dispute (or appeal) - but no more.

Can it be said that the applicant "ought to have been joined" in this appeal, or that its "presence may be necessary in order to enable the Court effectually and completely to adjudicate and settle all the questions involved in the cause or matter" (O. III, r. 11)?

I note that the often cited decision of Devlin, J. (as he then was) in Amon v. Raphael Tuck & Sons Ltd. (1) appears to have been disapproved by Lord Denning, M.R. and Sachs, L.J. in In re Vandervell's Trusts (2). The Court of Appeal indicates therein that the corresponding English rule should in future not be given a narrow interpretation. It is announced that "this Court will give the rule a wide interpretation so as to enable any party to be joined whenever it is just and convenient to do so." That was a case in which plaintiffs sought to add the Inland Revenue Commissioners as second defendants to an action against trustees. The Commissioners consented, and the subject matter of the action could clearly have been the subject of a second claim as between the plaintiffs and the Commissioners. The same issues arose between the plaintiffs and the defendants, and the plaintiffs and the Commissioners, viz. who were entitled to certain dividends. With respect, this decision would seem to have the effect of rewriting the R.S.C. Order XVI, r. 11 (or rather O. XV, r. 6(2) as it now is), without amending it, but no doubt the Court of Appeal's reasons for judgment must be read in the light of the features I have above enumerated, namely that the subject matter was common to two different claims between two different sets of persons.

I will assume however for the purpose of this application, without deciding, that the proper method of interpreting whether a new party "ought to have been joined" and/or "whether its presence may be necessary in order to enable the Court effectually and completely to adjudicate and settle all questions involved in the cause or matter";

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(1) (1956) 1 Q.B. 357
(2) (1969) 3 W.L.R. 458 at pp. 463, 465

is for the Court to ask itself "is it just and convenient" to add the new party. I must say I find myself impelled by considerations neither of justice nor convenience to make such an addition. The matters which the applicant would seek to litigate ultimately (arising from contract or tort), which constitute its legal interest, cannot be ventilated or decided in this appeal, which is concerned with title to land and customary rights only.

One can imagine many people or bodies, which would have a commercial or administrative interest in the settlement or conclusion of a land dispute; the Police Commissioner because of law and order problems, the Electricity Commission because it might wish to run a power line, the Education Department because it might intend to seek permission to build a school, adjoining owners who wish for quietude or any number of Government Departments who wish to go about their business. But surely it would be intolerable for the Court to allow an intrusion of such parties into a dispute between two parties only (in effect) to ownership of a parcel of land; under colour be it noted of a rule clearly intended merely to prevent procedural failures comparable to those achieved by pleas in abatement.

I am of the opinion that the applicant may have an interest in seeing that there is an end to this litigation, but that it has no interest in the subject matter of the dispute such as would support this application. I am satisfied that it cannot either bring itself within the purview of O. III, r. 11 as it was hitherto interpreted; or support an argument that justice and convenience, if such be the proper test now, requires its addition as a party, even for the purposes of its limited intention.

I would with respect adopt my brother Raine's remarks at p. 5 of his judgment in Kurambangbangut (3), as to the exercise of any discretion which might repose in the Court under the wider interpretation suggested by the Court of Appeal as necessary in In re Vandervell's Trusts (4) (supra), and content myself with saying that the facts of this case would not warrant the exercise of such a discretion, indicating as they do, that real negotiations for settlement between the parties to the appeal are under way, at least at this point of time.

I dismiss the application and order the applicant to pay the costs of the respondents of this motion.

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(3) Unreported judgment No. 655 of 25/11/1971
(4) (1969) 3 W.L.R. 458 at pp. 463, 465