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

App. No. 19 of 1970 (N.G.)

CORAM: PRENTICE, J.
Thursday,
27th May, 1971.

BETWEEN: SECRETARY, DEPARTMENT OF THE ADMINISTRATOR, DIVISION OF DISTRICT ADMINISTRATION

and

TOVARAIT TOGUNAY of TAUI No. 1 on behalf of VUNAKUEAIK Vunatarai

Appellants

AND: THE ADMINISTRATION OF THE TERRITORY OF PAPUA AND NEW GUINEA

Respondent

Re Mokurapau Extended North

1971

Mar 15, 16 and 17.

RABAUL

May 27.

PORT MORESBY

Prentice, J.

The appeal is carried herein to the Supreme Court from a decision of the Land Titles Commission, constituted by Messrs. Acting Chief Commissioner O'Shea and Senior Commissioners Reid and Orken. Due obviously to the necessities created by retirements and repostings, the hearing had taken an unusual course. Initially the claim, one for restoration of a title under the New Guinea Land Titles Restoration Ordinance 1951-1966, was brought before the then Chief Commissioner, Mr. Kelliher, who adjourned the matter on 29th April, 1968 and 1st May, 1968, and took oral and documentary evidence on 4th June, 1968. Mr. Kelliher's positively final appearance in the starring role occurred on 7th August, 1968 when he further adjourned the matter. On 11th February, 1969 the claim became projected on a wider screen when Sir Colman O'Loghlen and Messrs. Senior Commissioners Reid and Orken took over the judicial role, and further oral and documentary evidence was received. On 29th July, 1969 and two subsequent dates when further evidence was tendered, Messrs. Senior Commissioners Reid and Orken remained in the cast, but Mr. Acting Chief Commissioner O'Shea then took centre spot. The two latter "tribunals" were referred to by counsel throughout this appeal, "irreverently" but conveniently, as the "No. 1" and "No. 2 Troika". Miss Campbell, who appeared for the appellants before me, was a member of the original cast in the Kelliher production. In this appeal she was careful not to use the adjective

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gilbertian; but in effect submitted, with due respect, that the array of judicial officers appearing on the Mokurapau stage had been "rather too much of a good thing." I am indebted to her for her clarity of exposition. Her arguments were manifold, and, as ever, presented competently and forcefully. I endeavour to list them: -

A. That the Land Titles Commission exceeded its jurisdiction is shown in that -

(1) the provisional order dated 22nd August, 1967 does not define boundaries and is therefore contrary to Sec. 17 of the Restoration Ordinance;

(2) the Commission "failed to investigate" - Sec. 42 requires it to do so;

(3) it denied the appellants natural justice;

(4) it "failed to investigate" properly, matters in the statutory declaration of O.M. Rondahl;

(5) it considered evidence not properly before it.

B. That the Land Titles Commission conducted its hearing in a manner contrary to natural justice:

(1) for the reasons supporting A(3);

(2) in that the Commission allowed the report of P.J. Walshe to be given in evidence - which report was a privileged document;

(3) in that it failed to investigate, as laid in (1) above.

C. That the Land Titles Commission erred in law in that:

(1) there was no or insufficient evidence to base its decision;

(2) that it based its decision on matters not (properly) before it.

D. That the Land Titles Commission's decision was against the weight of evidence:

A(5) and C(2) were again urged hereunder and it is said that the exhibits tendered and evidence given before the Commission as previously constituted was neither re-tendered nor re-sworn before the "No. 2 Troika" (the tribunal as ultimately constituted).

I propose to deal seriatim with the grounds.

Excess of Jurisdiction

A(1) Inadequate description of land.

It is true that on the plan accompanying the provisional order no area is shown; no adjoining areas, no natural features or name of the road are shown. However, boundaries, a road, distances and compass bearings are shown, sufficient in my opinion to identify the land for purposes of the provisional order. (The Land Titles Commission in its final order may re-define the boundaries as set in a provisional order.) Clearly the application was made in respect of Portion 94 as shown on the Kokopo milinch (see Exhibit "I"), and the provisional order made in respect of that land. To my mind compliance with Sec. 17 of the New Guinea Land Titles Restoration Ordinance does appear in the form of the provisional order. The appellants' stand upon this point appears to have been raised for the first time before me. I would entertain grave doubts as to whether it may in these circumstances, be so taken.

A(2) Failure to investigate the native claims.

Miss Campbell urged that the Commission itself should have taken other steps to investigate the native claims - that it failed to carry out this statutory duty. Apparently the various members constituting the Commission found themselves troubled by the form in which the native claims were being variously presented from time to time. Counsel herself expressed some doubts as to the extent of the claims. However, a number of adjournments were allowed, a surveyor was recalled, and the native claimant gave evidence a second time. For reasons I have advanced in the Toriu appeals (1) and elsewhere, I consider the Commission in a suitable case may be entitled to rely on the presentation of claims by competent counsel on claimants' behalf, without being obliged itself to go behind counsel's efforts and further enquire itself - though there may well be instances where prudence might suggest that further enquiry be insisted on. I do not consider that any "failure to investigate" has been shown in this case.

A(4) Failure to investigate Rondahl's statutory declaration.

The appellants say that Rondahl should have been called from South Australia and examined, though the appellants' counsel did not ask for that at the time, nor did he (Miss Campbell was not appearing at this stage of the hearing) object to the reception of the statutory declaration. Rondahl was not

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(1) Unreported judgment No. 610

identified, it is said, and his sources of information are not shown. I am of the opinion that the Commission was quite entitled to admit the declaration under Sec. 29(2) of its constituent Ordinance, and may have had a duty to consider its contents, under Sec. 29(1). The matters urged against the reception of the declaration appear to me more properly to be directed towards its weight as evidence. I do not consider that there has been a "failure to investigate" on this score; and I would regard the criticism of the reception of the declaration as evidence, as not open to the appellants before me for the first time (David Syme & Co. v. Swinburne (2); and Heppingstone v. The Commissioner of Railways (3).

A(3), B(2) and (3) The appellants were denied natural justice.

In addition to relying under this head on the "failure to investigate" with which I have dealt above, the appellants rely on the reception of the Sec. 36 Certificate and the report and evidence of P.J. Walshe as amounting to a denial of natural justice.

Mr. Walshe as an Administration officer was directed by his superior to make the required statutory investigation following on the issue of the provisional order of 6th July, 1961 respecting an earlier claim for the restoration of a leasehold of the subject land. This was done and Mr. Walshe's report was compiled in September, 1961, upon which Mr. McCarthy, the then Director of Native Affairs, certified that no native claims were being made in respect of the land the subject of that provisional order. It is argued that in making such an investigation report and certification, Mr. Walshe and the Director were acting as non-professional agents of the natives (presumably all the natives of the area); and that where an objection is now taken on behalf of certain natives, the report and certification must be regarded as privileged and ruled inadmissible. (The privilege, Miss Campbell made clear, was submitted to be that of the natives, not of the Director.) I am of the opinion that it cannot be said that Mr. Walshe and the Director were acting as the agents of any particular natives nor that litigation involving any particular native was then existing or contemplated. The certificate and report did not come into existence for purposes of litigation - none was then contemplated. No relationship of lawyer and client was then in existence, the report was not made "merely to be laid before a solicitor" (Bartram & Son v. E.A. Clark & Son Pty. Ltd. (4)).

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(2) 10 C.L.R. 43
(3) 1901 W.A.L.R. 63
(4) 1905 V.L.R. 443

Indeed the officers were merely carrying out their statutory duties, and I consider no privilege attaches to the document. Mr. Walshe's oral evidence was made the subject of a similar objection. Some portions of it related to a visit made to the land in February, 1969 in the company of Miss Campbell, apparently in the attempt to clarify certain aspects of the natives' then claims. These portions were elicited by counsel for the appellants. I am of the opinion that Mr. Walshe's oral evidence as to his earlier investigations and knowledge was admissible for the reasons I have given in relation to the certificate and his original report. It is to be noted that the question of privilege was raised by appellants' counsel, not by the witness himself (cf. R. v. Davies (5)). Apparently it was raised on behalf of the natives and not on behalf of the other appellant, the Director.

I propose next to deal with the ground I have numbered C(2) above:

Evidence not properly before the Commission.

It was contended that the following evidence was not properly before the "No. 2 Troika" (the Commission as finally constituted):

(1) the evidence of Tovarait given before Chief Commissioner Kelliher;

(2) any of the gazettes (except a certain rent list gazette which does not seem to be now with the file);

(3) statutory declaration of Theo. Bredmeyer;

(4) the Sec. 36 Certificate;

(5) the report of Walshe;

(6) the evidence of Walshe (for reasons already dealt with);

(7) the evidence of McLellan.

This is urged on the basis that the evidence was given before a differently constituted Commission and was not re-sworn. The actual transcript of the proceedings of 11th February, 1969 (before the "No. 1 Troika") appeared to have been lost and the only record available was in the form of counsel's notes. These should not have been admitted, it is now said. It was pointed out, however, by Mr. Ross that the said notes were those of Miss Campbell herself, and that at the proceeding in July, 1969 they were admitted as the record, with the concurrence of the Commission and the consent of Mr. Garnsworthy, then appearing for the appellants. And indeed in these notes themselves, there appears

(5) 1921 S.R. N.S.W. 311

an undertaking by Miss Campbell that "at any future hearing no objection will be made to the exhibits already tendered." These notes appear to be very well taken, if I may so comment.

Counsel for the respondent argues that there has in effect been one hearing by the Commission, differently constituted as it was at different times by the then Chief Commissioner sitting alone, and the two subsequent "troika". What was done was done under the rules allowing Commissioners, it is said, to make arrangements among themselves for the transfer of the hearing of applications. I think it is unnecessary for me to consider the extent to which such arrangements may be carried, for I am satisfied that the whole of the material taken before the tribunal as earlier constituted was properly before the Commission as ultimately constituted by Mr. Chief Commissioner O'Shea and Messrs. Reid and Orken. The Commission must act judicially, but it is clear that it does not have to follow court procedures. It has power to make preliminary enquiries and investigations (Sec. 15(1), and a record of such must be kept (Sec. 28A(2)). Under the Restoration Ordinance specific provision is made for a Chief Commissioner to accept without rehearing, evidence taken before another Commissioner relating to boundaries of land the subject of a claim or to native customary rights in respect of it (Sec. 50).

Now it is to be noted that all parties were at all stages of the taking of evidence represented by counsel. No objection appears in the record, to the tribunal as finally constituted treating as evidence before it that taken on the earlier occasion by Chief Commissioner Kelliher and the "No. 1 Troika". It was open to all parties to recall witnesses and indeed two were recalled, Tovarait and McLellan. If the reception of the evidence given before the earlier tribunals without being re-sworn or certified in some way, was an irregularity, then I think the parties must be taken to have acquiesced in or waived the irregularity (Brennan v. Brennan (6)) and a party cannot now complain of it.

The documents which were originally tendered before Chief Commissioner Kelliher were marked as exhibits before the O'Loghlen "tribunal" and retained these exhibit markings before the O'Shea "tribunal". They were authenticated by Sir Colman's signature. Miss Campbell, present counsel for the appellants, appeared before Chief Commissioner Kelliher and the O'Loghlen tribunal. It is her notes which apparently became accepted as the record of the proceedings before the latter tribunal of 11th February, 1969. Contained therein is the undertaking to

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(6) 89 C.L.R. 129 at p. 137

make no objection, above referred to. The course of cross-examination before the O'Loghlen tribunal (11th February, 1969) related to the evidence of Tovarait of 4th June, 1968 regarding the moving of pegs. I infer that Sir Colman regarded this earlier transcript as being in evidence before him and his brothers, and that counsel consented to this course. There are many references in the hearing of 29th July, 1969 to the last hearing indicating the O'Shea tribunal was familiar with the course and conduct of the earlier proceedings. References are made to Miss Campbell's remarks, contents of documents exhibited therein, the statement as to the area of dispute. Numerous references are made to the evidence of February, 1969 and I infer that it was assumed, with the consent of counsel, to be before the O'Shea tribunal for consideration. The further examination of Tovarait in July, 1969 indicates reference was being made to his evidence given in February, 1969 and indicates the latter was being treated as being before the O'Shea tribunal. At page 35 of the O'Shea tribunal's transcript of evidence, the Acting Chief Commissioner said: "At this juncture, taking into account that there has been a good deal of evidence adduced today and that the evidence involves a great deal of cross-examination and re-examination in what was said earlier today and what was said in February and what was said in June last year, I think it would be best, before any addresses are made, that the full record of what the decision is to be based upon is available to both counsel and to us who have the task of making a decision, in order that addresses will be limited to what is the accepted record rather than entering into argument as to what in fact was adduced and what was not. The hearing will be further adjourned to enable to (sic) record to be compiled and checked....." Counsel made no objection at this stage (nor apparently later), although reference was made then by one of them to another matter. All the material of the earlier hearings was kept in the Commission file and duly indexed. At page 4 of the file appears the certification of the Registrar that the documents and exhibits certified were "before the Commission at the time of the original enquiry or hearing" (the material now challenged was included). Finally, it is clear from counsel's addresses (p. 12 thereof in the Commission's record of addresses) that the evidence given before Chief Commissioner Kelliher and the O'Loghlen tribunal was regarded as being in evidence and was relied on.

I consider the matter now being challenged to have been properly before the Commission, but if I were wrong in this finding I should still consider that counsel's conduct of the proceedings has been shaped in such a way that it is now

too late for a challenge to admissibility to be maintained. I find no error in law as argued.

D. The verdict against the weight of evidence.

Counsel has presented a most attractive argument as to why I should regard the decision of the Commission as being against the weight of evidence. There is force in her comments as to the form in which the record is to be found and the possible areas of investigation that might have been pursued. However, it must not be overlooked that the hearings in the matter extended from its first listings in April, 1968 and first tender of evidence in June, 1968 to October, 1969, during which time there was full opportunity given to the appellants to investigate and to arrange for the attendance of witnesses. It is sufficient for me in regard to this ground, to set out what is my opinion, namely, that there was ample evidence on which the decision actually taken by the Commission could be founded. I am not satisfied that the Commission's decision is clearly wrong. (Whiteley Muir and Zwanenberg Ltd. v. Kerr and Another (7) as applied in Da Costa v. Cockburn Salvage & Trading Pty. Ltd. (8), and the Wangaramut case (9).)

A further interesting argument was advanced by Mr. Ross in support of the Commission's decision. The respondent, he says, is entitled to rely in these proceedings on the final order made by the Commission on 6th July, 1961 whereby an agricultural leasehold from the Administration to E.T. Fulton was held to be a restorable title and a declaration was made that "No native customary rights were retained on the appointed date by any native or native community in respect of the said land or any part thereof." The land thereby dealt with is identical with that now declared to have had a freehold vested in the Administration. The definition of "interest in land" appearing in the Restoration Ordinance expressly excludes native customary rights. Section 2 of the Land Titles Commission (Declaratory) Ordinance 1968 provides that a decision of the Land Titles Commission is for all purposes and as against all persons conclusive evidence of the ownership, as at the date of the decision, of the land the subject of the decision, and of rights, titles, estates and interests in the land, as set out in the decision. Nice questions are raised as to whether the phrase "interests in the land" is to be construed in relation to a decision by the Land Titles Commission under

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(7) 39 A.L.J.R. 505
(8) 44 A.L.J.R. 455
(9) Unreported Full Court judgment FC4

the Restoration Ordinance in the sense given to it by the Restoration Ordinance, namely, as excluding consideration of native customary rights or is to be construed in its presumably general sense as used in the Land Titles Commission (Declaratory) Ordinance. And also possibly as to whether the inclusion of the phrase "as at the date of the decision" in the Declaratory Ordinance prevents the operation of that Ordinance upon a situation where the question is the existence or non-existence of native customary rights at the appointed date in 1952. Or again, whether it is to be construed in the light of the definition in Sec. 4(1) of the Land Titles Commission Ordinance itself where "land" is said to include "an interest in land whether arising out of and regulated by native custom or otherwise."

Because of my findings on the other matters raised, I find it unnecessary to express a concluded opinion on this aspect of the argument. I would merely observe that in any case the finding in 1961 was obviously a matter that the tribunal in 1969 would find to be material and helpful to its own consideration of the problem before it. In the even therefore I am unable to allow any of the grounds argued on behalf of the appellants. I should like to express my indebtedness to counsel for the assistance they have so ably provided me. I dismiss the appeal and confirm the order of the Commission. I reserve liberty to apply on the question of costs.

Solicitor for the Appellants : W.A. Lalor, Public Solicitor

Solicitor for the Respondent : P.J. Clay, Crown Solicitor