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

CORAM : CLARKSON, J.

Monday,

29th June, 1970.

BETWEEN THE DIRECTOR OF DISTRICT ADMINISTRATION ON BEHALF OF TARIS WANAM AND MAINDU SISI WHO CLAIM FOR THEMSELVES AND NATIVES OF KAVEDEMKI AND MARUNGA VILLAGE

Appellant

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

1st Respondent

AND ALAN H. REYNOLDS

2nd Respondent

IN RE TOL EXTENDED

1970

Jun 23, 24 and 29.

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Clarkson, J.

This is an appeal by the Director of District Administration (on behalf of Taris Wanam and Maindu Sisi who claim for themselves and natives of Kavedemki and Marunga villages) against a final order of the Land Titles Commission dated 10th May 1967 in favour of the two Respondents under the New Guinea Land Titles Restoration Ordinance.

The original claim of the second Respondent was dated 27th April 1954. The claim set up that the land in issue was the subject of an Administration agricultural lease for 99 years and registered in the Register of Administration Leases in Vol.7 folio 94. The date of the lease is shown to be 14th May 1947 but this is clearly a typographical error - the real date being 14th May 1937. The claimant claimed as transferee of the lessee's interest in the land.

On 18th July 1958 the then Commissioner of Titles made a provisional order which stated it to be established that on the appointed date the following registered interests in the land were owned by the following persons:

(a) absolute ownership by the Administration of the Territory of Papua and New Guinea;

(b) lease from the Administrator of the Territory of New Guinea for 99 years from 14th May 1937 by Alan H. Reynolds;

and that no native customary rights were retained on the appointed date in respect of the said land by any native or native community.

On 4th September 1958 almost two months after the making of the provisional order part of which was in its favour the Administration lodged a claim for registration as the owner of the

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freehold of the land. This claim on its face does not acknowledge the leasehold interest claimed by the second Respondent but nothing appears to turn on such omission.

In the meantime the Commissioner on 21st July 1958 had given the usual notice of the making of the provisional order and this notice fixed the 1st December 1958 as the closing date for objections.

The record shows that the Director of Native Affairs instituted enquiries as he was bound to do under the Ordinance and there is a copy of a letter dated 3rd November 1958 which reads as follows:

"

TOL PORTION 18 AND TOL EXTENDED

The only claim made by the natives in regard to the above properties was that to the established use of the road which commences in the N.W. corner of portion 539, runs parallel to the beach until it reaches portion 18, and then continues east to native owned ground at the eastern part of portion 18.

There have been no disputes regarding use of the road and the claim was made to ensure that no restrictions are made in the future. "

It should be noted that Tol Extended is the property now in issue and that Tol Portion 18 lies immediately to the South of it.

The next move appears to be a letter dated 29th March 1967 from the Director of District Administration (formerly the Director of Native Affairs). The substance of the letter reads:

"

TOL EXTENDED, EAST NEW BRITAIN DISTRICT:

I refer to the Provisional Order issued under the New Guinea Land Titles Restoration Ordinance in respect of the above land, dated 18th July, 1958.

A report to the effect that there are no native customary rights being claimed has been received from the District Commissioner of the District in which the land is situated, and I therefore enclose my Certificate under Section 36 of the same Ordinance. A copy of the relevant investigation report is also enclosed for your records. "

With it were enclosed two documents, the first being a formal Certificate under s.36 of the Ordinance which stated in effect that no native or native community was on the appointed date entitled to any customary rights in respect of the parcel of land the subject of Provisional Order made on 18th July 1958.

The second document I set out in full:

"

NEW GUINEA LAND TITLES RESTORATION ORDINANCE 1951-55
INVESTIGATIONS REGARDING NATIVE CUSTOMARY RIGHTS

DISTRICT - NEW BRITAIN

1. TOL EXTENDED : 18th July, 1958

2. (a) Bainings peoples of Kavudemki & Marunga Village
   (b) As in (a)
   (c) Tol Portion 18
   (d) Water of Wide Bay

3. No claims made to property.
   Claim to established use of road running through property.

4. N/A

5. N/A

6. Approx. 3% p.a.natural increase

7. Nil

8. N/A

9. 31/1/66 and 1/2/66

M. Davies, C.P.O. "

Counsel were unable to say to what the numbers referred so much of the information supplied is unintelligible.

There is nothing on the record to show whether any public road runs through the property and the plan annexed to the final order shows no such road. Nor is there anything to show the location of the two villages named. I do not know therefore whether the "road" in respect to which there is said to be an "established user" is a right of way for pedestrians or for vehicles nor whether the right to use it is claimed for the benefit of occupiers of adjoining land and their licensees or for the public generally.

I have no doubt however that I should read the two sentences in the paragraph numbered 3 as stating in layman's language that whilst the occupants of the two named villages did not claim ownership of the land they claimed the right to continue an already established right of passage of some kind over portion of the land.

The Appellant raises a number of matters on this appeal. The first arises from the fact that the Administration's claim was not made until after the provisional order was made. The Appellant says, in effect, that the claim by the second Respondent cannot support the provisional order which was made in favour of both Respondents and that the provisional order being invalid cannot support the final order.

I think the Appellant is right in saying that the general scheme of the Ordinance is that a provisional order should follow and not precede a claim. Whether a claim by a lessee will support a provisional order in favour of both lessee and reversioner is no doubt arguable but on the facts of this case I have decided that it will. The stage at which notice is given to those with possible adverse interests is after the making of the provisional order which the Appellant received and acted on. The failure by the Administration to file a claim until after the making of the provisional order was an irregularity of procedure which did not prejudice the Appellant or anyone else and did not invalidate the final order when made.

I have no doubt however that even if the absence of a claim by the Administration invalidates any provisional or final order in its favour, it does not affect the validity of the final order in favour of the second Respondent.

The second Respondent made a valid claim to a leasehold interest. Those portions of the provisional and final orders which relate to the Administration, if invalid, are clearly severable and can be deleted without affecting the order in favour of the second Respondent, which is capable of standing alone.

As I have said, the Administration's claim form contained very little information. Its claim to the freehold of the land relies on the evidence relating to the claim of the second Respondent. It is reasonable to assume once it was shown that the second Respondent held a registered Administration Lease that the Administration held a title sufficient to support the lessor's interest. The simple point taken by the Appellant is that proof of the registered Administration lease to the second Respondent does not show a title in the Administration any greater than that of a lessee from natives for 99 years.

I think this argument is clearly right, although evidence of Titles Office practice at the relevant time may well justify a contrary finding.

On the information before me, which includes all the evidence certified as being before the Commission there is insufficient evidence to justify a finding that the Administration had any further title than that required to support the interest of the lessor under the registered lease. What order should follow this conclusion I will discuss later.

I return now to the problem raised by the presence on the record of two reports by field officers to which I have referred.

It is clear from his letter that the Director's certificate was based on the second of these reports which shows that there was in fact a claim by natives in the area to a right of passage of some kind. Whether the claim was to a right amounting to an interest in land registered or unregistered or to a customary right cannot be determined from the report,

/s

although it is unlikely to have been a claim to a registered interest because under ss.39 and 40 of the Land Registration Ordinance as then in force registration would have been in the name of the Director himself and not the claimant natives.

The certificate given under s.36 of the Ordinance is not conclusive evidence of the facts stated in it. It merely entitles the Commission to proceed to the making of a final order (s.37). The duty of the Commission under s.42(1) of the Ordinance is "to investigate hear and determine" claims and if, as here, no objection has been made, the Commission was entitled to make a final order without a hearing (s.42(2)). It was however still under an obligation to "investigate....and determine" the claim.

I make no attempt to define the scope of this expression. The investigation required will depend on the facts of the case and will no doubt be different in a case where there is no hearing from what it would be at a full hearing with parties represented by counsel.

I have concluded however that it is wide enough to require some further enquiry when the Commission had before it the two reports, particularly the latter, to which I have referred. These showed that there was a claim based on an alleged existing user, to some interest in the land, and the Commission when charged with the duty of investigating the claim was wrong in law in looking only to the certificate and thus disregarding the natives' claim clearly revealed in the report on which the certificate was admittedly based.

The result thus achieved is similar to that reached by Frost J. in re Tol Extended Foreshore Reserve Portion 540 (1).

The second Respondent argued, in effect, not only that the order in his favour was good but that the whole order could be supported.

In relation to the order in his favour the second Respondent justifies it in this way: if the natives' claim was to an unregistered interest it could not stand against the registered interest of the lessee; if it were a claim to a registered interest the onus was on the Appellant to establish it; and if the claim set up that there was a public road through the property then the native claimants were not entitled to set that up as their interest in the land. I accept that a claim to an unregistered native customary right cannot stand against a registered title. This is clear from the decision of the High Court in Tedep's case (2). But there, an examined copy of the Certificate of Title was in evidence. Here the evidence shows the existence and registration of the lease but little more. It does not show for instance that there was no encumbrance of the lessor's or lessee's interest.

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(1) (unreported) Judgment No.571 of 3 Jun 70.

(2) 38 A.L.J.R. 344.

I also accept, with the important qualification to which I refer later, that the lessee having established a registered interest, only a registered interest in favour of the Appellant could prevail against it and that it is for the Appellant to establish such a registered interest.

The qualification to which I refer arises from the provisions of the Lands Registration Ordinance as in force at the relevant time. S.85 provided:

" 85. Except where the context is inconsistent therewith, the provisions of this Ordinance, and in particular the provisions of Part IV. thereof relating to the Register Book and registration, shall, where applicable, apply to the Register of Administration Leases and to Administration leases as if the Register of Administration Leases were the Register Book and as if an Administration lease were a grant or certificate of title respectively. "

Part IV of the Ordinance includes s.68 which provides, in effect, that the registered owner of any estate or interest in land shall, except in the cases specified, hold the land free from all encumbrances. One of the exceptions reads as follows:

" (c) in case of the omission or misdescription of any right of way or other easement created in or existing upon the same land "

As I have said earlier I am not able to determine the nature of the Appellant's claim, but it might amount to a claim for a right of way amounting to an easement. If the claim is to some other interest and that interest is unregistered and does not fall within the exceptions to s.68, then, in the absence of fraud, the registered interest prevails.

It remains to determine the proper order which should be made.

The Appellant seeks a complete rehearing as against both Respondents but I do not think this is justified. I think the second Respondent is entitled to retain the order in his favour insofar as it recognizes him as the registered holder of an Administration agricultural lease for 99 years from 14th May 1937.

The Appellant's rights as against him should be limited to the opportunity to establish:

(a) a registered interest in the land as at the date of the final order;

(b) a right of way falling within the description contained in s.68(c) of the Lands Registration Ordinance and created in or existing upon the land as at 14th May 1937.

As against the Administration the Appellant is entitled to wider relief.

That portion of the Final Order declaring absolute ownership of the land in the Administration and an entitlement to registration in respect

thereof should be quashed.

I have already expressed the view that that portion of the provisional order in favour of the Administration is not invalid, but it is a matter which should be put beyond argument in order that the Administration's claim should be decided on its merits.

The Commission should make a new provisional order on the Administration's claim. This will enable the Appellant to make such references or objections on behalf of the people he represents as he thinks fit. The matter can then proceed to hearing and final order, limited so as not to disturb the final order in favour of the second Respondent except to the extent already indicated.

If the Commission does not within 28 days after receipt of the formal order herein issue a new provisional order as suggested above then there is remitted to it for hearing -

(a) that part of the case relating to the portion of the final order made in favour of the Administration which I have said should be quashed;

(b) that part of the case relating to the two matters which I have said the Appellant should have an opportunity to establish as against the second Respondent.

To the extent set out above the case is remitted for hearing by the Commission. If the parties are unable to agree on the terms of the formal order liberty to apply in respect thereof is reserved to all parties. Liberty is also reserved to any party to apply as to the costs of this appeal.

Solicitor for the Appellant : W.A. Lalor, Public Solicitor.
Solicitor for 1st Respondent: P.J. Clay, A/Crown Solicitor.
Solicitor for 2nd Respondent: F.N. Warner Shand, Esq.