

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

Appeal No. 52 of 1968(NG)
 CORAM : MINOGUE C.J.

BETWEEN BURNS PHILP TRUSTEE COMPANY LIMITED
 Appellant

AND THE DIRECTOR OF DISTRICT ADMINISTRATION
AND
TOLOM ATOM OF IALAKUA
 Respondents

In re Waldow

1970

Appeal

Apr 9,10.
 Oct 19.
RABAUL.
 Minogue,CJ.

This is an appeal against a Final Order of the Land Titles Commission by which the Commission declared it to be established that on the appointed date (10th January 1952) no interest was owned by the appellant in land described by it as being freehold land containing one acre or thereabouts known by the name of Waldow. The appellant had claimed to have been entitled as at the appointed date to a freehold interest and to be registered or entered in a Lost Register as the owner of or the person entitled to that interest. The appellant was the administrator of the estate of one Clothilde Phoebe Parkinson who died in a concentration camp in New Britain on 27th November 1944, intestate, and who was claimed to have been the proprietor of the subject land free of encumbrance at the time of her death.

The claim was heard by the Chief Land Titles Commissioner on 26th April 1968 and he appears to have delivered judgment on that day. As is not unusual in this type of case the evidence was sketchy. Chronologically, it began with copies of entries in Volume 1 Folio 53 of the German Land Register (Grundbuch) which described the land as Wunagongo, a rectangle with sides of 41 metres and 49.5 metres length bounded on the north by the sea, on all other sides by native land and covered with light bush. The Land Register went on to show that the original owner was one Adolf Kleinschmidt and that his ownership had been entered therein on 5th March 1898 in pursuance of a contract of purchase and sale of 23rd November 1881 and of a Certificate of Inheritance of 6th April 1895. Miss Anna Waldow was shown as a subsequent owner and her ownership was entered in the Register on 5th September 1898. The area of the land was shown to be 20 ares 30 square metres which is approximately a half acre.

Next there was tendered a German map said to have been made in about 1908 showing land holdings in the vicinity of Herbertshohe (now Kokopo). On that plan in the vicinity of Raluana and about 6 kilometres on the Rabaul side of Kokopo there is shown a small allotment of land having a sea or beach frontage with printed beside it the words and figures "Wunagongo (Waldow) 53". The allotment is shown as being on the seaward side of a road leading to Herbertshohe and there is no .. /2

1970

In re
Waldow.

Minogue CJ.

track or roadway shown as connecting it with that road. There was also tendered a New Guinea Gazette Notice of 28th March 1929 wherein the Registrar of Titles gave notice under the Land Registration Ordinance 1924-1928 of his proposal to register Vunagongo situated at Blanche Bay in the administrative district of New Britain containing 20 ares 30 square metres under the provisions of that Ordinance. The German Land Register volume and folio number were shown therein as Gazelle Peninsula Volume 1 Folio 53 and the owner as shown in the Draft Certificate of Title was stated to be Anna Waldow of Ralum, spinster. Consequent on this notice the Commissioner of Native Affairs in turn published in the Gazette of 15th June 1929 a notice calling for claims to rights over land by natives over, inter alia, the subject land. A copy of this notice was also tendered. Next was a letter written on 12th February 1965 by what I take to be a field officer named Ellis to the Registrar of the Land Titles Commission in which he made reference to Waldow (Wunagongo) Claim No. 1369 (the Land Titles Commission number allotted to this claim) and in which he stated the land claimed had a frontage to the beach and that Tolom, the luluai of Ialakua village at Raluana showed him the boundaries of the land. On these boundaries he placed three steel pickets on the north-east, south-east and south-western corners and on the north-western corner he found an old Australian cement which according to him was placed there when the block was re-surveyed around 1927. He further stated that the sea had eroded away the north-east corner and the cement had gone, that he could find no cements on the southern boundary, that the area of the claim was found to be approximately half an acre which agreed with the description of the German ground book, Volume 1 Folio 53 and, finally, that there was a house, garage and a shed on the property. A plan which he prepared on 15th February 1965 showed the area to be .44 acres and he set out a rectangular block with sides of 36.61 metres, 50.29 metres, 36.41 metres and 50.89 metres respectively. The boundaries of this rectangle were shown to be an old Australian cement and the three steel pickets to which he had referred in his letter. The plan did not relate to either other land in the vicinity or the seafront to which he had referred as being eroded at the north-east corner.

One witness was called for the claimant, Mr. Rudolph Diercke who was born in 1905 in the Kokopo District and who was a grandson of Mrs. Parkinson, the claimant's predecessor in title. He remembered his grandmother's purchase of the land from Miss Waldow who was then in Germany in about 1929, and stated he knew the land as Waldow although it was sometimes called Vunagongo. This he said was not its right name as the place Vunagongo was on the other side of Raluana, but he thought that the natives sometimes called it by that name. His grandmother had formerly lived on native land on the other side of Raluana which he knew as Vunagongo but when she completed the purchase from Miss Waldow she began building on the land the subject of the claim. In fact the witness and his uncle built a home for her on the land. The house was destroyed

during the war with Japan and all what I take to be the family papers and belongings were lost. He expressed himself as having a clear recollection of seeing the actual title deed to the land and it was also his recollection that Mr. Justice Phillips verified the existence of the Certificate of Title and had assisted his grandmother in obtaining an access road between the subject land and the main roadway. He did not think a title had been obtained for this road. The land known as Vunagongo on which Mrs. Parkinson had formerly built appears to have been held under some sort of permissive occupancy; it was smaller than the subject land and was just sufficient to hold a small house. He also knew that the subject land used to belong to Mr. Kleinschmidt who worked for Mrs. Kolbe, better known as Queen Emma, on Mioko Island. The land was unoccupied until the building of the house in or about 1929. He had never heard of any dispute as to the ownership of the land although he knew there was initial objection to the access road. According to him the native owners were obstinate about the matter as they had bananas there and did not want them destroyed. In his view any dispute or complaint about the land itself would have emerged at this time.

For the respondents Tolom Atom was called and he claimed the land as his as a descendant of his grandfather Tumurang to whom it had originally belonged. He acknowledged that there was another property near this land called Vunagongo but it belonged elsewhere. It was, he said, smaller than the subject land. He stated that he heard that the land had previously been bought by Queen Emma but that the payment was given back by the owner, that is Tumurang. Tumurang, so he said, had told him that he gave the pay back to Dr. Hahl who was at one time the German Governor and, according to the story which had been handed down to him, Dr. Hahl had said that Tumurang was to have the land back. He had never heard from his people of a meeting between Mr. Justice Phillips and them about Vunagongo as he was away for some years in Buka, although he had heard that whilst he was away in Buka the Judge had somehow marked the boundaries of Vunagongo and that he had personally walked the boundaries. He went on to say that Mrs. Parkinson told him that she had taken Judge Phillips to Vunagongo and marked the boundaries and that some native people went with him. It is clear to me from the evidence that the Vunagongo he is referring to in this part of his evidence is the land the subject of this claim.

The Commissioner seems to have given his judgment immediately on the conclusion of the evidence. It is a judgment distinguished for its brevity if not its cryptic quality. I set it out in full:

"If one takes the evidence as a whole, one is led into confusion. If one tries to take the evidence piece by piece and work out problems arising from each combination of facts, one is still confused. I am not satisfied that this land, the subject of the Provisional Order, is the land referred to in the Ground Book Entry and having seen and heard the witnesses, I am not satisfied that the claimant was registered, or entitled to be registered, prior to the appointed date and in the circumstances I will direct that a Final Order of No Interest issue. "

I have had some difficulty in understanding what he means by his direction that a final order of no interest issue. The final order which in fact was issued over the signature of the Acting Registrar of the Land Titles Commission on 14th May 1968 states it to have been established that on the appointed date no interest was owned by the claimant as administrator of the estate of Clothilde Phoebe Parkinson. This is different from a finding that it is not established that such an interest was owned.

Section 17 of the Ordinance directs the Commissioner to declare whether it is established that a person was at the appointed date entitled to an interest in the land the subject of the order and to be registered or entered in a lost register as the owner of or the person entitled to that interest. I suppose it could be that his actual decision directing that a final order of no interest issue should have been translated into a declaration that it was not established that on the appointed date an interest in the subject land was owned by the claimant. Such a declaration could follow from his expressed confusion and his lack of satisfaction that the land the subject of the provisional order was the land referred to in the Land Register entry. It may be that his confusion arose because of the established fact that at different times Mrs. Parkinson lived on two parcels of land each known as Vunagongo and from an assumed failure on the part of the claimant to establish that the parcel shown as Vunagongo on the 1908 plan was in substantially the same position as was that surveyed with chain and compass by Mr. Ellis in 1965. But the whole tenor of the evidence seems to me to show that the land described in the Land Register and the land the subject of the claim before the Commission were the same. There was no attempt made to show that the land about which Mr. Diercke was testifying was not that purchased from Miss Waldow and from Mr. Ellis' letter it is apparent that the land had a beach frontage and that the northeast corner had suffered erosion by the sea. A most significant fact too is that the respondent Tolom had actually shown the boundaries of Vunagongo to Mr. Ellis and that it was the land comprised within these boundaries about which he gave evidence and it was this land that he had been told by Mrs. Parkinson was perambulated by Mr. Justice Phillips. It is surprising to me that neither the claimant's advisers nor the Commissioner himself saw fit to either actually inspect the subject land or to compare its location with the land shown on the German map, particularly if there was likely to be any confusion between the two Vunagongos. However, I would have thought that the probabilities were all in favour of the subject land being the land referred to in the Land Register. It would seem to me to be too remarkable a coincidence if there were other land of approximately half an acre bordering on the sea and formerly owned by both Miss Waldow and Kleinschmidt. There was no record before me of the arguments or submissions of counsel but there is nothing in the course of the evidence to indicate that the confusion to which he subsequently expressed himself as being subject existed in the Commissioner's mind during the hearing. However, he goes on to say that having seen and heard the witnesses he is not satisfied that the claimant was registered or entitled to be registered prior to the appointed date.

I have not the benefit of knowing where his dissatisfaction with either or both witnesses lay and I am certainly not able from a perusal of the record to guess from whence it might have sprung. It may be, as Mr. O'Neill has submitted, that there was something in the demeanour of Mr. Diercke which made him an unsatisfactory witness or one on whose memory reliance could not be placed. It may be, too, that the Commissioner reasoned that the Certificate of Title which that witness claimed to have seen was no more than a Draft Certificate of Title which the Registrar would have sent under the provisions of Section 21(1)(e) of the Lands Registration Ordinance.

But looking at his reasons as a whole I am of the view that he fell into error in concluding that Mrs. Parkinson had no interest in the subject land and because of this error failed to consider whether assuming such an interest the claimant was entitled to be registered or entered in a Lost Register, either because a Certificate of Title had in fact issued or by the application of Section 67(3) of the Restoration Ordinance. The core of his reasoning seems to be, no identity of land therefore nothing to register. The Chief Commissioner does not seem to have considered the applicability of Section 67(3) of the Restoration Ordinance at all. I am unable to conclude from the record of proceedings whether this aspect was argued before him but it was argued before me without objection and consequently I think I should deal with it. It is clear that the previous existence of a Certificate of Title was relied upon but I am not in a position to assess the credibility of either Mr. Diercke or Tolom nor to assess the probability of a Certificate of Title having in fact been issued. The registration process had certainly begun in 1929 at or about the time when Mrs. Parkinson purchased the land.

With respect I agree with what was said by Clarkson J. in In re Tonwalik (1) that if Section 67(3) is to be relied upon then the opinion to be formed under that section is to be formed by the Commissioner and not by this Court. In my opinion this case should go back to the Land Titles Commission for re-hearing and accordingly I allow the appeal and quash the final order and order that the case be remitted to the Commission for re-hearing.

Solicitor for the Appellant : F.N. Warner Shand, Esq.

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

(1) (unreported) Judgment No.526 of 2/6/69.