Mr. Justice Kaine

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IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: PRENTICE, J.

Wednesday,

20th December, 1972.

IN THE MATTER of an application to the Mining Warden at Wau by Michael James Leahy for a Special Mining Easement.

Special case stated by the Mining Warden.

JUDGMENT

1972
Sep 18
WAU
Dec 20
PORT MORESBY
Prentice J.

On this matter being called on for hearing at Wau, there was an appearance on behalf of native objectors by the Public Solicitor; but no appearance by or on behalf of either M. J. Leahy the original applicant, or of the Mining Warden - though both these gentlemen were present in court throughout the hearing.

Mr. Tuthill immediately sought an order giving leave to the Administration to intervene as a party, under Order 3, Rule 11 of the Supreme Court Rules. So far as relevant, that rule provides: - "The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or Judge to be just, order .... that the names of any person who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter, be added, either as plaintiffs or defendants." The rule does not appear to have been framed with anything other than a cause or suit in mind; but has been applied I understand as governing all matters on the civil side of the Court.

As both counsel were adamant that an instant decision was preferred as it was wished that the matter be disposed of, I gave a decision that I was of the opinion that the presence of the Administration before the Court may be necessary in order to enable the Court effectually and completely to adjudicate and settle all questions involved in the cause; I therefore ordered that the Administration have leave to appear as a party to this reference by way of stated case, in the exercise of my discretion. I was of the opinion based upon the

affidavit of Donald Stewart Grove of 7th September, 1972, put before the Court, that insofar as the Administration had granted 75 mining tenements and 18 special mining easements, it may be said to be a materially interested party that should be heard so that complete justice may be done. It was said that the question of whether any sluicing claims, such as had been granted by the Administration, were valid, became directly involved. The power of the Administrator to grant special mining easements and consequently to charge rent on mining tenements was being challenged - the answer to the question might disrupt and impair mining development in the country.

In Amon v. Raphael Tuck & Sons Ltd. (1) Devlin J. (as he then was) considered the comparable English rule was to be read narrowly; so that it was not a matter of the Court's discretion - no party should be joined unless it was necessary to do so to make him bound by the result. This was disapproved by Lord Denning (Gurtner v. Circuit (2)) who held the Court had a discretion to join a third party where the determination of the dispute would directly affect him in his legal rights or pocket. Lord Diplock in that case, while interpreting the rule more widely than Devlin J., does not appear to have gone as far as Lord Denning. He enunciated that natural justice requires that a person to be bound by a judgment in an action brought against another, and directly liable to the plaintiff on that judgment, should be entitled to be heard in the proceedings in which judgment is sought to be obtained. Lord Salmon was able to agree with both judgments and therefore presumably found leave to intervene necessary in that case on the narrower basis propounded by Lord Diplock. In Vandervell v. Inland Revenue Commissioners (3), Lord Denning propounded the test of whether the addition of the party was a just and convenient course. Sachs and Karminski, L.J.J. agreed in disapproving the "narrow test" of Devlin, J.

However, in the House of Lords, in Vandervell's case, the Court of Appeal's decision allowing the joinder of the Inland Revenue Commissioners was reversed on the ground (held by a majority) as I understand the decision, that there was no jurisdiction in the Court to adjudicate on the particular issue between Commissioner and subject as to tax

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(1) (1956) 1 Q.B. 357
(2) (1968) 2 Q.B. 587 at p. 595
(3) (1965) 2 All E.R. 37

liability. Certain of the Law Lords while adhering to the notion that the relevant English rule should be given a wide interpretation, considered that Lord Denning's dictum in the Court of Appeal could not be supported. By inference they would presumably not support his dictum in Gurtner v. Circuit (4) (supra) either.

In the result I am in some doubt as to how I should be ruled and guided by the English case law. I note that my brother Frost allowed the addition of Bougainville Copper Pty. Ltd. as a party in Teori Tau v. The Administration (5). His Honour found himself assisted by Buckley J.'s reading down of Gurtner v. Circuit (6) (supra), and by Wynn-Parry J.'s decision in Dollfus Mieg et Compagnie S.A. v. Bank of England (7), in coming to the conclusion that the Court had a wide discretion. Since that decision of His Honour, Buckley J.'s decision has been successively reversed in the Court of Appeal (8), and restored in the House of Lords (9).

I note a difference between the English rule and that of our Court. When the former was being considered by Wynn-Parry J. in 1951 it then read (as does that of this Court) "or whose presence before the Court may be necessary to ...." (emphasis mine); but it was being considered by the House of Lords in Vandervell's case (10) (supra) in its present English form, namely "whose presence before the Court is necessary ...." I consider that the older form possibly allows a greater latitude to the Court in that it is not essential for the Court to conclude positively, that the applicant's presence is necessary. At the point at which I was required to rule I was faced with the prospect of having difficult points of law which were said to go to the foundations of the Mining Ordinance, put to me with argument only from one of the interested parties. In these circumstances I came to the conclusion that the presence of the Administration may be, in the sense of "may become" necessary to enable the Court effectually and completely to adjudicate. I adhere to my decision and am prepared to say now after hearing the full argument on the main point and studying the cases cited to me, that at the point of time of my interlocutory judgment - it "was necessary."

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(4) (1968) 2 Q.B. 587 at p. 595
(5) (1969-70) P. & N.G.L.R. 53
(6) (1968) 2 Q.B. 587
(7) (1951) 1 Ch. 33
(8) (1970) 1 Ch. 44
(9) (1971) A.C. 912
(10) (1971) A.C. 912

I may say that I was, and am, quite unable to appreciate why the Crown Solicitor could not have arranged representation on behalf of the Mining Warden, who referred the Special Case, and had the points thought essential by the Administration duly argued in that capacity. However, it was plain this was not going to be done; and my decision had to be taken accordingly.

In the event of the objectors' success in this case, it appears to me that the rights of the Administration in regard to grants and reservations made in favour and against other persons will be affected. The situation here seemed close to that obtaining in Esquimalt and Nanaimo Railway Company v. Wilson (11) when the Attorney-General was added as a defendant apparently against his will.

Having arrived at the situation where both sides of the argument could be put, I found myself astonished by the next development. Before Mr. Loveridge could make his submissions, Mr. Tuthill for the Administration submitted that the Court had no jurisdiction to hear the case, as the Mining Warden had no jurisdiction to submit the case (an argument which could have been put on behalf of the Warden). Having obtained the right to be heard, the Administration now said, nobody should be heard. The man in the street would I think, like myself, be so startled at the effrontery of such a switch of positions, that he would have difficulty in describing it as other than chicanery. It seems hardly calculated to inspire respect for the administration of the law.

Mr. Tuthill first relied on an old decision of Stevens v. Barnett (12), to establish that the type of special case here stated was not of the kind that can be asked. In that case the New South Wales Full Court in effect held that a Warden could not submit a question in a form such as "Have I jurisdiction to proceed?" It was held that once a jurisdiction point were taken the Warden must decide the point and thereafter be corrigible either by way of mandamus or prohibition. The case had been stated under Sec. 79 of the 1874 Mining Act, and the relevant section no longer appears in the present New South Wales Mining Act of 1906-1952. I am unable to recover the text of this section and accordingly am unable to extract

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(11) (1920) A.C. 358
(12) (1900) 17 W.N. (N.S.W.) 38

assistance from the decision. It does not appear to me that the case here has been stated in an objectionable form.

Mr. Tuthill then submits that the present section in the New South Wales Act dealing with the stating of cases, namely Sec. 168, seems to preface an actual determination to the application for a case to be stated. The parties are called the appellant and respondent respectively (Subsec. (2)). There is no provision in New South Wales for the statement of a case whilst proceedings are in progress. Insofar as the case can be stated by way of appeal in New South Wales it can be stated only in those proceedings which end in a determination. Careful distinction therefore has to be made between those functions of the Warden which are merely administrative or ministerial and those which are judicial. The former issue only in recommendations or reports to the appropriate Minister, not in determinations. The decisions in Wallamine Colliery Pty. Ltd. v. Cam & Sons Pty. Ltd. (13) and Minerals Recovery Pty. Ltd. v. Broken Hill Proprietary Co. Ltd. (14) established that there can be no appeal by stated case from the exercise of ministerial power such as is entailed in granting or refusing authorization to enter and search under Sec. 70A of the New South Wales Act (the Wallamine's case (15) (supra)), or in entertaining a complaint as to non-compliance with labour conditions Sec. 124A (the Minerals Recovery case (16) (supra)), or an application for suspension of labour conditions under Sec. 113 (as affected by regulations since 1965); none of which are "proceedings in a Warden's Court" within the meaning of Sec. 168. Similarly in Queensland, it has been held that a Warden recording and reporting on applications for mining leases was merely exercising ministerial functions (R. v. Mining Warden at Herberton, Ex parte LeGrand (17)).

The New Guinea section (101) does not require a "determination" before a reference; but it does provide that references may be made "in any proceeding before a Warden's Court" (an exception existing where the decision is made a final one). Inasmuch as it contains the words "in such cases no final order shall be made in respect of

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(13) (1961) St. R. N.S.W. 195
(14) (1966) 85 W.N. (N.S.W.) 1
(15) (1961) St. R. N.S.W. 195
(16) (1966) 85 W.N. (N.S.W.) 1
(17) (1971) Q.W.N. 36

any matter on which such question is reserved until such opinion (of the Judge) is given;" it is submitted that this contemplates that the "proceedings" being provided for are those which issue in an order. Those before the Warden under Sec. 64 do not result in an order, but in a report to the Administrator and transmission of the file to the Secretary for Mines, whereupon the Administrator may grant or refuse the application.

Mr. Loveridge says that the hearing by the Warden is nevertheless a proceeding, because by Sec. 64C(4) it must be held in open court, and thereon the Warden has all the powers of a Warden's Court. With respect I should think that the reference to having the powers of a Warden's Court may indicate that the Warden when so conducting a hearing is not sitting as a Warden's Court. He submits that the transmission by the Warden of his report which requires the Secretary and the Administrator to do something, is equivalent to an "order" of the Warden. I am unable to accept this submission. I am of the opinion that the "proceedings" contemplated by Sec. 101 involve the use of judicial functions which issue in a final order. Indeed the authorities cited by Mr. Loveridge to the contrary in his written submissions to me subsequent to the hearing at Wau, merely fortify me in my opinion against his contention. Though the New Guinea section provides for the taking of advice in the course of a proceeding rather than for an appeal at the conclusion thereof, nevertheless it is restricted I feel to a court proceeding which imposes liability or affects rights.

I have given consideration to whether the provision of Sec. 64C(4) - could itself work a right to submit a case, insofar as the Warden at the hearing and enquiry "shall have all the powers of a Warden's Court." But I cannot see that it can thereby change the nature of the hearing and enquiry. "The powers of a Warden's Court" contemplated I feel, are those other than in Sec. 101 (which is restricted to proceedings issuing in a decision and order) - namely those in Sec. 70A et seq.

I come to this decision with regret, for very important questions as to principle and interpretation of the Mining Ordinance as to native lands are involved. The Administration to the lay mind would seem to be putting itself in the strange situation of saying we have granted

many mining easements and many tenements over native land, but we don't want to know whether they have been invalidly granted. This is surely an unsatisfactory light in which to be viewed. I would hope that procedures can be devised for testing the legality of the action being sought of the Warden, by way either of mandamus or prohibition (if either of those writs are available), or otherwise.

I therefore remit the case to the Warden with the advice that I have no jurisdiction to answer the questions asked.

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

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