

NO. 1184

NATIVE LAND APPEAL COURT.

IN THE MATTER of an Appeal by HAVINI
of Lemammanu.

REASONS FOR JUDGMENT.

11.5.59.

This is the first of a series of Appeals pending before this Appeal Court which was established under the Native Land Registration Ordinance of 1952. It is brought under the provisions of Section 33 of the Ordinance, and under Section 34 the Court is required where practicable to hear the Appeal where the land the subject of the Appeal is situated.

In the present case, however, it became apparent that questions of law as to the status and jurisdiction of the two tribunals established under the Ordinance would have to be determined in order that the nature and scope of the Appeal could be ascertained. It seemed obvious that since the land in question in this case is situated in Bougainville where there are no facilities for determining questions of law, and since a long and costly journey must be undertaken to reach the site of the land, it is most appropriate that these questions of law should be determined in the first instance in Port Moresby so that should it be found appropriate for the substantial questions involved in the Appeal to be decided in Bougainville, arrangements can be made in advance for the conduct of the hearing at the place where the land is situated.

The present proceeding before me is a Summons for Directions taken out under the Rules asking for directions as to the nature of the Appeal, the taking of evidence from witnesses and the place and time of hearing. The main purpose of the Summons is to seek determination of the questions to which I have previously referred.

The first question of substance is as to the nature of the tribunals which are created under the Ordinance. It is common ground that if the Native Land Commission is a Court properly so called, and likewise the Court of Appeal, then the Appeal would be to an Appellate Jurisdiction, and would not normally involve a re-hearing of the case in the sense that

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the whole matter would begin again and evidence would need to be called. On the other hand, if the Commission is an administrative tribunal, the Appeal would be to the original jurisdiction of the Appeal Court and would mark the first stage of a judicial determination of the issues arising in the case. If both bodies proved to be administrative tribunals, then the limited Appeal to the High Court under Section 36 would mark the commencement of the judicial process and would be heard in that Court in its original jurisdiction.

For this purpose the distinction to be made is between Courts which exercise part of the sovereign judicial power and tribunals set up on a more or less judicial footing but exercising powers of inquiry and determination in aid of the executive or administrative arm of the sovereign power. Barrripp v. Commissioner of Taxation 44 S.R. (N.S.W.) 16; Shell Company v. Federal Commissioner of Taxation 44 C.L.R. 530, 542, 545.

The name or form of the tribunal or the nature of particular functions entrusted to the tribunal is not necessarily a final test, for there are many examples of true judicial bodies exercising legislative and administrative powers of non-judicial character, and it is common for non-judicial bodies to employ judicial rules and procedures to achieve their purpose. Moses v. Parker 1896 A.C. 245.; N.S.W. v. Commonwealth 20 C.L.R. 54, 87.; Holmes v. Angwin 1906 4 C.L.R. 297.; The Queen v. Davison 90 C.L.R. 353; R. v. Kirby exp. Boilermakers' Society 1956 A.L.R. 163, 211; Federal Commissioner of Taxation v. Munro 38 C.L.R. 153, 174-9.

The negative tests referred to in Shell Company v. Federal Commissioner of Taxation 44 C.L.R. 530, 554-5, have been fully canvassed in argument and although they do not provide a final answer they must be borne in mind. The question may be put shortly thus - does each of these tribunals constitute a Court within the meaning of Section 63 of the Papua and New Guinea Act or not? It is a test of function and purpose rather than of form. Munro's Case 38 C.L.R. 153, 175-179.

Applying these considerations in the present case, I think that it becomes clear that the Native Land Court of Appeal is intended to be established as a Court with a truly judicial function.

The Appeal which comes before the Court involves claims between parties who seek determination of what they claim to be their legal rights and interests. The finality of the decision of the Appeal Court, subject only to a limited Appeal to the High Court, is characteristic of the judicial process

and this element of finality is in no way dependent upon the lapse of time or other limitations set out in Section 24. The proceedings before the Appeal Court are limited to Appeals by persons who are adversely affected by some determination of the Commission. The scope of the word "aggrieved" is indicated in Stroud's Judicial Dictionary and this and all the expressions used in Part VI of the Ordinance are strongly suggestive of and consistent with the Appeal Court being a Court within the judicial system of the Territory. This confirms rather than rebuts the presumption that powers conferred on judicial persons and bodies are intended to be judicial powers. Medical Board v. Meyer 58 C.L.R. 62, 71-2; Holmes v. Angwin 4 C.L.R. 297, 302.

The status of the Commission itself raises rather different considerations. The main functions of the body are set out in ^{Section} Paragraph 8 and they are broadly the determination of land of a particular description and the determination of the natives or native communities who own that land. There is a suggestion of administrative responsibility in Section 7 and the broad purpose of the Ordinance so far as it is revealed in the text is to create a record of native lands bearing some resemblance to the records kept by Titles Commissioners under the Torrens System.

The first function of the Commission in conducting its inquiries and reaching its determination seems to me to be analogous to that of a fact-finding Commission of Inquiry rather than of a judicial tribunal.

Although priority is to be given to inquiries initiated by applications from interested persons, it is clear from Section 10 that this is only part of a general duty to inquire as to lands which may or may not be subject to claims and may be waste and vacant land calling for administrative reports and recommendation under Section 37.

The only part of the Commission's duties which appear to me to have any judicial character about them relates to the determination of disputed claims when they arise under Section 14. These disputes are heard and decided but the decision is not binding on any party.

So far as this Ordinance is concerned, I can see no reason why a party to a determination should not be at liberty, if he saw fit, to ignore the determination of the Commission and bring proceedings in the appropriate Court to have his claims judicially determined.

The decisions of the Commission provide the material from which the Register of Native Land is kept by the Commission. This register becomes a public record and is comparable to such

other public records as Torrens System and other land registers, and registers relating to motor vehicles, births deaths and marriages, licences of various kinds, and so on. It is the register itself and not the decision of the Commission which becomes presumptive evidence of title, and after a period of five years from the date of the last amendment, becomes conclusive under Section 25. From this pattern I would infer that if any title should become finally determined by judicial process (including determination on Appeal) the Commission would in the ordinary course of its duty amend the register to show the true title as so determined.

Mr. Clay in argument pointed out the similarity in the provisions of the Ordinance relating to the two tribunals, and sought to infer from this that whatever character one tribunal was intended to possess, it should be taken as the intention of the legislature that the other tribunal should be of the same character. This argument is persuasive but not conclusive, for similar words may produce quite different results when they are used in reference to a judicial or non-judicial body and the legal consequences depend on the character of the tribunal as finally determined.

The powers to summon witnesses and other incidental powers conferred on the Commission by the Ordinance do not give any positive indication of the nature of the Commission. I think that the powers of the Commission are quite consistent with those commonly conferred upon non-judicial bodies. The quasi-judicial character of some of them indicates no more than that the Ordinance intends that the proceedings shall be conducted according to proper legal safeguards for the interests of the persons concerned subject to the power conferred in Section 18 in cases where the Commission for sufficient reason may see fit to depart from strict legal rules. These considerations, however, do not alter the character of the Commission, and I think that the proper conclusion is that it is intended by the Ordinance to be an administrative body in the sense that its function is not strictly judicial and that its purpose is directed towards the carrying out of the administrative functions of Government.

I mention in passing that in view of the express provisions of Section 64 of the ^{Native and Non-Native} Act creating a right of appeal to the High Court from the Supreme Court of the Territory, it may well be found that there is some constitutional difficulty in the provision for a right of appeal from the Native Land Appeal Court to the High Court under Section 36 of the Ordinance. It is not for me to decide this question.

It follows from the conclusions that I have reached that the Appeal from the Commission to the Appeal Court falls within the original jurisdiction of the Appeal Court and that the Appeal Court should determine judicially the issues which are found to arise between the parties to the appeal, including any interested person who may establish the right to come forward and join in the Appeal proceedings. The issues before the Court of Appeal may not be precisely the same as those which arose before the Commission in the course of its inquiry and the scope of the Appeal will be determined by the interests of the parties rather than by sole reference to the precise language of Section 8 of the Ordinance. Further, I think that the duties of the Court of Appeal are different in extent; for example, it would be no part of the duty of that Court to make any inquiry, report or recommendation to the Administrator under Section 37 of the Ordinance. If such a report should be made in consequence of any determination made on appeal, I think that it is an administrative function which would be appropriately made by the Commission in the light of any decision of the Court of Appeal.

Proceedings in the Court of Appeal being in the original jurisdiction must be supported by evidence sufficient to cover the whole area of the facts in dispute, and the records and decisions of the Commission should be placed before the Court in the same way as in the case of Taxation Appeals before the High Court. It is expected that most of this evidence will be found in practice to be of such a nature as to invoke the provisions of Section 34 of the Ordinance and require that that evidence should be heard where the land is situated. I think, however, that Section 34 is a provision intended to facilitate the hearing of Appeals where local evidence and local considerations are involved. I do not think that the Section should be construed as meaning that all the activities of the Appeal Court shall be conducted upon the land. There may be issues purely of law arising on admitted facts and interlocutory matters which could be much more effectively disposed of either in Port Moresby or in one of the regular Circuit centres of the Supreme Court. I think that the test of practicability involved in Section 34 should be construed in this way, that prima facie, evidence of local residents and those parts of the hearing which depend on the nature or location or any other relevant aspect of the land itself should be conducted as far as practicable either on the land or as near to it as the Court can sit. In cases where the efficient despatch of the Court's function indicates need for the Court to conduct the whole or part of the hearing of an

Appeal elsewhere than where the land is situated, I can see no objection on the score of practicability to the Court so directing.

Since this is the first Appeal, I think I should say something about the classes of interests in land which come within the contemplation of the Ordinance so that as these questions arise for determination they may be fully considered and dealt with.

Section 8 appears to include all the "rightful and hereditary property" held by native customary right. The definition of native customary rights includes those of a possessory ^{native} ~~native~~. "Native land," an expression sometimes used and sometimes not used to describe land the subject of the Commission's duties, includes land "possessed" by customary rights but is limited to land held for an estate corresponding to an estate of freehold. The definitions of "native owner" and "native claimant" depend partly upon the definition of "native land."

The effect upon the text of the Ordinance of using or not using in various sections terms so defined does not now arise for determination but it seems to me likely that the Ordinance contemplates three main classes of land:-

- (a) Land passing by inheritance and under the exclusive dominion of a native community. This may be taken as the approximate equivalent of freehold since it includes unlimited right to possession and occupation. It will usually be communal property subject to community control.
- (b) Land depending on continued actual possession, control or use of the land. This may be within the community property or outside it. If within that property it will normally be an individual right to occupation, possession or use. If outside the land under the effective dominion of the community it cannot rank as freehold but may correspond with some lesser title claimed by the community or by individuals such as rights to hunt or take the fruit of trees. Titles of this class may or may not be claimed to pass by inheritance and much may depend on what persons recognise the claims and to what extent.
- (c) Lands to all intents and purposes not subject to interests of class (a) or (b).

If some such classification as is suggested above is

in accord with the intention of the Ordinance, it will follow that the inquiries under Section 8 extend to all interests in land, subject to it appearing that they pass by inheritance. A claimant under Section 10 may bring any claimed interest before the Commission for investigation. Section 12 only applies to freehold interests, but Section 13 may extend to recording (not necessarily in the register) all customary rights. Sections 14 and 15 extend only to disputes over freehold land, but Section 16 may not be so limited. Under Section 23 the only titles required to be recorded in the register are freehold titles, and it is only to such titles that the evidentiary character of the register attaches.

Thus if the Administration should contemplate acquiring land, the register will show what land is subject to freehold claims and the reports and recommendations will show what lands are waste and vacant land. Other claims by individuals and communities may apply to both classes of land but are apparently regarded as being beyond the scope of the present scheme and would call for special attention in the process of acquisition.

It may be that the interpretation that I have suggested is too narrow and that question must be left for final determination, but what I have said illustrates what I regard as an unmistakable administrative rather than judicial purpose. If the Commission were a judicial body it would have great difficulty keeping within its jurisdiction.

Upon the Summons now before me I give the following directions:-

- (1) The Appeal will be a judicial re-hearing of the whole matter so far as it affects the interests of the parties to the Appeal and will be heard as an original proceeding.
- (2) Evidence may be given by witnesses orally or by other appropriate means as on the trial of an action.
- (3) The hearing of the Appeal is to be opened at the place where the land is situated or as near thereto as is practicable, and thereafter the hearing is to proceed subject to any further directions which may be given.
- (4) A date will be fixed on application as soon as a Judge and Counsel are available to travel.