50575

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

CORAM : O'LOGHLEN, A.J.
Tuesday,
9th June, 1970.

Appeal No. 26 of 1965 (N.G.)

THE DIRECTOR OF DISTRICT ADMINISTRATION (now the DIRECTOR OF THE DIVISION OF DISTRICT ADMINISTRATION) on behalf of ISIMEL-TAMBOK of VUNAIROTO.
Appellant

- and -

THE CUSTODIAN OF EXPROPRIATED PROPERTY.
Respondent.

re RAKUNAI.

1970.
Feb. 23, 24
RABAUL.
Jun 9
PT. MORESBY.
O'Loghlen A.J.

This Appeal is expressed to be "against that part of the Final Order issued by the acting Registrar of the Land Titles Commission, D. M. Stenner, and dated 21st May, 1965, which declares that piece of land known as Rakunai, Portion 599, District of New Britain and to which title to an estate in fee simple shall be restored in the Custodian of Expropriated Property, to be that land as delineated and edged red on the map annexed to the said Final Order and marked with the letter 'A'".

The grounds of appeal as amended in 1970 and particulars thereof are that the Commission exceeded its jurisdiction or alternatively was wrong in law or alternatively its decision was against the weight of evidence in that -

(i) the said Final Order conflicts with the decision and directions of the Commission as to the starting point and boundaries of the land the subject of the said Final Order, and

(ii) the said Final Order was wrong in that the said plan annexed thereto and marked with the letter 'A' showed the area of the subject land as 21 ares 72 square metres.

The Appellant seeks an order that the Final Order be amended to define the subject land as being that land shown in the Draft Certificate of Title of 1928 less that area of land encroached upon by the sea.

The Claim lodged by the Custodian in respect of the subject land, which was known as Rakunai Trading Station, was dated 31st October, 1952 and it also covered three other properties in the same locality, Wangaramut Plantation, Wunagaramut and Rapindik.

The Custodian's claim was that Certificate of Title Volume 8 Folio 62 dated 10th January 1935 had issued in respect of the subject land. He was not able to produce a duplicate Certificate of Title, but relied on an examined copy of same which was held in his records at Melbourne.

At the hearing of this Appeal, Counsel for the Appellant conceded that a Certificate of Title had issued prewar in respect of the subject land: but he pointed out that this Certificate was for an area of 0.2172 ha., whereas the Draft Certificate of Title (1928) and Ground Book entry (post-1900) out of both of which the Certificate had arisen were each for an area of 0.1125 ha.

The differences between the two areas may be seen from a comparison of the data shown on the maps accompanying the respective documents:-

			C/T Vol 8 Fol. 62	Draft C/T
Northern boundary		length	about 46 metres	45 m.
"	"	bearing	none shown	101°3'
Eastern	"	length	45.00 m.	25.00 m.
"	"	bearing	180°26'	191°30'
Southern	"	length	50.93 m.	45.00 m.
"	"	bearing	277°37'	281°30'
Western	"	length	46.00 m.	25.00 m.
"	"	bearing	6°47'	11°30'
Total area			0.2172 ha.	0.1125 ha.

The northern boundary in both cases was the sea-shore: the measurement 45 m. and bearing 101°3' shown in the Draft Certificate were obtained by joining two points on the eastern and western boundaries set back 4 m. from the high water mark.

On 20th April, 1955, the then Commissioner of Titles issued a provisional order in connection with the Claim: it gave an estate in fee

simple to the Custodian and on a plan attached thereto it adopted the area and boundaries set out in the map in the margin of the examined copy of Certificate of Title Vol. 8 Fol. 62.

On 1st June, 1964, there was a reference of a question of native customary rights by the Director of Native Affairs, setting out an assertion of same by ISIMEL-TAMBOK of VUNAIROTO on behalf of his vunatarai on the ground that "the land was never alienated (no payment was made)".

There were two public hearings before the Land Titles Commission: the first at Port Moresby on 2nd February, 1965 and the second at Reimber Council House, Rabaul, on 26th March, 1965.

Prior to the first hearing, one Giles, who was described to me as being a field officer of the Commission but not a qualified surveyor, had reported to the Commission in or about the month of January 1964 as follows:-

> "This property adjoins the Methodist Mission property of VUNATAMBIMAPINA on the west, the latter property adjoins WANGARAMUT Plantations on the west. VUNATAMBIMAPINA is more or less overgrown with bush and old gardens. I did not sight any of the cements that were in position when this property was measured up approx ten years ago when claim was submitted. Rakunai has been planted with cocoa by natives. There is one cement in the sea about 6 metres below H.W.M. at the Northeast corner it is planted normally, but personally think that erosion would have washed the cement out rather than sink it straight down. North boundary is the sea. South boundary is a natural geographical feature a slope up of approx 25 feet. It is possible that as much as 15 metres may have been eroded by the sea and area will have to be reduced accordingly. I expect to go over this property with DNA representative before return to New Ireland."

At the first hearing in Port Moresby, no evidence was taken. Counsel for the Custodian produced a photostat copy of a typewritten copy of Certificate of Title Vol. 8 Fol. 62 and also a letter dated 22nd February 1935 from the Delegate of the Custodian in Canberra which read as follows:-

> "A copy of the draft Certificate of Title for this property was forwarded to you on the 3rd July, 1928. This draft was based on the survey made by Wernicke in 1900. The property was re-surveyed by McKenzie in August last. He located all the original cements and found that the property had a depth of approximately 45 metres, as against the 25 metres shown in the draft. From the

documents, it is fairly apparent that the property was re-surveyed about 1904, but that the record of this later survey was lost. Consequently no alteration was made in the Ground Book description. The Registrar decided to accept McKenzie's plan of the property and a Certificate of Title has been registered accordingly. A copy of this Certificate is enclosed for your records."

The hearing was adjourned, as it appeared that the land had been planted up with cacao by natives and the extent of their occupation was not known.

At the second hearing at Rabaul, the Custodian's "temporary" file was produced: as well as the examined copy Certificate of Title and letter of 22nd February, 1935 referred to at the first hearing, this file contained a copy of the Draft Certificate of Title and copy letter dated 3rd July, 1928 from the Delegate in Rabaul to the Custodian in Melbourne, forwarding same, a translation of the entry in the Ground Book relating to the subject land and relevant extracts from Gazettes. A statutory declaration by Albert Richards, a Senior Inspector in the employ of the Custodian, supported the authenticity of the examined copy of the Certificate of Title.

Two witnesses gave evidence at this hearing. The first was ISIMEL TAMBOK on whose behalf the Director had made the reference: he adopted the contents of a statement which he had previously made to A.D.O. Jones who had made the investigation on behalf of the Director: this read:-

"Many years ago TOMUNGA a big man of my clan was friendly with a Chinese TOWUN who was a boatbuilder TOMUNGA brought him and let him sit there. I believe that while I was a mission teacher at NAKANAI a survey was carried out and the people from my village told the surveyor that it was my land. The land was never paid for, it was only because TOMUNGA and TOWUN were friends. After TOWUN left, the boss of WANGARAMUT took it over. He did not use it except for coconuts. The sea has now taken all the coconuts. After the Japanese war I planted gardens and cocoa on it because it was my land and it was never bought. I was not born when Dr. Brown came. I think I am more than 60 years old. I remember the Germans quite well. (I imagine ISIMEL to be nearer 70 than 60). I know of no payment made but I know TOMUNGA bought a Bainings woman for TOWUN. She has been dead now a long time. There were no children. When TOWUN left his house was removed also. TOWUN remained on the RAKUNAI after the Germans left and the Australians came. The cocoa on RAKUNAI belongs to me. I wish to claim this land on behalf of my Vunatarai. The land adjoining RAKUNAI is mine also. I have made no complaint about RAKUNAI as I know it was never bought and it has not been used for years, and therefore is mine."

The remainder of ISIMEL's evidence related to erosion of the foreshore:-

"Q. Over the years has the sea been out on the land where this place RAKUNAI was?
A. Yes.
Q. Do you know how much has been washed away since you were a small boy?
A. (indicating length) About 50 feet.
Q. There is a wrecked ship in front of RAKUNAI, is that correct?
A. Yes.
Q. Was that ship always out on the water or was it once up on the beach?
A. It is on the water now. The ship was on the beach."

He was not cross-examined.

The second witness was one Kelly, an officer of the District Administration stationed at Rabaul. He was asked:-

"Q. How far is the wreck from the Beach?
A. When I visited it yesterday afternoon it was approximately 50 yards from the water mark.
Q. What sort of a vessel?
A. You cannot see anything of the vessel itself. There are two pieces of decking sticking above the water line. You cannot see any details of the vessel at all. It was described to me as a PINIS (Japanese) which was left from the last war."

On cross-examination, he was asked:-

"Q. Who sent you to investigate the ship wreck?
A. Mr. Cruickshank asked me to have a look at it.
Q. Did you know the purpose of the investigation?
A. No, but I do now.
Q. What is the purpose?
A. I believe it is to try and ascertain whether any of the block in question has been eroded by the sea."

At the conclusion of the evidence, the Chief Commissioner inspected the site and thereafter gave his decision as follows:-

> "Inspected site of old German Cement. Direct Final Order to issue restoring freehold to Custodian. Fix the commencing point of boundaries as O.G.C. in water on north east corner, dimensions as per pre war plan."

On 21st May, 1965, the Final Order was issued. Annexed to it and marked "A" was a map which is a copy of the map in the margin of the examined copy of Certificate of Title Vol. 8 Fol. 62: the Certificate was dated 10th January, 1935. The Final Order directed the Registrar of Titles to "bind up in the Register Book as Folio 62 of Volume 8 a folio thereof a true copy of the document annexed to the original of this order". A certified copy of this annexed document has been produced to me: it reproduces the contents of Certificate of Title Vol. 8 Fol. 62 as same appears from the examined copy propounded by the Custodian: in the space

of the Certificate normally taken up by the map in the margin appears the direction:-

"Here insert the Plan referred to in the Final Order dated the 21st day of May 1965. Land Titles Commission. D. N. Stenner. A/Registrar."

This Appeal is said by Counsel for the Appellant to be limited to the boundaries of the land which is the subject of the Final Order. Basically the Appellant seeks -

(a) the cancellation of the area and boundaries set out in that Order,

(b) the substitution therefor of the area and boundaries set out in the Draft Certificate of Title, and

(c) the excision from the last mentioned area and boundaries of whatever has been encroached upon by the sea.

In my opinion, however, the issue in this Appeal does not relate to boundaries; it is the title itself of the land which is in issue.

The Chief Commissioner in this Claim was dealing with an examined copy of a Certificate of Title and the evidence in support of it was overwhelming. The Claim was covered directly by the then recently published decision of the High Court in Custodian of Expropriated Property v. Tedep (Varzin)(1). At pages 336 and 337 of that judgment, the following passage appears:-

> "..... it follows from what has already been said that, if a claimant can produce a clean certificate of title or establish by other evidence an entitlement to a clean certificate, no native rights can be said to exist in the land, unless, after becoming entitled to such a certificate, and before the appointed date, the claimant has dealt with the land in such a way as to enable it to be said that such interests have been created. Further it should be noted that s. 13 of the Ordinance provides that where the Director is entitled to make a claim in respect of an interest in land vested in him for the benefit or on behalf of, or as trustee for, a native or native community, he shall take all proper steps to establish, in accordance with the procedure provided by the Ordinance, that the interest was so vested in him. But the Director could not succeed in any such claim unless he could show that he was entitled to an interest in the land and that he was entitled to be registered or entered in a lost register, within the meaning of those sections, as the owner of or the person entitled to that interest. Clearly enough, the Director could not have succeeded upon any such claim in the present case and it is idle to suppose that the Ordinance so operates as to allow the claim of a registered proprietor to be

(1) 113 C.L.R. 318.

> defeated or affected by an adverse claim to the land, or to an interest in the land, the owner of which could not succeed in establishing that he is entitled to registration as the owner thereof under the Ordinance."

Once he accepted the examined copy as evidence of an entitlement to registration, and it is clear that he did so, the Chief Commissioner had to restore the Certificate to the Register in the form in which he found it, unless he saw fit to apply the provisions of Section 24(2) of the Restoration Ordinance. This he did not do.

It was urged on behalf of the Appellant that this Court should now act under the sub-section. It was conceded by the Respondent that the examined copy Certificate of Title in question was an "old document" within the meaning of the Section: if the Commission was of the opinion that the document did not contain correct particulars (inter alia) of the boundaries of the land, it might in a Final Order direct the Registrar to vary the particulars in the manner specified in that Order. In the present case, where I am entitled to exercise the powers of the Commission, I find myself unable to form that opinion for the reason that in my view the old document before the Commission, viz. the examined copy Certificate of Title, contained the correct particulars of the boundaries of the subject land.

I am also not able to accede to the further argument put forward on behalf of the Appellant as a result of his submission that the Registrar of Titles had not acted lawfully in registering a Certificate of Title for land the area and dimensions of which were greater than those shown in the Draft Certificate of Title. Counsel for the Appellant argued that in these circumstances the Registrar went beyond his statutory power to make adjustments following survey and he was bound to go through the whole registration procedure once more in respect of the excess because in this case, it was clear that the additional piece of land involved was native owned. In my opinion, whatever the defects may have been, they have been cured by registration and, as fraud has not been alleged, the indefeasibility provisions contained in Section 68 of the Land Registration Ordinance 1924-1962 operate in favour of the Claimant.

On the question of erosion, the Appellant does not appear to derive much benefit from the evidence which was before the Commission: to be of any assistance to the Chief Commissioner, the evidence as to erosion had to be related to the boundaries of the land, particularly high water mark. Neither of the witnesses who gave oral evidence was of much help in clarifying the situation: the wreckage of the small Japanese ship is itself a moveable object and the Chief Commissioner was probably not impressed by evidence which tied the shoreline to the position of the ship. The Field Assistant Giles is the only person to refer to high water mark as such: his report, however, is valueless on the question of erosion because he had been unable to find any of the cements which appeared to have marked the boundaries some ten years before.

In my view, the evidence as to erosion of the foreshore of the subject land was such that the Chief Commissioner was justified in taking no positive action to indicate its extent as a part of his Final Order. He restored the boundaries as they stood in the Certificate of Title issued in 1935. The relocation of those boundaries is now a matter of survey and I fail to see that the Claimant can possibly gain any advantage over land that is outside those boundaries.

The final matter to be mentioned is the apparent failure on the part of the acting Registrar, Miss Stenner, to incorporate in the Final Order the direction given by the Chief Commissioner in his decision:- "Fix the commencing point of boundaries as O.G.C. in water on north east corner, dimensions as per pre-war plan." Counsel for the Appellant has pointed out the ambiguity of the last expression inasmuch as there had been two differing pre-war plans before the Commission, the one on the Draft Certificate of Title, the other on the 1935 registered Certificate.

I do not regard the matter as one of any great substance because clearly the Final Order as issued is not inconsistent with any part of the direction: it is true that the terms of the Final Order do not expressly incorporate the direction as to the commencing point and the ambiguity as to the plan is patent. However, there is not necessarily a

conflict between the Final Order and the direction, either as to commencing point or as to the plan. I do not consider that, in the circumstances, the Final Order requires any rectification: it accurately reflects the title as it had been registered in 1935 in Folio 62 of Volume 8 and is therefore correct.

The Appeal is dismissed.

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

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