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

CORAM : FROST, J.
TUESDAY,
21ST APRIL, 1970.

IN THE MATTER of the LAND TITLES COMMISSION ORDINANCE 1962/1968

- and -

IN THE MATTER of an application by GOMARA UDIA and HARIKI GORO and others.

## JUDGMENT.

1970.
Apr. 21
PT. MORESBY
Frost, J.

This is an Originating Summons in which the applicants make application for an order that the Land Titles Commission temporarily refrain from making a decision and state a case on certain questions for determination by this Court. The facts upon which this Originating Summons is brought appear in an affidavit by Mr. Young. The applicants have made application to the Land Titles Commission under Section 15 of the Land Titles Commission Ordinance 1962 for the determination of their claim that a large tract of land at Port Moresby, approximately 45 square miles in area, including June Valley and running down to the Laloki River, is native land and not Crown land. The hearing of the application commenced in November of last year and is proceeding. In the meantime, other native clans have appeared and also made claim to the land. They have by their representatives been joined as respondents to this summons and Miss Campbell, who appears for them, supports the application.

On the 8th April, Mr. Young made an application to the Land Titles Commission, at a stage when the evidence was not completed, that the Land Titles Commission temporarily refrain from making a decision and state a case for the determination by this Court on the following question of law:- "Is a contract of sale of land between natives and the Crown valid under the law existing in 1891, if the land is communally-owned land and (a) not all natives who have interests in the said land were parties to the transaction; or (b) the parties to the transaction had no right or title in perpetuity of which they were capable in law of disposing; or (c) the parties to the transaction did not understand the nature of the transaction". There had been given in evidence before the Land Titles Commission certain contracts, whereby in 1891 and 1897 the Administration purported to purchase the land. The case which is

being made by Mr. Young on behalf of his clients is that those contracts were not binding on the three grounds incorporated in the question of law which he seeks to be determined.

Before the Commission, much evidence has been called, and much evidence remains to be called. There is no agreement upon the facts. The view which Mr. Young took was that it would facilitate the hearing if he could at that stage have the law established so far as his three objections are concerned which relate to the validity of the transactions of purchase. The application was made under Section 32(1) of the Land Titles Commission Ordinance, which provides that in the course of an enquiry into or the hearing of a matter, the Commission may, and upon the order of a judge shall, temporarily refrain from making a decision and state a case upon a question (other than a question of fact only) for determination by the Supreme Court. The matter was fully argued by each of the counsel before me here today and in a well-reasoned judgment, the Land Titles Commission on the 9th April, 1970, refused the application. The following passage from the learned Chief Commissioner's reasons sums up the basis of the Commission's decision:

> "What is most relevant in my view is that the facts upon which the question of law is requested to be stated are not all before the Commission, they have not been the subject of a determination, some may or may not be established, and they are contested. No determination of fact could properly be made by the Commission at this stage. I am unable to agree that the Commission is likely to benefit from the case being stated, and the facts on which the question is to be stated be first established, determined or agreed upon, is, in my opinion, a necessary pre-requisite of any such benefit."

Now, it is plain that, under Section 32(1), supra, I have a discretion in the matter. How that discretion is to be exercised has been the subject of legal argument before me. Mr. Young's argument was that the Land Titles Commission was wrong in the view it took that at this stage, when the facts were not agreed upon, and not determined, it was premature to have a case stated for the determination by this Court. He referred to Order 38(2) of the Rules of the Supreme Court (Queensland, adopted), which he submitted indicated by analogy the principles to be observed in the exercise of my discretion. Order 38 Rule 2 provides, in substance, that if it is made to appear to the Court

or a judge that there is any question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, the Court or judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or judge may deem expedient. Mr. Young argued that the only two matters to be considered under that rule are, first, was the question which was sought to be determined by the Supreme Court a question of law, and secondly, was it convenient to have it decided at that stage, and there was nothing contained in Order 38 Rule 2 which required that the facts should first be determined or agreed upon before a Court would order a case to be stated. He referred to three matters bearing on convenience - first, that the Land Titles Commission was a commission in which there were two lay members who could overrule the Chief Commissioner, secondly, that the resolution of the question of law would relieve the Land Titles Commission of deciding any other questions except those of the facts, and, thirdly, at this stage they would be assisted to have that determination of law so that they could proceed immediately without further debate to the determination of the facts. However, it is quite plain on the authorities that the power conferred by Order 38 Rule 2 will not be exercised where the legal liability depends on facts which are disputed. It is sufficient for me to refer to the case which was cited before the Land Titles Commission, of Sumner v. William Henderson & Sons Ltd., (1). There the Court of Appeal was dealing with an application for the determination of certain questions by special case. The court said:-

> "It does not seem to us possible, or, if possible, appropriate to express a general opinion on the law which might be of no effect or erroneous on a certain view of the facts or which would have to be alternative with regard to a variety of views of the facts .........
> In the present case no facts have been agreed and what the outcome of the evidence will be is most uncertain. It does not seem to us in the interests of either party that a hypothetical decision should be reached now."
> (at pages 827/8).

Thus, if resort is made to the provisions of Order 38, Rule 2, by way of analogy, the Court would not order the question of law to be determined on a special case if the facts upon which that question depends are not agreed or determined. It is unnecessary for me to

(1) (1963) 1 W.L.R. 823.

consider the other authorities cited by Mr. Young as to the limits of the discretion conferred under that particular rule. It seems to me that the considerations referred to by the Court of Appeal are helpful in determining the principles upon which I should exercise my discretion under Section 32(1) of the Land Titles Commission Ordinance, and I have reached the conclusion that an order should not be made where the facts upon which the question depends have not been determined or agreed. That is the case before me. It is possible that at the end of the hearing before the Land Titles Commission, the Commission will find different sets of facts from those upon which the question is based, rendering its determination nugatory. In my opinion, this Court should avoid making an order on a hypothetical set of facts, for, as was said by Warrington L.J. in the case cited by Mr. Tuthill, Stephenson, Blake & Co. v. Grant, Legros & Co. (2), "the function of the Court is not to decide abstract questions of law, but to decide questions of law when arising between the parties as a result of a certain state of facts". (At page 440). For these reasons, I refuse the application.

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| Solicitor for the applicants | : | W. A. Lalor, Public Solicitor. |
| Solicitor for the respondent, The Administration of the Territory of the Papua and New Guinea | : | P. J. Clay, Acting Crown Solicitor. |
| Solicitor for remaining respondents | : | W. A. Lalor, Public Solicitor. |

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(2) (1917) 86 L.J. Ch. 439.