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

CORAM : CLARKSON, J.

Thursday,

16th July 1970

M.P. No. 49 of 1970(P)

BETWEEN SARAGA SINA AND MADAHA GEITA ON BEHALF OF IAROGAHA AND UHADI CLANS

MEA GABE AND DIHO GABE ON BEHALF OF THE ADARE CLAN

KORE AVIE AND RAHO RAKATANI ON BEHALF OF THE GAIBUDUBU CLAN

Applicants

AND THE ADMINISTRATION OF THE TERRITORY OF PAPUA AND NEW GUINEA

GOMARA UDIA AND HARIKI GORO ON BEHALF OF THE OGONI DABUNARI CLAN

VANA RAKATANI ON BEHALF OF THE OGONI GUBINI CLAN

UDIA SIVARI ON BEHALF OF THE MOKOGAHA CLAN

HENI GUBA ON BEHALF OF THE KAEVAGA CLAN

GANEGA GUMASA ON BEHALF OF THE BARUNI CLAN

Respondents

RE DA1 AND DA180, PORT MORESBY

1970
Jul 13 & 16.
PT MORESBY.

Clarkson,J.

There is at present pending before the Land Titles Commission a claim, No.14 of 1967, to certain lands known as DA1 and DA180 in the Port Moresby area.

The original claim was made on 20th January 1967 by two claimants on behalf of the Ogoni Dabunari clan. On 4th November 1969 a further four claimants representing separate clans were joined and representatives of three further clans were joined on 6th July 1970. It was agreed before me that all parties now before the Commission were either formally or informally before it prior to 6th July 1970.

It appears that the claims of the claimants are several and it is conceded that certain of the claims overlap one another.

The claim as it now stands before the Commission is that "the land comprised in the annexed plan and known as DA1 and DA180 is owned by the above idihus."

The original application also showed that the Administration claims the land the subject of the application and the Administration has in fact appeared before the Commission to contest the claims of the native claimants.

1970

re DA1 and DA180, Port Moresby.

Clarkson,J.

On 8th July last, in the course of proceedings before the Commission, all the applicants applied to amend the application by deleting the words set out above, namely, that the claim is "the land comprised in the annexed plan and known as DA1 and DA180 is owned by the above idihus" and by substituting therefor the words "that the claim by the Administration to be the owner of the land comprised in DA1 and DA180 to the exclusion of claims to ownership by native custom of or the right by native custom to use the said land be declared invalid and of no force and effect." The application was opposed by the Administration.

The Commission unanimously rejected the application to amend and published reasons for its decision.

On 10th July 1970 the sixth-named claimant applied to the Commission pursuant to Section 32(1) of the Land Titles Commission Ordinance requesting it to state a case on certain questions for determination by the Supreme Court. Section 32(1) reads as follows:

> "32.(1) 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 on a question (other than a question of fact only) for determination by the Supreme Court. "

This application was supported by the seventh and eighth-named claimants.

On the same day the Commission refused the application and gave its reasons in writing.

The matter now comes before this Court on the hearing of an application of the present applicants, being the sixth, seventh and eighth claimants, for an order that the Land Titles Commission temporarily refrain from making a decision and state a case on certain questions for determination by the Supreme Court. The application is supported by all the other claimants and is opposed by the Administration.

The applicants argue that the Commission has power to control its own procedure but that if in the exercise of its discretion to refuse or allow an amendment of the claim it misdirects itself in law the Supreme Court is entitled to intervene, and here, it is argued, it is apparent that the Commission acted on a wrong principle because it was under misapprehensions relating to its functions, the legal effect of the amendment sought and the law to be applied in determining the claims. Further, the applicants say, the Commission failed to give proper or any weight to the fact that all eight parties on one side of the record supported the application for amendment.

Counsel for the Administration has argued to support the decisions of the Commission, firstly to refuse the amendment and secondly to refuse to state a case. As to the first, it is said that the claimants by their proposed amendment sought to abandon or at least defer the claim they had made to be owners of the land and to substitute for it the contention that the Administration could not establish its claim to the land; further, that the claimants' claim may well fail without the Administration having to establish its own title.

As to the second, it is said that this application before me is not an application under Section 32(1) but an attempt to challenge a ruling by the Land Titles Commission in the course of the hearing.

What I have set out is by no means a complete summary of the matters in issue but it is sufficient to outline the circumstances in which arises the problem which I am required to determine, and that is the limited question whether under Section 32(1) of the Land Titles Commission Ordinance I should order the Commission to refrain temporarily from making a decision and to state a case on a question (other than a question of fact only) for determination by the Supreme Court.

I am not aware of any previous applications under this section to this Court and counsel did not refer me to any.

A similar procedure is provided for in some jurisdictions in respect to arbitrations - see for instance Section 19 of the Arbitration Act 1889 of England considered in The Tabernacle Permanent Building Society v. Knight (1) and Section 19 of the Arbitration Act 1915 of Victoria considered in Carr v. Shire of Wodonga (2).

The Land Titles Commission Ordinance sets no criteria by which the exercise of my discretion should be controlled although the cases to which I was referred by counsel, including the two mentioned, give some indication of matters which have been considered relevant.

In view of the conclusion I have reached I wish to make it abundantly clear that I express no view on the merits of the claimants' objections to the Commission's refusal to permit the proposed amendment. I heard sufficient argument to enable me to appreciate the nature of the dispute and to conclude that the amendment if allowed could well have a substantial bearing on the future proceedings before the Commission. I therefore make no comment on the written reasons of the Commission dated 8th July 1970.

I am, however, concerned with what happened thereafter.

As I have said, on 10th July application was made to the Commission requesting it to state certain questions for the determination of this Court. Those questions, which are before me, were clearly enough intended to be the basis of a challenge to the refusal of the Commission to permit the amendment sought, and the real question then before the Commission was whether in exercise of the power conferred by Section 32(1) it should state those

(1) (1892) A.C.298.
(2) (1923-24) 34 C.L.R.234.

questions, or the substance of them, for determination by the Supreme Court.

But it seems to me that at this stage the proceedings miscarried, and that the Commission did not address itself to the question properly before it. The Commission said:

> " The Commission is not being asked to temporarily refrain from making a decision and state a case on a question for determination by the Supreme Court but to submit to the Supreme Court for its confirmation or otherwise a ruling made in the course of hearing the present application. "

I have the impression that the Commission in this opening passage of its reasons is equating the "decision" it is being asked to refrain from making with the ruling it had made on 8th July and that in effect it is saying to the claimants: "you are not asking us to refrain from making a decision and to state a case. You are asking us to submit to the Supreme Court for confirmation or otherwise the ruling or decision already made." The implication is that in some way Section 32(1) does not fit the facts as they then existed.

It is true that the Commission then goes on to say without giving any reasons that it did not consider "this matter" one which it should refer under Section 32 but it seems to me that the reason for this view is not some relevant but unexpressed considerations but the situation as the Commission understood it, and as is described in the first paragraph of its reasons which I have set out above.

I think it clear that the "decision" referred to in Section 32(1) which the Commission is asked to temporarily refrain from making is something in the nature of a final decision on the claims or a final determination of all the matters in dispute and that it is no bar to the Commission stating a case, or to this Court requiring it to state a case, that the Commission has already expressed its view on the question or questions it is asked to refer.

In Spiller's case (3) which was concerned with Section 19 of the Arbitration Act 1889 of England, the English Court of Appeal held that the fact that the arbitrator had expressed no opinion adverse to the party applying for a direction that a case be stated was no bar to the right to apply for such a direction, and the Court of Appeal clearly assumes that the right exists when an adverse opinion has already been expressed, as is the case here.

In the present case I have concluded that the Commission did not apply itself to the proper question before it, namely, whether the Commission should in the judicial exercise of its discretion have stated a case on the questions of law said to be involved in its ruling of 8th July 1970, but rather it treated its ruling of 8th July as finally concluding the matter raised except presumably to the extent that it might subsequently be challenged in ways other than under Section 32(1).

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(3) (1897) 1 Q.B.312.

The problem then is to decide what action I should take. I could adjourn this summons in order that the Commission might reconsider the application to it in the light of the views I have expressed. This course however might still result in my having to deal finally with the application.

All parties consider the ruling on the application to amend the claims to be of considerable importance. I am told that the claims refer to a large area of land on which the Administration has already erected substantial improvements in the form of buildings and roads. And it seems that if the Commission were wrong in refusing the application - and I do not say it was - the future course of these proceedings which have already continued for 3½ years could be significantly changed.

In these circumstances I have decided to exercise my discretion in favour of the applicants and to require the Commission to state a case on questions of law, substantially in the form of those set out in paragraph 18 of the affidavit of Miss Campbell, for determination by the Supreme Court.

Although it appears that the Commission at the present stage of its enquiry is not in a position to make any final decision the formal order will be in terms of Section 32(1) of the Land Titles Commission Ordinance.

I assume that the parties will endeavour to provide a draft of the proposed case for the Commission and I invite their attention to the remarks of Hale J. in B.P. Australia Ltd. v. Town of Albany (4) and the authoritative statement by the High Court on the principles regulating the contents of cases stated appearing in The Queen v. Rigby & Anor (5).

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

Solicitor for 1st Respondent: P.J. Clay, A/Crown Solicitor.

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

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(4) (1964) W.A.R.40.
(5) (1958-59) 100 C.L.R.146 at 150 et seq.