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MR. KINNA.

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

CORAM : O'LOGHLEN, A.J.
Wednesday,
6th May, 1970.

APPEAL NO. 64 OF 1969 (N.G.)

BETWEEN:

THE ADMINISTRATION OF THE TERRITORY OF PAPUA AND NEW GUINEA.

Appellant

- and -

TOILU MAI on behalf of the KURAKUR CLAN and ARURUSEA TA-US on behalf of the GNAI-U CLAN.

Respondents.

re EMANANUS ISLAND.

1970.
Feb. 24, 25, 26.
RABAUL.
May 6.
PORT MORESBY.
O'Loghlen, A.J.

This is an Appeal against the Final Order of the Land Titles Commission dated 29th August, 1969, whereby the Commission declared -

"that in connection with the claim to re-establish ownership, as at the appointed date, of interest in or in respect of the claimed land it is not established that as at the appointed date the Claimant was entitled to an interest in the claimed land or to be registered or entitled to be registered as the owner of or person entitled to an interest therein."

The grounds of appeal are that the Commission exceeded its jurisdiction and was wrong in law in that -

(a) it failed to permit withdrawal of the Claim for restoration of title;

(b) it heard the matter after the Claim for restoration of the title had been withdrawn.

The Appellant seeks an order that the Final Order of the Commission be quashed and that the Appellant be permitted to withdraw its Claim for restoration of title.

The Administration, which was the Claimant before the Commission, alleged that it had withdrawn its Claim on two occasions. The first was by letter dated 23rd March, 1966, that is, prior to the making of the

Provisional Order on 28th July, 1966. This alleged withdrawal was investigated by the Commission during the course of the public hearing at Kavieng on 23rd July, 1969, and its finding was that there was no record of the same having been communicated to the Commission and having thereby become effective prior to the making of the Provisional Order. The Commission therefore concluded that the alleged withdrawal of 23rd March 1966 had been ineffectual and that the Provisional Order was validly made.

The second purported withdrawal was the one which is the subject matter of this Appeal and was made by Counsel for the Claimant at the public hearing of the Claim before the Commission at Kavieng.

At the commencement of this Appeal, Counsel for the Appellant intimated that he was no longer pressing the Claimant's earlier contention that it had withdrawn its Claim prior to the date of the making of the Provisional Order and that his argument would be limited to the withdrawal of the Claim after such Order had issued.

The exercise by the Administration of the right to withdraw a Claim under the Restoration Ordinance is potentially a matter of some importance by virtue of Section 14, which provides that the time limits which operate against other persons shall not apply to the Administration as long as a Final Order has not been made in respect of the land concerned. Once, however, a Final Order has been made, the Land Titles Commission (Declaratory) Ordinance 1968 enacts that the same becomes a judgment in rem in respect of the ownership of land the subject of the decision and of the rights, titles estates and interests therein set out.

If therefore it is decided in this Appeal, as it is urged on behalf of the Appellant, that a Claimant has the right to withdraw his Claim at any time before a Final Order has been made, then the Claimant of his own decision can inhibit the power of the Commission to make findings as to ownership which would, once made, operate as a judgment in rem: and, if that Claimant is the Administration, it has the unrestricted right to make a fresh Claim in respect of the same land at any later time when it should consider that circumstances have become more favourable. There are relatively few Claims still to be dealt with in the Restoration jurisdication and any advantage which might accrue to the Administration as a result of such a determination may not now be of great practical importance.

The first point raised by Counsel for the Appellant is that the Commission was wrong in law when it stated in the reasons handed down by the learned Chief Commissioner:-

"In this regard Counsel also sought assistance from the provisions of Rule 15(3) of the Land Titles Commission Rules 1968. That Rule, however, in my opinion, cannot be relied upon at all as it is not applicable to proceedings under the Land Titles Restoration Ordinance."

Rule 15(3) states inter alia that an Application shall not be heard unless the Applicant and Respondent or their representatives are present at the hearing.

Counsel submitted that the Chief Commissioner was wrong in saying that Rule 15(3) was not applicable to proceedings under the Restoration Ordinance in view of the provisions of Rule 8(2) which states that the Land Titles Commission Rules 1968 shall apply, mutatis mutandis, to any matter arising under the Restoration Ordinance or the Regulations made under it.

Rule 15 deals at some length with the procedure to be observed in the hearing of "Applications". The Applications specifically mentioned in the Rules appear to relate to those made under the provisions of the Land Titles Commission Ordinance 1962-1967, the Land (Tenure Conversion) Ordinance 1963 and under Section 82 of the Land Ordinance 1962. The whole content of Rule 15 seems to me to have no connection with proceedings under the Restoration Ordinance because the latter are subject to the express provisions of that Ordinance and those provisions do not appear to be in any way affected by Rule 15.

However, Counsel for the Appellant, although he did not press the matter strongly, argued that the effect of Rule 15(3) when read with Rule 8(2) was that an applicant or, in the Restoration jurisdiction, a Claimant, if he wishes to withdraw, can effectively do so just by failing to be present at the hearing: the Commission can give a decision under the Rule 15(3) in the absence of the other party, the Respondent, but cannot do so in the absence of the Applicant who in the Restoration jurisdiction must be the Claimant.

Rule 15(3) is not, in my opinion, of any assistance to the Appellant in this case, because in fact the Claimant was represented at the hearing and a decision against it was then given. However, Counsel argued that recognition must be given to Rule 15(3) and it must be treated as a factor which suggests that a Claimant can withdraw at the hearing and as an indication that a Claimant is not necessarily caught in the situation where a Final Order must be made against him. I do not find it necessary, for the reason above given, to decide the matter, but if I were to do so, I would uphold the view expressed by the Chief Commissioner that Rule 15(3) was not applicable to proceedings under the Restoration Ordinance.

Counsel for the Appellant then went on to attack the Chief Commissioner's reasons where the latter had relied for his decision on the provisions of Section 42 of the Restoration Ordinance. These reasons were:-

> "..... I must now consider the question as to whether or not a withdrawal may be effected at this stage, i.e. after the issue of an Order and the lodging of a reference to native rights. Counsel for the claimant contends that the right to withdraw remains right up until almost the time that judgment is given and cites dicta of Parke B. which is quoted in a passage of the judgment of the Court of Appeal in Clack v. Arthurs Engineering Ltd. (1). The passage discusses the Common Law and statutory rights of a party to elect to be non-suited and thereby preserve the right to institute fresh proceedings later. At page 225 of the same judgment the Court of Appeal referred to the overriding consideration in the public interest that there shoujd be an end to litigation. Whatever support may be lent by that authority, however, is far outweighed by the statutory provision under which this tribunal is set up and proceedings are directed to be followed.
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> Section 42 of the Land Titles Restoration Ordinance obligates the Commission to proceed to investigate hear and determine the claims objections and references which are the subject of or relate to Provisional Orders and to make Final Orders in respect thereof. Section 17 sets out what is to be declared in a Final Order. There is no reference in the Ordinance to a power or right to withdraw."

Counsel stated that he did not argue against the concluding sentence except to repeat that an Applicant need not be present at a hearing and that under the Rule quoted above, as it now stands, the Commission in such case could not make a Final Order.

Section 42 reads as follows:-

> "(1) Subject to Section 37 of this Ordinance, the Commission shall, after the date specified in the notice published under Section 34 of this Ordinance, proceed to investigate, hear and determine the claims, objections and references which are the subject of, or relate to, the provisional orders listed in the notice, and to make final orders in respect thereof, either in the same terms as the provisional orders, or in such other terms as it thinks just.
>
> (2) If, in respect of a provisional order, no objection is made in accordance with the provisions of this Ordinance on or before the date specified in the notice published under Section 34 of this Ordinance relating to that order, the Commission may, without a hearing, make a final order in the terms of that provisional order or in such other terms as the Commission thinks just.
>
> (3) The Commission may, if it appears to it convenient and just so to do -
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> (a) make more than one final order in respect of the claims, objections and references which are the subject of or relate to one provisional order; or

(1) (1959) 2 Q.B. at page 219.

(b) make one final order in respect of any or all of the claims, objections and references which are the subject of or relate to two or more provisional orders.

(4) A hearing under this section shall be public, and the Commission shall decide the matters in issue judicially."

Counsel for the Appellant denied that the effect of Section 42 was that once a Provisional Order was made the Commission was bound to proceed to make a Final Order. Section 42 was merely the first Section of Division 6 of Part III of the Ordinance: the Part is headed "Establishment of Interests and Compilation of New Registers". The seven Divisions of this Part lay down a Scheme under which the Commission operates in the Restoration jurisdiction. The Scheme laid down however must be regarded as a broad one and while there was no express mention of withdrawal in the Ordinance, a right to withdraw does not in any way conflict with Section 42 or with any other provision of the Ordinance. It is something which is incidental to the operations of any judicial body and Section 42 does not make it mandatory for the Commission to proceed to a Final Order.

As there is no statutory provision on the subject matter in the Restoration Ordinance or the Land Titles Commission Ordinance, apart from Rule 15(3) mentioned above, Counsel submitted that one must look to the Common Law situation to find out what are the rights of a Claimant. He referred to Robinson v. Lawrence, (2), Outhwaite v. Hudson, (3) and Clack v. Arthurs Engineering Ltd.(4) These cases establish clearly the right of a plaintiff in a Common Law action to withdraw at any time prior to pronouncement of judgment in a case where a judge sits alone or prior to verdict where there is a jury. Counsel accordingly submitted that as the Commission was bound under Section 42(4) of the Restoration Ordinance to act judicially, it was bound to apply the right to withdraw which was incidental to every Court.

He further submitted that the Chief Commissioner erred in weighing heavily in favour of the principle that there should be an end to litigation: he claimed that the Chief Commissioner in adopting in his reasons the reference to this aspect contained in Clack's case, (5) had taken it out of the context of the particular case; that when one reads the whole of that judgment one sees that the words were used in respect of a situation where two persons had been given ample opportunity to amend particulars and had not done so: it was this which had given rise in Clack's case (6) to the comment that there should be an end to litigation.

(2) 7 Exch. 123.
(3) 7 Exch. 380.
(4) (1959) 2 Q.B. 211.
(5) (1959) 2 Q.B. 211.
(6) (1959) 2 Q.B. 211.

Counsel then went on to show that the right to withdraw is universally recognized in other jurisdictions. In the Supreme Court of the Territory, it is covered by Order XXX. In the District Courts of the Territory it is expressly granted by Section 153 of the District Courts Ordinance 1963.

Counsel then argued that the Chief Commissioner was in error when he said:-

> "Further reference to the preambles of both the Land Titles Commission Ordinance and the Land Titles Commission (Declaratory) Ordinance leads me firmly to the conclusion that once a Provisional Order is made and a reference is lodged the Commission must proceed to determine the Claim as directed by Section 42. It is not empowered to give effect to an application to withdraw a Claim".

In his submission the preambles contained nothing whatever which would indicate that once a Provisional Order was made and a reference lodged then there should be a Final Order: the Chief Commissioner should have looked at the Common Law and decided that as there was no statutory provision against withdrawal he should apply the English Law on the subject as required by Section 16 of the Laws Repeal and Adopting Ordinance 1924-1952.

The Chief Commissioner had further said:-

> "The views expressed by Clarkson J. as to the obligations imposed on the Commission and the manner in which they may be met in his judgment In re Tonwalik (7) have afforded me much assistance in determining whether or not an Order simply dismissing a Claim would sufficiently discharge the obligations of the Commission and having regard again to the provisions of Section 42, I hold it would not be sufficient."

Counsel did not seek to argue that, in the matter under Appeal, there should have been a simple dismissal of the Claim: what was sought was something different, namely, discontinuance. In his submission, Mr. Justice Clarkson in the case quoted was not addressing his mind to the question of withdrawal: that question was not before him at all in Tonwalik, (8). In the instant Claim the proceedings had not even reached the stage of dismissal. In the Appellant's submission, the Chief Commissioner was not assisted in any way by what Mr. Justice Clarkson had said in Tonwalik (9).

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(7) (Unreported). Clarkson J. No. 526 of 2 June 1969.
(8) (Unreported). Clarkson J. No. 526 of 2 June 1969.
(9) (Unreported). Clarkson J. No. 526 of 2 June 1969.

Having considered the matters raised in this Appeal, I am of the opinion that the decision of the Land Titles Commission should be upheld upon two grounds.

The first is that the Commission was within its jurisdiction and acted lawfully in the circumstances in refusing to permit the Claimant to withdraw its Claim and in proceeding thereafter to hear the matter and to make the declaration appearing in the Final Order.

Procedural matters before the Commission are dealt with principally in two sections of the Land Titles Commission Ordinance: Section 29(1) provides that in the investigation hearing and determination of any matter before the Commission, it is not bound to observe strict legal procedure: it is also not bound to apply technical rules of evidence. Section 40(1) provides that the Chief Commissioner may make rules for regulating and prescribing the practice and procedure to be followed in matters before the Commission, and for regulating and prescribing all matters incidental to or relating to any such practice and procedure or necessary or convenient to be prescribed for the conduct of any business of the Commission.

The current Rules made under Section 40(1), the Land Titles Commission Rules 1968, contain no reference to withdrawal or discontinuance of a Claim under the Restoration Ordinance. The Restoration Ordinance itself is also silent on the same subject matter, although it is noteworthy there is specific provision for another matter of procedure, the amendment of Claims. Section 29 provides that the Commission may, at any time before a Final Order is made in respect of the land the subject of the Claim, and subject to such conditions as the Commission things fit, permit a claimant to amend his claim. Section 39(4) also empowers the Commission, subject to such conditions as it thinks fit, to permit a person objecting to a Provisional Order to amend his Objection.

In considering then the Appellant's contention that a Claimant has an absolute right of withdrawal, the first observation one would make as to the nature of the Land Titles Commission is that it is not a Court: it is a specialist tribunal which in some areas must act judicially: in other areas it may act administratively. It is a creature of statute and its powers and duties are those granted in the Ordinances relating to it.

In its Restoration jurisdiction, a person seeking to establish an interest in land must commence proceedings by lodging with the Commission by a specified date, now expired, a Claim completed in accordance with a form which is prescribed by Regulation.

The Commission deals with this Claim by converting it into a Provisional Order and this may be done without the merits of the Claim being substantiated at that stage by any evidence more compelling than

the answers contained in the Claim form; Restoration Ordinance, Section 33.

It is of interest that even at the time of the making of the Provisional Order, the Commission is empowered to include in such an order a Declaration in terms as detrimental as those which are contained in the Final Order made in the instant Claim, which is to the effect that the Claimant had not established an interest in the subject land which was capable of being restored to the Register (ibid, Section 17(1)).

The Provisional Order, in whatever terms it may be and whether or not it conforms to the interest claimed by the Claimant, is then dealt with in the manner set out in the Ordinances: the broad procedure comprises Notice of the making of the Provisional Order (ibid, Section 34); reference of questions of rights in the land claimed by natives (ibid Section 36); or Certification that no such rights exist (ibid, Section 37); Objections by any person to the Provisional Order being made into a Final Order (ibid, Sections 39-41); the public hearing of any matters raised in the proceedings, followed by a Final Order (ibid, Section 16 and Section 42(1)). The Final Order is subject to appeal, but, in default of appeal, it operates as a judgment in rem.

Against this legislative background, the Commission in the instant Claim declined at the public hearing to permit the Claimant to withdraw its Claim and proceeded to make the Final Order which has been appealed against in terms which could not possibly be more adverse to the rights in the subject land which had been claimed by the Claimant.

In my opinion, the law applicable to a tribunal dealing with such a situation is this: where a statute creates a tribunal but there is no machinery laid down in the statute for dealing with the matter before it, then the tribunal itself is to prescribe the machinery: where the tribunal sets up procedural machinery for the conduct of its business, that machinery is valid unless it is contrary to statute or to natural justice: the tribunal may make these rules of procedure as the need arises. Ex parte Toohey's Ltd.; re Butler and Others (10); Electric Light and Power Supply Corporation v. Electricity Commission of New South Wales (11); re Horacek, Ex parte Springfield,(12); R. v. The Industrial Court and Others (13); Edgar v. Greenwood (14).

In the first mentioned case, Ex parte Toohey's Ltd. (15), Jordan C.J. said at page 284:-

(10) (1934) 34 S.R.N.S.W. 277 at page 284.
(11) (1956) 94 C.L.R. 554.
(12) (1933) Q.W.N. 24 at page 25, per Henchman J.
(13) (1964) 58 Q.J.P.R. 50 at page 52.
(14) (1910) V.L.R. 137.
(15) (1934) 34 S.R.N.S.W. 277.

"It is true that where a statute directs a specific proceeding in any court the meaning to be attached to such direction is that the proceeding must be according to the practice of such Court: ex parte Heathfield (16); but where there is no practice specially applicable, it is competent for the tribunal to deal with the matter as justice and common sense alike call for: Inland Revenue Commissioners v. Joicey (17); A.-G. for Ontario v. Daly (18). 'Where the intention of the Legislature is that something shall be done which may be done by a tribunal charged with the duty, but no machinery is prescribed, then the Tribunal itself will prescribe the machinery.' Edgar v. Greenwood (19)."

In the last mentioned case, Edgar v. Greenwood (20) Madden C.J. said at page 144-5:-

"As to that, there appear to be two answers - one is that where a function is prescribed for a public officer, judicial or quasi-judicial and jurisdiction is given to him to deal with certain matters, and no machinery is provided for dealing with those matters, he must do the best he can with the means he has available. But apart from that there is a rule which has been laid down by this Court in several cases - among them In the Will of Todd (21), in the case of probate matters, and R. v. Justices of the Central Bailiwick, Ex parte McEvoy, (22) in the case of matters under the Marriage Acts - that where the intention of the Legislature is that something shall be done which may be done by a tribunal charged with the duty, but no machinery is prescribed, then the tribunal itself will prescribe the machinery."

In my view, the Land Titles Commission in the Claim before it which is the subject of this appeal was entitled, when confronted with the demand by the Administration for the recognition of its absolute right of withdrawal, to regard it as a matter of practice and to treat it in the way in which it did, that is, to reject it; and that in so doing it did not act contrary to natural justice or to the provisions of any statute applicable to it.

The second ground upon which I uphold the decision of the Commission is that I agree with the view expressed by the Chief Commissioner

(16) 8 Taunton, 403.
(17) (1913) 1 K.B. 445 at page 451.
(18) (1924) A.C. 1011.
(19) (1910) V.L.R. 137 at 144-5.
(20) (1910) V.L.R. 137.
(21) (1887) 13 V.L.R. 185.
(22) (1881) 7 V.L.R. 90.

that where Section 42(1) of the Restoration Ordinance states that:-

> "..... the Commission shall ..... proceed to investigate, hear and determine the claims, objections and references which are the subject of or relate to the provisional orders listed in the notice and to make final orders in respect thereof ....."

the requirement is mandatory. There must be a discharge of the Provisional Order and the minimum requirement for that is a decision as to the disposal of the Claim.

In my opinion, the whole scheme of the Restoration Ordinance is mandatory. Wide discretions in respect of procedure and of evidence are specifically allowed to the Commission and numerous powers are granted to enable it to deal with particular situations; but in my view the framework within which the Commission otherwise operates is rigid and must be followed, whether or not it suits the convenience of the Commission or of the persons affected.

Section 42 itself refers to matters where the Commission is at liberty to act in alternative ways.

Section 16 is in my view also mandatory and obliges the Commission before making a Final Order to act in terms which are very close to those contained in Section 42(1) unless the particular case comes within the specified exceptions.

Section 17, which deals with the content of Provisional and Final Orders, is in my view also, subject to the matters which it expressly permits, mandatory.

In coming to my decision in this appeal, I have received assistance from two cases where it was held that a right to discontinue is not an essential part of the structure of a statutory tribunal.

In R. v. Income Tax Special Commissioners, ex parte Elmhurst, (23), a taxpayer who had been assessed to an additional assessment to income tax gave notice of appeal against that assessment: he subsequently gave notice that he withdrew the appeal: it was held by the Court of Appeal in England that the appeal could not be withdrawn at the instance of the taxpayer once he had set it in motion and that he could not prevent the Commissioners from assessing his liability according to the true facts or debar them from proceeding further to develop the facts so that they could feel that they had ascertained the true position.

In Johnstone Shire Council v. Wilson and Anor., (24), certain ratepayers had appealed against a rate valuation. A magistrate sitting as

(23) (1935) All E.R. 808.
(24) 32 Q.R. 151.

a valuation tribunal had ruled that the ratepayers had a right to withdraw their appeal against the objection of the Shire Council to such a course. The Queensland Full Court held that the Council was entitled to have a determination by the tribunal as to whether the valuation should be upheld or reduced or decreased.

The argument in this rating case has been extensively reported and is markedly similar to that adduced in the Appeal before me.

The Full Court went on to decide that there was nothing in the legislation which it was considering which gave an appellant ratepayer the power of deciding for himself the question which was before the Court. It was not the intention of the legislature at all that he could go on and win if the Valuation Court was with him and withdraw his appeal and so escape defeat if it was against him; the wording of the Acts imposed on the Valuation Court the power and duty to hear and determine the appeal. Henchman J. could not see how the appellant, by withdrawing his appeal, should be able to determine adversely to the Respondent its right to an adjudication. Graham A.J. considered that the ratepayers by giving their notice had created both the jurisdiction of the Court and the right in the local authority on the hearing of the appeal to an adjudication in its favour: once they had invoked that jurisdiction and created that right, he did not think that they were able at any time thereafter of their own motion to curtail the jurisdiction of the Court or to bar the right of the local authority to prosecute its claim for an increase.

While the decisions in the two cases here quoted were necessarily based on the wording of the legislation under review, they do establish that in the absence of a specific power so to do, a person initiating a matter before a statutory tribunal can well be faced with the position where he has not got the unrestricted right to withdraw and another interested party may well have a right to determination.

In my view, that is the situation which is brought about by the provisions of the Restoration Ordinance: persons whose rights are included in a Reference, an objector and the Commission itself are all entitled to see through to finality the determination of the Claim which has brought the jurisdiction into existence: or as it was put in argument in the Johnstone Shire Council case (25), the public has an interest in the result.

In my opinion, the Commission was both entitled and bound to proceed as it did. The Appeal is dismissed.

Solicitor for the Appellant : P. J. Clay, Acting Crown Solicitor.
Solicitor for the Respondents : W. A. Lalor, Public Solicitor.

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(25) 32 Q.R. 151.