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

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

Appeal No. 15 of 1965 (N.G.)

BETWEEN THE DIRECTOR OF NATIVE AFFAIRS
Appellant

AND THE CUSTODIAN OF EXPROPRIATED PROPERTY
Respondent

re UTUAN VIRGIN LAND.

1970,
RABAUL.
eb 19,20,23.
PORT MORESBY.
May 6

This is an appeal against the Final Order of the Land Titles Commission dated 30th December, 1964, whereby the Commission declared that "on the appointed date the following interest in the ...(subject)... land was owned by the following person:-

> Estate in fee simple by the Custodian of Expropriated Property subject to encumbrances in favour of the Administration of the Territory of Papua and New Guinea relating to mining conditions and recognition of public roads or rights-of-way or landing places and that the Custodian of Expropriated Property was entitled to be registered as the owner of his interest in the Register Book kept under the provisions of the Lands Registration Ordinance 1924-1962 of the Territory of New Guinea and Section 21 of the New Guinea Land Titles Restoration Ordinance 1951-1963 and that no native customary rights were retained on the appointed date by a native or native community in respect of the land the subject of this Order or any part thereof."

The grounds of appeal in their amended form as filed in 1970 are as follows:-

1. that the Commission was wrong in law in restoring a fee simple interest in the said land to the Respondent in that it relied upon evidence of occupation which does not in law give rise to any inference upon which acquisition of the said land by the German Government could be based:
2. that the finding of the Commission was against the weight of the evidence in that there was no evidence or no sufficient

evidence before the Commission upon which it could find that the Respondent was entitled to registration of the said interest in the said land under the provisions of the New Guinea Land Titles Restoration Ordinance 1951-1968:

3. that the Commission was wrong in law that it failed properly to exercise its discretion under section 67(3) of the New Guinea Land Titles Restoration Ordinance 1951-1968: and

4. that the Commission was wrong in law in that it failed to give proper consideration to the fact that in the body of evidence placed before it there was -

   a) evidence that the said land was not registered in the Land Register (Grundbuch),

   b) evidence that no certificate under section 17 of the Land Registration Ordinance (New Guinea) 1924-1963 had been issued in relation to the said land, and

   c) no evidence of the commencement of any proceedings for registration of the said land prior to January, 1942.

The Appellant seeks an order that the Final Order of the Land Titles Commission be quashed and that in lieu thereof there be an order that at the appointed date the Custodian had no interest in the subject land.

The Claim which had been filed by the Custodian was in the usual form and was verified by the statutory declaration of C. R. Greig of Canberra, who was his duly authorised agent. In it, the Custodian claimed to have been entitled as at the appointed date to an interest specified in the answer to Question 1 of the Claim in or relating to the subject land and to be registered or entered in a Lost Register as the owner of or the person entitled to that interest.

The answers to most of the questions set out in the form were either consequential to more explicit answers or were negative, but the following questions and answers are material to the issues involved:

Question	Answer.
1. What is the nature and duration of the interest to which you claim to be entitled?	Freehold.
3. How was the interest acquired by you?	Expropriation.
4. From whom was the title relating back to the interest claimed acquired by the person to whom the land was first alienated?	Former German Government.
5. Was the interest registered, entered or notified in (a) the Register Book, (b) the Register of Administration leases, (c) the Land Register (Grundbuch), or (d) any other record?	(a) No. (b) No. (c) No. (d) Not known.
19. Where is your Certificate of Title or other instrument evidencing your title to the interest claimed?	Certificate of Title not issued. See attached documents.
21. Can you give any other information likely to be of assistance to the Commissioner concerning the land the subject of the interest or the whereabouts of documents in any other matter or thing affecting this claim?	Advertised for sale "Rabaul Times" No. 153 of 23.2.28. Purchased by R. K. Moore. Fully paid.

The attached documents referred to in the answer to Question 19 were:-

firstly, a note initialled by W.C.T(homas) showing date 17.4.31 which reads as follows:

> "According to the records held by the Delegate in Rabaul, the D.H.P.G. were recognised as the owners of the land in an agreement between the company and the German Fiscus dated the 15th September, 1905."

secondly, a memorandum from the Custodian to the Delegate dated 21st April, 1931, which was as follows:-

> "I shall be glad of advice as to the present position concerning the issue of a Draft Certificate of Title to the property Utuan, referred to in your papers L.T.587."
>
> and

thirdly, a copy memorandum from the Delegate to the Custodian dated 9th May, 1931:-

> "With reference to your memorandum of 21st April, 1931, T.253, I have to advise that the survey of Utuan was completed

recently, but that the survey plan is not yet available. As the property is not registered in the Groundbook, it will be necessary for a Certificate under Section 17 to issue before a draft Certificate of Title can be published."

These three documents were part of the Custodian's file T.253 which was tendered to the Commission at the hearing. The summary sheet which forms part of the file and shows the handwritten date 1.8.51 and some initials at the bottom gave these details:-

"Certificate of Title or Lease Register No. Vol..... Fol.	Nil.
Draft C.T.	Nil.
Section 17 Certificate	Nil.
Native Rights	(No answer recorded)
Additional Remarks	Survey completed. C.T. yet to issue. Not transferred."

Following this Claim, a Provisional Order was made on 6th March, 1962, which gave the fee simple in the subject land to the Custodian. On 5th October, 1962, there was a reference of a question of native customary rights by the Director of Native Affairs setting out the native claims as follows:-

"The natives Tokoikoi and Ambo of Kerawara Island for and on behalf of the lineage of Tolaura - Silbet vunatarai, claim full rights of ownership over the whole of the land by customary right and assert that the land has never been alienated."

A public hearing by the Chief Commissioner was held in Rabaul on 21st September, 1964, when submissions were made on behalf of the Custodian and of the native claimants. The Chief Commissioner adjourned the hearing and directed that further investigation of the native claims should be made by a Commissioner. This was later done by Commissioner Smith and on 4th December, 1964, there was a further hearing by the Chief Commissioner, at the conclusion of which he stated his reasons as follows:-

> "That shows a remarkable continuity of occupation from as far back as we can possibly go and compared with the documentary evidence of the Custodian's file I think there is sufficient evidence on which I can say the Government acquired the land and gave a title of some sort to the original occupant and the present Government is quite happy to give the Custodian an estate in fee simple regardless of whether the original occupants had the German right of perpetual occupation for a time. I do not think there is any difficulty in finding there is enough evidence. The native claim is summed up in their own words that it is their Island and they want this Island back. They want this land and it was their land. The area is so small and the land is so poor that it is not going to help them much. It is 3 acres, 3 roods, 30 perches according to one story."

Following these reasons, a Final Order was issued by the Commission in the terms set out in the opening paragraph above.

In my opinion the Final Order cannot be supported by the reasons for his decision given by the Chief Commissioner.

The documentary evidence produced on behalf of the Custodian established conclusively that there had not been at the appointed date any registered title in existence which was capable of being restored to the Register by the application of Sections 9 and 10 of the Restoration Ordinance. The only possible means by which the Chief Commissioner could have restored the freehold to the Custodian was by dealing with the Claim as an application for initial registration under Sub-section (3) of Section 67 of that Ordinance. He would thus have had to consider whether the Claim would have come within the ambit of the sections of the Land Registration Ordinance which were repealed by Sub-section (1) of Section 67, and, if that were the case, he would then have had to form the opinion required by Sub-section (3) of Section 67.

The transcript of the proceedings before the Commission contains no reference whatever either to the repealed sections of the Land Registration Ordinance or to Section 67 of the Restoration Ordinance which repealed them. I am satisfied that the provisions of all relevant sections were not brought to the attention of the Chief Commissioner in the hearing

of the Claim and were not the subject of his enquiry. The same provisions just as obviously were not of consequence to Counsel on both sides: the evidence which they led and their submissions related to the occupation of the subject land and to the nature and source of any non-native title which may have existed in respect of it around the turn of the century. Both of these matters are material to the forming of an opinion by the Chief Commissioner as to whether or not a Certificate under Section 17, which was one of the repealed Sections, would have been given by the Commissioner of Lands. However, they are only two aspects of the much wider field of enquiry which argument in this Appeal has shown to have required to have been canvassed. All these other aspects which relate to the procedures which had to be applied in order to implement the repealed sections are not shown by the transcript to have been covered in the course of the hearing.

Looking back with hindsight, a likely reason for the omission comes readily to mind. At the time of the hearing of this Claim in December 1964, Section 67 of the Restoration Ordinance had not yet attained the position of importance in the "restoration" arena into which it has since been developed.

The effect of Section 67(3) in providing for initial registration seems to have been fully argued for the first time before Mr. Justice Minogue in Tolain v. The Administration (1) (re Vulcan land) in August 1965 and general appreciation of the scope of the sub-section would have followed the publication of that judgment in mid-1966.

In my view, the question of the application of Section 67(3) to the facts of the present case did not have the proper attention either of the Commission or of Counsel for the respective parties. After hearing the detailed argument of Counsel in this Appeal, I consider that all concerned are entitled to have the numerous, complex issues, which are now shown to have been raised by the Claim, properly dealt with vis-a-vis the sundry procedures required to be considered under the sub-section.

(1) (1965-66) P.N.G. L.R. 232.

In re Vulcan land (2), Mr. Justice Monogue was able, as a result of a lengthy rehearing of the Claim before him, to substitute a Final Order which differed from that of the Commissioner of Titles which he had been reviewing. The Appeal before me has, however, been conducted under amended provisions of the Land Titles Commission Ordinance which have abolished the rehearing provisions on an appeal; and it has been conducted only in relation to the evidence which was before the Commission in 1964.

A similar problem involving Section 67 of the Restoration Ordinance was recently before Mr. Justice Clarkson in re Tonwalik (3). Both sides in the instant Appeal have relied strongly on dicta in the judgment in that case; indeed the matters in issue in the instant Claim are only a further extension of the disputed issues in re Tonwalik (4) inasmuch as our Claimant's title from German times is less determinate than the one put forward by the Custodian in re Tonwalik. (5).

In the instant Claim, the Custodian, as seen from his answers in the Claim form, had claimed the freehold based on expropriation. The Appellant has submitted that there had been no evidence before the Commission of expropriation or as to the person from whom expropriation may have taken place or as to the nature of the interest which may have been held in German times. Counsel for the Respondent conceded that he was not able to show from where the Fiscus had got his title but claimed that the Fiscus had probably acquired this land between 1899 and 1905 by purchase from natives. The undisputed facts apparent to me were that there was no entry in the German Land Register in respect of this land and that no Section 17 Certificate had ever been given by the Commissioner of Lands despite the carrying out of a survey in 1931. The Respondent argued that expropriation had been claimed in the Claim form which had been supported by the initial Statutory Declaration and this particular issue had not been disputed at the hearing: while he conceded that an expropriation did not establish any title which was better than that of the Custodian's

(2) (1965-66) P.N.G. L.R. 232.
(3) (Unreported) No. 526 of 2nd June, 1969.
(4) (Unreported) No. 526 of 2nd June, 1969.
(5) (Unreported) No. 526 of 2nd June, 1969.

predecessor, it was evidence that in 1920 there was an actual German ownership: the Custodian must at that stage have based his expropriation on something and the Respondent suggested that this was the German document alleged in the Custodian's file to be held in the Land Office stating that the subject land was that owned by the German Company D.H.P.G. following an agreement with the Fiscus. The Respondent also continued the argument put forward at the hearing before the Commission that the reference (in the entry Vol. 1 Fol. 21 of the German Land Register set out in the Supplementary Appeal Record) to land on the west of the property described in that Register as being "the Estate of the German Trading and Plantation Company" was in fact a reference to the subject land and it indicated that the same was considered at the date of that entry, 27th June, 1905, to be non-native land.

In the circumstances of the Claim, the Commission acting under Section 67(3) of the Restoration Ordinance would at the hearing have had to consider whether in its opinion the Custodian would have been entitled at the appointed date to an interest in the land and to be entered or registered in the Lost Register if -

(a) such of the repealed sections which were relevant remained in force, and

(b) the procedures prescribed by those sections had before the appointed date been completely applied.

The repealed sections which were submitted in argument before me to be relevant were:-

Section 17 - land not yet registered in the German Land Register had, in order to achieve registration, firstly to be the subject of a certificate by the Commissioner of Lands;

Sections 19-20 - a draft Certificate of Title had to be prepared by the Registrar of Titles and to contain specified particulars;

Section 20B - requirements as to survey had to be satisfied;

Section 21 - the draft Certificate of Title had to be served on sundry interested parties;

Section 22 - the Director of Native Affairs had to take prescribed action to contact local native people and after a prescribed period certify that no native rights existed or if same did exist refer any such rights either to the Central Court or to the Administrator;

Section 24 - the Director of his own initiative to refer any question of possible native rights to land to the Central Court;

Section 24A - the native rights could be barred if same had not been asserted or used for twenty years;

Section 24B - the native claim could be dealt with by the Director by compensation in certain circumstances;

Section 26 - native claims referred to the Central Court by the Director had to be the subject of a determination by the Court where they could succeed or fail or partially succeed to the extent that an encumbrance or a native reserve would be created;

Section 27E - the native claim could be dealt with by the Court by the award of compensation in certain cases.

In my opinion, the parties were entitled to have their cases considered in the light of each of these provisions and the opinion of the Commission given as a result of that consideration. A negative, that is an adverse, opinion on any material Section would be fatal to the Claimant; and it must be conceded that only the highest standards would be acceptable to the Administrator, the Registrar of Titles and other officials in carrying out their duties under the Ordinance.

Despite the expressed wishes of Counsel that the matter be disposed of one way or the other in this Appeal, I feel that that course would be unfair in the circumstances to both parties. The proper enquiry called for by Section 67(3) of the Restoration Ordinance has not been made in respect of this Claim and I respectfully endorse and adopt the observation made by Mr. Justice Clarkson at the conclusion of his judgment in re Tonwalik (6) that even after proper enquiry is made, the question of whether an entitlement would have arisen in the circumstances is one which the Ordinance commits to the opinion of the Commission.

The order of this Court is that the Appeal be allowed, the Final Order quashed and that the case be remitted to the Land Titles Commission for rehearing.

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

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

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(6) (Unreported) No. 526 of 2nd June, 1969.