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

CORAM: FROST, S.P.J.

Tuesday,
5th October, 1971

BETWEEN: THE DIRECTOR OF NATIVE AFFAIRS
Appellant

AND: THE CUSTODIAN OF EXPROPRIATED PROPERTY
Respondent

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Frost, S.P.J.

This is an appeal brought by the Director of District Administration against a final order which was made by the Land Titles Commission in respect of certain land known as the Adolfhafen Virgin Land, situated in the Morobe District upon Morobe Harbour which was known in German times as Adolfhafen. It consisted of three pieces of land which were known respectively as Namandei, MO Block A and MO Block B. The land was referred to both in the Provisional Order and the Final Order by reference to a plan which was annexed and it is apparent that the plan was based upon an extract from Bezirk's Morobe Sketch dated 31st December, 1911. The land called Namandei at the mouth of the Morobe River is the most northerly of the pieces of land shown on the Sketch as consisting of 171 hectares 6 ares. MO Block A is the land shown on Adolfhafen of 18 hectares 6 ares next southerly, and MO B of 3 hectares and 6 ares which is the most southerly portion of the land also situate upon Adolfhafen.

Following the making of the Provisional Order on 21st June, 1957, pursuant to Section 36 of the New Guinea Land Titles Restoration Ordinance there was on 26th November, 1957 a reference of the question of Native Customary rights on the appointed date (which was 10th February, 1952) in respect of the land. The Acting Director of Native Affairs therein stated that the natives and native communities therein referred to claimed full ownership rights over each of the pieces of land. Under the Restoration Ordinance, Section 42, following the reference made under Section 36, it

was necessary for the Commission to proceed to investigate, hear and determine the claims, objections and references the subject of the Provisional Order and to make final orders in respect thereof. The initial hearing took place in Lae on the 7th October, 1964 when two witnesses, Mr. Lowry, a patrol officer, and one Papoka-Gaura, were called and examined before the learned Chief Commissioner. Mr. Commissioner Reid was then requested to conduct further hearings at Morobe and examine various native witnesses as to the claims made by them. This hearing took place on the 3rd November, 1964. The Final Order was made at Lae on the 15th December, 1964, after a document, to which I shall refer later, was put in evidence and submissions by Counsel. In the Final Order it was declared that at the appointed date there was an estate in fee simple to which the Custodian for Expropriated Property was entitled, subject to the usual encumbrances in favour of the Administration relating to mining conditions, public roads, etc., but subject also to most extensive encumbrances in favour of the Director of Native Affairs as a trustee for natives of the surrounding areas, over each of the portions of land, broadly speaking, to use each of these pieces of land, in the case of Namandei for gardening, and in the case of each of them for collecting or taking produce from the land, and for fishing purposes and also, so far as Namandei is concerned, for the erection and user of dwellings upon that land.

The title of the Custodian which was upheld was a title which he claimed as a successor under the Expropriation legislation from the New Guinea Company which in turn, according to the claim made by the Custodian before the Chief Commissioner, was based upon a purchase by the New Guinea Company after 1906 and probably before 1908 from natives in the area. The ground of appeal relied upon by Counsel for the Director, on behalf of the native claimants, is that the Commission exceeded its jurisdiction or alternatively was wrong in law or alternatively such decision was against the weight of evidence, in that the Commission was wrong in

declaring the Custodian to be entitled to registration on the Register Book as the absolute owner of the said land. Some argument was advanced as to errors of law made by the learned Chief Commissioner, but the main ground relied upon was that the decision was against the weight of evidence pursuant to Section 38(2)(aa) of the Land Titles Commission Ordinance.

It is necessary to look at the way the case was put under the Restoration Ordinance. Under Section 9, it is provided that a person claiming to be entitled as at the appointed date (a) to an interest in land, and (b) to be registered or entered in a lost register as the owner of or the person entitled to that interest (whether or not he was, before the loss or destruction of that register, so registered or entered), may make a claim in respect of that interest. The relevant portion of Section 10 provides that for the purposes of the preceding Section, a person shall be deemed to have been entitled to be registered or entered in a lost register as the owner of or the person entitled to an interest in land if he would have been so entitled, but for (a) the destruction or loss of any register (including the Land Register or German Groundbook), record, certificate or document. But it was conceded that the Custodian was not registered in any lost register in respect of the subject land pursuant to the Land Registration Ordinance of New Guinea, nor had there been any document in existence that would have entitled the Custodian to have become so registered pursuant to the provisions of Section 10(a). The case which was made before the Chief Commissioner was a case under Section 67(3) of the Land Titles Restoration Ordinance, the relevant part of which provides that for the purposes of the Ordinance a person shall be deemed to have been entitled, at the appointed date, to an interest in land, and to be entered or registered in a lost register as the owner of, or a person entitled to, that interest if in the opinion of the Commissioner, he would have been so entitled if - (a) the provisions repealed by this section had remained in force; (b) no relevant document or register had been lost or destroyed; and (c) the procedure prescribed by those provisions had, before the appointed date, been completely applied in relation to that land. The only basis for the decision of the learned Chief Commissioner is that he did form the opinion that if the provisions of the Land Titles Registration Ordinance, relat-

ing to bringing of land under that Ordinance, had not been repealed and had remained in force and the procedure prescribed by those provisions had been completely applied, then upon the facts before him the New Guinea Company was shown to have been entitled to full ownership of the land and the Custodian as its successor was accordingly entitled to be registered in respect of that interest. Both Counsel relied in this Court after Tolain and ors. v. The Administration (1) and The Custodian of Expropriated Property v. The Director of District Administration - In re Tonwalik Island (2) and I am content to adopt the construction of the section therein laid down. These decisions establish that it is for the Chief Commissioner, having regard to the evidence which he then had before him, to apply the provisions of the Ordinance, assuming that they had remained in force and the proper procedure had been applied and to form an opinion whether the claimant had proved that he was entitled to be registered in the lost register as entitled to an interest in that land. It is for this Court, having regard to the evidence which was put before the Chief Commissioner, to come to the conclusion whether the opinion which he so formed was an opinion which was against the weight of the evidence.

I propose to turn now to the relevant provisions of the Land Titles Registration Ordinance. Section 16 provides that where any land or estate or any interest in land or any right affecting land is registered in the Land Register (which means the German Groundbook formerly in use) the Registrar shall without any application from any person interested proceed to bring that land under the Ordinance in accordance with the provisions thereof. As it is conceded that the land was not so registered the appropriate provision is Section 17, the relevant words of which provide that where any person was before the 9th May, 1921 entitled, either immediately or in the future, and either absolutely or contingently, under the laws then in force to be entered in the Land Register as the owner of any land or of any estate or interest in land or of any right affecting land, the Commissioner for Lands may at any time certify by writing under his hand that any such person or his successor in title is entitled to be registered in the Land Register as

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(1) (1965-1966) P. & N.G.L.R. 232 (Minogue, J. as he then was)

(2) Unreported judgment P. & N.G. (Clarkson, J.)

the owner of the land, estate, interest or right which is described in the certificate. It is thus provided that the Commissioner for Lands is to initiate the procedure for bringing land under the Ordinance.

Mr. Tuthill submitted, in my judgment correctly, that if an entitlement were shown then the meaning to be given to the word "may" is "shall" so that the Commissioner for Lands was bound to give such a certificate. If the certificate was given the Registrar was to proceed to bring the land affected under the Ordinance in accordance with the provisions of the Ordinance, Section 18. He was to cause to be prepared a draft certificate of title (Section 19) and there was provision for the Registrar to serve notice and also a copy of the draft certificate of title on various persons including the Director of Native Affairs (Section 21), and for the Director, having caused the notice to be published in the Gazette and made certain enquiries, to certify to the Registrar either that he was satisfied that there were no native rights over the land or forthwith to refer the question of native rights to the Supreme Court, or to the Administrator (Section 22). There was also a procedure under Section 24 which enabled the Director to refer the question of possible native rights to the Supreme Court, whether or not he had been served with the notice and draft certificate under Section 21.

Mr. Tuthill submitted an argument that because of the provisions of Section 26 the Courts' jurisdiction to hear and determine questions concerning land under Section 22 and 24 extended to claims to an estate in land under the law in force prior to the 9th May, 1921, and that in the determination of those questions pursuant to Section 27C of the Lands Registration Ordinance the Court was not bound by the principles and rules of common law and equity which were in force in England on the 9th May, 1921 pursuant to the Laws Repeal and Adopting Ordinance 1921-1939, but might be guided by such principles of right and good conscience as it deemed to be applicable to the matters referred to it, having regard to the tribal institutions, customs, usages of the natives of the Territory and to the conditions existing in the Territory since its occupation by persons other than natives. Thus, he submitted there was jurisdiction in the court to declare and define rights to an estate in land which was claimed to have arisen prior to 9th May, 1921,

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and in the determination of the questions the court might be guided by the principles of right and good conscience. I do not consider that this is tenable construction of the legislation. In my opinion, upon the proper construction of Sections 17 to 24, the procedure for bringing land under the Act presupposes, (except where the land is entered in the Land Register) the issue by the Commissioner of a certificate under Section 17, so that if questions are referred to the Supreme Court under either Section 22 or 24, then a certificate must first have been given by the Commissioner as to the entitlement before 9th May, 1921 by a person to an estate in land under the law then in force.

Turning now to Section 26, that Section provides that the Court shall have jurisdiction upon the return of a summons to hear and determine any question of the customary or other rights of any natives to or affecting land to which a summons refers (sub-paragraph (1)) and that the order to be made upon the hearing shall either declare that no native rights exist affecting the land or define the nature and extent of the rights which the Court finds to exist, and direct that those rights shall be protected by the necessary entries in the Register Book and on the certificate of title. (Sub-paragraphs 3(a) and (b)).

The summons referred to must be the reference by summons which is the procedure prescribed by Section 25(1) where any question of native rights is referred to a court under Sections 22 to 24. Thus, the jurisdiction conferred by Section 26 upon the Supreme Court for that reason is confined to land entered in the Land Register or the subject of a draft certificate of title. Indeed, upon the terms of Section 26 itself, in my opinion, that jurisdiction is limited to declaring and defining native rights affecting land, and does not extend to claims to an estate in land under the law in force prior to 9th May, 1921. The scheme of the legislation is that such interests are dealt with by the Commissioner under Section 17. The argument based on Section 27C also fails not only because that Section is expressly related to the determination of matters referred to the Supreme Court under Section 22 or 24, but also because the generality of its terms is not to be taken to override the specific provisions of Section 17. Accordingly if the Custodian is to succeed the New Guinea Company's entitlement

to an interest in the land must be shown to have existed under the laws then in force. The construction I have adopted is consistent with the application of the section made by Phillips, J., as he then was, in the Jomba Plains Case (3) and in Re Malala Lands (4). In my opinion, the submission by Mr. O'Neill is correct, that if no valid purchase is shown in a case such as this where the interest relied upon goes back to a date before the 9th May, 1921 then there is no scope for the operation of the words of Section 27C providing that the court may have resort to the principles of right and good conscience.

The further consideration of the application of this section by Sir Beaumont Phillips in the Mortlock Islands case(5) was referred to by Counsel, but, because of the view I have taken, it is not necessary for me to consider that case.

The task now before this court is to examine the evidence before the Chief Commissioner to determine whether on that evidence the Custodian was as the successor of the New Guinea Company entitled to a certificate by the Commissioner for Lands under the law in force immediately prior to 9th May, 1921, which was, of course, the German law in force in the former German Colony which was the first and essential step enabling the Custodian to be registered in the Land Register as the owner of the land under Section 17 of the Lands Registration Ordinance. It is, therefore, necessary to look at the law in force between the years 1906 and 1908, because the evidence is that the Germans first came to Adolfhafen between those years and if there was any acquisition of land it took place at about that time. The information as to the law applicable is limited. The starting point is contained in Article 7 of the contract made between the Reich and the New Guinea Company dated the 7th October, 1898 which was placed in evidence on the final day of the hearing before the Chief Commissioner. Pursuant to that section the New Guinea Company was given the right to acquire within ten years from the 1st April, 1899 in Kaiser Wilhelm's land (the main island of New Guinea) or New Pommerania and the islands belonging thereto, land of a total of 50,000 hectares of their own choosing always observing the rights of third persons -

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(3) Unreported judgment of 25th May, 1932

(4) Unreported judgment of 22nd September, 1932

(5) Unreported judgment of 29th April, 1930

subject to certain restrictions so far as the selection of coastal land and land on river banks is concerned. The significant words are these - "The New Guinea Company is held to inform the representative of the Reich about the selection of land in each case and must prove within one year that - in agreement with existing regulations - the selected land was either acquired as ownerless or from natives". Thus, the New Guinea Company was by law entitled to acquire land from natives. Next I refer to the directions given concerning the procedure relating to acquisition of land by the New Guinea Company dated the 10th August, 1887. The procedure was detailed and appears designed fully to protect the rights of natives. Prior investigation was required to be made as to the land, the customs of the natives as to sale and their entitlement to sell. There was provision for the payment of the purchase price, a meeting was to be called of natives, a contract in writing was to be drawn up in duplicate in the German language and fully explained to the native sellers, it was to be signed on behalf of the New Guinea Company and by the natives, either by signature or by mark. Provision was made for interpreters, for a witness to certify that the information had been made clear to the sellers, that payment had been made to the persons entitled, and further a copy of the contract was to be handed to the sellers. There is no reason to suppose that these provisions were later relaxed in any way. The other material relating to the German law is contained in the Mortlock Islands case (Phillips, J. as he then was), to be found at page 244 of Fashion of Law in New Guinea (ed. Professor B.J. Brown (1969)) which contains an extract from the judgment. It is as follows:-

> "On the 22nd July, 1904 the Governor of German New Guinea under the powers given him in the Imperial Ordinance of the 21st November, 1902 prescribed conditions regarding the occupation of ownerless land and its disposal and the acquisition of native land by agreement with natives. He ordered that these matters pertained exclusively to the Fiscus of the Colony and that areas necessary for the livelihood of the natives in particular; dwelling places, garden lands and palm groves were precluded from acquisition. He also ordered that further conditions governing the acquisition by the fiscus of native land and

> the resale thereof would be laid down by the Governor, either generally or for each individual case, as he deemed fit; and general conditions relating to the cession into private ownership of lands that had been acquired by the Fiscus were published in 1904, 1910, 1912, and 1914".

This passage indicates that the German Government was much concerned with the acquisition of land from natives, to the extent that areas necessary for the livelihood of the natives were precluded from acquisition. No other information as to the relevant German law was available because of the general destruction of books and documents during the Second World war. It may be that because of the destruction of these legal sources and the paucity of evidence as to the German law, that that in itself is sufficient to prevent a claimant from proving his title under Section 17(1), but it is unnecessary for me to go so far. However, it is plain that there were strict regulations (which indeed are referred to more than once in the Mortlock Islands case) as to the procedure for negotiating a purchase which point to an overriding requirement that the German Government should be satisfied that the acquisition was not contrary to the interests of the natives. What then was the evidence before the Chief Commissioner? The evidence relied upon by the Custodian is a file (No. 189) of the New Guinea Company, which, of course, claimed to be the owner. As Mr. Tuthill submitted, I consider that, having regard to the heading, the land referred to in this file does consist of Namandei, MO A and MO B. There is a reference to the right of acquiring the said properties under Article 7 of the agreement, and that purchase agreements have been acknowledged. Then there is the note by "F.W. Hafen" dated 8th March, 1911 upon which Mr. Tuthill strongly relied, as follows:-

> "Entry in Groundbook has been applied for and granted pending certain enquiries, which are shown in the following letter".

This is, of course, a note by the interested party, a consideration which goes to the weight it is to be given. The relevant passage in the letter concerning the Adolfhafen properties is as follows:-

"The entry in Ground Book of the properties on Adolfhafen also presents unforseen difficulties. As you know, Dr. Scholz at one time took exception to the extension of the river banks not being put on to its whole account. The plans were then sent together with application of 23rd February 1910 to the Government for the purpose of having the extent of the river bank accurately determined by the Government Surveyor. He did so but at the same time pointed out to the Government that the boundaries of the big property on Morobe River were unusual and against the interest of the Fiscus. At the time when the boundaries were fixed small points of land were cut off, apparently to save extension of the river bank. On this report of the Surveyor, the Acting Governor instructed the District Officer to inquire into the matter and to report on it; this so far has not been done".

The substance of this passage, in my opinion, is that the entry in the Groundbook as to the three properties on Adolfhafen has been delayed because of a report made by the Government Surveyor after a visit for the purposes of determining by survey the extent of the river bank in relation to Namandei. The report, in my opinion, bears the construction that the regulations concerning the rights of natives were being infringed because of the extent or area of the Namandei purchase. The procedure for entry in the Groundbook was thus suspended pending the enquiries ordered by the Acting Governor. It is apparent that these applications at no time proceeded so far that they resulted in registration in the Groundbook. It is possible, that the applications were not persisted with because it was found that to provide adequate living or garden areas for natives in the vicinity meant that the applications were not worth proceeding with. It is possible that the Government requirements were more than the Company was prepared to grant and that no compromise could be reached. But it is entirely consistent with the information in the file that the pending enquiries were never resolved which was the reason for the applications not reaching the Land Register. As I have said, this is a self-serving document. It is put forward in a report to the Berlin head office by an officer in circumstances of which nothing is now known. As to the accuracy of the report nothing is known. One is left in

doubt. There is no evidence that the enquiries were resolved. The only other piece of documentary evidence is the extract from Bezirk's Morobe Sketch. It shows three areas which appear to be those referred to in the heading of file 189. There is no indication that in respect of Namandei that the 171 acres is the whole of the land included in that block or excluding an area of swamp land on either side of the river, but this is a minor detail, and the extract cannot assist the Custodian.

There is no evidence of the parties, the names of the sellers of the land, the price agreed to be paid, any reference to a survey other than that to be gained from the extract from Bezirk's Morobe Sketch. The only other evidence of a purchase which Mr. Tuthill was able to rely upon was Mr. Roberts' statutory declaration in which the deponent deduced from the facts that when he was living prior to the Second World War as an officer of the Administration in the area, and sought oysters for himself, the Suena people went to MO A and MO B to obtain the oysters whereas when they sought oysters for their own purposes they used other land, that those two pieces of land were regarded as Administration land. Mr. O'Neill rightly attacked this reasoning as equivocal and inconclusive. Mr. Roberts did not appear and he was not cross-examined upon the statutory declaration. But the information in it was put to all the native witnesses both at Lae and at Morobe. So far as this oral evidence is concerned none of the witnesses knew of any purchase or any payment made, which is significant because the Suena people who had gained the land by conquest owned it as a tribe so that if the land was sold, all would have been entitled to receive some portion of the consideration. It was true that articles such as food, tobacco and matches were given by the Germans when they first came, but the people believed that this was for goodwill or work done. No money was paid to them but in these early cases that is of no significance. The natives knew of no survey. They were quite frank that several cement pegs had existed but only two were found on MO A and two on Namandei which are insufficient to indicate any complete survey. I am impressed by the observation of Mr. Ewing, the Commissioner who actually took the evidence of the natives at Adolfhafen, that in view of the large swamp areas in Namandei and MO A, it was unlikely that a proper survey would have been made to gain a little fertile land, and quite likely that the land was selected from the beach front. Any purchase must have taken place soon after

the first contact with European people. If the New Guinea Company had purchased land in accordance with the regulations in force, then this must have been known by the local people and it is to be supposed that traditional evidence would have been forthcoming to that effect. Another matter relied on by Mr. O'Neill, correctly, in my opinion, is the consideration referred to by Phillips, J. in the Jomba Plains case of the difficulty of bringing home to primitive natives the nature of a transaction of a sale in fee simple. The learned Chief Commissioner referred to this consideration in his judgment and it seems to me that if he had considered that it was necessary for him to find that there was a real agreement between the parties, then he would not have been so satisfied on the facts. Under German law for an agreement to be a lawful agreement such as to found an entry in the Land Register it must have been necessary that it should be based upon the true consent of the parties. Indeed, it is to be inferred from the regulations I have referred to. Mr. Tuthill also relied on some evidence of occupation by the Germans, without objection. I refer to the evidence of the old German bungalows on the land which is referred to in the letter of the 2nd August, 1956 by the Custodian and the planting of coconut trees by Mr. Roberts. But as between Europeans and primitive natives such occupation cannot be taken as evidence of any basis of legal right.

To sum up the evidence before the Chief Commissioner, there is the reference in the New Guinea Company file that purchase agreements were entered into in relation to the Adolfhafen lands, but there are no other details whatever as to the purchase. The evidence of the native witnesses was that the Suena people who had occupied the land by conquest prior to the arrival of the Germans, had not sold the land, there was thus some evidence of a purchase, but, in my opinion, not more than a scintilla. Further the Custodian must go on and show that the New Guinea Company was entitled under the laws in force prior to 9th May, 1921 to be registered in the Land Register. The inference that the legal requirements for a valid acquisition had been observed which might otherwise have been made from the reference in the file that entry in the Groundbook had been granted, is not, in my opinion, open because of the fact of the enquiries pending, and the nature of such enquiries which are related to compliance with the Regulations concerning the protection of native rights in the acquisition of land. The fact that the entry in the Ground-

book was never made indicates, in my opinion, that the Regulations had not been complied with. In my judgment, there is insufficient evidence to establish that there was a valid purchase in accordance with the requirements of the German law, and that accordingly the Final Order in favour of the Custodian was against the weight of evidence.

Accordingly I propose to allow the appeal and quash the order. There being no objection I propose also to make an order in favour of the Suena tribe.

Appeal allowed. Order appealed from set aside. In lieu thereof order as follows:-

1. Order that Custodian of Expropriated Property has failed to establish an interest in the land the subject of this appeal.
2. Declare that as at the appointed date all native customary rights were retained by the Suena tribe in respect of the subject land, no declaration being made as to the sub-clans (if any) entitled to any portion of the said land.
3. Reserve liberty to apply as to the form of order.

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