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

Appeal No. 38 of 1967 (N.G.)

CORAM: PRENTICE, J.
Friday,
29th January, 1971.

BETWEEN

THE DIRECTOR OF DISTRICT ADMINISTRATION

Appellant

AND

METHODIST OVERSEAS MISSION TRUST ASSOCIATION

Respondent

In re Vunagamata

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J.

The appellant, Director, appeals in this matter from a decision of the Chief Commissioner of the Land Titles Commission of 3rd April, 1967, made under the New Guinea Land Titles Restoration Ordinance 1951-1963. A claim was brought originally by the respondent (henceforth referred to as "the Mission") in respect of 2.8644 hectares of coastal land known as Vunagamata situate at Kabakada on the north coast of New Britain. The Mission claimed to have been registered as the owner of the freehold of this land, in the register destroyed by enemy action in 1942. The volume and folio reference of the alleged Certificate of Title was not known. The claim was dated 4th November, 1952 and at that time the land had on it a church and pastor's house.

On 16th June, 1955 the then Commissioner of Titles made a provisional order that in respect of the land known as Vunagamata, Portion 488, District of New Britain containing 2.8644 hectares more or less:

(sic) "It is established that on the appointed date the following registered interest(s) in the parcel(s) of land described above was/were owned by the following person(s)

Estate in fee simple by Methodist Overseas - Missions Trust Association."

The Chief Commissioner took oral evidence and was tendered documentary evidence at Rabaul on 13th March, 1967. At the conclusion of the hearing he appears to have made no specific findings, but merely marked the file "Final order as per provisional order. Fixed costs of $150." He does not

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appear to have given reasons subsequently for his decision. The Land Titles Commission Ordinance did not then contain Sec. 28B.

I take the final order to amount to a finding that the Mission was entitled to a freehold interest in the land claimed at the appointed date and to be registered in the lost register as the owner of its interest subject to the usual encumbrances to the Administration, but unencumbered by any retained native customary rights (and thereby as amounting to a compliance with Sec. 17, Land Titles Restoration Ordinance).

It appears impossible to establish from a perusal of the transcript whether the Chief Commissioner in deciding to make the final order actually made, relied on an application of Sec. 9, Sec. 10, or Sec. 67(3) of the Restoration Ordinance. And indeed this is made a gravamen of the appeal. I shall refer to this aspect later.

The grounds of appeal as amended read as follows:

"1. The Land Titles Commission erred in law in finding that the Respondent was entitled to a freehold interest in the land the subject of this Appeal and to be registered on a Lost Register in respect of that interest, in that such a finding involved a wrong application of either Sections 9 and 10 of the New Guinea Land Titles Restoration Ordinance (1951-1966) or a wrong application of Section 67(3) of the New Guinea Land Titles Restoration Ordinance (1951-1966).

2. The finding of the Land Titles Commission that the Respondent was entitled to a freehold interest in the land the subject of this Appeal and to be registered on a Lost Register in respect of that interest was against the weight of the evidence.

3. The Land Titles Commission exceeded its jurisdiction in finding that the Respondent was entitled to a freehold interest in the land the subject of this Appeal and to be registered on a Lost Register in respect of that interest."

Error of Law

Mr. O'Neill's argument in support of the first ground (error of law by way of wrong application of either Secs. 9 and/or 10, or of Sec. 67(3)) commenced with the proposition

that because the Chief Commissioner gave no reasons for his decision, this is enough to require a rehearing. No authority was urged in support of the proposition, and with all respect to his able argument, I find myself unwilling to accept the proposition. It seems to me that if I (sitting as an appellate court) came to the conclusion that the Chief Commissioner's order could be supported by the application of either one or a combination of these sections then it should not, on this ground, be set aside. A respondent can support the judgment at the hearing of an appeal upon any legal ground appearing in the evidence. Marks v. Jolly (1), cf. Osborne & Co. v. Anderson (2); Prior v. Sherwood (3).

The further argument in relation to Secs. 9 and 10 overlap with that raised under ground of appeal 2, viz. insufficiency of evidence such that the decision was against the weight of evidence.

The argument in relation to the application of Sec. 67(3) in my view becomes irrelevant if I come to the decision that the Chief Commissioner's order could be founded properly on either or both Secs. 9 and 10. I turn therefore to a consideration of the second ground of appeal.

Decision Against Weight of Evidence

On such a ground of appeal, I take the position of this Court, sitting in review of the Commissioner's decision, to be stated definitively in the decision of Minogue, J. (as he then was) in the Wangaramut case (4) - "It must be able to come to the conclusion that the decision appealed against was wrong and could not be supported either by the evidence or by any proper inferences to be drawn therefrom or from the relevant law."

It is, I think, useful to compare the evidence in this case with that given in relation to Vulcan Island (5) and to contrast it with that given in Tonwalik Island (6). In the former case there had been a registration in the Ground Book and a Registrar's Notice of Intention of 28th February, 1931 was followed by preparation of a draft Certificate of Title, and the calling for objections. A Sec. 22 statutory notice

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(1) 38 S.R. N.S.W. 351 at p. 359 per Jordan, C.J.
(2) 1905, V.L.R. 427 at p. 436
(3) 3 C.L.R. 1054 at p. 1063
(4) Unreported Judgment No. FC4 (Full Court) at p. 5
(5) 1965-66 P. & N.G.L.R. 232
(6) Unreported Judgment No. 526, Clarkson J.

was then given by the then Commissioner of Native Affairs. Semble the only other evidence on the point of likelihood of subsequent registration having been effected, took the shape of a document analysing the statistics of Certificates of Title drafted as against those matured to registration. (These statistics were not before the Chief Commissioner in this case as far as is known, and presumably are not such as he, and a fortiori this Court, could take notice of.) And further, there was the indication in evidence that in 1937 Vulcan Island was regarded as a Government leper station. On this evidence Minogue, J. found at p. 258 (7) - "I think the probability very strong indeed that the Administration had become registered as the owner of this land and that the Certificate of Title issued and I would so hold."

In the Tonwalik case (supra) (8), draft Certificate of Title was prepared by 1926 and Sec. 22 notice given. There was evidence that by 1928 the land had not been brought under the register and that by 1931 an impasse had been reached as to the appropriateness or acceptability of the encumbrances which should be endorsed on the Certificate of Title, should it issue, and that the matter was put away - no further enquiries being made until 1951. Various other enquiries, references and delays occurred up until the making of the final order in 1965. There was evidence of unbroken continuing native rights for fishing. In its finding that "no restorable interest" was owned by the Custodian (which form of finding was held by Clarkson, J. to be unacceptable and to require a reference back to the Commission) is implied the finding "It was not established that the Custodian on the appointed date was entitled to an interest in respect to which interest he was registered or entitled to be registered as owner." I understand His Honour not to cavil at the appropriateness of such a finding on the evidence there given.

In the instant case the starting point of the evidence is a Ground Book entry, Vol. 1, Fol. 68 relating to Wunagamata in the Kerevia District (an area variously described as 3.575 hectares and 2 hectares 95 ares - the discrepancy cannot be explained but the identity of the property was not challenged before the Commissioner or before me) being acquired on 30th November, 1898 in pursuance of a contract of purchase and sale of 28th June, 1897 and of the application of 17th November, 1898 by the New Guinea Company. The register shows

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(7) 1965-66 P. & N.G.L.R.
(8) Unreported Judgment No. 526, Clarkson J.

the said land registered in the name of the Australiasian (sic) Wesleyan Methodist Mission Society of Sydney from 30th November, 1893 in pursuance of contract of sale and transfer of 17th November, 1898. And further, the registration of the "Methodist Mission Society of Australia in the Bismarck Archipelago, Company with limited liability" on 17th December, 1906 in pursuance of a transfer of 13th December, 1906. (The identity of this entity with the present applicant was assumed throughout the proceedings in the Land Titles Commission and before this Court.) It was shown that the New Guinea Gazette of 13th April, 1933 called for native claims in respect of Vunagamata allegedly owned by the Methodist Mission Society - a draft Certificate of Title to the land claimed having then issued in the Mission's name. The evidence of Paulias Turuna was to the effect that the Church had been using Vunagamata for many years - there being a church building on it before the Japanese came. There had been a church of bush material on the land when the Germans left. Several successive church buildings have been built over the years, the last being of permanent materials. There were four "cements" on the land put by the Germans. This witness says the land belongs to the Mission and he had heard no one say it does not belong to them. Since the new church was built he had heard people say they want the land brought back to the natives. He saw the first Fijian or Samoan missionary come and Tokavic (one of the possible claimants according to Benson) would have seen him. Payment was made for the land when the cement was put down - the witness's knowledge of this related to the existence of the cements, apparently by inference, rather than to information given him.

The witness Towatat stated the land was, at the time the Mission came, Tokonakonom's. Tokonakonom brought the Mission. The witness did not know whether the land was paid for or not. To the question (p. 8, transcript) "Have you heard of any payment being given or land given or sold to either the German or the Methodist Mission at this time when the Mission first came"; he replied "Only the person Tokonakonom - it was his land". This witness claimed the land belonged to himself, Tolukac and Toiakup; Tokonakonom being dead. The reason why the land did not belong to the Mission was stated to be that "Tokonakonom put the Mission on Vunagamata". The witness did not wish to "rous" the Mission. He wanted to find out whether they bought the land or not.

Toiakop's evidence was that his mother said the land belongs to him "We gave that land to the Mission" - "The big man got two pigs and took them to Vunaroto and brought the

Mission from Vunaroto to Vunagamata and told the people the land belonged to the Mission and the Mission did not have to pay for the land". The witness agreed that in the fashion of the people that is called waratabai. The questioning of this witness proceeded.

Question: It was only last year that you made a claim for this land against the Mission, is that right.

Answer: When the kiap went there I told him that the land was given to the Mission without payment and now I have no land for myself and I wanted the land back because the Mission had not paid for it.

Question: Before that time when you spoke to the patrol officer were you afraid to make a claim for the land because the Mission had been there a long time.

Answer: I told the patrol officer what I just told you.

(These two answers were given to questions asked by the claimants' counsel.)

The statement of one Benson admitted in evidence, averred ownership of Vunagamata in Tokonakonom and Tovukik, the former's interest devolving upon Ioel (who do not appear to be claimants). The witness has never been told of any payment for the land. (The discrepancy between this "witness's" evidence that Tovukik and Ioel should apparently be the claimants and the fact that Towatat, Toiakop and Tolukat are the actual claimants was not explained.)

The statement of Tolukat averred agreement with Toiakop's story and that he knew of no payment for Vunagamata and that he wanted it returned.

Between the making of the provisional order and the hearing of the claim by the Chief Commissioner, a certificate under Sec. 36 of the Restoration Ordinance of no native claims, was issued by the Director of Native Affairs on 2nd August, 1957. On 17th October, 1966 the Director of District Administration purported to make a reference as to native claims to customary rights on the land. This was apparently rejected and thereafter the Director, Mr. McCarthy, filed an objection on 5th January, 1967 which formed the basis of the hearing before the Chief Commissioner.

An analysis of that evidence shows that one witness believed payment had been made - but had no independent knowledge; another did not know, but wished to find out; another

knew of no payment; and a fourth had "never been told" of a payment. Tokavic and Ioel, two of the persons entitled to claim according to Benson, were not called to give evidence. Tokavic was a contemporary on this version of Tokonakonom. Tokavic was said by Paulias Turuna to be alive and of comparable age to himself.

The Ground Book entry is some evidence of purchase. There seems little point in a Ground Book entry if a mere permissive occupancy had been intended. And the facts of the size of the land, the permanent nature of the original proposed user, the period of continuous uninterrupted use with the original owner's consent, the apparent absence of native claims or complaints until at least after August, 1957, that no one claims Tokonakonom ever asserted a right or desire to reclaim the land, that it seems probable that no one else did so prior to the most recent church of permanent materials being constructed (it was still being built in 1967 - some three or four churches seem to have been built successively on the site); all in my opinion are capable of supporting the inference of the acquisition of a freehold interest by the Mission. The only evidence which asserts no payment is tenuous and goes towards establishing that there had been a gift of the land to the Mission. No argument was addressed to me that it was necessary to establish affirmatively a sale as distinct from a gift to found an entitlement to a freehold interest. I consider it not without significance that the Director, whom, in the absence of suggestion or evidence to the contrary, I must take to be a public official acting in accordance with his bounden duties, felt able to give the Sec. 36 certificate in August, 1957 of no assertion at that time of native customary rights.

A strict reading of the form of the provisional order adopted by the Chief Commissioner by his use of the short form of the final order, would seem to indicate a finding made of an entitlement under Class 1 of the four categories set out by Clarkson, J. in Tonwalik (supra) (9), namely, that a Certificate of Title had issued prior to the destruction of the register. In my opinion the evidence was such as to justify a finding that the probabilities were, having regard to the facts analysed above and to the stage to which the application for a registered title had proceeded in 1933, and to the lapse of time that then ensued to the destruction of the register in 1942, that a Certificate of Title would have issued and in

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(9) Unreported Judgment No. 526, Clarkson J.

fact did issue. It would, I consider, have been also open to find a claim established under the second category, namely, everything completed in all probability up to the registration, excepting some formality. I myself would have been prepared to come to the first conclusion that the probabilities are that a Certificate of Title did issue (compare the Vulcan (supra) (10)).

Excess of Jurisdiction

The argument as to exceeding jurisdiction (ground of appeal 3, and also part of that under appeal ground 1 - wrong application of law) was based entirely on the manner of application or possible application of Sec. 67(3). It may be that the Chief Commissioner's decision could have been supported by the application of Sec. 67(3). There is no indication in the transcript or in the form of the order that any reliance was placed by the Chief Commissioner on this section. But as I consider his decision supportable and correct on an application of Sec. 9, I do not find it necessary to make a decision on the interesting arguments directed to the application of Sec. 67(3) and the possible consideration thereunder of Secs. 22C(2), 24, 24A(2)(b) and Secs. 27 and 27E.

I consider therefore the Chief Commissioner's decision should be affirmed and I make an order accordingly.

Liberty is reserved to apply for costs.

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

Solicitor for the Respondent: Cyril P. McCubbery & Co.
Town agents for F.N. Warner
Shand, Barrister & Solicitor
Rabaul.

(10) 1965-66 P. & N.G.L.R. 232