[SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA]

THE MISSION OF THE HOLY GHOST (NEW GUINEA) PROPERTY TRUST *v.* ADMINISTRATION OF THE TERRITORY OF PAPUA AND NEW GUINEA AND OTHERS.

1970,
July 14, 15,
MADANG

Dec. 4.
PT. MORESBY

MINOGUE C.J.

Real Property—Restoration of titles—Claim for freehold interest —Entered in German land register—No entry showing native rights—Subsequent offer by German proprietor of conveyance reserving rights to natives—Land expropriated—Conveyance by Custodian of Expropriated Property to claimant—Land to be brought under Torrens system by law—Land surveyed for that purpose—Survey plans forwarded to Registrar of Titles—Registers lost during Japanese occupation—Entitlement of applicant if procedures had, before appointed date, been completely applied—Land Titles Commission holds itself unable to determine how matter may have been finalized—Failure to apply repealed legislation as required by restoration legislation —Application of power to direct compensation in repealed legislation—Lands Registration Ordinance 1924-1941, *Pt.* III, *div.* 2*, *s.* 27E*—*New Guinea Land Titles Restoration Ordinance* 1951-1965, *ss.* 17†, 42‡, 67.

The claimant claimed to have been registered in a lost register as the owner of a freehold interest in land in the Territory of New Guinea. An entry in the German land register, proved by a copy,

* The *Lands Registration Ordinance* 1924 provided, in its Pt. III, for the bringing of, inter alia, all land already alienated by the Administration or the previous German Administration within a Torrens system of registration which that Ordinance introduced in 1924. Division 2 of that Part dealt with freeholds already alienated or in the process of alienation by the German Administration. Where any estate or interest in land or any right affecting land was entered in the land register compiled by the German Administration, the Registrar of Titles was directed to proceed to bring that land under the system without any application from any person interested (s. 16). Under the provisions of ss. 17 and 18 the Registrar was directed to bring land under that Ordinance where any person was entitled to be entered in the land register compiled by the German Administration

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showed that the German New Guinea Company was the owner of the land and registered as such in the land register in 1907. The register did not show any native rights. The written offer by the New Guinea Company relating to approximately half the subject land, made and dated in 1914, recognized that some native rights existed in the area in that the offer was made to sell portion of the land excluding native reserves. In 1928, after the property was expropriated after World War I, the Custodian of Expropriated Property conveyed to the claimant the whole of the land appearing as registered in the German land register. The conveyance was expressed as excepting native reserves, of undefined area, situated within the area. By 1939 a survey

although not so actually entered. The Registrar of Titles, in the case of land to which div. 2 applied, was directed by the Ordinance to cause to be prepared a draft certificate of title containing those matters affecting the land as shown in the German land register, including particulars of all existing mortgages, leases and other encumbrances, not entered in that land register, to which, in the opinion of the Registrar, the land was subject. Once prepared, the draft certificate was to be served on a number of persons including the occupier of the subject land and the occupiers and owners of adjacent land. The Registrar was also obliged to publish in the *New Guinea Gazette* notice of his intention to bring the land under the provisions of the Ordinance. ~~Division 3 included ss. 27, 27A, 27B, 27C, and 27E~~ which contained provisions for presenting the case for natives whose interests were or might have been affected by the process of bringing land under the Ordinance. ~~Section 28~~ gave the Court a power of mediation. ~~Section 28A~~ provided that the Court was not to be bound by rules of evidence or legal procedure but could inform itself by the best evidence which it was able to procure or which was placed before it. By ~~s. 28B~~ the Court was not to be bound by the rules of common law and equity in force in England on 9th May, 1921 (notwithstanding anything contained in the *Laws Repeal and Adopting Ordinance* 1921-1928) but could be guided by principles of right and good conscience as it deemed to be applicable to the matters referred to it having regard to tribal institutions, customs and usages of the natives of the Territory and to the conditions existing in the Territory since its occupation by persons other than natives. ~~Section 27E~~ empowered the Court, when land was being bought under the Ordinance, to order compensation to be paid in extinguishment of a native right where the enforcement of the right would cause undue hardship and compensation would constitute an adequate remedy. ~~On 1st December, 1951, the *New Guinea Land Titles Restoration Ordinance* 1951~~ came into operation, its full title being "An Ordinance to provide for the compilation of new Registers and Official Records relating to Land, Mining and Forestry in the Territory of New Guinea in place of those lost or destroyed during the Japanese invasion of that Territory, and for other purposes". Under this latter Ordinance, 10th January, 1952 was the date appointed by reference to which any claimant to be registered or entered in a lost register was to establish his claim. ~~Division 2 of Pt. III of the *Lands Registration Ordinance* 1924 was repealed.~~ Section 67(3)† provided that, for the purposes of the 1951 Ordinance, a person should 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 person entitled to, that interest if, in the opinion of the Commissioner, he would have been so entitled if (a) the provisions repealed by that 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 relevant provisions of s. 17 are: "(1) In a provisional or final order the Commission shall declare—(a) whether it is established that a

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of the boundaries of the land had been completed for the purposes of bringing the land under the provisions of the *Lands Registration Ordinance* 1924.] Early in 1940 the Registrar of Titles sent to the claimant a certificate of title which seemed to have been regarded then as the claimant's title to land adjoining the subject land. On the hearing of the claimant's claim before the Land Titles Commission, counsel for the Administration submitted that if the land registration procedure had been fully applied before World War II the land would have been registered, and that s. 67(3) of the *New Guinea Land Titles Restoration Ordinance* 1951-1965 should be applied so that a title in fee simple could be restored to the claimant. In expressing reasons for its finding that there was no restorable interest in the claimant or in the natives who had made claims to the land the Commission stated, inter alia, that it was not satisfied on the evidence that the claimant was entitled to be registered, that it had not been established on a balance of probabilities in favour of the claimant that it was entitled to be registered, and, at the stage of the hearing, it could not be determined how the land registration procedure might have been finalized.

Held, on the claimant's appeal against the final order to the Supreme Court of the Territory of Papua and New Guinea, that the Commission had erred in law in that it did not consider, as required by s. 67(3), the notional application of the registration provisions of div. 2 of Pt. III of the *Lands Registration Ordinance* 1924-1941, and in consequence failed to properly investigate, hear and determine the claims and reference before it.

Per curiam: (1) Section 67 (3) requires the Commission notionally to apply the procedure prescribed by ss. 16 to 43 of the *Lands Registration Ordinance* 1924-1941, for until it does that it cannot be in a position to form the opinion that a claimant would have been entitled to an interest in land and to be entered or registered on a lost register as the owner of that interest. If it is able to form that opinion then the section is mandatory in its effect.

Custodian of Expropriated Property v. *Director of District Administration*; *Re Tonwalik* [1969-70] P. & N.G.L.R. 110, applied.

(2) In the formation of its opinion, the Commission is required by s. 67(3) to consider the position as if the procedure in ss. 16 to 43 of the *Lands Registration Ordinance* had been completely applied in

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person was at the appointed date, entitled to an interest in the land the subject of the order and to be registered or entered in a lost register as the owner of or the person entitled to that interest; (b) the boundaries of the land the subject of the interest; (c) the nature and extent of—(i) the interest established in that land; and (ii) the native customary rights (if any) which, at the appointed date were retained by a native or native community in respect of that land; and (d) any other matter which the Commission thinks necessary. . . ."

‡ The relevant provisions of s. 42 are: "(1) . . . 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 [illegible] in respect thereof, either in the same terms as the provisional orders or in such other terms as it thinks just. . . ."

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relation to the land, and such complete application must include an application of s. 27E of the latter Ordinance.

Dictum of Clarkson J. in *Administration of the Territory of Papua and New Guinea* v. *Director of District Administration; Re Nangumarum*, [1969-70] P. & N.G.L.R. 26, explained in relation to cases to which s. 67(3) applies.

(3) In the orders which the Commission is required to make under ss. 17 and 42 of the *New Guinea Land Titles Restoration Ordinance* 1951-1965, effect to s. 27E of the *Lands Registration Ordinance* may be given. Section 27E did not empower the Court to order that compensation be made, but empowered the Court if it was of the opinion that the conditions of the section were satisfied to order that compensation be constituted for a right established and that upon that compensation being made to the claimant who had established that right, the right would become vested elsewhere.

(4) If the Commission had been led to the view that there was no proper alienation of the land prior to 1907 it ought to have then proceeded and considered the effect of s. 27E after precisely identifying the native claims and the bases of those claims.

APPEAL under the *Land Titles Commission Ordinance* 1962-1965.

On 9th October, 1952, The Mission of the Holy Ghost (New Guinea) Property Trust (the appellant) lodged a claim that it was entitled to registration on a lost register as the owner of a freehold interest in land known as Rempi situated in the District of Madang. On 12th June, 1956 the Director of Native Affairs, of whom the Director of District Administration (the third respondent) is successor, made a claim to be entitled to an interest, on behalf of natives in five native reserves within the general area of Rempi. In 1961 the Director of Native Affairs filed a reference of a question of native customary rights in which reference it was asserted that the natives of Bamasi, Sempi, Dede, Dawe, Budup, Haven and Mebat villages (the second respondents) asserted a claim to full rights of ownership by native custom over the whole of the land claimed by the appellant and further asserted that that land had never been alienated. On hearing of the appellant's claim and references, counsel for the Administration of the Territory of Papua and New Guinea (the first respondent) submitted that upon the application of s. 67(3) of the *New Guinea Land Titles Restoration Ordinance* 1951-1965 a fee simple title should be restored to the appellant. On 4th October, 1966 a final order was pronounced, and issued on 19th November, 1966, declaring that at the appointed date no restorable interest was owned by, inter alia, the appellant.

The appellant appealed to the Supreme Court of the Territory of Papua and New Guinea against the final order.

An account of the evidence adduced on the hearing and the argument of counsel before the Commission and on the appeal, appear in the reasons for judgment.

Wood, for the appellant.

Ross, for the first respondent.

O'Neill, for the second and third respondents.

Cur. adv. vult.

DEC. 4

MINOGUE C.J. This is an appeal against a final order pronounced by the Chief Land Titles Commissioner on 4th October, 1966, and issued on 19th November, 1966, wherein it was declared that in connexion with the claim to re-establish ownership, as at the appointed date, of an interest in or in respect of the claimed land it was established that on the appointed date no restorable interest was owned by, inter alia, the appellant.

The land the subject of the claim was an area of land in the Madang District known as the Rempi land and consisted of some 4,775 hectares asserted to have been purchased by the appellant in 1928. Within this area there were a number of native reserves although the area of the reserves does not seem at any time to have been specified. From a plan submitted with a claim by the then Director of Native Affairs the areas appear to aggregate to something over 1,300 hectares.

As is usual in this jurisdiction, the Chief Commissioner when he began the hearing at Madang in May 1965, had before him a variety of material. This I shall endeavour to set out in some sort of chronological order. There was a copy of the land register (Ground Book) entry. I understand a separate Ground Book was kept at Madang. The entry showed that the New Guinea Company was the owner of an area of 4,775 hectares 20 ares, the boundaries of which were described therein. The acquisition was stated to have been in pursuance of contracts of purchase and sale of 23rd, 24th, 28th and 29th December, 1901 and a further contract of purchase and sale of 12th February, 1903. The entry was not made in the Ground Book until 2nd October, 1907 where it appeared as vol. 1 folio 16. It was urged upon me,

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and it could well be, that the delay in entry was brought about by investigations made by the German authorities as to the correctness of the purchase. The Ground Book did not show any native rights. The Chief Commissioner also had before him a document in the German language which was an offer by the New Guinea Company to enter into a contract of sale for approximately half of the subject land. The offer was made and dated at Berlin on 15th May, 1914 and it recognized that some native rights existed in the area because the offer was made to sell the eastern portion of the land excluding native reserves, and it further stated that the native reserves surveyed when entered in the Ground Book would be recognized both according to the survey map and the Ground Book. I should add that the land described in this offer bore substantially the same description as to boundaries and measurements as appeared in the entry in the Ground Book.

The next document before the Commissioner was a conveyance dated 13th November, 1928, whereby the Custodian of Expropriated Property conveyed to the appellant the whole of the land appearing in the Ground Book. In this conveyance it was recited that the Custodian was seized in fee simple of the subject land and in a schedule to the conveyance the land was described again substantially as it appeared in the Ground Book, and the area was stated to be 4,775 hectares 20 ares 48 square metres, but excepting thereout native reserves situated within this area. No area was given for these native reserves. From the conveyance, too, it appears that the land was advertised for sale by the Custodian on 10th February, 1927. A Mr. Solomons, an accountant of Rabaul, purchased the land for £4,819 and fairly shortly thereafter sold it to the appellant for the sum of £9,819. The purchase price was payable as to £4,819 to the Custodian and as to £5,000 to Solomons. In the document the Custodian and Solomons covenanted with the appellant that the publication and issue by the Registrar of Titles of a certificate of title to the subject land should issue free from any reference to them. I take that to mean that no encumbrances in their favour would be shown on a certificate of title when it eventually issued. The land, appearing as it did in the Ground Book, of course had by law to be brought under the *Lands Registration Ordinance* 1924 by the Registrar of Titles. From various correspondence in evidence before the Chief Land Titles Commissioner it appears that this conveyance was duly executed by all parties and arrangements were in hand

for the survey of the land. A Mr. McKenzie was appointed as surveyor, although there seems to have been some misapprehension as to who appointed or employed him. That matter was sorted out in the correspondence and it became clear to all that he was employed by the appellant. He was employed to survey two properties, the one Saint Michael's upon which the Mission at Alexishafen now stands and the other, Rempi. These properties adjoined each other, Rempi being further to the north and containing a much larger area of land than Saint Michael's. I was informed that the Land Titles Commission had before hearing this case directed that a final order issue in favour of the appellant in respect of the Saint Michael property.

In April 1939, after some difficulties with regard to the survey appear to have been ironed out, the appellant forwarded the survey plans for both properties made by Mr. McKenzie to the Secretary for Lands who in turn handed them to the Registrar of Titles and advised the appellant that the Registrar would deal with the appellant direct. Early in 1940 the Registrar forwarded to the appellant a certificate of title vol. 8 folio 100 which seems to have been regarded as the certificate of title for the Saint Michael property. There was no further documentary evidence before the Chief Commissioner which could in any way assist an evaluation of the situation prior to the outbreak of war with Japan in December 1941 and it would be not unreasonable to assume that after the middle of 1940, with England at war with Germany, there would be very little communication between the appellant and the Registrar of Titles in Rabaul with regard to the property of what might be thought to be German nationals.

The appellant made a claim under s. 9 of the *New Guinea Land Titles Restoration Ordinance* 1951 (the Land Titles Restoration Ordinance) on 9th October, 1952. The state of the Land Titles Commission record is such that it is difficult to know precisely what material, or more particularly what plan, accompanied the claim but I am satisfied that a plan showing the general boundaries of the land and showing also therein five native reserves was the one which reached the then Commissioner of Titles.

On 12th June, 1956 the Director of Native Affairs made a claim to be entitled to an interest in five native reserves within the general area of Rempi. Accompanying his claim was a plan showing as far as one can see the same boundaries of Rempi as were submitted with the appellant's claim, and also showing

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native reserves similarly located within those boundaries and of apparently the same area, but without specifying what the area actually was. On 19th July, 1956 the Commissioner of Titles made a provisional order whereby he declared that the appellant owned an estate in fee simple in the land shown on its plan, excepting thereout the areas coloured green which were the areas shown as being native reserves. He provisionally disallowed the claim by the Director of Native Affairs. The effect of the provisional order appears to have been that these areas coloured green were left without any order covering them. There the matter rested until January 1961 when the Director of Native Affairs filed a reference of a question of native customary rights in which it was asserted that the natives, who are the second respondents in this appeal, asserted a claim to full rights of ownership by native custom over the whole of the land claimed by the appellant and further asserted that that land had never been alienated.

The hearing of the claims and reference began before the Chief Commissioner of the Land Titles Commission at Madang on 13th May, 1965. Unfortunately the shorthand notes and transcript thereof of the hearing on this day were not able to be produced and by consent I allowed to be used on the appeal an affidavit made by Mr. Bredmeyer who appeared at that hearing. From this affidavit it appeared that counsel for the native claimants was not able to proceed with his case because he did not know at that stage what witnesses he would be able to call. The Chief Commissioner decided to hear the mission evidence in the absence of the native claimants and this procedure was consented to by Mr. Bredmeyer. One Father Saiko who represented the appellant, tendered a letter dated 14th February, 1940 from the Registrar of Titles to a Father Madigan which accompanied the certificate of title vol. 8 folio 100 to which I have previously referred. It had already been produced in the previous case which dealt with the Saint Michael land and which was heard on a day preceding this hearing and was marked as an exhibit in that earlier case. Evidence was then given by Father Saiko who stated that he was business manager of the Mission of the Holy Ghost at Alexishafen and had come to that mission in 1945. He was familiar with the history of the Rempi land both from mission records and from conversations with old natives of the area and with pre-war missionaries. That history was as follows.

The land was purchased by three officials of the German New Guinea Company. It was later surveyed in German times and the

survey included five native reserves. The New Guinea Company did not use the land and it was known as virgin land. The mission built a church on one of the native reserves in German times and took care to build it on the native reserve and not on the company's land. The Custodian of Expropriated Property expropriated the property after World War I and sold it to Mr Solomons who almost immediately resold it to the mission. This sale was of course evidenced by the conveyance to which I have earlier referred. The mission began to plant up the land and to erect buildings on it, and in the 1930's, because it was desirous of having a registered title, it caused both properties to be surveyed. The land was now planted up in part and was, so he said, a valuable property. He further stated that the natives in the area were mostly adherents of the Catholic church. He also took care to point out that the mission did not lay any claim to the five native reserves within the Rempi property.

One Brother Eder also gave evidence to the effect that he had been at the mission at Alexishafen since 1928 and was familiar with the Rempi property. He had walked the boundaries of the property with the former native owners, once shortly after his arrival at Alexishafen just after the purchase by the mission and again in 1936 or 1937 with Surveyor McKenzie and with the Rempi natives to show the surveyor the German stones, i.e. their survey markers. According to him the Australian survey closely followed that made earlier by German surveyors. There had been no claims by natives to ownership of or of inadequate compensation for the land before World War II and he did not know of any claims by natives post-war. Relationships between Rempi natives and the mission were good. In the 1920's and the 1930's he had worked on the planting-up of Rempi. The coconut plantings and other improvements on the land had all been made by the mission.

Counsel for the native claimants was present throughout the hearing which was then adjourned to allow the native claims to be investigated. It was not resumed until 18th April, 1966 when there was a further application for an adjournment, it then being disclosed that no further preparation on the part of the native claimants had been made. The only contribution made by counsel for the native claimants was to inform the Chief Commissioner that she had instructions that, before any further investigations were undertaken, the mission should negotiate (I presume with the claimants) with regard to the boundaries. The hearing was

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adjourned to a date to be fixed and was eventually resumed on 3rd October, 1966.

A number of native witnesses were called and after reading the transcript supplied by the Commission I formed the view that the evidence as a whole was of an inconclusive nature. One Madoko testified that he had heard that Rempi was sold by his ancestors and that they received payment in the form of axes and a few trade goods. He did not know the quantity. His father had told him that his ancestors did not know what they were doing as they could not speak Pidgin and the surveyors placed the cements without such ancestors realizing the implications of this action. He thought it was a German who bought the land with trade goods and that that German sold the land to the mission. Cross-examined, he agreed that some payment was made but it was not enough, and that he and his people thought the purchase price was not sufficient. However, he finally stated that he was not over-upset that his ancestors received only a small price for this area of land.

A witness Kape who appears to have come from the same village as Madoko, disclaimed any interest in the subject land. One Nanan named five pieces of land in which his clan was interested without specifying their location. He did not give any evidence with regard to traditional belief as to the manner of acquisition of Rempi by the New Guinea Company although he knew there had been some payment made, and he further informed the Commission that the question of insufficient payment was raised with the authorities in 1948.

A witness, Miag from the Sempi group of people, named fourteen pieces of land as being under dispute but again no one appears to have sought to have these pieces identified within the general context of Rempi. His belief was that at the time of the original acquisition his ancestors had no idea of there being any German designs on their land. He went on to say that only now has the dispute arisen because his people are short of land.

The next witness, Ganui, claimed that some Germans originally placed cement markers on the Rempi land and that his ancestors did not know that the payment of tomahawks and bush knives made to them was for the sale of their land. Upon being asked if he knew of any complaint after the Japanese occupation he stated that "we" disputed the purchase of the land in 1948.

Four other witnesses were called but stated no more than that they agreed with what the previous witnesses had said. The last

witness, Kison, added that his clan was without land and that he was living on land of another group, his land having been taken away.

Counsel for the Administration, who appears to have been also conducting the case on behalf of the appellant, shortly addressed the Chief Commissioner and made the point that if the land registration procedure had been fully applied before the War the land would have been registered. He submitted that the Chief Commissioner should apply s. 67(3) of the Land Titles Restoration Ordinance and restore a fee simple title to the mission. Counsel for the native parties involved contented herself with the observation that she thought there should be a final order of no restorable interest, whereupon the Chief Commissioner with equal brevity said. "Well you can have it. There will be a finding of no restorable interest." He announced that he would give reasons for his decision on the morrow and on 4th October, 1966 published such reasons. I think it desirable to set them out in full and they are as follows:

"This matter has caused me a great deal of concern. If there had been no question of native rights in this matter it would still have caused me concern. Taking the evidence for the claimant mission as a whole I am not satisfied that it was entitled to be registered. Taking the evidence for the claimant segment by segment some of it is probative but some of it leaves doubts. I have looked at the facts as a whole and as individual items, I have as it were even turned them upside down. So far as probabilities are concerned, I cannot find a balance in favour of the mission on the scale between possibility and certainty. An example is Ex. A. The letter could refer to Rempi or to Saint Michael. In the claim to Saint Michael the claimant relied on the letter as establishing a certificate of title to Saint Michael, that title was restored. It was conceded that the letter does not refer to both properties. I think that this matter was, in the 1930s, far from finalized. On the evidence before me I cannot infer at this late stage how it might have been finalized. I am obliged to seek the solution to these matters within the confines of the four corners of the legislation. I cannot resort to social engineering.

"On my view of the facts (excluding the irrelevant ones) there is only one course open to me and that is to direct that a final order of no restorable interest issue."

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Although a number of grounds of appeal were taken, Mr. Wood's main if not only argument was directed to the Chief Commissioner's failure to apply the provisions of s. 67(3) of the Land Titles Restoration Ordinance. I granted leave to amend the notice of appeal to, in effect, add a ground that the learned Chief Commissioner failed to accept the conveyance made on 13th November, 1928 between the Custodian, Solomons and the trustees of the mission as prima facie evidence that the mission was entitled to an interest in land the subject of the appeal. This was an allegation of a contravention of s. 49 of the Land Titles Restoration Ordinance. It is not clear from the Chief Commissioner's reasons for decision whether he found that it was not established that the appellant had an interest in the Rempi land If they are capable of bearing that construction then it seems to me he must have overlooked the provisions of this section. I would have thought that with the aid of that section an interest was established. The actual area of land the subject of that interest and the co-existence of any native customary rights over that area needed definition. However the real questions, as it seems to me, are whether s. 67(3) can have application under the circumstances of this case and, if so, whether the Chief Commissioner properly or at all applied its provisions. If it can and if he did not then he erred in law and the appellant has made out its major ground of appeal.

I adhere to the view which I expressed in *Tolain* v. *Administration of the Territory of Papua and New Guinea; In re Vulcan Land* (1) where I said: "In my view s. 67(3)(c) could have no other purpose than to enable the Commissioner to consider applications for initial registration . . ."; and (2): "that . . . can only be explained on the basis that it was envisaged that the procedure prescribed by the repealed provisions might not have been completed or even begun for some land the subject of claims before the Commissioner. Those provisions, of course, all refer to initial registration."

The Rempi land was registered in the German land register and accordingly an immediate duty was cast on the Registrar of Titles to bring it under the *Lands Registration Ordinance* 1924-1939 (see s. 16). The first step was to prepare a draft certificate of title. It is strange that there was no evidence that this had been done. This step in no way depended on action by the person claiming

(1) [1965-66] P. & N.G.L.R. 232, at p. 263.
(2) [1965-66] P. & N.G.L.R., at p. 264

ownership of the land. So far as the evidence shows the registration procedure seems hardly to have got off the ground. Be that as it may, it is clear that the process had begun and that both the Department of Lands and Mines and the Registrar were concerning themselves with the boundaries and area of the land and that a survey had been made. It appears also that the survey made on behalf of the appellant showed five substantial areas of land within or as part of the 4,775 hectares. There is very little doubt that the question of native rights must eventually have been referred to the Court under s. 22 of the Registration Ordinance. The survey plan was forwarded to the Registrar of Titles in May 1939 and there is no reason to suppose that but for the intervention of war the process of registration would not have been carried on its unhurried course. Notionally, the Restoration Ordinance allowed until 10th January, 1952 for the completion of that process. This is clearly a case where s. 67(3) was applicable.

Whether the Chief Commissioner properly or at all applied this provision is a question of greater difficulty. The section is not easy to construe. I take the view that, albeit most elliptically, it requires the Commissioner to notionally apply the procedure prescribed by ss. 16 to 43 of the *Lands Registration Ordinance*; for until he does that he cannot be in a position to form the opinion that a claimant would have been entitled to an interest in land and to be entered or registered in a lost register as the owner of that interest. If he is able to form that opinion then the section is mandatory in its effect. I respectfully agree with what was said by Clarkson J. in *Custodian of Expropriated Property* v. *Director of District Administration; Re Tonwalik* (3) in his reasons for judgment. He there indicates in essence the procedure the Chief Commissioner is required to follow. As I have earlier said, there is little doubt that the question of native rights must eventually have been referred to the court under s. 22 of the Registration Ordinance. In my view, in this case it was incumbent on the Chief Commissioner to place himself in the position of the court on a reference and consider what decision a court would have pronounced bearing in mind the provisions of s. 24c. An outstanding example of the way in which the court went about its investigation of such a reference is provided by the judgment of the late Sir Beaumont Phillips in the case known as *In re Jomba Plains* (4), heard and determined in the Madang District

(3) [1969-70] P. & N.G.L.R. 110, at p. 130.
(4) Unreported, 25th May, 1932.

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in 1932. The Commission is also I think entitled to have regard to s. 27A of the Registration Ordinance.

Section 27E has caused me the greatest difficulty. On the one hand in the formation of his opinion the Commissioner is required to consider the position if the procedure prescribed by the repealed provisions had before the appointed date been *completely applied* (emphasis mine) in relation to the land, and of course complete application of those provisions must include application of s. 27E. On the other hand, Clarkson J. in *Administration of the Territory of Papua and New Guinea* v. *Director of District Administration; Re Nangumarum* (5) came to the conclusion that except in the limited circumstances set out in ss. 18, 19 and 20 of the Restoration Ordinance there is no power in the Land Titles Commission to award compensation and although, as he pointed out, s. 27E could not in any event apply in the case before him, he might be thought to have taken the view that legislative intervention was necessary to enable the Commission to deal with questions of compensation in cases where s. 67(3) operated. However, it seems to me that in the orders which the Commissioner is required to make under ss. 42 and 17 of the Restoration Ordinance it is possible to give effect to s. 27E of the Registration Ordinance. It will be noted that the section does not in fact empower the court to order that compensation be made. What the court could do if it was of opinion that the conditions of the section were satisfied would be to order that compensation be constituted for a right established and that upon that compensation being made to the claimant who had established tha right the right would become vested elsewhere. In effect, as I see it, it set up a contingent interest in the person who sought registration. On payment of the compensation constituted that interest became vested. Under s. 17(1) the Commission is directed to declare the nature and extent of the interests established in the subject land and any other matter which it thinks necessary. In my opinion, should the occasion arise the Commission could under this section frame an order declaring a contingent interest and directing that registration be not effected until the contingency occurs.

No doubt those responsible for the enactment of the Restoration Ordinance in 1951 would have been astonished at the idea that claims could be still in progress in 1966 and would have given very little thought to the difficulties inherent in notionally applying fifteen years in the future provisions which involved a

(5) [1969-70] P. & N.G.I.R. 26.

number of detailed and somewhat complicated procedures. Nonetheless as I see it the intention of the legislature was to cast on one man, the Commissioner of Titles and subsequently on the Land Titles Commission, the duty of considering and notionally applying those procedures. As I read the reasons of the Chief Commissioner he seems in the main to be considering whether a certificate of title had in fact issued to the appellant in respect of Rempi. His reference to the letter (scil. of 14th February, 1940) following as it does immediately after his reference to the probabilities of the case support this view. The five sentences following this reference probably were written with s. 67(3) in mind. At any rate I am prepared to assume they contain the decision he came to on counsel's submission on the section. In my view he has misplaced and shrunk the four corners of the legislation. I have come to the conclusion that he could not have considered the complete application of the repealed provisions and that he did not direct his mind to the way in which a court would have approached the matter on a reference to it. Although the Commission sat in Rempi village which I take to be situated somewhere on the subject land no attempt seems to have been made to investigate the nature and extent of the native interests nor to define the native reserves shown in the plan before him. The Chief Commissioner had before him evidence of initial purchase by the appellant, nearly 40 years' undisturbed occupation by it and considerable expenditure on improvements. True it is that he gained no great assistance from counsel either in the presentation of the case or in the arguments adduced. But I can come to no other view than that he did not apprehend the effect of s. 67(3) and consequently did not see the necessity for attempting to notionally apply the repealed provisions of the Registration Ordinance.

Mr. O'Neill forcefully pointed out to me the amount of speculation in which he would have had to indulge, but as Clarkson J said in *Custodian of Expropriated Property* v. *Director of District Administration. Re Tonwalik* (6) the section requires a number of speculations and to assist him in these speculations I think had he been aware of the full import of s. 67(3) he would at least have sought to precisely identify the native claims and the basis for such claims. This may have led him to the view that there was no proper alienation at the outset in 1901 and 1903 but then he would have had to have gone on and considered

(6) [1969-70] P. & N.G.L.R. 116.

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the effect of s. 27E as did Phillips J. in *In re Jomba Plains* (7). It is clear to me that it did not occur to him to adopt this course. Accordingly, in my view, the Chief Commissioner misconceived the [illegible] and in consequence [illegible] before him investigate hear and determine the claims and refer before him. This failure amounts to an error in law and entitles the appellant to succeed on its appeal.

The appeal will be allowed and the matter must go back for rehearing.

Appeal allowed. Final order quashed. Case remitted to Land Titles Commission for rehearing.

Solicitors for the appellant: *Cyril P. McCubbery & Co.*

Solicitor for the respondents: *W. A. Lalor*, Public Solicitor.

N.K.F.O'N.

(7) Unreported. 25th May, 1932.