

**PAPUA NEW GUINEA
[SUPREME COURT OF JUSTICE]**

REGINA

v

**THE WARDEN'S COURT AT JABA RIVER
EX PARTE BOUGAINVILLE COPPER PTY. LTD.**

Port Moresby
Minogue CJ Clarkson Kelly JJ
4 November 1970
4 December 1970

MINES AND MINERALS - Compensation to owners - Claim for loss of fish and marine creatures in portion of river - Basis of assessment - Claimant receiving payment from others for right to take fish - Loss of a right - Whether payment of compensation ought to be by instalments related to term of mining lease - Necessity of identifying claimant in whose favour order is made - Mining (Bougainville Copper Agreement) Ordinance 1967, s. 6, Sch. cl. 15 (d)[v]1.

PREROGATIVE WRITS - Certiorari - Warden's court - To remove and quash - Error of law in judgment - Award for payment of compensation for mining operations - Damage - Judgment expressed as being made under inapplicable statute - Appropriateness of remedy - No privative clauses - Mining Ordinance 1926-1966, s. 56 - Mining (Bougainville Copper Agreement) Ordinance 1967, s. 6, Sch. cl. 15 (d)[vi]2. A judgment of a Warden's Court upon a claim for compensation, capable of being supported only by reference to the provisions of the *Mining (Bougainville Copper Agreement) Ordinance 1967*, set out that the claimant was "entitled to compensation for damage caused by the operations of the defendant under the provisions of s. 56 of the *Mining Ordinance 1926-1966*". This judgment awarded compensation for the loss of fish and other marine creatures in a certain stretch of river, payable by periodic payments over a period of time equal to the term of the relevant mining lease. The claim for the loss of the fish related not only to fish which would otherwise have been taken by the claimants but to fish which would otherwise have been taken by persons other than the claimants upon making recompense to the claimants.

Held

By the Full Court: Taking the most limited view that for the purposes of proceedings in certiorari the record includes the formal judgment and does not include the evidence or the reasons (but without deciding that the record is so restricted) an error was apparent on the face of the record of the Warden's Court. Since there was no privative provision

rendering certiorari inapplicable and, if the remedy were discretionary in the circumstances, the case was not one in which a discretion should be exercised to refuse the writ, certiorari should be granted to remove the judgment and quash it.

Per the Full Court:

- (1) That it is necessary to clearly identify and specify the persons on whose behalf such an award for compensation is made;
- (2) That such compensation recoverable is not necessarily related to the period of time which is the term of the relevant mining lease;
- (3) That assuming that the Warden's Court had power to make an order awarding compensation by a number of periodic payments, where compensation is being awarded for the loss of a right compensation awarded ought more properly to be a lump sum equal to the value of that right at the date of its loss; and
- (4) That, in respect of a claim for compensation by a clan for the loss of fish and marine life in a river, the loss, so far as regard is to be had to fish caught by persons outside the clan, is not the loss of the fish but the loss of the recompense paid for the taking of those fish.

Certiorari

On 4th December, 1970, on the application of Bougainville Copper Pty. Ltd. an order nisi for prohibition was granted by the Full Court directing Domasi Onoka (the first respondent) and Hector James McKenzie (the second respondent) the Mining Warden constituting the Warden's Court at Jaba River to show cause before the Full Court of the Supreme Court of the Territory of Papua and New Guinea why a judgment and order of that Warden's Court dated 3rd August, 1970, should not be removed to the Supreme Court and quashed.

Particulars of the record of the proceedings before the Warden's Court appear in the reasons for judgment below.

Counsel

Opas Q.C., with him Wood for the prosecutor.

Gyles, with him Lovering, for the first respondent.

Kinna, for the second respondent, to abide the order of the Court.

Cur. adv. vult.

MINOGUE CJ CLARKSON KELLY JJ: delivered the following joint judgment:
The prosecutor, Bougainville Copper Pty. Ltd., seeks a writ of certiorari to remove into this Court a judgment and order made by the respondent Hector James McKenzie, the Mining Warden constituting the Warden's Court at Jaba River, whereby it was ordered

that the prosecutor, which was the defendant in a proceeding in that Court, pay compensation to Domasi Onoka, who was the plaintiff in that proceeding, or his heirs or successors for the loss of fish and other marine creatures in a certain stretch of the Jaba River. The order further provided for periodic payments up to the year 2011 with an alternative method of payment by way of a capitalized lump sum in the event that this Court should rule in other proceedings that the Warden's Court does not have power to award periodic payments.

The only basis on which compensation could be awarded in the circumstances of this case is pursuant to cl. 15(d) of the agreement set out in the schedule to the *Mining (Bougainville Copper Agreement) Ordinance 1967* which by s. 6 of that Ordinance has the force of law as if contained in the Ordinance. Clause 15(d) requires the prosecutor to make compensation for any loss suffered by any indigenous or other inhabitant of Bougainville Island or the other islands adjacent thereto resulting from any damage done (whether to land, anything on land, water or otherwise) or any interference with any right to use land or water caused by the disposal by the company of any overburden removed in the course of, or tailings produced as a result of, its operations under the agreement. The clause further provides that such compensation shall be provided either in cash or by way of provision on reasonable terms and conditions of land or other facilities or benefits or partly in one form and partly in another and in default of agreement thereon between the company and the person seeking such compensation the entitlement to and the amount and nature of such compensation shall upon application by such person be determined in accordance with procedures provided for in Pt VII of the *Mining Ordinance*.

The judgment of the Warden's Court given on 3rd August, 1970, after setting out various findings of fact proceeded as follows:

“The Plaintiff is entitled to compensation for damage caused by the operations of the Defendant under the provision of Sec. 56 of the Mining Ordinance 1928-1966 of the Territory of New Guinea for:

- (a) damage to the surface and to the improvements on the surface including crops and economic trees;
- (b) severance of the land from other lands of the owner;
- (c) loss of surface rights of way; and
- (d) all consequential damage”

and then went on to make various orders including the order for the payment of compensation already referred to.

One of the grounds on which certiorari may be granted is error on the face of the record. Although argument, supported by authority, was directed to the Court as to what

constitutes the record for this purpose, we do not find it necessary to express any view on this matter as taking the most limited view of the meaning of “record”, that is, as including the formal judgment and excluding both evidence and the reasons, but without deciding that the record is necessarily so restricted, it is apparent that there is error on the face of the record. The Warden purported to act under s. 56 of the *Mining Ordinance* 1928-1966, a section dealing with compensation in respect of prospecting or mining on private land. The applicable Ordinance for the present purpose is the *Mining (Bougainville Copper Agreement) Ordinance* 1967 and compensation is to be assessed pursuant to cl. 15(d) of the agreement set out in the schedule to that Ordinance. As the Warden in his judgment has purported to award compensation under an inapplicable statutory provision there is thus error on the face of the record.

Unless by reason of a privative provision the remedy of certiorari is not available or unless the Court in the exercise of any discretion which it may have to refuse the writ should refuse to order that it issue, it would follow that the writ should issue.

In this case there is no privative provision whereby the remedy of certiorari would not be available. Section 134 of the *Mining Ordinance* provides that: “No proceedings under this Ordinance shall be removed or removable into the Supreme Court except as provided by this Ordinance”. However, although the Warden purported to make the order under s. 56 of the *Mining Ordinance* the proceedings were not proceedings under that Ordinance. Clause 15(d) of the Schedule to the *Mining (Bougainville Copper Agreement) Ordinance* 1967 provides that compensation is to be determined in accordance with the procedures provided for in Pt VII of the *Mining Ordinance* but it does not thereby follow that a proceeding for such a determination is a proceeding under that Ordinance and we do not consider that it is correct to so regard it. The consequence is that s. 134 has no application in this instance.

If the grant of certiorari were discretionary in the circumstances (and we do not find it necessary to decide that it is) the Court would be entitled and indeed required to look at the whole of the proceedings including the evidence and the reasons for judgment to determine how this discretion should be exercised. A possible ground for the exercise of the discretion to refuse the writ would be that, even though the Court had purported to act under an inapplicable statutory provision, the award was one which could properly have been made under the applicable provision.

On looking at the evidence and the reasons it is apparent that there was no evidence, or at the most only a scintilla of evidence, to support the conclusion implicit in the Warden’s reasons that the loss to the plaintiff as representing his sub-clan was 1,500 pounds of fish per year. It is apparent that his judgment proceeded on this basis and having regard to this fundamental error it clearly could not be said that the award was one which could properly have been made under the statutory provision which did apply. This would therefore not be an appropriate case to exercise any discretion to refuse the writ.

For these reasons the order nisi should be made absolute and the judgment and order quashed.

As the matter will no doubt again be litigated we shall not deal with the facts other than to the extent to which we have already referred but we consider it appropriate to comment on certain matters of principle. Firstly, it is obviously necessary to clearly identify and specify the persons on whose behalf the award is made. Other claims may be made by other persons in the future so that any order for compensation made now should clearly indicate on whose behalf such compensation is awarded. Secondly, it must be appreciated that merely because the term of the lease is forty-two years the compensation recoverable by a claimant is not necessarily to be tied in any way to that period.

We express no opinion on the matter of the power of the Warden to make an order in the form in which he did in this case by his first alternative, that is, to award compensation in the form of a number of payments to be made over a period of years; this is clearly a question of considerable difficulty. However, even if the Warden were to have the power to make an order in that form, we would not consider it appropriate that he should do so in the circumstances of this case. Compensation is here being awarded for the loss of a right and it would seem that such compensation would more properly be a lump sum, that is, the value of that right ascertained as at the date at which it was lost.

Finally, we would point out that, on the basis that the plaintiff claims for himself and all the members of his sub-clan, so far as regard is properly to be had to fish caught by persons outside the sub-clan, the loss to the sub-clan is not the fish but the recompense paid for the taking of those fish.

Order nisi for certiorari made absolute.

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

Solicitor for the first respondent: *W. A. Lalor*, Public Solicitor.

Solicitor for the second respondent: *J. C. Kinna*, Department of Law.

[v]The effect of s. 6 and the provisions of cl. 15(d) appear sufficiently in the reasons for judgment at p. 13.

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