

Mr. P. O'Reill S.B.L.T.C. - Natural Justice - fair hearing 1705
- actual injustice - interference with decision - must be
satisfied & wrong - correct history & recent use --
competing claims - have to satisfy, don't just choose
IN THE SUPREME COURT } CORAM : FROST, S.P.J.
OF PAPUA NEW GUINEA }
6th October 1972

APPEAL NO. 34 of 1972 (P)

BETWEEN : MADAH RESENA OF TATANA ON BEHALF OF
HIMSELF AND THE TUBUMAGA TATANA CLAN,
THE NENEHI LAURINA CLAN AND THE NENEHI
IDIBANA CLAN.

Appellant

AND : MOREA MABI OF ROKU VILLAGE

Respondent

In re Idumava Land

1972

Aug. 8, 9,
Oct. 6.

REASONS FOR JUDGMENT

PORT
MORESBY

Frost,
SPJ.

These appeals concern certain land of an area of approximately 240 hectares known as Idumava, which is situated on a point of land on the western side of Port Moresby Harbour. Between the point and the eastern shore of the harbour lies Tatana Island. Since 1966 the land has been the subject of disputed claims by the Motuan people of Tatana and the Koita clans of Roku village, which is situated on Idler's Bay some distance south-west of the subject land. In fact the Koita people claim all the land from its northern tip south to Roku village. The first application (No. 47) to the Land Titles Commission in respect of the land was dated 21st March 1966 and made by one Ata Ageva of the Mavara clan of Roku village. This was followed by application No. 49 dated 20th April 1966 by the respondent, Morea Mabi of Tanomotu clan also of Roku village, on behalf of the Morea-Iramo lineage in respect of land known as "Iduwaiwai KuruKuru(DA1341)". The latter application referred only to a small area of less than 2 acres at the northern tip which had been purchased by the Administration in 1921 from two Tatana men. That application was dealt with on 16th September 1966 and dismissed by Mr. Acting Commissioner Jones, as it appeared that the applicant Morea did not contest the Administration's title, although he did claim that the

1972In re
Idumava
LandFrost,
SPJ.

wrong persons had been paid for the land. On 16th September 1966 the application of Ata Ageva came on for hearing before Mr. Acting Commissioner Jones who, on 26th September 1966 after hearing the evidence, reached the conclusion that it was insufficient to support the application and dismissed the application. From the transcript of the proceedings which took place over six days it appears that all the witnesses called were Koita men, and that they were cross-examined by Madaha Resena, the present appellant, on behalf of the clans from Tatana village. The men from the other Koita clans all supported the claim of the Tanomotu people to the land.

Immediately prior to that application being disposed of, two further applications, both dated 22nd September 1966, had been made to the Land Titles Commission in respect of the subject land, application No.62 being made again by Morea Mabi, of the Tanomotu clan, on behalf of the Morea-Iramo lineage, in which it was stated that Madaha Resena of Tatana village also claimed the land; and application No.63 made by Madaha Resena on behalf of Nenehi Idibana, Nenehi Laurina and Tubumaga clans, in which it was stated that Morea Mabi of Roku village also claimed the land. These applications were heard by Mr. Acting Commissioner Jones, on 29th and 30th September 1966 and 11th October 1966. At this hearing Madaha Resena and other Tatana men gave evidence, followed by Morea's witnesses of the Koita clans. However, the hearing appears to be inconclusive for no order was made.

Applications Nos. 62 and 63 were next brought on before another Commissioner, Mr. Commissioner Smith, on 29th August 1967, at which it appears that only Madaha Resena and men of the Tatana village were present. Madaha adopted his evidence as set out in the proceedings in the transcript before Mr. Acting Commissioner Jones, as did the other Tatana witnesses. From the record it does not appear that there was any appearance by Morea Mabi or any of the Koita men. Mr. Acting Commissioner Jones himself gave evidence to the effect that no map or survey of the subject land

was in existence, and this presumably was his reason for not concluding the hearing he had embarked upon in 1966. At the conclusion of the proceedings Mr. Commissioner Smith informed Madaha Resena and the persons present that he was not prepared to give a decision in the matter without the applicants first indicating the area claimed by marking out the boundary on the ground to enable the land to be surveyed and a map to be drawn. The hearing was then adjourned to a time and place to be specified. Mr. Commissioner Smith appears not to have taken any further part in the proceedings.

The two applications, Nos. 62 and 63, the subject of the order of the Land Titles Commission now appealed from, then came on for hearing on 19th March 1968 before Mr. Senior Commissioner Kimmorley (then Acting) who decided to hear them together. The hearing took place on 19th, 20th and 21st March 1968. Feeling ran high and on the last day the morning sittings had to be adjourned because of disturbances amongst some of the competing litigants. Satisfactory evidence was apparently given as to the boundary of the land and then witnesses were called, commencing with Morea Mabi and Gaudi Rei and Dorigi Dere on Morea's behalf, each being cross-examined by Madaha, followed by Madaha and Heni Rei of Tubumaga Iduhu. The hearing was adjourned until Monday, 26th March 1968, but it appears that the Senior Commissioner was engaged upon other matters and did not resume the hearing until 20th September 1968, when in the presence of the parties and their witnesses he made an inspection of the land and viewed various sites. For various reasons the Commissioner was unable to resume the hearing until 4th September 1969 when he made enquiries as to rights in the land claimed by Gaudi Rei as derived from the Tanomotu clan. The hearing was then adjourned until 9th September 1969. At this hearing Resena Gaigo of the Nenehi Laurina Iduhu said that he and his people did not want to give evidence as they had already given evidence before Mr. Acting Commissioner Jones; he merely adopted that evidence. Ata Ageva also adopted his evidence given on his earlier application and said he had nothing further to add to it. At the end of this hearing the Commissioner adjourned the proceedings to a date to be fixed.

In fact the hearing did not resume until 1st September 1970. Vagahu Neime adopted, with certain corrections, his earlier evidence. The hearing continued on 2nd September 1970

when Vagahu Neime and also Bobby Gaigo on behalf of the Nenehi Laurina gave evidence. On that day the Senior Commissioner reserved his decision which he gave at the final hearing on 17th September 1970.

It is unfortunate that the original proceedings should have been spread over a period of more than four years with hearings before three Commissioners of the Land Titles Commission, but I am satisfied that full opportunity was given each party to call witnesses and present his case.

I first turn to the clearly stated reasons for judgment by the Senior Commissioner in which he upheld the claim of Morea Mabi on behalf of the Tanomotu clan. Morea, he said, claimed that the land had been originally owned by the Kuriu and Gaibudubu clans of the Koita people but now belonged to his clan, the Tanomotu. The ancestors of this clan had come from the north, away inland from Roku village; they had moved towards the sea eventually making contact with the two clans mentioned, from which they had received the subject land. They made villages on this land years ago but later left them. They made gardens on the land and have continued to do so. The claim by Madaha Resena was made on behalf of the Nenehi Laurina, Nenehi Idibana and the Tubumaga clans of the Tatana people, as ancestral clan land inherited from their forefathers. The claim was supported so it was said by use of the land for gardens by the ancestors and in more recent times at two places on Idumava Point, but the people lived in the villages on Tatana. They erected only stone shelters near the gardens. The Tatana people claimed that there were no villages on the land at least as far back as the time of Captain Moresby's visit in 1873. They also claimed that the Tanomotu people had "no villages, no gardens, no houses" on the land.

Before considering the evidence of user, the Senior Commissioner referred first to European writings concerning the early relationship of the Koita and Motu peoples, which at the hearing before me were referred to as the outside sources. They consisted of extracts from the book "Pioneering in New Guinea" by Bishop James Chalmers, published in 1887, "The Melanesians of British New Guinea" by Dr. Seligmann, the anthropologist, published in 1910, "The Great Village" by Dr. C. S. Belshaw, also an anthropologist, published in 1957, and a paper by T.E. Dutton on "Linguistic Clues to Koiaran Pre-History".

The reference to these outside sources is an important feature of the case because they had not been referred to at the hearing, so that the appellants had not been given the opportunity to comment on them or to counter their effect by producing other written or oral evidence (which must have been of a traditional nature). In my opinion the use made of these sources was taken to support the Senior Commissioner's judgment, for he drew from those sources the conclusion that "the Koita people were the original holders of (the) land, and that the Motu people came later and settled on the coastal fringe, and that the Motu originated elsewhere than in the Port Moresby area." He thus considered that there was "no reason to disbelieve the Koita story of its migrations, told at this hearing - and that they were the first on the land. And it seems prima facie that the Koita might be expected to own land which is not close to any Motu village It is my opinion that if the Motu clans own any of the land away from Tatana Island, including the subject land, they acquired it from the Koita people." The Senior Commissioner then turned to the evidence of occupancy put forward by each of the clans. He examined Ata Ageva's claim to the land and rejected it, a conclusion which was not challenged before me. From his observations he considered that there were at least two old village sites upon the land and others outside the subject land which he considered it was reasonable to assume were the Koita villages which Morea Mabi had spoken of, and that the hard and stony ground disproved that there had been Motuan gardens at these sites. His conclusion was that it was Koita land, that the Motu people had gone onto the land, or its fringes, at times for fishing and gardening, mainly at a place called Hourata Bay and Ubuna (outside the subject land) on the shore opposite Tatana Island; but he did not consider that by these activities the Tatana people acquired an interest of a possessory kind, but merely a permissive occupancy. It is clear that the Senior Commissioner preferred the evidence of the respondent and his witnesses and accepted the evidence of user found on the ground as confirmatory of Morea's traditional evidence that the Tanomotu people had become the owners of the land, and he supported this conclusion by the inference from the outside sources that the Koita people had come first to the land. The Senior Commissioner's decision was thus to uphold Morea Mabi's claim subject to a derivative interest in Gaudi Rei.

Following the decision four persons, Madaha Resena, Heni Rei, on behalf of the Tubumaga clan, Bobby Gaigo on behalf of the Nenehi clan and Gabi Gaigo on behalf of the Nenehi Idibada clan, lodged requests for review under sec.34 under the Land Titles Commission Ordinance 1961-1968. In each case the grounds were the same, viz: "(1) That the said decision was against the weight of the evidence; (2) that the Commission acted in a manner contrary to natural justice in that it based its decision upon material without making that material available to the parties and without giving the parties an opportunity to comment on that material or to bring material to counter it." The material referred to consisted of the outside sources referred to in the Senior Commissioner's reasons for judgment and also a report by Mr. L. W. Filewood, the biologist in charge of the Research Station, Kanudi, who examined samples of shells collected on the subject land. Mr. Filewood reported that the species were purely marine, their presence inland was usually associated with human activity, and all species were commonly used by indigenes for food in the present as in the past. This report seems to have been taken by the Senior Commissioner as supporting the existence of villages on the land.

The Land Titles Commission Ordinance provides that upon receipt of the application for review the decision should be reviewed by three Commissioners (sec.36(1)). The Commissioners making the review, after considering the records relevant to the decision and hearing such evidence and making such enquiries (if any) as they consider necessary, may - (a) confirm the decision, or (b) set aside the decision and substitute another in its place. Sec.36(3). It will be noted that upon application for a review there is an obligation upon the Commission actually to review the decision.

The requests for a review came on before the Chief Commissioner and two Senior Commissioners on 10th February 1971, at which each of the applicants, unrepresented by counsel, supported the terms of the written requests. On 6th October 1971 the Chief Commissioner (then Acting) notified the parties of the Commissioner's interim ruling that the proceedings on the review be re-opened, and also the reasons therefor. The Chief Commissioner considered the first ground, whether the decision was against the weight of the evidence, independently of the second ground, and took into account only the evidence adduced

at the hearing, thus expressly excluding the outside sources. The first ground was not in fact touched on at the hearing. It is important to note that the learned Chief Commissioner rejected that ground and held, "Insofar as his (the Senior Commissioner's) determination was based on the evidence, excluding the material the subject of the second ground for review, there is shown to be no error in the record, and I would dismiss the requests on this ground." In making this finding he thus deliberately put on one side the outside sources. However, the learned Chief Commissioner upheld the second ground that the Senior Commissioner had taken the outside sources into account without bringing them to the notice of the parties. He correctly took the law to be that "if relevant material is not disclosed at all to a party who is potentially prejudiced by it, there is a prima facie breach of natural justice irrespective of whether the material in question arose before, during or after the hearing", citing a passage from Professor S.A. de Smith's textbook on 'Judicial Review of Administrative Action' 2nd Ed. p.199, approved by Clarkson, J., in re Volupai (Portion 161) (1). The learned Chief Commissioner thus concluded that before any final decision was given on the review the applicants for review should be given the opportunity to make whatever comment they wished to make on the outside sources disclosed in the Senior Commissioner's reasons for decision and to adduce countering material. Only after this had been done and the evidence then before the Commission was considered could a decision on the review be made.

The decision to hold a further hearing for the purposes stated was concurred in by Senior Commissioner Read, but it is significant that his decision was reached after he had prepared a written judgment dated 6th September 1971, in which he formed the conclusion that the applicants for review had not advanced any evidence whatsoever to cause any upsetting of the decision with which he concurred entirely. However having seen the Chief Commissioner's reasons, the course he took was to state on 2nd October 1971 that he fully concurred with the interim ruling and his previously expressed concurrence with the decision was to stand "in abeyance" pending the outcome of any further review proceedings. Senior Commissioner Page, without expressing any view on the merits, concurred that a further hearing of the review should be held to allow the applicants the opportunity to comment on and counter the outside sources.

(1) (1969-70) P. & N.G.L.R. 303

The review proceedings came on again for hearing on 19th October 1971, at which each of the four applicants for review were present, made comments and gave evidence. Morea Mabi also was present. It is plain from the transcript that while the applicants understood that it was open to them to counter the outside sources, none of the applicants fully appreciated that the purpose of the rehearing was restricted to calling evidence of that nature. The decision of the Commission on review was given shortly thereafter. Each member of the Commission gave written reasons. The Chief Commissioner and Mr. Senior Commissioner Read upheld the Senior Commissioner's decision, Mr. Senior Commissioner Page dissenting. The Chief Commissioner stated that he based his decision on the reasons set out in his interim ruling and a consideration of the evidence, material and comments of the applicants at the final hearing. He considered the evidence "as a chain of self-serving statements and allegations aimed at establishing their (the applicants) claim to ownership". He considered the evidence biassed and untruthful and insofar as it was contraverted by other evidence he did not accept it as truthful. He concluded: "The comments of the applicants and the written material produced did not justify any interference with the original decision. Accordingly my decision is that it should be confirmed". Mr. Commissioner Read in his judgment dated 8th November 1971 concurred, stating, "Having now considered the evidence deriving from the further review proceedings I find no cause whatever therein to vary my reasoning of 6th October 1971."

I now propose to turn to the submissions made before me on the hearing of the appeal. Notices of appeal were lodged by the appellant Madaha Resena on behalf of all the Tatana clans, viz. Tubumaga Tatana clan, Nenehi Laurina clan and the Nenehi Idibana clan, and also by Korahi Asigau on behalf of himself and the members of the Idubana clan of Tatana, and Bobby Gaigo Rahonamo on behalf of himself and the members of the Laurina clan of Tatana village. There being no objection by counsel for Madaha Resena and the respondent, I heard brief statements from the two appellants in person, but the only real arguments addressed to the Court on behalf of the appellants were made by Mr. Francis for Madaha Resena. Mr. Francis' first submission was that the Commissioners on review, having ruled that the parties be given the opportunity to comment on or call evidence in rebuttal of the material used by the Senior Commissioner and having

adjourned the hearing of the review to afford an opportunity for so doing, failed to take steps to ensure that the parties were aware of and understood the nature of the comments and evidence which the Commission was prepared to hear and admit. He therefore submitted that there had been a denial of natural justice on the part of the Commission. There is certainly ample evidence that the applicants for review stated that they were unaware of the limited purpose of the hearing and the learned Chief Commissioner, as he stated in his reasons for judgment, found it difficult to explain it to them and to confine them to that purpose. However in my opinion it cannot be ignored that the Commission adjourned the review to enable the outside sources to be answered, following an application based on that express ground made by the applicants, and that the Registrar was directed to furnish each of the parties with a copy of the ruling and the reasons therefor. It was not suggested that copies were not so furnished. Moreover written material was submitted by Madaha Resena which was not only plainly relevant to these outside sources but also of the greatest significance in rebuttal, as I shall later indicate, which shows that the principal party was in fact aware of the purposes of the adjourned hearing. For these reasons I am unable to uphold this submission.

Although it was not expressly stated in the grounds of appeal, Mr. Francis then submitted that there had been a denial of natural justice in another respect, viz. that the majority of the Commission in effect had, after the first hearing, reached a decision on the merits that the Senior Commissioner's decision was correct and had, at the adjourned hearing, failed to give full consideration to the whole of the evidence, including the new written material submitted by Madaha Resena. Reference was made at the hearing to a passage in Professor de Smith's textbook (*supra*) at p.178 in which the learned author is dealing with the case where a tribunal is under a duty to give a prior hearing before making a decision, but the requirement is not complied with at all, or has been carried out inadequately, and a hearing or rehearing is then given by the deciding body to repair the omission. The passage continues: "Such a hearing is potentially capable of curing the original defect, but it is right for the courts to examine the produce of these afterthoughts with particular care. In practice a hearing granted by a body once it has already come to a decision on the merits of the case is seldom likely to satisfy the requirements of fairness." The learned author supports

this passage by reference to Ridge v. Baldwin (2) and Polsuns v. Toronto Stock Exchange (3). Mr. Francis' submission was that the Land Titles Commission having in effect, by a majority, reached a conclusion at the first hearing upon the merits of the dispute when it ought to have deferred that decision until the opportunity to call further evidence was afforded., was under an obligation at the final hearing fully to re-consider the matter, in such a manner as to satisfy the requirements of fairness. It is useful to refer to Ridge v. Baldwin (4) (supra) in which the House of Lords had to consider as one of the issues in the appeal before it, whether the failure on the part of a disciplinary authority in reaching a decision to observe the principles of natural justice, was made good by a subsequent meeting. Lord Reid said, "I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid". In Polsuns v. Toronto Stock Exchange and Gardiner (5) (supra), in an action for inducing breach of contract the court had to consider whether the Toronto Stock Exchange in taking disciplinary action against the plaintiff had acted in accordance with the rules of natural justice. At the first hearing a penalty was imposed but the appellant was not represented by counsel, and was not given proper notice of the charge. The Court then had to consider whether the situation was remedied by a subsequent hearing at which full opportunity was given for counsel to adduce evidence and make representations. The Court of Appeal adopted the trial judge's statement of the law that, if the "members of a tribunal engaged upon a rehearing resolve conscientiously and honestly to reconsider the matter without being influenced by the effect or terms of their earlier decision, there has been a sufficient disavowal of that decision to permit them to do justice, if Lord Reid's other precepts are also honoured", at p.214. That was a reference to the passage I have already cited from the speech of Lord Reid. However, it is clear from the judgment of McLennan, J.A. in the Court of Appeal in Polsuns' case (6)(supra) that, if the second hearing were conducted as an appeal and the deciding body was only prepared to be shown that its previous resolution was wrong and did not consider the charges with open minds free from the earlier decision, a subsequent decision upholding the first cannot stand. Mr. Francis submitted that in fact the latter was the approach of the Land Titles Commission in

-
- (2) (1964) A.C.40
 (3) (1964) 46 D.L.R. (2d) 210; affirmed on Appeal (1966) 53 D.L.R.(2d)
 (4) (1964) A.C.40 193
 (5) (1966) 53 D.L.R. (2d) 193
 (6) (1966) 53 D.L.R. (2d) 193

this case, that the majority had come to a decision on the merits at the first hearing and was only prepared to change the earlier decision if it were shown that it was wrong.

I add a reference to the case of Ex parte The Angliss Group (7), in which the High Court held that the existence of a general tendency of mind on the part of members of the Commonwealth Conciliation and Arbitration Commission towards the adoption of the principle of equal pay as soon as the industrial situation permitted would not disqualify such a member from sitting in a matter in which a decision as to the awarding of equal pay had to be considered. The High Court in stating the principles applicable, first adopted with approval various authorities which established that "when it is necessary to consider a question of fairness in relation to a tribunal the whole of the circumstances in the field of the enquiry are of importance", and then continued,

"Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it." at page 152.

Reviewing these authorities I consider that the passage cited above from Professor de Smith's textbook does go somewhat further than the cases establish. However the decision of the Canadian Court of Appeal, although of persuasive authority only so far as this Court is concerned, in my opinion provides a valid test in circumstances similar to those occurring in Polsunsv. Toronto Stock Exchange (8) (supra). I must also bear in mind that upon the principles stated by the High Court it is the effect on the minds of the public of the circumstances said to show an infringement, which is the critical test.

At this stage it is convenient to consider the evidence at the final hearing of the review. Senior Commissioner Read did not refer specifically to oral evidence called on behalf

(7) (1969) 43 A.L.J.R. 151

(8) (1964) 46 D.L.R.(2d)210; affirmed on Appeal (1966) 53 D.L.R.(2d) 193.

of the applicants so that it cannot be said whether he accepted it as credible evidence or preferred the respondent's evidence as a matter of weight. The Chief Commissioner however specifically rejected the applicant's oral evidence. The written evidence remains and I now propose to turn to it. The main evidence was a paper entitled "Blood Groups of the Motu and Koita Peoples" by Murray Groves and others tendered by Madaha. This paper does seem to me to bear directly upon the weight to be given to the outside sources. The paper commences with a discussion of the lands occupied by the Motu and Koita people who, it is said, inhabited the Papua coast for a distance of about 70 miles in the vicinity of Port Moresby. The paper proceeds, "Motu inhabit villages on the beach. Their lands never extend very far into the interior. They are notably a maritime people, traders and fishermen, though they also make gardens.

Some Koita inhabit villages situated a mile or two inland, others inhabit villages on the foreshore. A substantial number live as minority groups in seaside villages inhabited mainly by Motu. The Koita are hunters and gardeners by tradition, but those who now live by the sea have learnt how to fish and sail Koita claim to be the original inhabitants of those areas which they now share with the Motu The Motu have no tradition that they ever came from elsewhere. They say that they have always enjoyed dominion over the coastline they now occupy, though within that area, they say, some of them have sometimes moved from one place to another." The authors then refer to the passage from Chalmers referred to by the Senior Commissioner, and state that the Motu consider themselves to be divided into two major groups, which may be called the Eastern Motu comprising certain villages of Port Moresby, and the Western Motu, comprising certain villages at Port Moresby and west thereof, that all Western Motu believe that they are descended from ancestors who once lived together at Port Moresby, and that in the distant past they moved from a single settlement called Badihagua down to the seashore and founded the cluster of villages now known collectively as Hanuabada. There they were joined by groups of Koita who had migrated from the hinterland. The authors in referring to the Eastern Koita also state, "The Koita people's traditional domain extended from Galley Reach to Port Moresby and from the seaside hilltops across the grasslands that run north to the Laloki River Before Europeans came, and for some decades afterwards, they frequently shifted their settlements. Abandoned Koita village sites are numerous

Koita joined Motu at Hanuabada before white men arrived. Many Koita have emerged from the hinterland to join the Motu at Porebada since British administration was established in 1884; their former village sites are now abandoned. The people of Roku and Koderika are also said to have come from the hinterland to the beach in recent times."

These latter passages are important because they indicate the habit of the Koita people to shift their settlements and thus abandon previous village sites, and also that the people of Roku were said to have come from the hinterland to the beach in recent times. It is clear that these views remove the foundation for the inferences drawn by the Senior Commissioner from the outside sources that the Koita people were the original holders of the land. In my opinion, the same weight is to be given to this paper as to those outside sources and it follows that no inference can be drawn from the documentary material as a whole that the Koita came from the hinterland to Roku at a time prior to the Tatana people commencing to make journeys to the land from their own Island for the purpose of gardening and fishing. The reference to the abandonment of sites could also be used to support the appellant's claim.

Neither the Chief Commissioner nor Senior Commissioner Read referred to any of the evidence in detail, so that whether there was an infringement has to be decided really upon the process of decision making adopted by the majority of the Commission. The Chief Commissioner's judgment is to be considered as a whole, and in such a manner that his statement that the evidence and comments on review do not justify any interference with the original decision is not taken out of the context. So considered and particularly because he took as one of the grounds of his decision the reasoning of his interim ruling in which he rejected the submission that the decision under review was against the weight of evidence, specifically taking into account only the evidence adduced and excluding from consideration the outside sources, I consider there was no breach of natural justice on his part. Senior Commissioner Read's judgment has caused me more difficulty. In the original reasons he prepared the inferences drawn in the judgment under review from the outside sources were adopted but the respondent's case, based on occupancy, was also preferred. It is irrelevant on this part of the case whether his decision that the new evidence was not such as to

require any variation in that part of his reasoning as was based upon the outside sources, was correct or otherwise. In the end I have come to the conclusion that the words used by Senior Commissioner Read cannot be said firmly to establish that a suspicion may be engendered in the minds of reasonable persons that his approach was one of pre-judgment, for those words are equally capable of referring to a consideration of the matter afresh by him with an open mind free from the earlier reasoning. Thus, although I have some doubts, in my opinion, it has not been shown, beyond "a mere lack of nicety", that there has been an infringement of natural justice on the part of the reviewing Commissioners (The grounds of appeal 3(i)(d) concerning the delays in the hearing was not pressed by Mr. Francis).

There is another consideration which may lead to the same result. No submission was made on behalf of the respondent that if a breach of natural justice was established the Court should not in the circumstances afford redress. There was before the Court only Mr. Francis' simple submission that if a breach was established the appellant should be granted a rehearing. (His main submission that an order should be substituted to the effect that the appellants were the owners of the land could only be supported if the decision were found to be against the weight of evidence). However it seems to me that a right to a rehearing does not necessarily follow such a finding. The fact that there is an alternative remedy by way of appeal to the Supreme Court against the decision of the Commission upon review upon grounds of both fact and law has to be taken into account. See the Land Titles Commission Ordinance 1963-1968, sec.38(2). The jurisdiction of the Supreme Court to entertain an appeal on the ground that the decision is against the weight of the evidence confers a wide jurisdiction to consider the whole of the evidence called both upon the original hearing and the review. Professor de Smith refers to cases generally in which a decision is challenged on the ground that natural justice is infringed and states that "the general attitude is that it is immaterial to ask whether substantial justice was in fact done", and the courts will normally prefer to set the decision aside (supra pp.227-228). But there are authorities which are the other way. They are cited by Professor de Smith (supra) at page 227. These authorities support the view that even where a breach of natural justice is established a court ought not to afford redress if satisfied that the decision would have been the same had the rule been observed. It appears

that those decisions may be founded on the existence of the court's discretion in issuing the prerogative writs. See Lamond v. Barnett (9). But this Court also has a discretion whether, if the justice of the case so requires, to substitute another decision, or to remit the case for further hearing. Land Titles Commission Ordinance, sec.38A(2)(c)(d). It follows, in my opinion, that in appeals such as those under the Land Titles Commission Ordinance, if a ground of appeal is made out that the hearing of the Commission was conducted in a manner contrary to natural justice, it is open to this Court to go on and ask, as the Court did in Lamond v. Barnett (10) (*supra*) at p.204, did the decision result in any real injustice? I thus consider that, applying that test to the present case, if the outside sources are excluded from consideration on the ground that they are effectively countered by the evidence called upon the review, and there is taken into account in favour of the appellants any inferences which can be drawn from that latter evidence, and the decision is then seen not to be against the weight of the evidence, the Court may in the exercise of its discretion refuse to grant a rehearing and may hold that the decision of the Commission ought not to be set aside.

Accordingly I turn to the next ground of appeal that the decision was against the weight of the evidence, which was naturally strongly argued by Mr. Francis to support the order most favourable to the appellants. As the orders of the Commission are challenged insofar as they are based on findings of fact, this Court may not set aside such findings if it is not satisfied that they are wrong. Edwards v. Noble (11), per Barwick, C.J. at p.686.

Excluding, for the reasons I have stated, the outside sources from consideration, the case turns upon the traditional history of the competing clans and the evidence of the occupation of the land. The traditional history of the Tanomotu people was that they originally came from the Vanapa River, or (possibly thereafter) from a place near Burns Peak on the hills at the north-east of Port Moresby harbour, and later settled on the northern shore of Fairfax Harbour at certain villages, including Tanomotu, on that shore opposite Idumava Point and some distance inland. From Tanomotu the clan saw smoke arising from Naba Naba on or close to the subject land, and went there to investigate. There is nothing to suggest that it was not possible to make the journey overland by following a course around the western side of

(9) (1964) N.Z.L.R. 195 at pp.202-3

(10) (1964) N.Z.L.R. 195 at pp.202-3

(11) (1971) 45 A.L.J.R. 682

Fairfax Harbour. They became friendly with other Koita clans who apparently had settled at this place and who owned the subject land, and acquired it from them. They then moved, some of them to Gaea Gari, a village which they established south of Idumava Point, and some to another village, Idumava Makara, to the south of Gaea Gari. All then moved to Sironimu and then to Sisiakai, a little south of the present Napa Napa Road (which crosses the subject land in a general west to east direction), then to Morea Gaudi, also further south, and afterwards to Roku, situated on the shores of Idler's Bay, where they finally settled. However while shifting their villages, they continued to make gardens on various parts of the land along the east coast, at the base of Idumava Point, and at various places about and south of where the Napa Napa Road now runs.

I have already referred to the traditional history of the Tatana people, which was that the land belonged to them, they had no villages on it, as they slept on the Island, they used the land for gardens and for collecting useful plant material, and also built garden shelters upon it. It seems from the evidence that the places where the Tatana people claimed they gardened were Ubuna (south of the subject land), Hourata Bay and other places on the coast north towards Idumava Point, which would have been directly accessible by canoe, and also at some places near the present Napa Napa Road, which also would have been accessible by canoe from Tatana Island around Idumava and Gladys Points. All of these places were also claimed as gardening areas by the respondents. The evidence is conflicting and neither side was ready to concede that the other gardened in the same vicinity. It appears that at the end of the Second World War when the people returned from Manu Manu, where they had lived during the war years, most of the men became employed in Port Moresby and the gardening operations conducted were only on a small scale, confined mostly to places close to Idumava Point and the Napa Napa Road. From the evidence much of the land is barren and indeed the Tatana people found it necessary to take water with them from Tatana village when they journeyed to the gardens.

Where there is a conflict as to the traditional history concerning land the proper approach to be adopted by a Court has been laid down by Lord Denning in delivering the judgment of the Privy Council in T. Adjeibi Kojo II v. Bonsie (12), the passage is as follows, op.cit 1226-1227:

(12) 1 W.L.R. 1223

"The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard it must be recognised that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is the more probable."

In fact this seems to have been the approach adopted by the Senior Commissioner at the hearing, particularly on the view and inspection which, accompanied by the parties, he undertook of the land. It is to be noted that a Commissioner is required to have a knowledge of native customs in relation to land, Land Titles Commission Ordinance, sec.9(3), and also may make all such preliminary enquiries and investigations as it deems necessary for determining the claims, op.cit sec.15(1). Thus the Senior Commissioner was quite entitled, and it was not suggested to the contrary, to investigate the alleged sites with a view to determining whether they were old village sites. I consider also that he was entitled because of those provisions of the Ordinance to take into account his own observations. The fact that he decided that there were old village sites at Gaea Gari and elsewhere on the subject land, in my opinion, was quite properly considered by him to indicate that the traditional history of the respondent was to be preferred. Further as the whole of the land south of Idumava Point was claimed by the respondent I consider that he was also justified in attaching significance to signs of old village and gardening sites in the vicinity but off the subject land. I consider that the Senior Commissioner's conclusion that there were old village sites at Gaea Gari cannot be challenged as a finding of fact. He took into account that the shurds, old shells and piles of stones there were claimed by Madaha as being indications that there had been Motu gardens. But from his observations he was unable to accept this and took the view that the piles of stones were consistent with the respondent's claim that they were the remains of windbreaks or ovens. His observation that the ground was very rocky and stony

and could not therefore be used for gardening was not challenged. At the review hearing the appellant Madaha claimed that this conclusion was wrong because there were no signs of a cemetery or mango or coconut trees. The trees of course in the course of time may have been burnt down, but the fact that the ground was hard and stony may well have been the reason why a burial place had to be sought elsewhere, and could also account for the absence of mango or coconut trees. On this part of the case, having regard to these findings, I should also add that the fact that the appellants denied there were villages on the ground could also have properly been taken into account upon the issue of the credibility of those who put forward the traditional history of the Tatana people, for as Senior Commissioner Read pointed out that history does not seem to go back much beyond three generations. For these reasons I consider that the Senior Commissioner was right in accepting the traditional history of the Tanomotu people that they were the owners of the land and rejecting the traditional history of the Tatana people.

Mr. Francis relied upon the matters raised in the dissenting judgment of Senior Commissioner Page. It is, with respect, a well reasoned and persuasive judgment, and I respect his wide knowledge of the people of this country and their customs, but I regret that I am unable to agree with it. The main matters relied upon were that the respondent had abandoned the subject land, the purchase by the Administration in 1921 of the land at Idumava Point from two Tatana men, and the occupation of the area inland known as Geu Geu by Mr. Brammel and his wife who was a Tatana woman. I shall consider each of these matters in turn. No case was cited at the hearing in which it has been held in English law that the title to land may be extinguished by abandonment. However, there is a reference to abandonment of land in a passage cited from Blackstone's Commentaries Vol.2, p.9, which is to be found in Words and Phrases Legally Defined, Vol.1, p.2. The passage is as follows.

"Property, both in lands and moveables, being originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it: for then it becomes, naturally speaking, publici juris once more, and is liable to be again appropriated by the next occupant."

I am prepared to accept in the circumstances of this case, where it is not suggested that the land is subject to any particular statutory provisions bearing upon the matter, that the title of the land may be abandoned. It is plain that the villages were abandoned - a habit apparently of the Koita people according to the paper by Groves and others - and the Tanomotu clan has long ceased to live on the subject land, but, in my opinion, in view of the ample evidence by the respondent and other witnesses, that the land continued to be used for gardening in the various places that I have referred to during the days of his grandfather and father and even to the present day, whilst the clan lived nearby at Roku it could not be said that there has been shown in this case that there was an intention to abandon the land itself.

Both the two other matters referred to by Senior Commissioner Page are, in my opinion, equivocal in effect. It does seem that no one was concerned to claim the land until 1966, when a pearl fishing industry was started at the Point and a nautical school proposed for Napa Napa, and only then did the respondent come forward and state that the wrong persons had been paid for the land at the Point. But the extent of any investigation held by Mr. O'Malley in 1921 and whether it went into the claims of the Koita people to that land is unknown, and it is only upon this basis that an inference adverse to the Tanomotu people could be drawn from the Administration purchase.

There was the remaining matter that the Tanomotu clan apparently made no objection to Mr. Brammel, who was married to a Tatana woman, living on the land. There is much force in the Senior Commissioner's view that this can be taken as evidence in favour of the appellants - although not so far as to raise a strong presumption, the term used by him - that the land was Tatana land. But, again, it is an inference quite open on the facts that the attitude of the Tatana people to those persons living on the land may have been determined because of their relationship with Mr. Brammel himself, irrespective of his wife. Further there is the evidence of the lease in 1958 by the respondent himself to the Administration of a small piece of land, Hadiawa, which is in the same place or close to where Mr. Brammel lived, which shows that at that time, which was prior to the economic activity being started on the coast-line, that the Tanomotu people claimed the land. In my opinion these two matters are insufficient to establish that the decisions of the Commission were wrong.

I thus reach the conclusion that the Commission's decision, both at the original hearing and on review, in favour of the respondent should not be disturbed because on the evidence the claim of the respondent based upon his traditional history of the Tanomotu people that they were the owners of the land is to be preferred, and that this claim is supported by sufficient evidence of occupation. Even if this claim were not to be sustained, I would have grave doubts whether, on the probabilities, the use of the lands by the Tatana people for gardens at convenient points approached by canoe from Tatana Island, was sufficient to support an inference that the appellants and their clan were the owners of the whole of the subject land. I consider also that the finding of the Senior Commissioner that upon the evidence the Tatana people enjoyed limited occupancy only of the places where they gardened with the permission of the Tanomotu people was correct.

Before leaving these appeals I should refer to Mr. Francis' submission that the Chief Commissioner made an error of law in his interim ruling. The relevant passage refers to the Chief Commissioner's statement that, "It was not for him (the Senior Commissioner) to decide on the evidence adduced at the hearing who established the better claim inter partes. He was required to make a determination in rem as to the ownership of the land the subject of the claim." Whilst Mr. Francis was correct in his submission that the reference to a determination in rem was inappropriate, I consider that the learned Chief Commissioner was merely drawing attention to the function of the Commission under sec.15 of the Ordinance of hearing and determining disputes concerning and claims to the ownership by native custom of any land. It is well established that if a number of parties make claim to the same piece of land it is not the law that the party or parties showing the best right must succeed in establishing ownership. The Commission may decide, having regard to the paucity of the evidence, that some only are or none of the claims is established; the Commission's function is to examine the claims and to decide whether claimants and which of them, if any, have established a claim to the ownership of the land. The law is stated in a decision of the Court of Appeal for Eastern Africa in Abdulla Bin Rithiwani v. Wakf Commissioners (13), the relevant passage of the judgment of the Court being set out in the decision of the Full Court in Saraga Sina & Ors. v. The Administration (14). Understood in the sense to which I refer

(13) (1919) 8 Kenya Law Reports 105 at 106-7

(14) (1969-70) P. & N.G.L.R. 359 at 363

the learned Chief Commissioner's judgment contained no error of law.

I would therefore dismiss the appeal.

Order: that the appeal be dismissed and the decision of the Land Titles Commission affirmed.

Solicitor for the Appellant - Messrs. Francis & Francis

Solicitor for the Respondent ~~W. A. Lalor, Public Solicitor~~