

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

594
CORAM: KELLY, J.

Friday,

2nd October, 1970.

IN THE MATTER of the Land Titles Commission
(Appeals) Ordinance 1970

AND IN THE MATTER of an application by the
Director, Division of District Administration,
Department of the Administrator and Akun,
Topal and Tebuar on behalf of themselves and
the people of Mualim Village and Anton of
Mioko Pal Pal Village under the provisions of
Section 3 of the abovementioned Ordinance.

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On 21st August, 1970 an originating summons was taken out by the Director, Division of District Administration, Department of the Administrator and others, seeking an extension of time for instituting an appeal to this Court against a final order made by the Land Titles Commission on 9th October, 1967 in respect of the land known as Invura (or Rakada) in the Duke of York Islands, East New Britain.

The application was made pursuant to Sec. 38(1AA.) of the Land Titles Commission Ordinance 1962-1970 which is in the following terms -

"Notwithstanding anything in the preceding provisions of this section, a Judge may, where he thinks it desirable in the interests of justice to do so, extend the time for appeal, but no such extension shall be granted after the Registrar of Titles has, in pursuance of the decision of the Commission, made any entry in a Register kept by him or issued any documents of title."

This provision was inserted by the Land Titles Commission (Appeals) Ordinance 1970 (No. 34 of 1970) which came into operation on 31st July, 1970. The preceding provisions of Sec. 38, namely Subsecs. (1) and (1A) provide that a person aggrieved by a decision of the Commission may appeal to the Supreme Court within ninety days after the decision or review of the decision and in the case of a final order under the New Guinea Land Titles Restoration Ordinance such period is to run from the date on which a written final order is issued by the Commission. Thus in the present case the time for appeal had expired in January, 1968.

Mr. Wood for the respondent, The Sacred Heart Mission (New Britain) Property Trust submits that in this case the Court cannot extend the time for lodging the appeal as, prior

to the enactment of the provision giving it power to do so in certain events, that time had already expired.

The first question for determination is whether the Ordinance in question, No. 34 of 1970, is a retrospective enactment in the sense in which that term is to be properly understood in this context. I adopt the test propounded in Craies on Statute Law, 6th ed., p. 386, that a statute is retrospective which takes away or impairs any vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed. There is a further principle that a statute is not to be given retrospective operation unless there is perfectly clear language showing the intention of Parliament that it shall have a retrospective application (Croxford v. Universal Insurance Company Limited (1)).

As Williams, J. points out in Maxwell v. Murphy (2) where the question arises whether a statute has a retrospective operation, it is usual to divide statutes into two classes, the one where the new statute affects existing substantive rights and the other where it affects only the existing practice and procedure of the courts for enforcing such rights.

In this case I consider that Ordinance No. 34 of 1970 does affect an existing substantive right. Under the law as it stood prior to that Ordinance coming into operation a person aggrieved was given a right of appeal but it was a condition of that right that it be exercised within ninety days. Thereafter the right was lost and in the case of a final order such as that with which we are here concerned, assuming that no stay of execution had been ordered, the person in whose favour the order was made then had a right to have effect given to that order (see Sec. 47(1) of the New Guinea Land Titles Restoration Ordinance). Any order extending the time for appeal which had thus expired would clearly affect the existing rights of the parties and any legislation coming into force after the time for appeal had expired and which enabled that time to be extended, with the consequence of impairing this right, would therefore be a retrospective statute.

I would not think it correct to regard the amending provision as being merely procedural. As Williams, J. explains in Maxwell v. Murphy (2) (supra), in referring to statutes of limitation, if an existing statute of limitation

1) (1936) 2 K.B. 253, per Scott, L.J. at p. 281
2) (1956-57) 96 C.L.R. 261 at p. 277

is altered by enlarging the time within which proceedings may be instituted whilst a person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural, but if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time, very different considerations could arise. In the view of Williams, J. a statute which enables a person to enforce a cause of action which was then barred could hardly be described as merely procedural and such a statute would affect substantive rights.

Although we are not dealing here with a statute of limitation in the proper sense, to my mind the same considerations apply (see Maxwell v. Murphy (3) (supra) where Williams, J. considers the right to enforce a cause of action as being of the same character as the right to prosecute an appeal, namely an existing substantive right).

There is here no clear language showing the intention of the legislature that the Ordinance shall have retrospective operation. The Ordinance itself certainly does not say so and the opening words of the new subsection, namely "Notwithstanding anything in the preceding provisions of this section" although apparently intended to enable a Judge to extend the time even though it may already have expired, that is, expired after the Ordinance came into operation, do not clearly indicate that the legislature intended to give retrospective operation to this provision. I consider that something much more explicit would be necessary to bring about this result.

I do not consider that the provision in Sec. 2 postponing the operation of the Ordinance until a date to be fixed by the Administrator by notice in the Gazette should be taken as an indication against the presumption that a retrospective intent is not to be inferred. Craies (op. cit.) deals with this matter on pages 392-393 and I would adopt the conclusion reached by the learned author that the result of the decisions on postponement clauses seems to be that the suggested exception is rarely, if ever, applicable and cannot be accepted as an undoubted rule of construction. Provisions in the form Sec. 2 are not uncommon in present day statutes and ordinances and without more, are no indication that retrospectivity is intended.

Mr. O'Neill submits that the proceedings should be treated as still continuing until registration takes place. It is true that effect is not finally given to a claim until registration, but it is when the time for appeal has expired following the making of a final order with no stay having been granted that the substantive rights come into existence which would be affected by an extension of the time for appeal and that is the crucial point for the present purpose.

For these reasons I hold that Sec. 38(1AA.) does not operate to enable me to extend the time for appeal in this instance when such time has already expired prior to that subsection coming into operation. I therefore dismiss the summons with costs.

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

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