Tu'ipulotu v Hon. Niukapu

Privy Council, Nuku'alofa
(Judicial members : Morling, Burchett & Tompkins JJ)
Appeal 7/94

20 February & 28 April 1995

Estoppel - issue estoppel - res judicata - binds parties and privies
Land - Hereditary titles and estates - res judicata
Privy Council - binding on Land Court
Res judicata - binds parties and privies - estoppel

The appellant (plaintiff in the Land Court) claimed that he was the rightful successor to the noble title Niukapu and the appertaining estates, the respondent having had that title conferred on him following the death of the appellant's father. The Land Court dismissed the claim holding that the appellant's direct ancestor appointed to the title by King George Tupou I at the time of the adoption of the Constitution of 1875 was but a "trustee" of the title for the respondent's direct ancestor and that the title properly had been conferred on that family

Held, allowing the appeal

1. The Land Court orders should be set aside.
2. A declaration was made that the appellant was entitled to succeed to the title and estates of Niukapu.
3. The respondent's father (both for himself and earlier on his behalf) had unsuccessfully challenged the appellant's father's right to the title in both the Land Court (once) and Privy Council (three times) and the matter was therefore res judicata, binding on both the parties and their privies and the decision of the Privy Council was binding also on the Land Court who had a duty to accept it.
4. (Obiter) Support for the view of the earlier decision of the Privy Council, and the appellant's case, can be found in the history of the Constitution (see King George Tupou's speeches in 1875 at 2 Tongan L.R. 1-5) and other decided cases i.e the title must descend to the descendants by blood of the holder of the title at the time of or immediately after the grant of the Constitution in 1875 (with an exception in cases only of adoption - and this case did not involve any adoption)

Cases considered : Carl Zeiss Stiftung v Rayner & Keeler (2) [1967] 1 A.C. 853
Ramsay v Pigram (1968) 118 C.L.R. 271

Effem Foods v Trawl Industries (1993) 115 ALR 377
Tu'ipulotu v Kava'onuku (1938 -1939) 2 Tongan L.R. 143
Mahe v Tu'ipulotu (Privy Council 25/10/1966)
Ulu'ilakepa v Fulivai (1924) 2 Tongan LR 10
Fulivai v Kaianuanu (1961) 2 Tongan LR 178

Statutes considered : Constitution

Counsel for appellant : Mr Niu
Counsel for respondent : Mr Paasi

Judgment

This appeal concerns the right of succession to the noble title of Niukapu, with the estates appertaining to it, which was claimed by both the appellant and the respondent, and has been conferred upon the respondent.

The appellant's case is extremely simple. He says he is the eldest legitimate son of the late Sanualio Tu'ipulotu who held the title Niukapu. The respondent does not dispute this, but seeks to set up an earlier title derived through his father Viliami Mahe, the eponymous grandson of Viliami Mahe who was the Niukapu from 1906 until his death in 1914. But the assertion of his alleged earlier title almost inevitably involves an attack on the validity of the recognition of the appellant's father as the last Niukapu. If he held the title validly, there can (except for one point to be discussed later) be no reason to pass over his eldest son in order to go back to another line of descent. The Constitution provides, save for presently irrelevant exceptions, for descent by blood from the title holder. Section 111 says that "the eldest male child shall succeed and the heirs of his body and so on until all the male line is ended".

The difficulty which then confronts the respondent is that the title of the last Niukapu was unsuccessfully challenged in the Land Court and in the Privy Council, both on behalf of the respondent's father and by the respondent's father himself. As the respondent claims through his father Viliami Mahe, he is his privy in title and (of course) in blood, bound by the same res judicata as against the late Niukapu at his death. Of that Niukapu, the appellant, too, as his son claiming through him, is a privy. The law is that a res judicata binds, not only the parties to an action, but also their privies: Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2) [1967] 1 AC 853 at 910-911 per Lord Reid, 933-934 per Lord Guest; Ramsay v Pigram (1968) 118 CLR 271 at 279; Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (1993) 115 ALR 377 at 495-408. In Ramsay v Pigram at 273-4 Deane Q.C. (as he then was), adopting Everest and Stroke on the Law of Estoppel (3rd ed., 1923) at p.55, submitted: "The essential nature of a privy for the purpose of estoppel is .... one who claims a title or right or makes a claim by virtue of a title or right in someone before him." Barwick C.J. (at 279) made clear his acceptance of this view, saying that the "basic requirement of a privy in interest in that the privy must claim under or through the person of whom he is said to be a privy." Accordingly, the respondent here, claiming by virtue of and through his father's title, is his privy in law, and cannot dispute the title upon which the appellant's claim is based.

Retracing those steps, in 1937 a claim was brought in the Land Court by the late Sanualio Tu'ipulotu against one 'Isileli Kavaonuku (or Kava'aunuku), who was trustee for Viliami Mahe, the respondent's father, then an infant. In that proceeding, the competing contentions of the families of the present protagonists were fully explored. It was proved that an ancestor of Tu'ipulotu (and thus of the appellant), one 'Uli'uli, was appointed Niukapu by King George Tupou I at the time of the adoption of the Constitution of 1875. But there was evidence that 'Uli'uli was not of the original Niukapu line, and it was urged he was but a "trustee" of the title, which properly reverted to the respondent's ancestor Viliami Mahe in 1906. This argument appealed to the Land Court judge, Ragnar Hyne J. However, the Privy Council in a decision delivered by Stuart C.J. in 1938, reversed the Land Court, holding in favour of Sanualio Tu'ipulotu, who was accordingly reinstated as Niukapu in 1940, from when he was to retain the title until his death in 1984.

But before the final recognition of Sanualio Tu'ipulotu in 1940, there was a further

petition to the Privy Council heard on 23rd February 1939, when it was asked to set aside its own earlier ruling. In refusing to do so, Stuart C.J. delivered reasons in which he summarized the basis of the previous decision as follows (see Sanualio Tu'ipulotu v Tsileli Kava onuku (Trustee for noble Niukapu) 2 Tongan L.R. 143):

> "In this case Mr Ragnar Hyne having found as a fact that 'Uli'uli was in undisturbed possession in 1875 of the title and estates in dispute was wrong in going back beyond the Constitution.
>
> This simple mistake resulted in his giving judgment for the respondent. This judgment was incorrect. Judgment must be altered to judgment for the appellant with costs."

In the present case, Daigety J has asserted: "This decision I must say defies all logical explanation." But it was a decision of the Privy Council, and binding on him. It was his duty to accept it. Furthermore, it had been re-examined within a very short time by the Privy Council itself, which found nothing wrong with it. In fact, the reason given in it is perfectly logical. The Privy Council took the view that the correct line of descent was to be determined in accordance with the decision of King George Tupou I appointing 'Uli'uli; that appointment provided a starting point from then on. When the Privy Council so decided, it had had the benefit of exhaustive evidence about the position as it was in 1875, including the direct evidence of a witness said to have been born in 1838. If it were possible to re-examine the matter now, we would not have the light of evidence of that sort.

But it is not possible. Res judicata. This Privy Council has already held that, for the dispute was brought forward again in 1960, when the respondent's father Viliami Mahe made a claim in his own name against Sanualio Tu'ipulotu. This time, the Land Court (Hunter J.) dismissed the claim as res judicata. On appeal, the Privy Council held on 25th October, 1966:

> "The decision made by Judge Hunter in the Land Court appears to us to be the only decision which it was open to him to make, and we are not able to set it aside. It is not open to the Privy Council whilst sitting as a judicial tribunal in these circumstances to reopen a case between the same parties over the same subject matter that was decided by the Privy Council some 28years ago, in the absence of legislative authority to do so."

The only difference, apart from the lapse of a further 28 years, between the question decided then and the question before us now, is that then the attempt to relitigate the matter was made between the same parties (treating Viliame Mahe and his trustee as the one party), whereas now the attempt is made as between the privies of the parties. That makes no difference in law. An issue estoppel or res judicata binds the privies of parties as well as the parties themselves.

Although this result is supported by a doctrine of a technical nature, it is one that should be seen as promoting stability. When a disputed issue is settled by the Courts, it should remain settled. Rights to noble titles (and indeed other rights) should not be subject to disturbance every time the generations change. The law does not exist to foster constant litigation, but to resolve it. That is why the principles of issue estoppel and res judicata became established, and they must be applied in a case of this kind: Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (supra) at 380, 399, 404.

What has been said is sufficient to decide this appeal. However, it should be added

that there is further support in the history of the Constitution and in the cases for the view taken by the Privy Council in 1937. When the Parliament assembled which adopted the Constitution of 1875, King George Tupou I addressed it in terms which are recorded in 2 Tongan L.R. 1 - 2. After referring to past practice, by which, he said, "my rule was absolute, and .... I could please myself to create Chiefs and alter titles", he proclaimed:

> "I have made up my mind absolutely not to alter names or nominate Chiefs, so that the estate shall go with the title, and the succession shall be from the father to son for ever. The Law of Succession is stated in the Constitution, and such succession shall be by blood relationship only: from to-day no adopted children shall succeed to the estate or title or to anything; only the children of blood relations and by marriage. Should there be any dispute it shall be tried by the Justices of the Court in accordance with the usages of civilised Governments. You Chiefs of Tonga all of you who have titled and estates when the Constitution comes in force: I now affirm to you the right of yourself and of your children by marriage, to hold and possess your titles and estates for ever, as stated in the Constitution."

At the close of the Parliament, on 4th November 1875, the King again delivered an address (reported in 2 Tongan L.R. 3 -5), in which he "appointed" twenty Nobles as "dictated by the Constitution", saying with reference to some who could already claim to be "blue-blooded chief[s] in [their] own right", that "a Constitution has been enacted by which unless one has been conferred by me with an hereditary title one cannot get in to Parliament as a noble". He declared: "These are the gentlemen I have appointed, they and their descendants, are to be the nobles of Parliament in accordance with the Constitution." Among the gentlemen named on that occasion was the then holder of the title Niukapu, who was 'Uli'uli.

A decade before the 1937 decision of the Privy Council in Tu'ipulotu v Kavaonuku (supra), another dispute between representatives of two families, each claiming a noble title, came before Scott J. in the Land Court: Tevita Uluilakepa v Fulivai (1924) 2 Tongan L.R. 10. There too, it was alleged that King George Tupou I had conferred the title upon a holder (one Kaianuanu) who was "only .... a representative" of a person not then of age. But Scott J. held (at 11): "My considered opinion is that the succession to nobles' estates is bound by the rules of succession given in the Constitution and as indicated by the evidence heard the title and the estates were conferred on Kaianuanu so the same must pass on to Kaianuanu's heir if he had such." This ruling was confirmed by the Privy Council on 23rd February 1927 (see note at 2 Tongan L.R. 12).

The decision in Fulivai was controversial because Kaianuanu was an adoptive son of the previous holder of the title, and ancient custom did not regard the children of an adopted son as heirs of the title obtained by him by virtue of his adoption. After the lapse of more than two decades, an amendment to the Constitution was passed in 1953 dealing with the right to succession to a noble title or estate where a holder of the title or estate has inherited it by virtue of blood descent from an adopted child. In such a case, "the estate and title shall revert to the descendant by blood of the original holder of the estate and title".

The effect of the amendment to the Constitution was tested in Fulivai (Noble) v Kaianuanu (1961) 2 Tongan L.R. 178, where the Privy Council (Hammett C.J.) held it must refer to an adoption relating to the holder of a title as at 1875 or before, since the Constitution did not allow an adopted child to succeed to a title after 1875. But in the

course of the reasons of the Privy Council, it was said (at 180), with reference to the decision in Tevita Uluilakepa v Fulivai (supra):

> "The Court then held, (and its decision was upheld by the Privy Council) that since the Law of Succession contained in section 107 of the Constitution was quite explicit, the title must descend to the descendants by blood of the holder of the title at the time of or immediately after the grant of the Constitution in 1875 whether he be a son or adopted son of the previous holder. This decision made it clear that the Law of Succession contained in the Constitution was contrary to, but nevertheless must take precedence over the chiefly Tongan custom relating to adopted sons who had been appointed to hold a chiefly title and the right of their descendants to inherit their titles."

The later Privy Council decision in no way criticizes that proposition as a general statement of the law of the Constitution. What it establishes is that the amendment was effective to introduce an exception in cases only of adoption.

The present case does not involve any adoption.

For these reasons, the appeal should be allowed; the orders made below should be set aside; and it should be declared that the appellant was entitled to succeed, upon the death of his father, to the title and estates of Niukapu. As the succession to a noble title is not exclusively a private matter, and in all the circumstances, it would be appropriate to exercise a discretion to order that each party bear his own costs of the action and of the appeal.

The Privy Council, having received the opinion of its Judicial Members, ORDERS THAT:

(1) The appeal be allowed, and the orders made by the Land Court on 28th April 1994 be set aside;

(2) It be declared that the appellant was entitled to succeed, upon the death of his father, to the title and estates of Niukapu;

(3) Each party bear his own costs of the action and of the appeal.