IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Case No.19 of 2011

Antonius Heinrich and Ors

Plaintiff

V

Nauru Lands Committee	1st Defendant
Josephine Gadeouwa and Ors	2nd Defendants
Raymond Gadabu and Ors	3rd Defendants

JUDGE:	Eames, C.J.
DATE OF HEARING:	13-14 June 2012
DATE OF JUDGMENT:	19 June 2012
CASE MAY BE CITED AS:	Antonius Heinrich v NLC and Others
MEDIUM NEUTRAL CITATION:	[2012] NRSC 11

CATCHWORDS:

Judicial review – Certiorari – Determination published in Gazette in 2010 by Nauru Lands Committee as to owners of "Abotsijij", in response to enquiry by Ronphos concerning persons entitled to royalties – No family meeting called by Committee as required by Administrative Order No 3 of 1938 - Committee relied on its records as determining the question - Whether jurisdictional error – Whether error on face of record – Whether plaintiff denied procedural fairness. Jursidictional error.

APPEARANCES:

For the Plaintiff	Mr Pre Nimes Ekwona (Pleader)
For the 1st Defendant	Ms L Lo Piccolo, Acting Secretary for Justice
For the 2nd Defendants	Mr R Kun (Pleader)
For the 3rd Defendants	Ms M Depaune (Pleader)

CHIEF JUSTICE:

1 The plaintiff applies for relief by way of certiorari to quash a determination of the Nauru Lands Committee made in Government Gazette Notice No 690 of 2010, published in the Government Gazette No 161 on 15 December 2010. The decision was titled "Land Determination" and it concerned Phosphate land in Buada, being Portion Number 94 known as "Abotsijij"[1].

2 In its written statement of its reasons for the decision the Committee said that in late 2010 Ronphos Corporation asked the Committee "to publish a determination in respect of the land". Ronphos has the responsibility for making payments to landowners of phosphate mining royalties. In responding to that request the Committee reviewed all of its records and Minute Books. All records between 1937 and 1950 have been lost. The Committee came to the conclusion that ownership had been determined in 1933 by GNN 24 of 1933. The Committee added: "For this reason, the Committee did not call a family meeting".

3 Thus the determination was published without any family meeting having been called by the Committee to hear the competing claims, if any, to be included as a beneficiary. The Committee decided that a meeting was not necessary, indeed was inappropriate, because it could answer the question of who were the beneficiaries of this land from its records, and it would be beyond power for it to make a determination that in effect overrode the previous decisions of the Committee which had identified the owners.

4 Antonius Heinrich was unaware that the Committee was considering the ownership of "Abotsijij" and did not learn of the publication in the Gazette until after the 21 day time limit for appeals under s.7 of the *Nauru Lands Committee Act 1956* had expired. The Court ruled that that time limit could not be extended and the land appeal which was filed eight months out of time was struck out. Mr Heinrich then made application under Order 38 of the *Civil Procedure Rules 1972* to apply for

[1] There are variations in the spelling throughout the documents. This spelling is taken from the determination.

judicial review by way of certiorari. That application was granted and a writ was issued seeking that relief.

The Determination

5 The determination stated: "The Nauru Lands Committee hereby determine the ownership of certain land or shares in land as being shown hereunder". In the published chart under the heading "Original Owner' is the name Dedage, who was shown to have a half interest in Portion 94.

6 As the "Present Owner" the following people were named and their shares stated:

Gumwear (1/4 share)

Gadabu (1/4 share)

7 Beneath Gumwear's name appeared two gazettal notice numbers as follows:

22/08

44/97

8 The beneficiaries of Gumwear's one quarter share of Dedage's estate were then listed, being descendents of Gumwear, led by Josephine Gadeouwa and others, the second defendants. Their individual interests in some cases were as low as 5/2304th.

9 The beneficiaries of Gadabu's one quarter share of Dedage's estate were listed as including Raymond Gadabu and Tyran Capelle, who were among those comprising the 3rd defendants.

10 In all, some 45 people shared in the distribution of the 1/2 interest in Abotsijij that had been held by Dedage when he died.

11 The plaintiff, Antonius Heinrich, is not primarily concerned to contend that any of those named people named should not have been beneficiaries (although Mr Ekwona, his pleader, did at times suggest as much) but he contends that he should,

at least, have also been one who shared in that division of Dedage's land, the plaintiff's interest being gained through his grandmother, Dogitaoe Heinrich. He concedes that he is not a blood relative of Dedage or of Gumwear, but claims that his grandmother gained her interest in this land, as sole owner, pursuant to the will of her husband Agiriauwa.

12 Upon the death of Dedage, who died without issue, the land must have reverted back to his family or his nearest relatives (by virtue of par (3)(b) of the 1938 Administrative Order). That meant that his interest reverted to Udibe, Erina and Agiriouwa. The plaintiff claims that his grandmother, Dogitaoe, was the lawful heir of Erina and of her daughter Eigigu. Eigigu died without issue and her land interests would have reverted to her family and closest relatives. The plaintiff contends that while he is not a blood relative of Dedage, he is a blood relative of Eigigu, and it is through her that the present beneficiaries of Abotsijij must trace their interest.

Certiorari

13 Although much of the argument in the case focussed on identifying non-jurisdictional error on the face of the record, that is a relatively narrow and difficult avenue for obtaining relief by way of certiorari, because of the restrictions on what constituted "the record". Traditionally, the alternative avenue of seeking to establish jurisdictional error also presented difficulties, requiring differentiation between the technicalities of jurisdictional and non-jurisdictional error, but the scope for certiorari, with respect to the decisions of tribunals rather than inferior courts, has now been significantly broadened by decisions of the High Court.

14 In *Craig v South Australia*[2] the High Court removed the fine distinctions that were previously drawn between jurisdictional and non-jurisdictional error, insofar as the judicial review related to the decision of a tribunal rather than a court. In consequence, therefore, the scope for finding jurisdictional error on the part of an

[2] (1995) 184 CLR 163

administrative tribunal was significantly broader than for an inferior court.

15 In *Craig v South Australia* the High Court held[3] (omitting citations):

> "Where available, certiorari is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing (8) of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error (9), failure to observe some applicable requirement of procedural fairness (10), fraud (11) and "error of law on the face of the record" (12). Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for certiorari can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it (13). In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record."

16 Reflecting that broadening of the scope for certiorari with respect to tribunals, the Court held[4] :

> "If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

17 The expanded scope for certiorari is nonetheless subject to restrictions.

18 In *Edwards & Ors v Santos Limited & Ors*[5] Hayne, J. cited *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [6]:

> "It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law where revealed on

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[3] At 175-176
[4] At 179
[5] [2011] HCA 8 at [18]
[6] [1952] 1 KB 338 at 357

the face of an order or decision, or irregularity, or absence of, or excess of, jurisdiction where shown. The control is exercised by removing an order or decision, and then by quashing it."

19 As the first of the above extracts from *Craig* demonstrates, an applicant for certiorari on the ground of jurisdictional error is not restricted to examining documents that constitute the "record". However, insofar as complaint is made of error on the face of the record, then the narrow understanding continues as to what constitutes the record.

20 Gibbs C.J held in *Hockey v Yelland*[7], as to correcting an error of law on the face of the record, that: "Some aspects of the law as to what constitutes the record for this purpose remain open to debate, but in this case I have no doubt that the determination, the reference and the documents attached to the reference (the medical certificates and the application) constitute the record." In the same case, Wilson J (Dawson J agreeing) held[8]:

> "However, the exercise of that supervisory jurisdiction by way of a writ of certiorari to quash the decision of a tribunal because in the exercise of its jurisdiction it has made an error of law is strictly limited. The appellant accepts that in order to succeed he must show that the error of law is apparent on the face of the record of the proceedings: R v. Nat Bell Liquors Ltd. (1922) 2 AC 128. The next step is to determine what constitutes the record. There is no fixed rule which requires the same answer to be given in every case. It is for the court undertaking the review to determine what constitutes the record in the particular case but this is not in any way to countenance a roving commission through the materials in a case in an attempt to discover an error of law. The procedure is not to be assimilated to a right of appeal for errors of law. Ordinarily, in the absence of statutory prescription, the record will comprise no more than the documentation which initiates the proceedings and thereby grounds the jurisdiction of the tribunal, the pleadings (if any) and the adjudication. It will not include the evidence or any reasons that may be given for the decision unless the determination itself incorporates them by reference. See, generally, R v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw (1952) 1 KB 338, at pp 351-352; Baldwin & Francis Ltd. v. Patents Appeal Tribunal (1959) AC 663.

21 Insofar as the challenge concerns a non-jurisdiction error on the face of the record the High Court in *Craig* rejected an attempt to expand the scope of "the record", so as to

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[7] (1984) 157 CLR 124 at 131
[8] At 142-143

include transcript of the deliberations of a court and its reasons, saying that would "go a long way towards transforming certiorari into a discretionary general appeal for error of law upon which the transcript of proceedings and the reasons for decision could be scoured and analysed in search for some internal error"[9]. Nonetheless, when considering the situation of a tribunal decision the Court accepted that what constituted the record could be expanded by incorporation of materials by reference, so that documents expressly referred to in the record might themselves be included as part of the record[10], thereby accepting the qualification of Gibbs CJ in *Public Service Board (NSW) v Osmond*[11] that reasons do not form part of the record "unless the tribunal chooses to incorporate them". As I shall later discuss, that would be relevant in the present case.

22 It is beyond doubt that insofar as the challenge is to jurisdictional error rather than non-jurisdictional error on the face of the record, I am entitled to consider the Committee's explanation as to how it came to its decision to publish the determination in the terms it did. This goes to the question whether the Committee asked itself the wrong question as to its jurisdiction, or misconceived its role, thereby causing jurisdictional error..

23 Given the broadening in *Craig's Case* of what constitutes jurisdictional error for tribunals (errors that might previously have been regarded as non-jurisdictional being now more likely to be regarded as going to the jurisdiction of a tribunal), the alternative basis of review, namely, for non jurisdictional error on the face of the record may now have limited application[12]. The sort of non-jurisdictional errors that were commonly identified included failure to take into account a relevant matter, or taking an irrelevant matter into account, acting for an improper purpose, acting on no evidence.

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[9] *Craig*, at 181
[10] At 181-2
[11] (1986) 159 CLR 656 at 667
[12] See *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1 at [78]-[85]

24 As the learned author of *Halsbury's Laws of Australia* observed[13]:

> "As a result of the High Court of Australia's decision in *Craig v South Australia* ('*Craig's* case'), error of law on the face of the record remains a ground of review available in relation to inferior courts but has become obsolete as a ground of review of tribunals. Although *Craig's* case effectively erased the distinction between jurisdictional and non-jurisdictional errors in relation to review of decisions by tribunals, there is some authority to show that errors made within jurisdiction that do not evidence a constructive failure to exercise jurisdiction are not subject to review. Otherwise an error of law made by a tribunal is amenable to judicial review, subject to the application of any relevant privative clause."

25 Both in cases where jurisdictional error is alleged and in cases where error of law on the face of the record is alleged judicial review does not extend to reviews of errors of fact, save for cases where the error of fact was as to a matter on which the tribunal's jurisdiction depended[14]. The merits of the decision are not amenable to review by certiorari[15]. In *Minister for Immigration and Multicultural Affairs v Bhardwaj*[16] Hayne J held: "(a)n 'error' about the findings of fact that are made, which does not constitute or reveal a jurisdictional error, concerns the merits of administrative action, not its legality."

26 The distinction between jurisdictional and non-jurisdictional error remains of critical importance in considering whether the tribunal became functus officio when it made the decision under review. That is not the issue here.[17]

27 Many of Mr Ekwona's submissions were concerned with identifying suggested errors of fact in the approach adopted by the Committee, an approach which amounted to an attempt to argue the merits of the decision. I confine myself to those arguments that constituted complaint of jurisdictional error or error on the face of the record.

28 Given that this was apparently the first recorded Nauru case where a trial had been

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[13] *Halsbury's Laws of Australia*, Administrative Law, Judicial Review, [10-2311], Lexis Nexis.
[14] See *R v Federal Court of Australia: Ex parte WA National Football League* [1979] 143 CLR 190 at 225-226, per Mason J; *Project Blue Sky Inc v Australian Broadcasting Authority* 91998) 194 CLR 355, at [92]-[93]; Halsbury's Laws of Australia, Administrative Law, Judicial Review pars [10-2299] [10-2302]
[15] *Attorney General NSW v Quin* (1990) 170 CLR 1 at 35-37, per Brennan J.
[16] (2002) 209 CLR 597 at 645 [149], and see too 603 [8], per Gleeson C.J. and at 647 [159] per Callinan J.
[17] As to that issue see *Charlie Ika v NRPT* [2011] NRSC 5 at [80] ff.

conducted seeking relief by way of certiorari, I allowed a degree of latitude to Mr Ekwona to refer to this material, but its relevance was limited in such a proceeding, and provided mere background to my decision.

29 It is unnecessary to finally determine what constitutes the record in this case, because it certainly includes the determination itself, and the references to other determinations contained within in it. While the error which the plaintiff identifies in this case is said to be seen on the face of that material, the alternative complaint of jurisdictional error is not closely confined to "the record".

Jurisdictional error

30 Mr Ekwona identified two or possibly three errors.

31 In the first place, he submitted that the Committee failed to hold an obligatory family meeting prior to making its determination. The Committee, he contends, was bound to invite the children and grandchildren of Dogitaoe, of which the plaintiff was one grandchild, to attend such a meeting so as to advance their claims to a beneficial interest. That failure constituted denial of procedural fairness, he submitted.

32 Secondly, Mr Ekwona contends that the Committee acted in breach of the Administration Order No 3 of 1938 which, so it is accepted on all sides, governs the Committee in determining customary law principles as to the ownership and distribution of land interests in the case of an intestate estate. He specifically referred to the requirements of Par (4) of that Order, and contended that a person could not be named as an owner of land if he had not been declared to be so by a previous determination.

33 A related argument which does require consideration arises from examination of the gazette notices relevant to Gumwear's interest, that were identified only by Gazette Notice Numbers in the Committee's determination. Mr Ekwona submitted that by referring to those gazette notices the Committee had made those determinations part of the record, and upon examination they disclose that Gumwear had never been

determined to have any interest in the land in question.

34 These arguments raise both a complaint about jurisdictional failure to meet a pre-condition to the exercise of power and, alternatively, denial of procedural fairness.

35 A further error was initially identified, namely a contention that the Committee purported to overturn an earlier determination, made in 1962, that had determined that Dogitaoe, and therefore her children and grandchildren, were the lawful heirs to the estate of Erina Detagaroa, the daughter of Dedage. This contention was not pressed by Mr Ekwona, who was unable to identify such a 1962 determination relating to this land.

36 Before dealing with those arguments, I first provide some background.

The approach taken by the Committee

37 In the case of appeals from determinations of the Nauru Lands Committee brought pursuant to s.7 of the *Nauru Lands Committee Act 1956* the Committee is required by Practice Direction No 1 of 2002 to provide the Court with a statement of its reasons for decision. Although this was not an appeal, the Committee adopted the same course, and helpfully set out detailed explanations of its decision-making process.

38 It is to be kept in mind that the Committee has always been interested to obtain guidance and direction from the Supreme Court as to the approach it should take in performing its duties under the Act. To my observation it has not adopted a partisan approach but has endeavoured to assist the Court by frankly explaining its processes when asked to do so.

39 The Committee said it was asked by Ronphos to publish a determination in respect of this land and to that end it examined its records. No minute books for the period 1937 to 1950 now exist. The Committee concluded that its predecessor, the Lands Committee, had determined ownership of the land in 1933 and for that reason no family meeting was called on this occasion.

40 The Committee was referring to Government Gazette No 24 of 1933, whereby the "Lands Committee" published on 10 June 1933 a "Determination of Ownership of Lands", and as to Block 94 "Abotsijij" the owners were shown as "Dedage and Peter". Dedage was recorded as having a half share.

41 It is believed by the Committee that Peter's estate was determined, and his beneficiaries identified, by the Nauru Lands Committee in Government Gazette No 79 of 18 November 1992. On that date the Committee published an "Amendment", being GNN 428 of 1992, to Government Gazette No 1 of 1961. Mr Ekwona submitted that nowhere in the 1992 determination does it state that the determination relates to Peter's estate, or Dedage's. An examination of the 1961 determination discloses a list of names of deceased person's, including Peter, Dedage and Agiriauwa, but the lands they owned are not identified, with one exception. In no case is Abotsijij mentioned.

42 In concluding that the 1933 determination had answered the question as to present owners of Abotsijij (the Committee dealt with only Dedage's half share, Peter's share being presumed to have been dealt with in 1961), the Committee listed a number of supporting facts that it found, as follows:

(a) Dedage was the original owner of the land. Dedage died without issue. His estate was given to his two nephews Udibe and Agirouwa, and his neice Erina;

(b) The land was first claimed by Erina in the Committee's 1928 register Book. The land was not included in GNN 22/1932. That gazettal only related to the lands known as "Adedabiri" and "Amwareobwiden";

(c) On 10 June 1933 the land was gazetted under Dedage' and Peter's name in GNN 24/1933;

(d) Agirouwa made a will in 1944 bequeathing all his property to his widow Dogiriauwa and adopted son Gumwear. The will listed all properties owned by Dedage and Eidibae. The land Abotsijij was not there listed;

(e) A land lease with British Phosphate Corporation was entered into with Deigaeruk, Gadabu, Dogirauwa and Gumwear on 10 February 1951;

(f) Portion 316, which was the subject of land appeal No 38/1954 confirmed that the land was not owned by Erina, and that the estates of Erina, Agiriouwa and Udibe are not common;

(g) The land "Abotsijij" was the subject of land appeal 9/1970 between Agirouwa's wife (Dogiriuwa) and Enna Gadabu, The appeal was dismissed on the basis that Dogiriuwa did not appeal GNN 24/1933 within time.

43 After setting out these matters in its report to the Court of its reasons the Committee stated that: "The Committee did not have power to review earlier determinations of the Committee. Accordingly, the Committee made a determination confirming the earlier findings of the Committee"

44 In the course of submissions counsel for one or other party referred to a number of other records, including:

(a) A minute of 1977 in which the Committee recorded discussion which led to a note of present owners as being Deigaeruk 1/4, Gadabu, 3/8, Dogirauwa 3/16, Kumweaer (Gumwear) 3/16.

(b) Notes of a meeting on 24 February 1949 in which the plaintiff's grandmother, Dogiteaoa, was present and contested the claims of Dogirauwa, claiming title through Agiriouwa's will. That recorded that Dogiteaoa was entitled to three blocks, but Abotsijij was not one of those named.

(c) Judgment of Magistrate Jackson in 1954 on a land appeal by the plaintiffs grandmother, Dogiteaoe, concerning the estate of Eigigu. Although the appeal was dismissed the magistrate found that Dogoteaoa did gain under the will of Agiriouwa a third interest in the block "Adedabiri".

The suggested errors

45 Mr Ekwona expanded at length on his submission that the present owners of Abotsijij must be able to trace their interest from the estate of Eigigu, as could the plaintiff but not Gumwear or his descendents. He argued that Magistrate Jackson had accepted that to be so with respect to another block of land to which he agreed Dogitaoea had an interest.

46 Mr Kun responded that to be a beneficiary of this land the plaintiff would have to be a blood relative of Eirina. The plaintiff is not, but is a blood relative of Erina's husband.

47 It is unnecessary for me to expand on that argument. That is precisely the sort of debate that might be advanced on one side or other before the Nauru Lands Committee; this court is not conducting that exercise[18]. The plaintiff's challenge to the decision of the Committee by way of certiorari requires focussing on jurisdictional issues.

48 As I have noted, no meeting of family took place to debate ownership prior to the 2010 publication in the Gazette. The Committee said it did not do so and was prohibited from doing so because the issue had been decided for it by previous determinations of the Committee. In saying "the Committee did not have power to review earlier determinations of the Committee" the Committee was making a finding as to its jurisdiction. If it was wrong, and it did have power and, more to the point, was obliged to conduct its own investigation pursuant to the 1938 Administrative Order, then it made a jurisdictional error.

49 In my opinion, there was no past determination of the Committee that precluded the Committee in 2010 from embarking on an enquiry concerning that portion of Dedage's estate that comprised Abotsijij.

50 It is common ground that subject to the possibility that the matter had been addressed in the now missing records of the Committee, the estate of Dedage was

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[18] Many of the deceased persons named in this judgment were referred to in a 1969 land appeal: *In re Dogirouwa*, [1969] NRSC 2, [1969]-[1982] NLR (B) 9, Thompson ACJ, 7 May 1969. Ownership of Abotsijij was not in issue, and I did not hear substantial argument about the significance of the decision.

never the subject of determination by the Lands Committee or its successor, the Nauru Lands Committee, as to his property and his beneficiaries. Nor was there any determination that identified Gumwear as the inheritor of Dedage's estate. Whilst the 1933 determination records Dedage's ownership of a half share in Abotsijij, with Peter, that was as far as it went. There was no determination by either Committee concerning the beneficiaries of Dedage's interest in this land between 1933 and 2010.

51 What is more, there was a determination before the Committee that pointed away from the conclusion that Gumwear was the present owner of the block.

52 The two gazette notices referred to under Gumwear's name in the 2010 determination relate to the distribution of the deceased estate of Gumwear, and also his wife, in 1997. The determination states in its heading that it is a determination of the beneficiaries of the estate of Gumwear and that the Committee had ascertained that by virtue of decisions of the Nauru Lands Committee or its predecessor Gumwear was owner of the following lands. Some 60 blocks of land were identified as owned by Gumwear when he died, but "Abotsijij" was not among them.

53 The significance of that is that if, as the Committee contends, it checked the records and they all pointed to the conclusion that Gumwear was an owner and, in turn, his blood relatives inherited his interest in Abotsijij, then the records which were relied on merely for the purpose of establishing the names of Gumwear's descendents (as Ms Lo Piccolo said was the case) should also have been taken into account as suggesting that Gumwear had no interest in Abotsijij. Those 1997 gazettes should have constituted part of the material which the Committee considered before it reached its conclusion that all of its records showed that Gumwear had inherited portion of Dedage's half share. That constitutes failure to take into account a relevant matter when making its decision. At common law that is one basis for overturning the decision of a tribunal.[19]

54 Of course, it is not unusual for the distribution of a deceased estate to overlook a

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[19] *Craig v South Australia*, at 179; *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41, per Mason J..

property as being part of the estate, thus requiring a later, further, determination by the Committee, but the fact was that no prior determination of the Committee had identified Gunwear as owner of Abotsijij, and the 1997 determination at least suggested he was not. That required investigation.

55 The importance of this is that the Committee acknowledges that there had not been a distribution of the estate of Dedage, and no determination had been published naming his beneficiaries of that land. The 2010 determination, therefore, was in reality either a determination of the estate and identification of beneficiaries of the estate of Dedage with respect to Abotsijij, or else, it was a determination of the estate of Gumwaer with respect to that block, that not having been dealt with in the 1997 determination of his estate.

56 The 2010 determination does not itself say whether the Committee was determining a named deceased person's estate. If the 2010 determination was in fact the determination and distribution of a deceased estate then the Committee was bound to follow the principles of Administrative Order 3 of 1938, which required "the distribution of property shall be decided by the family of the deceased person, assembled for that purpose". When acting with respect to determining the land and beneficiaries of a deceased state that is a jurisdictional pre-condition.

57 It is not necessary for me to offer a concluded interpretation of par (4) of the 1938 Administrative Order. It was not the subject of substantial submissions. As presently advised I do not believe that it prohibits any person being named as an owner who had not previously been the subject of a determination to that effect, as Mr Ekwona sought to argue. It does, however, tend to emphasise the importance of a formal determination before an estate could be distributed. That paragraph reads:

> "(4) No distribution of land of a deceased estate, whether published in the Gazette or otherwise shall be final unless the ownership of the deceased has been determined previously by the lands Committee or other authorised by the Administrator and published in the Gazette with the usual opportunity given for protest".

58 Mr Kun submitted that even if a family meeting had been called the plaintiff would

not have been invited to it, because he was not "family", his relationship being too far removed from Dedage and Gumwear to justify his attendance. He submitted that even if Mr Ekwona had identified jurisdictional error the Court should not grant relief as he could not participate in such a meeting. He cited *Gobure v Denea*[20] a decision of Thompson C.J. in 1972.

59 In that case the deceased, D, left a widow, a full brother and an adopted son. The grandchild and two great grandchildren of the sister of D's mother complained that they should have been invited to the family meeting. His Honour, not surprisingly, described their relationship to the deceased as "comparatively remote", and held that there was no reason why relatives as remote as those should have been called. His Honour did not lay down any broader principle, and the question is one to be determined in the circumstances of each case.

60 In any event, there having been jurisdictional error which went to the very task that the Committee was obliged to conduct, the decision was void, amounting to no decision at all[21]. Insofar as there may remain a discretion in these circumstances to refuse to grant certiorari[22], this would not be an appropriate case to decline the order sought. Issues of entitlement to royalties from phosphate land are extremely important and valuable interests are at stake. It is important that the Committee adopt the correct approach in performing its tasks.

61 I am not being critical of the Committee in making that comment. I have no doubt that the Committee thought it was adopting the correct approach, merely exercising its power under s.6 of the Act to "determine questions" as to ownership and rights in respect of land, not undertaking the determination and distribution of a deceased estate. No doubt it thought it would be inappropriate if every enquiry about land ownership led to the calling of a family meeting and a determination by the Committee. This, however, was more than a mere enquiry. It amounted to the

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[20] [1972] NRSC 4; [1969]-[1982] NLR (B) 55, 20 June 1972.

[21] *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 at 615, per Gaudron and Gummow JJ., and Hayne J at 643-646

[22] See *Re Refugee Review Tribunal; Ex parte Aola* (2000) 204 CLR 82; *Waterside Worker's Federation v Gilchrist & ors* (1924) 34 CLR 482 at 517.

distribution of a deceased estate, an estate that had not previously been the subject of a determination as to beneficiaries. The publication of beneficiaries' names was contentious, and a family meeting might have resolved or avoided some tensions.

62 Whether the plaintiff and his family are entitled to be given notice and to attend a family meeting in this case is a matter for the Committee in the first instance. I do note, however, that the expression "family of the deceased person" is used in Order 3 of 1938 when speaking of calling a meeting, but if the family cannot agree then distribution of land is governed by the provisions of par 3 which uses the expression "family or nearest relatives". I did not hear argument on this matter, and make no finding, but it might be thought that attendance at a family meeting might potentially involve a wider group than "nearest relatives". In argument before me over two days in this case I had extensive reference made to genealogies suggesting that for the purpose of attending a meeting broad family connections might be arguable not only by the plaintiff but also by those who had sought to be joined as co-plaintiffs in this case, being the family of Jerome Reweru[23].

63 I conclude that the Committee fell into jurisdictional error and its determination GNN 690/2010 published in Government Gazette No 161 of 15 December 2010 is therefore quashed. I direct the Committee to convene a family meeting for the purpose of determining the present beneficial owners of Portion 94 Buada, known as "Abotsijij"

64 Having reached this conclusion concerning the primary argument of Mr Ekwona it is unnecessary for me to address the other bases on which he sought relief by way of certiorari.

65 I will hear the parties as to any other orders.

Geoffrey M Eames AM QC

Chief Justice

19 June 2012

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[23] I rejected their application to be joined as "2nd plaintiffs".