IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Land Appeal No.2 of 2011

CEILA CECILIA GIOUBA

Appellant

V

NAURU LANDS COMMITTEE Respondent

Land Appeal No 4 of 2011

CLARA AGIR Appellant

V

NAURU LANDS COMMITTEE Respondent

JUDGE:	Eames, C.J.
WHERE HELD:	Nauru
DATE OF HEARING:	21 March 2011
DATE OF JUDGMENT:	6 May 2011
CASE MAY BE CITED AS:	Giouba v NLC; Agir v NLC
MEDIUM NEUTRAL CITATION:	[2011] NRSC 7

Land Appeal - *Nauru Lands Committee Act* 1956-1963 ss.6,7 – *Succession, Probate and Administration Act* 1976 ss. 3, 37, 63 - *Custom and Adopted Laws Act* 1971, s.3 - Preliminary issues – Whether Nauru Lands Committee has jurisdiction to determine questions as to distribution of personal estate of a deceased Nauruan – Whether the Supreme Court has jurisdiction to hear an appeal from a decision of the Nauru Lands Committee concerning distribution of personal estate of a deceased Nauruan Customary law role of Nauru Lands Committee.

APPEARANCES:	COUNSEL
For appellant Ceila Cecilia Giouba	Appellant in person
For appellant Clara Agir	Mr R Kun (Pleader)
For Nauru Lands Committee	Mr D Lambourne
For affected beneficiaries	Mr D Aingimea (Pleader)

CHIEF JUSTICE:

1 Common preliminary issues have arisen in the cases of Ceila Cecilia Giouba v Nauru Lands Committee and Clara Agir v Nauru Lands Committee. In both cases the Nauru Lands Committee purported to investigate and make determinations as to the appropriate distribution of the personal estate of deceased Nauruans. In both cases, the appellants, being unhappy with the determinations, have filed notices of appeal to the Supreme Court under s.7(1) of the *Nauru Lands Committee Act 1956-1963*. In both cases, preliminary questions have arisen as to the jurisdiction of the Committee and of the Supreme Court.

2 The two preliminary questions may be stated as follows:

(a) Does the Nauru Lands Committee have jurisdiction to consider and make decisions as to the distribution of personal property in an intestate estate of a deceased Nauruan, or is its jurisdiction confined to questions of the ownership and distribution of the land of deceased Nauruans?

(b) If the Committee does have power to address and make decisions concerning the personal estate of intestate deceased Nauruans, is there any right of appeal to the Supreme Court against any decision taken by the Committee concerning the personal estate of deceased Nauruans?

Does the Nauru Lands Committee have power to deal with personal estates?

3 In the course of submissions to me on these questions, there was agreement on all sides that the Nauru Lands Committee had, since its inception in 1956, dealt with issues concerning not just the real estate but also the personal estate of deceased Nauruans. Furthermore, the predecessor bodies of the Nauru Lands Committee had also addressed issues concerning the personal estate, as well as the real estate of deceased Nauruans. That reality was acknowledged by the Administrator of Nauru in *Administration Order No 3 of 1938*, which established "Regulations governing Intestate Estates". The opening paragraph of the regulations provided:

> "On the death of a person who dies intestate, the division of the property of the deceased shall be decided in the following manner. Such division shall

include both real and personal property."

4 The 1938 regulations provided in par (1) that "The Chief of the District will make a list of all property of the deceased". Par (2) provided that the distribution "of property" was to be decided by a meeting of the family, but by par (3) further regulations then governed the situation in the event of disagreement among family members.

5 Paragraph (4) of the 1938 Administration Order provided:

> "(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 authority authorised by the Administrator and published in the Gazette with the usual opportunity given for protest".

6 The "Lands Committee" therein referred to is not the Nauru Lands Committee (which was created in 1956). Before 1956 land disputes and questions concerning succession to estates of deceased Nauruans were the province of the Council of Chiefs, and subsequently of a body known as the Lands Committee[1]. In 1956 a statutory body was created - the Nauru Lands Committee – being vested with limited statutory powers.

7 The powers expressly given to the Nauru Lands Committee ("the Committee") are set out in s.6 of the 1956 Act, which reads as follows:

> "6.(1.) The Committee has power to determine questions as to the ownership of, or rights in respect of, land, being questions which arise –
>
> (a) between Nauruans or Pacific Islanders; or
>
> (b) between Nauruans and Pacific Islanders.
>
> (2.) Subject to the next succeeding section, the decision of the Committee is final."

8 A right of appeal is provided in s.7. That reads:

[1] See *Ralph Eoe v James Ategan Bop and Eiwata Adimim*, Nauru Law Reports [1969-1982] Part B 65 at 67, per Thompson, C.J. Judgment 27 February 1973.

"7(1) A person who is dissatisfied with a decision of the Committee may, within twenty-one days after the decision is given, appeal to the Central Court against the decision.

(2.) The Central Court has jurisdiction to hear and determine an appeal under this section and may make such order on the hearing of the appeal (including, if it thinks fit, an order for the payment of costs by a party) as it thinks just.

(3.) Notwithstanding anything contained in any other law, a judgment of the Central Court given on an appeal under this section is final."

9 In their submissions on this question, there was general agreement among counsel that the power of the Committee to deal with issues of personalty derived from the *Succession, Probate and Administration Act* 1976, although it was acknowledged that the legislation did not do so in clear terms, and that the legislation generally did not apply to the estates of Nauruan people.

10 Section 3(2) of the *Succession, Probate and Administration Act* 1976 provides:

"(2) Except as expressly otherwise provided, this Act does not apply to the will or estate of any person who at the time of his death is a Nauruan, unless he has, by a will which conforms with the requirements of the Wills Act 1837, the Wills Act Amendment Act 1852 and the Wills Act 1963, all being Acts of the Parliament of England in their application to Nauru, directed that this Act is to apply to his will and estate, in which event it shall apply only to his real estate outside Nauru and to his personal estate wherever situated.

11 Sections 37(1) and (3) did apply to estates of Nauruans. They provide:

PENDING GRANT ESTATE TO VEST IN THE CURATOR
37. (1) Pending the grant of probate of a will or of administration of the estate of a deceased person, the real and personal estate of that person shall, without any charge being leviable thereof, vest in the Curator for the purpose of-
(a) accepting service of notices and proceedings and acting as nominal defendant or, in proceedings commenced by the deceased person before his death, as nominal plaintiff;
(b) executing leases of all or any of the real estate of the deceased person to the Nauru Phosphate Corporation for the mining of phosphate therefrom; and
(c) receiving and keeping in safe custody pending such grant any moneys or other property of which the deceased person died possessed or which are paid or delivered to him as part of such person's estate;

but the Curator shall not otherwise be under any obligation or have the power or authority to get in the estate of any deceased person pending such grant or to pay his debts or discharge his obligations.

(3) Notwithstanding the provisions of section 3, the provisions of this section shall apply to the estates of Nauruans:

Provided that, for the purposes of applying the provisions of this section to the estates of Nauruans, the expression "pending the grant of probate of a will or of administration of the estate of a deceased person" shall be taken as meaning the period from such person's death until the time when the persons entitled to receive the estate as beneficiaries have been finally ascertained, whether by a family agreement, a decision of the Nauru Lands Committee or, where any appeal is taken against such decision of the Nauru Lands Committee, the decision of the Court on that appeal."

12 Thus, whilst the real and personal property vests in the Curator pending ascertainment of the beneficiaries, the roles of getting in the estate and ascertaining the beneficiaries are expressly denied to the Curator. Instead, those questions are to be determined by family agreement or, in the event of disagreement, by decision of the Nauru Lands Committee or else by decision of the Supreme Court, on appeal under s.7 of the Act.

13 Section 37(3) clearly acknowledges, and relies upon, the fact that in the event of family disagreement the Nauru Lands Committee makes determinations concerning personal property as well as real property[2], but the question I must answer is, does that provision bestow power on the Committee to perform that task?

14 Further recognition of the role of the Committee with respect to personalty is found in s.63(5). Section 63(1) provides for the Court to order the Curator to collect the personal property of a person believed to have died, and to administer both the real and personal estates. S. 63(5) provides:

(5) Where the Court has, under the provisions of subsection (1), granted an order to the Curator to administer the estate of any person, the Court shall revoke that order-

(a) on application by that person or the Curator, upon being satisfied that that person is alive;
(b) upon granting probate or administration in respect of the will of that person or his estate; or

[2] In *Eidingaero Dake v Akua and Others*, Unreported judgment, 9 December 1999, Civil Action No 2/99 Donne, C.J. held that distribution of the assets in an estate could not be effected by the Curator until the Nauru Lands Committee made its determination.

(c) where that person is a Nauruan, upon being satisfied that he is dead and that the persons entitled to his estate and the extent of their respective beneficial interests therein have been finally determined by

(i) agreement of his family, or

(ii) in default of such agreement, the Nauru Lands Committee or, where an appeal is taken against the decision of the Nauru Lands Committee, the Court.

15 Section 63(7) and the proviso to the section, again acknowledge the role of the Committee. They provide:

> "(7) Notwithstanding the provisions of section 3, the provisions of this section shall apply to Nauruans:
>
> Provided that the Curator shall not distribute the assets except in accordance with a family agreement or the decision of the Nauru Lands Committee as to the persons entitled thereto or, where any appeal is taken against such decision of the Nauru Lands Committee, with the decision of the Court on that appeal."

16 Although both s.37(3) and s.63(5) acknowledge the role of the Nauru Lands Committee in dealing with the personalty of a deceased Nauruan, in my opinion neither provision constitutes an empowering provision, that is, neither is the source of the power of the Committee to deal with personalty. The obvious place for that power to appear is within the Nauru Lands Committee Act, but no mention of personal property is there made; indeed, to the contrary, s.6 gives power to the Committee only as to questions concerning ownership and rights in respect of land.

17 On all sides, the parties are in agreement, and urge, that I should find that the Committee does have power to deal with the personal estate of deceased Nauruans. There are compelling practical considerations that would strongly favour acceptance of those submissions, if it is possible to do so consistent with proper principles of statutory interpretation.

18 As s.37(1) of the *Succession, Probate and Administration Act* 1976 makes clear, although the personal estate is vested in the Curator for safe keeping:

> "The Curator shall not otherwise be under any obligation **or have the power**

or authority to get in the estate of any deceased person pending such grant or to pay his debts or discharge his obligations" (my emphasis)."

19 In addition, s.37(3) plainly accepts that responsibility for getting in the estate rests with the Committee, not the Curator, as is also the case with respect to determining the beneficiaries. Likewise, s.63(5) and the proviso to s.63 are predicated on the Committee performing those roles, and, indeed, the Curator is prohibited from distributing the estate except in accordance with determinations of the Committee.

20 Thus, if the Nauru Lands Committee is not empowered to perform the role it has long performed with respect to personalty in intestate estates, then no person or body, at all, is empowered or permitted to perform the roles of bringing in the personal estate and determining the beneficiaries. That would be a remarkable and unfortunate gap in the legislative framework, and a very long-standing omission.

21 It would of course be fortuitous if the power of the Committee to deal with personalty derived from the 1976 Act, given that the Committee had been performing that role since 1956. Yet, no provision could be pointed to in the terms of the *Nauru Lands Committee Act* that provided the Committee with the relevant power. It was not contended that an Administrative Order, such as that made by the Administrator in 1938, was capable of providing the relevant legislative power, without statutory support. Thus, so counsel agreed, we are left with the provisions of the *Succession, Probate and Administration Act* 1976 as the only possible source of power[3].

22 If the provisions of the *Succession, Probate and Administration Act* 1976 to which I have referred are the source of that power then that empowerment must be granted to the Committee by the following phrases, whereby restrictions or qualifications are imposed on the Curator as to distribution of the real and personal estates:

- "until the time when the persons entitled to receive the estate as beneficiaries have been finally ascertained, whether by a family agreement, a decision of the Nauru Lands Committee . . ."(s.37(3)).

[3] Mr Aingimea, for the respondent beneficiaries, also addressed me as to the possible relevance of the *Nauru Local Government Council Ordinance* 1951-1965, which I discuss later: see par [33] supra.

- "upon being satisfied that he is dead and that the persons entitled to his estate and the extent of their respective beneficial interests therein have been finally determined by . . .the Nauru Lands Committee . . ."(s.63(5)).
- (pending) "the decision of the Nauru Lands Committee as to the persons entitled thereto . . ." (Proviso to s.63).

23 Regrettably, I cannot agree that the provisions of the *Succession, Probate and Administration Act* 1976 to which I have referred do constitute the source of power of the Committee to deal with the personal estate of deceased Nauruans. The references to the Committee in that Act amount to no more than an acceptance and acknowledgement of the functions that the Committee had long performed. The provisions of the *Succession, Probate and Administration Act* presume that the Committee has power to perform the role it had traditionally performed with respect to personalty, but they do not themselves empower the Committee to do so. That is obviously the case, given that the *Nauru Lands Committee Act* 1956-1963 came into effect more than two decades before the *Succession, Probate and Administration Act 1976,* commenced. The former Act confined the role of the Committee to questions concerning land distribution, and made no reference to personalty.

24 It is notable, too, that the *Succession, Probate and Administration Act* does not contain a definition of the "Nauru Lands Committee" or a reference to the *Nauru Lands Committee Act*, a remarkable omission if it was that Act that, belatedly, became the source of the Committee's power to deal with personalty.

25 Insofar as a statutory basis is required for the Committee's role with respect to personalty, the mere fact that the present parties (in common with other interested parties since 1956) consented to the Committee performing that role could not in itself provide jurisdiction to a tribunal for which there was no statutory basis.[4] There is one other possible source of that statutory power.

The *Custom and Adopted Laws Act 1971*

[4] See *Halsbury's Laws of England*, "Administrative Law", Vol 1(1), para 23, Lexis Nexis. It is equally true for a statutory corporation (see *Halsbury's Laws of England*, "Corporations", Vol 24 (2010) 5th Ed, at para 432) and for a court (See *Thomson Australian Holdings Pty Ltd v TPC* (1981) 148 CLR 150 at 163).

26 Section 3 of the *Custom and Adopted Laws Act 1971* provides:

> "3. The institutions, customs and usages of the Nauruans to the extent that they existed immediately before the commencement of this Act shall, save in so far as they may hereby or hereafter from time to time be expressly, or by necessary implication, abolished, altered or limited by any law enacted by Parliament, be accorded recognition by every Court and have full force and effect of law to regulate the following matters -
>
> (a) title to, and interests in, land, other than any title or interest granted by lease or other instrument or by any written law not being an applied statute;
>
> (b) rights and powers of Nauruans to dispose of their property, real and personal, inter vivos and by will or any other form of testamentary disposition;
>
> (c) succession to the estates of Nauruans who die intestate; and
>
> (d) any matter affecting Nauruans only.

27 It is by no means clear to me how this provision is intended to operate. Before 1971 the Nauru Lands Committee undoubtedly constituted a Nauruan institution, indeed a pre-eminent institution, which applied customs and usages of Nauruans, when dealing with both real and personal estates of deceased Nauruans. The role with respect to identifying the beneficiaries of land was given statutory recognition and definition, but the customary law role which the Council of Chiefs and the Lands Committee had hitherto taken with respect to personalty was continued after 1956 by the Nauru Lands Committee, notwithstanding that that role was not recognised by the Nauru Lands Committee Act. Neither the *Custom and Adopted Laws Act 1971* nor any subsequent legislation "abolished, altered or limited" that customary role, but had the 1956 Act done so?

28 Donne, C.J. in *Lucy Ika & Kinza Clodumar v Nauru Lands Committee & Others*[5] concluded that insofar as the predecessors to the Nauru Lands Committee had exercised customary law powers of "adjudication" they were abolished by the 1956 legislation and were no longer recognised. For that conclusion he cited s.3 of the *Custom and Adopted Laws Act 1971*. I shall discuss that decision later.

29 On one view, the fact that the 1956 Act only empowered the Committee to make decisions concerning land issues might demonstrate the legislators' intention that the

[5] Civil Cases Nos 2/91, 3/91, 8/91. Unreported Judgment 21 August 1992

Committee should not perform a similar role concerning personalty that its predecessor bodies had performed. On the other hand, given that the role of the Council of Chiefs and the Lands Committee in dealing with personal property was of such long-standing, was recognised in the 1938 Administration Order and was widely accepted within the community, it seems equally likely that the legislators simply presumed that that customary law role would continue - now being performed by the Nauru Lands Committee - and, as before, required no statutory authorisation. That being so, then by virtue of s.3 of the *Custom and Adopted Laws Act* the customary practice and usage of the Nauru Lands Committee should be accorded "recognition . . .and have full force and effect of law to regulate . . .(c) succession to the estates of Nauruans who die intestate".

The Customary law role of the Nauru Lands Committee

30 There must be a degree of uncertainty as to how "full force and effect of law" may be accorded to a customary practice. The Nauru Lands Committee is a creature of statute, with specific responsibilities concerning land, but as an institution it also engages in customary practices concerning personal property for which it is not empowered by statute but which role is well recognised in other legislation, particularly in the *Succession, Probate and Administration Act*.

31 In *Detamaigo v Demaure*[6] Thompson, A.C.J. held, in 1969:

> "The Nauru Lands Committee may well have jurisdiction to determine the distribution of the part of the estate of a deceased person which consists of personalty, that jurisdiction being derived from customary law. But it is quite clear that the Court has no jurisdiction to entertain appeals from the Nauru Lands Committee's determinations in respect of personalty. Accordingly, the appeal is struck out for want of jurisdiction".

32 The observations concerning customary law were obiter in that case, but as I shall discuss, there has long been statutory and judicial acknowledgment of the fact that the Nauru Lands Committee continued to perform customary law functions that had been undertaken by its predecessor non-statutory bodies.

[6] Nauru Law Reports [1969-1982] Part B, page 7 at 8, Judgment delivered 30 April 1969.

33 In *Lucy Ika & Kinza Clodumar v Nauru Lands Committee & Others*[7], decided in 1992, Donne, C.J. discussed at length the role of the Nauru Lands Committee. The learned Chief Justice held that the administration of testate and intestate estates was effected both by statute and custom. He held that by s.37(1) of the *Succession, Probate and Administration Act* 1976 intestate estates, both real and personal, are vested in the Curator of Intestate Estates until they are ready for administration, and that the role of the Curator falls "short of getting the estate in and distributing it"[8]. Instead, "The administration of the estate is, by custom, the job of the Committee in its customary role". His Honour held that that role was recognised by s.44(1)(l) of the *Nauru Local Government Council Ordinance* 1951-1965. That Council was dissolved in 1992[9], but by s.44(1)(l) the Ordinance had given the Local Government Council power to make rules "regulating dealings in land between Nauruans and the handling of estates of deceased Nauruans in accordance with the customs of the Nauruans". It seems that no such rules had been promulgated by the Council.

34 Section 44(1)(l) does not seem to me to have been a source of statutory power for the role of the Nauru Lands Committee concerning personal estates. I agree with the characterisation of Donne, C.J. who held that that provision "recognised" that customary law role[10]. It did no more.

35 The issue in the case of *Lucy Ika & Kinza Clodumar v Nauru Lands Committee & Others* was whether the Nauru Lands Committee had jurisdiction to determine the validity of a will. The defendants contended that the Committee, and only the Committee, had that jurisdiction, it being a customary law role. Donne C.J. rejected that contention. He held that the jurisdiction of the Committee to resolve disputes was confined to the matters identified in s.6 of the 1956 Act. He held:

> "If in fact there were certain customary powers of adjudication hitherto exercised by the Committee's predecessor, they were not, by the Act conferred on the Committee. In my opinion by implication they were abolished by the legislation. They are no longer recognised. See *Custom and Adopted Laws Act*

[7] Civil Cases Nos 2/91, 3/91, 8/91. Unreported Judgment 21 August 1992
[8] At page 13.
[9] *Nauru Local Government Council Dissolution Act* 1992.
[10] At 13.

1971, sec 3".[11]

36 Notwithstanding the apparent breadth of that statement, in his reference to "customary powers of adjudication" Donne C.J. was addressing the exercise by the Committee of what he called "judicial" or "quasi-judicial" functions. One of those traditional functions was determining the validity of a customary will. That power, he held, was not given to the Committee by its legislation. Nonetheless, Donne C J held that:

> "The administration of the estate is, by custom, the job of the Committee in its customary role"[12]

37 He held that that was a role for which the Committee "is eminently equipped and suited". He concluded that, "The Committee has the exclusive task to inquire into and ascertain the extent of the deceased's estate and the interests therein of beneficiaries thereof"[13]. Donne, C.J. did not confine that role to the real estate of the deceased person. The Curator, he ruled, held the estate, both real and personal, until the extent of the estate was ascertained and the beneficiaries were determined[14]. Since the Curator had no role in getting in either the real or personal estate that role was taken by the Committee, doing so with respect to land, by virtue of its empowerment by s.6, and doing so with respect to personal estate, by virtue of custom. Donne, C.J. noted, however, that insofar as the determination of the Committee "may touch on any interest other than that in respect of land" there was no right of appeal against the determination[15].

38 It was not submitted by any party appearing before me that the power of the Committee to deal with personalty derived from or was endorsed by the provisions of the *Custom and Adopted Laws Act 1971*, as amended. Having received no submissions concerning that legislation I venture an opinion on its terms with some caution, and I will not make a final ruling on these questions without inviting

[11] At 10.
[12] At 13
[13] At 13.
[14] At 16.
[15] At 18-19.

counsel to address me on the matter.

39 In my opinion, insofar as statutory empowerment is required, then s.3 of the *Custom and Adopted Laws Act* does not directly empower the Committee to continue the customary role that it now takes with respect to personal estates of deceased Nauruans. Instead, it empowers, indeed requires, the Court to acknowledge and give full effect to that customary role. As I have said, that customary role is also recognised by the *Succession, Probate and Administration Act.*

40 In my opinion, in 1956 the *Nauru Lands Committee Act* did not "abolish, alter or limit" the customary law role that had been performed by the Council of Chiefs and the Lands Committee and thereby deny that customary role to the newly established Nauru Lands Committee. I therefore respectfully disagree with Donne, C.J. who concluded otherwise. The 1956 Act, as amended, did not render unlawful or disempower the Committee performing a customary role with respect to personal property of deceased estates.

41 Donne, C.J. held that the 1956 Act, by implication, abolished the customary law "adjudication" roles which the Nauru Lands Committee and its predecessors performed, but as I have discussed, his Honour accepted that the Committee did in fact continue to perform the customary role of administering the personal estate and determining its beneficiaries. That role was simply not addressed by the 1956 Act and, in my opinion, it cannot be said to have been impliedly abolished, when the reality was (as subsequent legislation such as the *Succession, Probate and Administration Act* reflected) that the role continued unabated, and no other body was empowered to perform it.

42 In my opinion, were the Court to declare that in making determinations concerning personalty the Committee was acting beyond power, and its decisions were null and void, then the Court would not be recognising the institution, and the customs and usage which it applied, and would not be giving full force and effect of law to the decisions of the Committee concerning personalty.

43 In my view, the recognition of customary practice required by the *Custom and Adopted Laws Act* has the effect of changing the focus of the enquiry from seeking a statutory empowerment for the role of the Committee in dealing with personalty (an appropriate inquiry for a statutory tribunal which exercises only those powers set out in its empowering statute), to the question whether by failing to accept the customary role of the Committee the Court would be in breach of s.3 of the *Custom and Adopted Laws Act.*

44 As I have said, I will not make a final ruling on this question without giving the parties an opportunity to present further argument to me after they have had an opportunity to consider these reasons. As presently advised, however, it is my tentative conclusion that the answer to the first preliminary question is that the Committee has power to address the personal estates of deceased Nauruans, to the extent that it has done so in the past, applying Nauruan custom and usage. That power is subject to any statutory direction, restriction or prohibition, but no such impediment presently exists.

45 I might add, that had I concluded that there was no jurisdiction, customary or otherwise, for the Committee to deal with personal property it would not have necessarily followed that all of the decisions of the Committee to date were null and void. The position is summarised in *Halsbury's Laws of England* as follows:

> "There is a presumption that the acts of public bodies, such as orders, decisions and bye-laws, are lawful and valid until declared otherwise by the court. Although some acts or measures may be described as being 'void ab initio' or as 'nullities', the modern view is that it is for the court to determine both whether an act is unlawful and what the consequences of that finding of unlawfulness should be".[16]

46 Although, as presently advised, I am persuaded that the Committee's role in dealing with personal property in deceased estates is preserved by virtue of s.3 of the *Custom and Adopted Laws Act,* it might be appropriate for the matter to be put beyond doubt

[16] Halsbury's Laws of England, Administrative Law, Judicial Review, Vol 61 (2010) 5th Ed; see too *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 413, as discussed in *Charlie Ika v NPRT & Others* [2011] NRSC 5 at [62], per Eames C.J.

by amendment to the *Nauru Lands Committee Act,* thereby providing express statutory empowerment for the Committee to perform that role. That is a matter the Parliament might see fit to consider.

Is there a right of appeal from decisions concerning personal estate?

47 In *Detamaigo v Demaure*[17] Thompson ACJ, in a short judgment, held that with respect to determinations of the Nauru Lands Committee concerning the distribution of personal property in a deceased estate there was no right of appeal to the Supreme Court given by the *Nauru Lands Committee Act*. The Acting Chief Justice, as he then was, noted that the 1956 Act was introduced to validate decisions of the Central Court (subsequently the Supreme Court) ostensibly made by way of appeals against Nauru Lands Committee decisions, notwithstanding that there was no legislation authorising such appeals. The Acting Chief Justice - observing that a right of appeal is a creature of statute - held that the 1956 Act gave a right of appeal only with respect to land determinations.

48 *In Lucy Ika & Kinza Clodumar v Nauru Lands Committee & Others* Donne, C.J. also held that a decision of the Committee could only be the subject of an appeal under s.7 of the Nauru Lands Committee Act if it concerned land. Such an appeal could assert error of fact or law, and must be lodged within 21 days of publication of the determination. He opined[18], however, that a challenge with respect to a land decision could also be made by way of judicial review, where error of law was asserted, and a successful challenge (to which a 21 day time limit did not apply) would render the decision void ab initio.

49 His Honour's judgment is, with respect, somewhat unclear as to whether judicial review, alleging error of law, was also available against the Committee with respect to determinations concerning personal estate, but he appeared to conclude that such proceedings were available[19]. I leave open the question whether a right of judicial

[17] Nauru Law Reports [1969-1982] Part B, page 7 at 8, judgment delivered 30 April 1969.
[18] At 19-20
[19] See the discussion at 13-14.

review might be available, and, if so, the possible ambit of such jurisdiction. Those questions might become relevant in at least one of these cases, but were not addressed before me as preliminary issues[20].

50 Having discussed the right of appeal on questions of fact or law under s.7 (which he elsewhere said was relevant only to appeals concerning land) and also judicial review, Donne, C.J. then cautioned that proceedings by way of judicial review would need to be taken promptly, because s.37(1) "allows an estate to be released from the Custody of the Curator of Intestate Estates after ascertainment of the beneficiaries"[21]. He added that once the estate was released, the lands would be distributed and the personal bequests would be transferred to the appropriate beneficiaries.

51 In addition to a possible right to seek judicial review of determinations affecting personal property, Donne, C.J. held that there was another remedy available with respect to determinations concerning personalty. He held:

> "In all other cases, there is, to any person claiming an interest in an estate who is dissatisfied with the administration (including any determination) or distribution thereof by the Committee, who wishes to dispute the same, the right to proceed, in accordance with the rules of the Supreme Court, by way of a probate action in that Court to obtain redress. In particular, these cases can be categorised as:
>
> (a) Any case where the determination of the Committee relating to the ownership of land in the estate and the interests therein of the deceased or the beneficiaries is claimed to be invalid on the ground that it is wrong and made contrary to law.
>
> (b) Any case where the determination of the Committee determining the right to personal property is challenged.
>
> (c) Any case touching on any other matters which can be properly the subject of such an action."[22]

52 With respect to His Honour, I have difficulty accepting that a party could challenge decisions of the Committee by way of a "probate action", given that not only are the

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[20] Clara Agir's notice of appeal was filed within 21 days, but not so the notice of appeal of Ceila Cecilia Giouba, whose notice seeks "leave to appeal out of time", which the Court has no jurisdiction to grant: See *Giouba v NLC* [2011] NRSC 1. Judicial review proceedings have not been issued to date.
[21] At 14.
[22] At 20-21.

provisions of the *Succession, Probate and Administration Act* 1976 almost entirely excluded, by s.3, from application to the estates of Nauruans, that Act also does not empower or provide a supervisory function with respect to the Nauru Lands Committee. It is unnecessary for me to resolve this question, however.

53 There is no common law right of appeal; a right of appeal is a creature of statute[23], and it is the terms of the statute that determine the scope of the appeal right. Once it is accepted that there is no prohibition on the Committee continuing to perform its customary law function in making decisions about personalty then it might seem likely that a right of appeal under s.7(1) of the *Nauru Lands Committee Act* would also apply. That sub-section provides a right of appeal within 21 days to any person who is dissatisfied with "a decision" of the Committee. The language of the provision seems sufficiently wide to embrace decisions based on Nauruan custom and usage.

54 In determining the intention of the legislature the Court must have regard to the plain words of the statute[24]. The words of a statute should be interpreted according to their terms, not by reference to an assumption of the kind of cases in which the provision would be likely to apply[25]. Where the result of giving the words their ordinary meaning would produce an irrational result the Court might be forced to conclude that the draftsman made a mistake, and that a more realistic interpretation would be appropriate[26]. However, where the words are unambiguous and do not limit the circumstances in which they apply, and where there is no reason why in an appropriate case they might not apply to a particular situation, then their literal interpretation should generally be the interpretation that should be given to them[27].

55 All of those considerations would tend to suggest that the right of appeal should extend to decisions concerning personalty. However, as Kirby, J. (in dissent but not as to this approach to interpretation[28]) noted in *Stingel v Clark*, the statutory text must

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[23] *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619; See too, "*Civil Procedure Queensland*", Ch 18, "Appellate Proceedings", r 745.1, Lexis Nexis.
[24] *Project Blue Sky Inc v Australian Boadcasting Authority* (1998) 194 CLR 355.
[25] *Stingel v Clark* (2006) 226 CLR 442 at [26], [29].
[26] *Cooper Brookes (Woolongong) Pty Ltd v FCT* (1981) 147 CLR 297 at 304.
[27] *Stingel v Clark* at [24].
[28] *Stingel v Clark* at [120]

be read in context[29], and as Hayne J observed[30], that includes the historical context out of which the legislation was produced. Does the context here manifest an intention of the legislators that a right of appeal not be given against decisions of the Nauru Lands Committee concerning the ascertainment and distribution of the personal estate of deceased Nauruans?

56 Of critical importance is the fact that by s.6 the legislation gave statutory empowerment ("power to determine questions") to the committee only with respect to questions as to ownership and rights concerning land. The right of appeal granted in s.7 with respect to "a decision" of the Committee, must be taken to refer, in context, to decisions taken in exercise of the power granted under s.6. The draftsperson must be taken to have known that the Council of Chiefs and the Lands Committee, as the forerunners of the Nauru Lands Committee, also undertook the role concerning personal estates that s.6 empowered with respect to real property, and that no other body was authorised to do so. That additional role had been recognised and endorsed by the Administrator in the 1938 Administration Order. And yet, against that background, the draftsperson did not empower the newly created Nauru Lands Committee to make decisions with respect to personalty, nor did the Act prohibit the Committee from performing that role.

57 In my opinion, this supports the conclusion that as to a right of appeal, the plain words of s.7 are qualified by the limit of statutory power provided in s.6.

58 I recognise that that conclusion could produce some difficult outcomes. It means that if the Nauru Lands Committee were to deal with personal estate in a manner that would have led to a successful appeal had the decision concerned land then there is no remedy, save for a possible (but by no means certain) right to judicial review.

59 Personal estate (which would include cash from royalties, and other assets) would be very valuable, in most cases. Why then would the draftsperson have been content to

[29] *Stingel v Clark* at [115]
[30] *Stingel v Clark* at [132].

allow the Committee to determine questions concerning personal estate without providing a right of appeal? The draftsman must be taken to have known that regulations under the 1938 Administration Order would continue to be applied by the Committee as they had by its predecessors, both with respect to land and personalty decisions, and yet the Committee's interpretation of those regulations would be largely immune from challenge with respect to personal property.

60 It is impossible to speculate as to the motives of the draftsperson, but it does not follow, in my opinion, that the omission of a right of appeal concerning personalty was simply a mistake; i.e. that the draftsperson overlooked that role. There may well have been good reason why it was thought inappropriate and/or unnecessary to provide a right of appeal with respect to personalty. For example, there may have been a perception that personal property should be dealt with more swiftly than land distribution, and that appeals should be discouraged. Alternatively, it may have been thought unnecessary to provide for appeals concerning personalty. I have been told that there have been very few disputes over personal property over the decades, and even fewer challenges to such decisions have been brought to Court. The 1956 Act was introduced to overcome the problem that the Supreme Court had been hearing "appeals" against land determinations without any statutory right of appeal being in existence[31]. There was no similar problem concerning determinations about personalty; it seems there had been no attempts to bring appeals in that regard.

61 I note that despite Thompson, C.J. having ruled in 1969 that there was no right of appeal concerning personal estate decisions, no amendment was made to the *Nauru Lands Committee Act* to provide that right. A reluctance to override the decisions of the Committee concerning personalty might be one reason why no right of appeal was given. Arguably, allowing a right of appeal would be inconsistent with giving full force and effect to what amount to decisions by a Nauruan institution based on custom and usage. That is not to say, however, that it is unlikely that the Court

[31] See *Ralph Eoe v James Ategan Bop and Eiwita Adimim*, Nauru Law Reports [1969-1982] part B 65 at 67, per Thompson, C. J., Judgment 27 February 1973.

would have been empowered to conduct an appeal against decisions concerning personalty that were based on custom and traditional usage. Plainly, the Court is quite capable of considering those issues, now, when addressing land appeals and has had little difficulty in doing so, on occasion rejecting the Committee's interpretation of custom in deciding an appeal[32].

62 One further factor adds to my belief that s.7 was not intended to create a right of appeal concerning personalty decisions, namely, the lack of guidance given by the 1956 Act if personalty decisions had been intended to carry a right of appeal.

63 Section 6 of the *Nauru Lands Committee Act* gives only limited guidance as to the scope of an appeal with respect to land issues, but neither s.6 nor s.7 provides any guidance, at all, as to appeals concerning personalty, nor does either section specify what power the Committee has with respect to personalty. The absence of such guidance suggests to me that it was not intended that the right of appeal granted by s.7 was intended to extend to the exercise of powers other than those set out in s.6. That is not to say that were it otherwise an appeal court would have no guidance as to the principles that should govern decisions concerning personalty.

64 In practice, the Committee applies the principles set out in the 1938 Administration Order when making decisions concerning both personalty and realty. With respect to the right of appeal concerning land decisions the Court can also call on a well-developed jurisprudence concerning appeals against decisions of statutory tribunals. It might be doubtful, however, whether that jurisprudence would apply to a body solely exercising customary law principles.

65 I am driven back to considering the terms of s.6 and s.7. They do not provide for an appeal against decisions concerning personalty. As presently advised, therefore, I conclude that there is no right of appeal under s.7 with respect to decisions of the Committee concerning personalty. The question is not beyond doubt, however, as to

[32] See for example *John Demaure v Adumo & Others,* Nauru Law Reports [1969-1982] Part B, 96 at 99 per Thompson, C. J., Judgment 11 May 1973; *Eidawaidi Grundler v Eibaruken Namaduk & Others* Nauru Law Reports [1969-1982], Part B, 92, per Thompson, C.J., Judgment 8 May 1973.

the intention of the legislators in this regard when the 1956 Act was passed. It would be appropriate for the issue to now be resolved by Parliament.

Conclusions and Orders

66 I will give leave to the parties to make further submissions, in writing, on these preliminary questions, should they wish to do so after considering these reasons. Subject to any further order by the Registrar or a judge, I direct that the submissions should be filed and exchanged within 28 days of publication of these reasons, with a further 7 days allowed for filing and exchanging any submissions by way of reply.

67 The conclusions expressed below are tentative, and are expressed subject to hearing further argument.

68 With those qualifications, I answer the two preliminary questions as follows:

(a) The power of the Nauru Lands Committee to make decisions concerning the personal estate of deceased Nauruans derives from customary law, and not from statute. Its power to make such decisions is recognised by the *Succession, Probate and Administration Act* 1976. The decisions of the Committee concerning personalty must be recognised and be given full force and effect by the Supreme Court, by virtue of s.3 of the *Custom and Adopted Laws Act* 1971.

(b) The *Nauru Lands Committee Act 1956-1963* does not vest jurisdiction in the Supreme Court to hear an appeal from a decision of the Nauru Lands Committee concerning distribution of the personal estate of a deceased Nauruan.

Dated the 6th day of May 2011

Geoffrey M Eames AM QC

Chief Justice