

IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Suit No.38 of 2011

Julianna Capelle

Plaintiff

V

Nauru Lands Committee

1st Respondent

Davina Capelle

2nd Respondent

JUDGE: Eames, C.J.
DATE OF HEARING: 8 March 2013
DATE OF RULING: 8 March 2013
CASE MAY BE CITED AS: Julianna Capelle v NLC and Anor
MEDIUM NEUTRAL CITATION: [2013] NRSC 4

CATCHWORDS:
Leave to appeal - Application for leave to appeal out of time against determination by Nauru Lands Committee as to personalty estate - *Nauru Lands Committee Act 1956*, s.6(1A) and s.7(1)(a) - Factors relevant to exercise of discretion - Leave granted.

APPEARANCES:

For the Applicant

Mr D Aingimea (Pleader)

No appearance for
respondents

CHIEF JUSTICE:

- 1 This as an application for leave under section 7(1)(b) of the *Nauru Lands Committee Act* 1956 to appeal against the determination of the Nauru Lands Committee as to the personal estate of Halsey Capelle, deceased. The applicant was the wife of the deceased.
- 2 A determination as the personal estate was published in the Government Gazette on 9 November 2011, by GNN 687 of 2011. The applicant made application for leave to commence judicial review proceedings pursuant to Order 38 of the Civil Procedure Rules 1972. That application was issued on 14 November 2011. Before those proceedings were issued protracted attempts had been made by the Nauru Lands Committee and the family of the deceased in order to reach family agreement. Unfortunately, those attempts failed, although resolution had looked promising.
- 3 Proceedings by way of judicial review were chosen, no doubt, because in other proceedings I had ruled, provisionally, that no appeal was available with respect to personalty decisions of the Committee. Some doubt had also been raised about whether the Act gave jurisdiction to the Committee to deal with personalty, or whether it did so only by way of a customary law exercise.
- 4 By an amendment to the Nauru Lands Committee Act 1956, by Act No 9 of 2012, a new section, 6 (1A), was inserted in the Act. That provided that the Nauru Lands Committee had the power to determine the distribution of personal estate of deceased Nauruans. That provision came into effect on 10 October 2012.
- 5 On 8 February 2012, the Committee published a determination concerning the real estate of the deceased. That determination, being No 72 of 2012, was published in GNN No 17 of 2012. On the 27th of February 2012, Mr Aingimea filed a notice of appeal on behalf of the applicant, challenging that determination. Although the determination which was nominated on the notice of appeal was that concerning the real estate of the deceased, the notice stated that the applicant challenged by the real

estate and the personal estate determinations.

6 That determination concern the land of the deceased but the notice related to both realty and personalty determinations. The notice of appeal was filed within the 21day time limit fixed by Section 7(1)(a), insofar as the appeal concerned the determination as to the realty. However, it was outside the 21 day limit with respect to the personalty determination. The personalty determination having been published on 9 November 2011, the 21 days expired on 30 November 2011. The application for leave to appeal out of time was filed on 7 March 2013.

7 As I have said, however, the application for leave to commence judicial review proceedings concerning the personalty determination had commenced on 14 November 2011 (well within 21 days of the determination, had a notice of appeal been filed) and leave was granted by the Registrar on 18 July 2012.

8 The applicant now applies for leave of appeal out of time with respect to the determination as to the personalty estate. Another new section, s.7(1)(b) also came into effect on 10th of October 2012. That provided that the Court may grant leave to appeal out of time. The discretion of the Court is not restricted in any way by the terms of section.

9 An application for leave to appeal out of time should not be judged by any strict formula or rigid formula. The relevant principles are well described in *Halsbury's Laws of Australia*:

“The discretion is unfettered and should be exercised flexibly with regard to the facts of the particular case. The court will not decide the application according to a formula created by erecting what are merely relevant factors into the arbitrary principles so as to allow the automatic production of a solution. However, since the discretion to extend time is given for the purpose of enabling the court to avoid an injustice, the court must determine whether justice as between the parties is best served by granting or refusing the extension sought. A consideration relevant to the exercise of the discretion is that upon the expiry of the time allowed for appeal the respondent has a vested right to retain the judgement unless the application is granted. Other relevant matters include the length of the delay in commencing the appeal, the reasons for the delay, the chances of the appeal succeeding if an extension of time is granted, the degree of prejudice to the respondent if time is

extended and the blamelessness of the applicant. Leave to appeal out of time may be given subject to specified terms. The interests of justice and a hearing upon the merits are the basal considerations.”¹

- 10 In support of this application, Mr Aingimea referred to a number of those considerations.
- 11 Mr Aingimea noted that notice of the applicant’s complaint about the personalty decision was in fact given to the respondents within 21 days, it was just that it was not in a document constituting a notice of appeal. It would have been had there not been any doubt raised about the right to bring such an appeal.
- 12 Mr Aingimea submitted that it was intended to appeal against both real and personal estate decisions and that in both cases the applicant had an arguable case. I agree that that is so. The personalty appeal will raise important questions about the interpretation of Paragraph 3 (c) of the 1938 Administrative Order No 1, relating to deceased personal estates.
- 13 In my view, there could be no practical disadvantage caused to respondents in this case if the proceedings were now converted from judicial review proceedings concerning personalty into an appeal under section 7. The issues that would be raised on the appeal would be substantially the same as those raised in the judicial review proceedings.
- 14 The delay in this case was largely because attempts were being made to resolve the personalty issues and the Nauru Lands Committee had been substantially involved in attempting to get resolution. The Committee had come very close to resolution on a couple of occasions but unfortunately negotiations broke down. Mr Bliim, who appeared for the Committee at the call-over, advised me that the Committee will abide by whatever orders the Court makes.
- 15 Although there has been no appearance for the 2nd respondent, Davina Capelle, I was informed by Mr Aingimea that she was served with this application and an

¹ Lexis Nexis [325-11740]

affidavit of service will be filed today. Although orders had earlier been made by the registrar for service on four named family members, Mr Aingimea advised me that he now acts for all of those people, other than Davina Capelle.

16 In my view, the justice of the case supports the grant of leave. Having regard to the early notification of the dispute about personalty, the delay in filing a notice of appeal is not over-long. There is no significant prejudice to any party if leave is granted.

17 I have been advised by Mr Aingimea that should leave be granted, he would seek to have the judicial review proceedings struck out, so as to proceed by way of appeal only.

18 I grant leave to appeal to the applicant to appeal the determination of the Nauru Lands Committee concerning the personalty of estate of Halsey Capelle, deceased published on the 9th of November 2011, by Gazette Notice No 687 of 2011. I make the following orders:

- I direct the applicant to file a notice of appeal within 48 hours, concerning the personalty estate.
- I direct that the notice of appeal should set out the grounds of appeal and the relief sought.
- I direct that the notice of appeal be served on Davina Capelle within 7 days of today.

19 Having regard to a concern that was expressed by the pleader representing a party who will be opposing a similar application for leave to appeal, I will note on the file, that the making of this order does not preclude any party seeking to challenge the jurisdiction of the Nauru Lands Committee with respect to dealing with personalty estates, notwithstanding the introduction of s.6(1A).

Geoffrey M Eames AM QC

Chief Justice

8 March 2013