IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Land Appeal No. 21 of 2012

Bernadette Aliklik,
Geraldine Buramen and Others — Appellants

v

The Nauru Lands Committee — 1st Respondent

Charlie Ika — 2nd Respondent

JUDGE:	von Doussa, J
DATE OF HEARING:	4th and 14th June 2013
DATE OF JUDGMENT:	19th June 2013
CASE MAY BE CITED AS:	Bernadette Aliklik & Oths v NLC & Charlie Ika
MEDIUM NEUTRAL CITATION:	[2013] NRSC 8

CATCHWORDS: Succession – intestate estate – deceased survived by siblings and illegitimate son - Nauru Lands Committee awards whole estate to illegitimate son based on custom – appeal by siblings – whether Committee erred in applying custom –*Administration Order No3 of 1938* – whether *Administration Order* inconsistent with *Custom and Adopted Laws Act 1971* - appeal dismissed.

APPEARANCES:

For the Appellant:	David Aingimea (Pleader)
For the 1st Respondent	Steven Bliim, Solicitor-General
For 2nd Respondent	Ruben Kun (Pleader)

von Doussa J

1. This is a Land Appeal against a determination made by the Nauru Lands Committee (NLC) and published as GN No 254/2012 on 16 May 2012 (the 2012 determination). The determination distributed the estate of the late Abatsir Ika, sometimes referred to as Alfred Ika (Abatsir) to the second respondent Charlie Ika (Charlie) who the NLC found to be the son of Abatsir.

2. The appellants are the descendants of the siblings of Abatsir. They contend that the estate of Abatsir was rightfully theirs, and should be distributed amongst them.

3. The dispute between the appellants and Charlie over the inheritance of Abatsir's estate erupted in the context of proceedings brought by Charlie in Civil Case 3 of 2010 in which he claimed entitlement to receive payments from the Nauru Phosphate Royalties Trust (NPRT) in respect of lands that form the estate of Abatsir. The background to the dispute is discussed at length in the judgment of Eames CJ published on 6 May 2011: *Charlie Ika v NPTR and others* [2011] NRSC 5. That judgment dealt with a range of preliminary issues, including whether the validity of the determination of the NLC in favour of Charlie published as GN No 246 of 2001 in the Gazette of 19 October 2001, and as amended by GN 251 of 2002 published in the Gazette of 18 December 2002 (the 2001 determination) could be contested by the present appellants in those proceedings. It was held that they could do so, but would have to join the NLC as a party, or they could separately seek to challenge the 2001 determination in separate prerogative writ proceedings.

4. The decision of the Chief Justice led to the commencement of two additional sets of proceedings between the parties, Civil Case 17 of 2011 and Civil Case 37 of 2011. Rather than go ahead with this conglomeration of litigation, the parties agreed that all previous determinations would be set aside by consent, and the manner of distribution of the estate of Abatsir returned to the NLC to be determined afresh.

5. Upon the publication of the 2012 determination in favour of Charlie, the present appellants, who had been the second respondents in Civil Case No 3 of 2010, immediately brought the present appeal on the grounds that:

> *1.The decision is contrary to Customary Laws of Nauru.*
> *2.The decision is contrary to decisions handed down by the Supreme Court with respect to children born out of wedlock.*

6. The matter has a long history. It is necessary to identify leading members of the family and then to look at the progress of steps taken over the years by the NLC to determine the distribution of the estate of Abatsir.

The family

7. This part of the history can start with Ika Ditto. He was the father of seven children of which Charlie's father Abatsir was the youngest. The other children were Dogodage, Edouwa, Adioren, Idarabwe, Beiyaun and Billy. I shall refer to these six children of Ika

Ditto as "the siblings". The siblings have now all passed on, and it is their descendants who I will refer generally to as "the siblings' children" and "the grandchildren" unless it is necessary to identify a particular person in one of those groups.

8. Abatsir was not married but lived at different times in two de facto relationships. Charlie's claim to the estate of Abatsir asserts that he is the child born from the first of those relationships, that with Milka (who at times is referred to in the papers as "Eigie"). As such, if that were so, he is the illegitimate son of Abatsir. Abatsir had no other children. I note at this point that the siblings' children now put in issue the paternity of Charlie, but for reasons which follow later I find that it is very plainly established that Charlie is the son of Abatsir.

9. Charlie was born on 6 July 1969. Abatsir died on 24 April 1984 when Charlie was 15 years old.

The NLC's considerations and determinations

29 October 1984

10. The NLC met on Monday 29 October 1984 to consider the division of the estate of Abatsir. The siblings, with the exception of Adioren, were assembled with the NLC for this purpose.

11. Notably, Charlie was not there, and no one spoke on his behalf.

12. There was discussion to identify assets, and to establish that Abatsir left no will. Then -

Dogodoge said:

> *Our father, Mr Ika Ditto, said that all his sons shares (Abitsir) are to go to his 'son and his wife'"*

The NLC then sought the views of the members of the family.

Idarabwe said:

> *There used to be a child who beared [sic] our name before but later changed to Charles Phillip and this woman, who also stayed with us now as Alfred's* (Abatsir's) *girlfriend, but has not married, her name is Rosa Edward, we will accept them as Alfred's child and girlfriend. I may be corrected here, but can I suggest that the estate should be given to us (brothers and sisters) and their shares (wife and child) will come from the shares given to Alfred's siblings. This is to prevent them from leaving the family (Alfreds) if they are given the full share. We have heard Idarabwe's opinion. Anyone else?*

Dogodage said:

> *I will follow what our father had said as I previously said.*

Beiyaun said:

> *I am in support of what Dogogage had said as been indicated to me by our father.*

Billy said:

I support what our eldest brother, Idarabwe, has said. I am in favour of giving them L.T.O.

The NLC said that is true in the case of the wife (I infer that is a reference to the LTO), but the child if accepted as legitimate will receive the full share and ownership.

Edouwa said:

I also support Idarabwe.

Idarabwe said:

They should rightfully go to the wife and the child (son).

13. In the course of this appeal there was discussion about the meaning of the proposal of Idarabwe that the estate be given to the siblings. Apparently there was a family concern that if the share was given outright to Charlie and the 'wife' they would no longer treat themselves as part of the family and would go off separately. Thus the suggestion was not to deprive Charlie and the 'wife' of a beneficial interest but to feed it out to them through the siblings. I do not think that the statement of Idarabwe can reasonably bear any other meaning.

14. The outcome of this meeting seems to be agreement by those present that the wish of their father should be respected and followed, though with the proposal from Idarabwe superimposed.

15. At the conclusion of the meeting the NLC said that it would try to inform Mr Adiorin Ika to come to the NLC office as soon as possible.

30 October 1984

16. On 30 October 1984 Idarabwe and Billy returned to the NLC along with Adiorin. The NLC read the contents of the previous meeting and asked Adiorin for his opinion.

Adiorin said:

I have nothing to say. Properties I have received from my mother are mine and since our father (Ika Ditto) is still alive and is the one looking after our welfare now, I cannot say anything but to follow our father's wish. Anything he decided, I agree to his decision. Once he died, then I have a say.

Idarabwe said:

I want to confirm my question yesterday for our brother's estate, Alfred (Abatsir) *Ika. Now I want the estate to return to us blood and not to the wife and child as stated yesterday.*

31 October 1984

On 31 October 1984 Edouwa called into the NLC office wanting to discuss Abatsir's estate.

Edouwa said:

I want to speak. If the estate of Alfred Ika was the estate from our mother Eamangur Ika, then it is correct to be returned to us. Alfred was not married and no register of child.

Idarabwe's reference to "us blood" and Edouwa's reference to "no register of child" indicates that they were now challenging Charlie's paternity, and that their change of heart was on that basis. Notably, they make no suggestion that the patriarch of the family, Ika Ditto had altered his wish that Charlie inherit the estate, a wish that the siblings at the meeting on 29 October 1984 respected.

23 January 1985 (The 1985 determination)

17. On 23 January 1985 the NLC published in the Gazette of that date determination GN No 29 of 1985 which distributed the estate of Abatsir to the siblings. The determination gave no interest to Charlie.

18. There were amendments made to this determination by determinations GN 31 of 1990 and 51 of 1991, but nothing turns on these. The distribution of Abatsir's estate remained essentially as determined in GN No 29 of 1985 (the 1985 determination).

1 August 1991.

19. The NLC has a minute that on 1 August 1991 Edouwa (one of the siblings) and Celestine Buramen (Edouwa's daughter) came to inform the Committee that all the family members had agreed that their brother's share (Abatsir) be awarded to his son Charlie, son of Abatsir and Milka Eige nee Detabene. The NLC has noted that since his shares were already divided amongst the siblings it would be best if they were to transfer all to the son and for all to sign the transfer. Edouwa said that they would "bring to the Committee in writing a.s.a.p." There is no record of such a document ever being received, and the interests set out in the 1985 determination were not altered.

20. It is very significant that Celestine was at the meeting, as in Civil Case No 3 of 2003 she seems to have been one of siblings' children leading the assault on Charlie's entitlement under the 2001 determination.

21. If the position was then as Edouwa said, the siblings were now in agreement that Charlie should get the estate. By this time Ika Ditto had died and the surviving siblings were the only family members who at the date of death of Abatsir comprised the group of people whose agreement would be necessary to decide the distribution of the estate.

Events of 2001-2002

22. From 1985 the distributions of royalty and other NPRT distributions were based on the interests of the siblings set out in the 1985 distribution and that remained the situation until 2001.

23. On 9 February 2001 proceedings were issued in the Supreme Court on Charlie's behalf by his legal counsel Mr Paul Aingimea. The proceedings named eight people as defendants, who the statement of claim said are the sons and daughters of Dogodage, Abatsir's brother. The pleadings say that all Charlie's uncles and cousins had signed a

transfer of their interests in Abatsir's estate to him, save for the defendants who refused to give him his inheritance.

24. A copy of the proceedings was given to the NLC by letter dated 12 July 2001 from Mr Aingimea. The letter asked the NLC to review the distribution of Abatsir's estate "as this young man has been given an unfair deal that has robbed him of his rightful inheritance."

25. On 8 August 2001 the NLC discussed Mr Aingimea's letter, and noted that the request, if granted, would conflict with the 1985 determination and the amendments thereto. On 13 August 2001 they also received oral submissions from Mr Aingimea.

26. On 4 October 2001 the NLC met to consider the request to include Charlie in Abatsir's estate. The minutes record a succinct statement by one member made to the meeting that then led on to discussion about the case. The member said:

> *…previous decisions for Abatsir's estate incorrect because we didn't invite Charlie who is the son of Abatsir. My decision is to amend the error and include Charlie in his father's Estate.*

27. At the conclusion of the discussion the NLC resolved that Abatsir's estate go to Charlie. The minutes of the meeting do not record the reasons for this decision.

28. At some point hereabouts the Supreme Court proceedings were withdrawn as the NLC had agreed to look into the matter. The evidence before this court does not disclose whether the proceedings were ever served on the defendants.

29. On 10 October 2011 determination GN No246 of 2011 was published in the Gazette of that date (the 2001 determination). The whole of the estate of Abatsir was given to Charlie. An addendum to this determination was published in 2002, but it did not alter the distribution wholly to Charlie.

30. There was no appeal by anyone from this determination, but this may have been because Gazettes were not available, and no one knew. None of the descendants of Ika Ditto raised any question about the validity until Charlie asserted his entitlement to NPRT payments in Civil Case No 3 of 2010. His complaint was that NPRT had not paid him in accordance with the 2001 determination, but had paid the siblings and their successors in accordance with the distribution shares published in the 1985 determination. So it is possible that the sibling interests did not get notice of the 2001 determination until they became aware of Civil Case No 3 of 2010.

18 November 2011

31. The consent order was made in the Supreme Court setting aside all determinations, and the manner of distribution of the estate of Abatsir was returned to the NLC to be determined afresh.

January 2012

32. On 11 January 2012 the NLC interviewed Rosa Edwards, who had been the second of Abatsir's de facto partners, and Mrs Lily Harris. Both these woman had first hand knowledge about the early part of Charlie's life. Both confirmed that to their knowledge Charlie was Abatsir's son, and had been so recognized by Abatsir.

33. The NLC also obtained a certificate of birth showing Charlie was registered on the day of his birth. The certificate records Abatsir as his father. The NLC also obtained a Certificate of Baptism of Charlie in the Catholic Church on 20 July 1969 which records Charlie's parents as Abatsir and Milka.

34. In late January the NLC had two meetings with a large gathering from amongst the siblings' children and the grandchildren. Charlie was present at one of these meetings.

35. In strident terms a number of those present asserted that Charlie had no entitlement at all to the estate of Abatsir. Charlie's paternity was questioned, and on this basis Abatsir was said to have had no issue. It was said that Charlie's birth was never registered as Abatsir's son. He is an illegitimate child. He was not adopted. There is no will. And the Supreme Court decision in "Gogoma Amwano" was said to establish that Charlie had no inheritance even if he was Abatsir's son.

36. In the second of the meetings, a member of the NLC asked a daughter of Dogodage who was being particularly outspoken, whether they do not want to follow the wish of their fathers. She replied that the old decision was only to do with our fathers, and "now we do not want to follow our fathers". The thrust of this comment is not that the fathers disagreed about Charlie's entitlement, but that the next generation had different wishes. The meeting became heated as some of those present were in favour of Charlie being recognized, and others were not. As the minutes note: "The family left, not too happy with the meeting."

37. On 19 April 2012 the NLC meet to re-determine the estate of Abatsir. The NLC decided that the estate would be given to Charlie based on Customary Law.

38. The members found that it was a Nauruan custom that if a child is
    1. Registered under Abatsir (father) name
    2. Baptised by Abatsir – father
       Eigie – mother

    The child is entitled to inherit.
    Even though these two were not married, the custom still stands.
    His grandfather Ika had already accepted this child and also wanted him to be the beneficiary of this estate.

39. The minutes record that the members had done a survey on the Custom and this survey conveyed that there was no difference between a child from wedlock or otherwise.

40. On 16 May 2012 the 2012 determination awarding the whole estate to Charlie was published.

Discussion

Charlie is Abatsir's son

41. The question of paternity is a question of fact, to be determined on the available evidence and aided by the presumptions arising from the registered birth certificate and the Certificate of Baptism. Here, contrary to the assertions of some of the siblings' children to the NLC in January 2012, Charlie's birth was registered.

42. The appellants have obtained a second certificate of registration of Charlie's birth on 6 July 1969, which, like the one relied on by the NLC, shows his mother as Milka Phillip, but has no entry for the fathers name. This is said to be evidence that Abatsir was not Charlie's father. It is not: it neither establishes that he was or was not Charlie's father. It has no evidentiary value at all on this question.

43. The evidence is overwhelming that Charlie has always been recognized by Abatsir as his son, and has been so recognized by those who were about when Charlie was a boy and young man.

44. The finding by the NLC that Charlie was the son of Abatsir is fully supported by the evidence before the NLC.

Issue of adoption.

45. Charlie's claim to the estate is not based on him having been adopted by Abatsir. However, the appellants' counsel submits that this is a case concerning an invalid or failed adoption, and the NLC fell into error of law in finding that Charlie had an entitlement because he was not lawfully adopted.

46. I have set out in some detail the discussion that has occurred from time to time in NLC meetings, and the reasoning of the NLC for the 2012 determination. Charlie's claim has not been decided on the basis that he has been adopted by Abatsir in custom. If it had been, the case of *Gad Demaunga v NLC and Another* [NRSC] 17 relied on by the appellant's counsel would be relevant. In that decision the Court held that the *Adoption of Children Act 1965* was a code that replaced the customary adoption schemes, and that after the passing of the Act only adoptions approved by order of a court would be recognized for succession and other purposes. However, as the NLC's decision is not based on a customary adoption the decision is not to the point.

47. The information gathered over the years by the NLC was that Abatsir was accepted, not adopted, as the son of Abatsir by Ika Ditto, and at times by the siblings.

Illegitimacy

48. It has always been the accepted fact by the NLC and at most times by the siblings that Charlie is the illegitimate son of Abatsir. Accepting that Charlie is the son of Abatsir, he is illegitimate.

49. Counsel for the appellants argues that on this ground Charlie's claim for a share of his father's estate must fail as a matter of law. The court has been referred to a number of decisions said to support this proposition which is contrary to the conclusion of the

NLC, on which the 2012 determination is based. The NLC has found that in custom it makes no difference to the inheritance rights of a child in Charlie's situation to a parent's estate whether the parents are married or not married.

50. In considering these cases I am mindful of the terms of Administration Order No 3 of 1938 (the Administration Order). It has frequently been applied by the Supreme Court in intestacy cases ever since. This Court is often told by counsel that the Order was not meant to change customary law, but to record it to assist in the administration of intestate estates. This assertion, however, is not universally accepted as correct. The late Mr Leo Keke, a respected lawyer in this Republic, in Chapter 22 of the "Pacific Courts and Legal Systems", University of the South Pacific, 1988, wrote:

    This Order regulated the distribution of intestate estates in cases where the family of the deceased were not in agreement as to its distribution. Rules for distribution under the Order looked like the re-enactment of the general principles of intestacy under the English legal system. In short, the rules were a fusion of Nauruan custom and English law, and very much a source of confusion today for those who try to understand it as a restatement of Nauruan custom. In fact it is not. The Order was fraught with inadequacies of language and confusion typical of a layman's work.

    Be that as it may, the Order is a legislative instrument made under delegated power, and it has the force of law that must be followed, unless it has been replaced or over-ridden by other laws.

51. I deal first with the direction in clause (3) of the Administration Order which reads:

    3. If the family is unable to agree, the following procedure shall be followed: –

    (a) In the case of an unmarried person the property to be returned to the people from whom it was received, or if they are dead, to the nearest relatives in the same tribe.

    (b) Married – No issue, – the property to be returned to the family or nearest relatives of the deceased. The widower or widow to have the use of the land during his or her lifetime if required by him or her.

    (c) Married – with children – the land to be divided equally between the children, and the surviving parent to have the right to use the land during his or her lifetime. When an estate comprises only a small area of land the oldest daughter to receive the whole estate and other children to have the right to use the land during their lifetime.

52. Sub-clauses (b) and (c) deal with married people. In *Geraldine Diema (nee Amwano) v Leeman and NLC,* Land Appeal No 6 of 2008 Millhouse CJ held that "married –with children" should be construed to mean children of lawfully married parents. On this construction an illegitimate child of a married person was not within the contemplation of sub-clause 3(c) which only distributes the deceased's assets to legitimate children of the of the deceased's marriage. [It should now be noted that since the passing of the *Interpretation Act 2011* the reasoning in that case no longer represents the law. Now by s74 (1) and (2) of the *Interpretation Act* the word "Married" will include a couple in a de facto relationship.]

53. Taking the cases in the order in which they were cited, the first was *Gad Demaunga NLC v Another.* I have already discussed this decision. It relates to adoptions and is not relevant here.

54. *Geraldine Diema (nee Amwano) v Leeman and NLC,* referred to above, was the next case cited. This is the "Gogoma Amwano" decision referred to by one of the siblings' children at the meeting with the NLC in late January 2012. This case construed the meaning of the words "Married – with children" in sub-clause 3(c) of the Administration Order.

55. The next case was *Leon Aedang v Mwareow, Land Appeal 3 of 2002.*This is another case concerning the distribution of an intestate estate under the Administration Order. There was one legitimate child of the deceased and two other children whose legitimacy was in question. Their legitimacy depended on a marriage between the deceased and their mother being established. It was in this context that Connell CJ at page 4 of his judgment noted a concession by counsel that if the two children were born out of wedlock they would have been prohibited from taking under intestacy. In short, this was dealt with as a case that concerned the application of sub-clause 3(c) of the Administration Order where there was a contest between legitimate and illegitimate children of the deceased.

56. The next reference was to a passage in the judgment in *Gloria Harris and Another v Lucas Hedmon and Others*, (1969-1982) NLR (B)151 (Land Appeal No 6 of 1981), at page 152

> *However, the illegitimate children of a man do not share in his estate unless by a will he makes them beneficiaries. That is also, I believe, well known to Nauruans.*

Counsel relies on this statement as a proposition of universal application. However, that is to take it out of context. The issue in the case was a narrow point of construction of a will, as Thompson CJ made clear at the top of page 152. The case is one where, if there had been no will, sub-clause 3(c) of the Administration Order would have been applied. The deceased had left two legitimate children and eight illegitimate children, and a will that named only his illegitimate children. The issue was whether properly construed against Nauruan custom, the will excluded the legitimate children. It was held that there is a rebuttable presumption that a Nauruan does not intend by a will to exclude legitimate children. It was held that the presumption was not rebutted, so all ten children shared equally.

57. Finally, counsel relied on *Sabine Debeb v Eireibowbwe Agabiri and Others* (Civil Action No 2 of 1980). Again, counsel seeks to rely as a universal proposition on the following passage lifted from the judgment of Thompson CJ:

> *If they had not agreed to Auriria and Eireibwobwe* (two illegitimate children) *receiving a share of Appe's estate, Auriria and Eireibwobwe would not have been entitled to receive a share.*

58. Again this case concerned a contest between the inheritance rights of two legitimate children and two illegitimate children of a deceased Nauruan, this time one who left no will. The case involved the application of the Administration Order.

59. No party has advanced an argument based on sub-clause 3(a) of the Administration Order, and it was not relied on by the NLC. Sub-clauses 3(b) and 3(c) concern the estates of married people. As the cases cited by the appellants' counsel establish, "marriage" has been construed to mean lawfully married, and on this construction the estate of a married person with issue would be distributed by the Order only to legitimate children of that marriage. Illegitimate children have been disinherited under the Order because sub-clause 3(c) directs that the whole of the estate go to the children of the marriage.

60. Sub-clause 3(b) necessarily attracts a similar construction of "married". Thus where a married person is survived by illegitimate children they are disinherited under the Order because it directs that the property of the deceased goes elsewhere.

61. Under sub-clause 3(a) illegitimate children of an unmarried person, i.e. some-one who is not lawfully married, would be disinherited because the Order directs that the property be otherwise distributed.

62. The Administration Order may to an extent reflect Nauruan customs, but to the extent that it does not, it does not say that Nauruan custom is abolished. The custom continues, but the Order takes precedence over custom.

63. The Order was made under delegated power and was made long before Independence. If a more recent Act of Parliament is inconsistent with the Order, the Order to the extent of the inconsistency can no longer apply. The Act of Parliament must take precedence.

64. The *Custom and Adopted Laws Act 1971* (Nr), in section 3 provides:

> *3 (1) 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 matters affecting Nauruans only.*

65. The express inclusion of matters concerning title to and interests in land, and succession in intestate estates is a clear direction from Parliament that the Court shall accord recognition to the institutions, customs and usages of the Nauruans in matters that are the essential subject matter of the Administration Order.

66. If the Court is obliged to give this recognition, it follows that the NLC must also do so as any determination of the NLC is subject to appeal to the Supreme Court.

67. In my opinion it follows that in a matter concerning succession to land in an intestacy the question is whether there is now an institution, custom or usage which is applicable

to the matter before the NLC, and if so, whether the institution, custom or usage is one that existed immediately before 1971.

68. If there is such an institution, custom or usage, then the NLC should determine the distribution of the intestate estate in accordance with it. It should do so even if this means departing from the succession rules set out in the Administration Order.

69. As I have observed, the Administration Order did not purport to abolish Nauruan institutions, customs and usages. It simply overrode them. Now by force of the *Custom and Adopted Laws Act*, Nauruan institutions, customs and usages override the Administration Order to the extent of any inconsistency.

70. On this view of the meaning and application of the *Custom and Adopted Laws Act* the statements extracted by counsel in the cases mentioned above relating to the application of sub-clause 3(c) of the Administration Order must be confined to cases where no inconsistent institution, custom or usage of the Nauruans is established, and put forward as the basis for the distribution of the estate. In the cases cited there does not seem to have been consideration whether inconsistent customs may have required a different result. In any event, Parliament has itself recently indicated that a different conclusion should follow in many of those types of case by amending the definition of "marriage" in the *Interpretation Act 2011.*

71. In the present case, the NLC did not apply the direction in sub-clause 3(a) of the Administration Order which probably would have led to a different result, but made its determination based on custom. Their enquiries showed that the custom they relied on was of long standing, and still existed. I consider the NLC was right to do so.

Was the NLC funtus officio once it published the 1985 determination?

72. This question was much debated before Eames CJ in the Civil Case No 3 of 2010 preliminary issues judgment. It is no longer an issue as all the earlier determinations have been set aside. However, lest it be thought that the NLC acted beyond power in making the 2001 determination, I deal briefly with the point. At paragraphs [80] and following Eames CJ discusses the difference between jurisdictional error and non-jurisdictional error. Where a tribunal makes a jurisdictional error it means that in reality there is no decision at all as the tribunal did not correctly exercise its function. In that circumstance the tribunal can determine the matter anew, this time hopefully doing so according to law.

73. The minutes of the NLC on 4 October 2001 record that the NLC realized they had erred by not hearing from Charlie or someone on his behalf before making the 1985 determination. The failure to hear an interested party is a jurisdictional error. The NLC acted in accordance with law in making a new decision in 2001. The NLC was not functus officio.

Was there a family agreement in favour of Charlie?

74. On 1 August 1991 Edouwa, a senior member of the siblings informed the NLC that the "family members have agreed that that their brother's share…. be awarded to his son

…Charlie …". However, as this statement was not followed up with a transfer as the NLC had suggested the evidence remains uncertain whether there was a family agreement on Charlie's entitlement. In the end, the NLC has not made the determination now under challenge on the basis of family agreement, so this is not presently an issue.

Conclusion

75. The appellants have failed to show any error by the NLC. The material before the NLC justified the finding that Charlie was the son of Abatsir. The NLC was entitled to give weight to the wishes of Ika Ditto. It was entitled, indeed it was its responsibility, to bring the NLC's knowledge of custom to its deliberations. Here the NLC even made enquiries from elderly people to bear out their understanding of custom. The NLC was entitled to make a decision according to custom.

76. For these reasons the 2012 determination is upheld and the appeal will be dismissed.

77. There will be an order that the appellants pay the costs of the first and the second respondents.

J W von Doussa, AO QC
Judge
19 June 2013