IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Suit No.3 of 2010

CHARLIE IKA — Plaintiff

V

NAURU PHOSPHATE ROYALTIES TRUST — 1st Defendant

CURATOR OF INTESTATE ESTATES — 2nd Defendant

BENEFICIARIES of ESTATE OF IKA DITTO — 3rd Defendants

SECRETARY FOR JUSTICE — 4th Defendant

JUDGE:	Eames, CJ.
WHERE HELD:	Nauru
DATE OF HEARING:	14 March 2011
DATE OF JUDGMENT:	6 May 2011
CASE MAY BE CITED AS:	Charlie Ika v NPRT and Others
MEDIUM NEUTRAL CITATION:	[2011] NRSC 5

Negligence – Claim arising from failure of Nauru Phosphate Royalties Trust to distribute trust funds to plaintiff – Plaintiff claims entitlement as landowner under 2001-2002 determinations of Nauru Lands Committee – 2001-2002 determinations purported to set aside previous 1985-1991 and 1986-1999 determinations of Committee which had determined 3rd defendants, and not plaintiff, were landowner beneficiaries – Committee acted on "fresh evidence" as to paternity of plaintiff – 3rd defendants claim denial of procedural fairness in failure to notify them as to proposed new determinations and failure to give them hearing as to paternity issue - No appeal brought against 2001-2002 determinations.

Preliminary Issues - Whether 3rd defendants can challenge the validity of the 2001-2002 determinations - Whether Committee was functus officio – Whether Nauru Lands Committee may self-correct its determinations by publishing a correction or amendment- Whether Committee's 2001-2002 determinations binding on Trust as proof of plaintiff's entitlement to royalties – How plaintiff may establish his entitlement to royalties – whether Court can or should determine the question of plaintiff's paternity.

Judicial review – Declarations – Certiorari - Whether 3rd defendants can seek declaration that 2001-2002 determinations beyond Committee's power – Whether certiorari necessary or appropriate to quash determinations – Discussion of factors relevant to Court's discretion as

to granting relief by way of declaration or prerogative order.

Practice and Procedure - Leave required under Order 38 *Civil Procedure Rules* 1972 to issue proceedings for prerogative relief – Applications out of time – Relevant factors for grant of leave to issue proceedings out of time –- Delay.

Pleadings – Need to specify terms of declarations sought – Joinder of Nauru Lands Committee appropriate.

APPEARANCES:	Counsel
For the Plaintiff	Mr R Kun (Pleader)
For the 1st Defendant	Mr L Keke
For the 2nd and 4th Defendants	Mr D Lambourne
For the 3rd Defendants	Mr D Aingimea (Pleader)

CHIEF JUSTICE:

1 This is a claim in negligence which gives rise to a range of very difficult, and important, preliminary issues. It is those preliminary questions with which I am at present concerned.

2 The plaintiff claims to be entitled to receive payments from the Nauru Phosphate Royalties Trust ("NPRT" or "the Trust") as an owner of land which has been mined for phosphate. He claims that it was on account of the negligence of the Trust, and also the negligence of the Curator of Intestate Estates, that he did not receive the payments to which he was entitled, and instead payments were wrongfully made to the third defendants.

3 The plaintiff claims interests in land, first, as the sole beneficiary of the estate of Alfred Abatsir Ika, who died intestate, and whom the plaintiff claims was his father. A second claim, as a joint beneficiary with the 3rd defendants, is made to land inherited from his grandfather, Ditto Ika, and an uncle, Adioran Ika.

The determinations of the Nauru Lands Committee

4 In 1985 the Nauru Lands Committee held family meetings to consider the distribution of the estate of Alfred Abatsir Ika, and following those meetings made determinations which were published in Government Gazette No 5 of 1985, by Gazette Notices Nos 29 of 1985 and 30 of 1985, and subsequently Gazette Nos 8 of 1990 and 51 of 1991[1]. The beneficiaries identified in those determinations were the brothers and sisters of the deceased, and did not include the plaintiff. In 1985 the plaintiff was about 15 years of age. His mother was alive but, so the 3rd defendants assert, made no claim on the estate on her son's behalf. That assertion has not been tested before me and, as I later discuss, the fact that the plaintiff was an infant at the time may have imposed an obligation on the Nauru Lands Committee to determine whether he had an interest in the land, an obligation that could not have been waived by his mother, even if it was true that she had not pressed a claim on his behalf in 1985.

[1] In her affidavit Celestine Buramen says the determinations in GN 8/90 and 51/91 were "corrigenda" made by the Committee. For present purposes, no significance attaches to those determinations, the primary determinations around which the present dispute revolves being those made in 1985.

5 In 2001 and 2002 the Nauru Lands Committee published new determinations, being GN No 246 of 2001 (under the heading "Amendment"), in Gazette No 63 of 19 October 2001, and GN No 251 of 2002 (under the heading "Addendum"), published in Gazette No 58 of 2002 on 18 December 2002. Those determinations purported to overturn the 1985-1991 determinations, so as to declare that the plaintiff was the sole beneficiary of the estate of Alfred Abatsir Ika ("as his only heir and son").

6 in addition to the land inherited through Alfred Abitsir Ika, the plaintiff also claims an entitlement to a shared interest (with the 3rd defendants) in land from the estates of Ditto Ika, the father of Alfred Abitsir Ika, and Adioran Ika, who was Alfred's brother. The plaintiff's shared interest in those estates was also determined by the Committee in Gazette No 58 of 2002 (GNN No 251/2002) of 18 December 2002, which purported to amend its earlier determinations concerning the beneficiaries of those estates which had been published in Gazettes No 37 of 1986 and No 49 of 1999[2], and had then not included the plaintiff as a beneficiary.

7 In reaching those decisions, the Committee accepted evidence of paternity from the plaintiff, including a birth certificate of details registered on 8 August 1969 in which the plaintiff, under the name of Alfred Charles Kendrick Ika, was registered as the son of Abatsir[3] Ika and whose mother was Milka Phillip. An earlier birth certificate recorded details which were registered on 6 July 1969, and showed the plaintiff's name as Alfred Charles Kendrick Phillip, with no name being recorded for his father. His mother's name was given as Milka Eigebweno Phillip.

8 On 23 February 1972 the plaintiff's mother, under the name Milka Detabene, made a statutory declaration declaring that she was the mother of Alfred Charles Kendrick Ika, who had been "re-named" Alfred Charles Kendrick Phillip. She requested these details be registered by the Registrar of Birth, Deaths and Marriages. On 10th June 1991, the plaintiff registered a change of name by deed poll, wherein he renounced the surname Phillip and assumed the name Ika.

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[2]I was not informed as to whether the determination No 49 of 1999 was a corrigenda to the decision published in No 37 of 1986. No issue was raised with me about its validity.

[3] In some places, including in the affidavit of the plaintiff, the name is spelt "Abatir", not Abatsir.

9 The third defendants contend that they were not consulted by the Nauru Lands Committee in 2001-2002 when it purported to reconsider its earlier determinations. They contend that the plaintiff is not the son of Alfred Abatir Ika. In an affidavit by Celestine Buramen, the beneficiaries advance a body of evidence which they claim demonstrates that the plaintiff's claim to paternity was without merit and that his mother's statutory declaration requesting her son's surname be recorded as Phillip, and not Ika, was her acknowledgment that the plaintiff was not the legitimate son of Alfred Abatsir Ika.

10 Ms Buramen's affidavit has been answered, in turn, by an affidavit of Ruben Kun, pleader for the plaintiff, referring to a minute of the Committee dated 1 August 1991 which records, he says, that Celestine Buramen acknowledged the entitlement of the plaintiff. Furthermore, he exhibits a "Document of Transfer and Relinquishment of the Property of the Late Alfred Abitsir Ika to his son Charles Kendrick Ika". That document is not dated but appears to be signed by some 19 people, most with the family name Ika, and including the mother of Celestine Buramen.

11 For the purpose of ruling on the preliminary questions, I am not making findings as to the competing contentions as to the plaintiff's paternity, nor am I setting out the evidence in full. I am simply illustrating the potential scope of this litigation, and the issues that it raises.

The Nauru Phosphate Royalties Trust

12 The Trust is a statutory body established in 1968 to manage trust funds of the Republic and one of the funds it managed was the Nauruan Landowners Royalties Trust Fund (Ronwan), which comprised the proceeds of phosphate mining, including interest. A beneficiary of the Ronwan fund is "a person who, on and after the first day of July 1967 is entitled to the beneficial interest in land in respect of which royalties for phosphate which has been or is mined on the land are held in the fund"[4].

13 The *Nauru Phosphate Royalties Trust Act* 1968- 2009 provides, in s.19(5), inter alia:

> " . . .the Trust shall (in such manner and upon such proof of entitlement as the Trust,

[4] S. 19(6) *Nauru Phosphate Royalties Trust Act* 1968- 2009

with the approval of the Minister, determines) pay to each beneficiary, or where there is a trustee for a beneficiary, to the trustee . . . the Ronwan Interest credited to the account of the beneficiary in respect of the preceding year ended on 30 June".

14 The plaintiff contends that given that his entitlement to receive royalty payments was confirmed both by the decisions of the Nauru Lands Committee in 2001 and 2002 and by the Department of Lands and Survey, which has prepared the plaintiff's land card, the failure to pay the plaintiff was a product of negligence.

15 The first defendant, the Trust, does not challenge the plaintiff's entitlement to receive such royalty payments as had fallen due and payable since 2001; indeed, it concedes that the plaintiff did not receive payment of royalties to which he was entitled by virtue of the determinations of the Nauru Lands Committee that identified him as an owner. The Trust however, says that whilst it endeavoured to pay royalties to the plaintiff it failed to do so only because of significant administrative difficulties, in particular the inadequacy of its computer programme. Those inadequacies were said to be caused by a significant policy shift by Government in 1997, which permitted beneficiaries to call on capital of the trust fund, something that had never previously been permitted and which the computer programme had not been designed to facilitate and which to date has proved impossible to correct by re-programming the computer system.

16 The Trust denies that it owed the plaintiff a duty of care, but if the Court finds otherwise then it denies that the failure to pay the royalties was negligent.

17 The Trust says that it has always accepted the determinations of the Nauru Lands Committee as the basis on which it determines who is entitled to payment of royalties, and as to what extent. It is not the business of the Trust, it contends, to second guess the Committee as to its determinations. It does not seek to do so in this case and will abide by the Court's ruling as to whom the royalties should be paid. The Trust contends that the Committee must have had good reason to make the 2001-2002 determinations, and it presumes that the Committee acted within power, merely correcting its previous decisions so as to ensure that justice was done. The Trust notes that there was no appeal against the

later determinations.

18 As I later discuss, the Trust may well benefit from the determination of the third defendants' claim for orders by way of declarations (and possibly prerogative relief). Indeed, it might itself consider seeking a declaration that were it to pay the royalties to the plaintiff to which the plaintiff claims entitlement, it would not be in breach of any contract, or law, or duty owed to anyone. Such a declaration would not be hypothetical[5] and would have practical value.

19 As explained in the affidavit of Paul Bannon, the Secretary of the Trust, the values of royalties are assigned to beneficiaries' accounts according to the fractional ownership held by the beneficiaries within the relevant land district and portion. The fractional ownership records are maintained by the Department of Lands and Survey. The landowners records of the department, which are compiled by reference to determinations of the Committee or Court orders, are relied on by the Trust for proof that someone is a beneficiary.

20 The 2001-2002 Ronwon interest payments were paid out by the Trust in 2009 Those payments went to the third defendants, some sixteen people who were beneficiaries by virtue of the 1985-1990 determinations concerning the estate of Alfred Abitsir Ika. Notwithstanding the 2001-2002 determinations, the plaintiff was not on the list of Ronwan beneficiaries, and received no payment. Furthermore, so the plaintiff claims, the Curator of Deceased's Estates had distributed funds from the estates of Alfred Abatsir Ika and of Adiorin Ika, from which he was wrongly excluded.

The competing claims in these proceedings

21 The issue of negligence is not before me at the moment. Once again, I am merely highlighting the issues raised by these proceedings, for the purpose of identifying the preliminary issues. Neither the plaintiff nor the third defendants bring any action against the Nauru Lands Committee. In particular there is no claim for damages[6], nor any other

[5] See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 356.

[6] A right to claim damages, in relatively limited circumstances, as a remedy in judicial review proceedings is given in England by s.31(4) of the *Senior Courts Act* 1981. Whether such a remedy is available in Australia is not an issue I need determine. See *Halsbury's Laws of England,* Judicial Review, Vol 61 (2010) 5th Ed, Lexis Nexis, at par 722

claim, made by the third defendants against the plaintiff or the other defendants, or the Nauru Lands Committee (which is not a party). In their defence, however, the third defendants allege that the 2001-2002 determinations were ultra vires, and deny that the plaintiff was the son of Alfred Abatir Ika. The only relief sought by the defence of the third defendants is that the 2001-2002 Gazette notices be "quashed" and the earlier Gazette notices be "upheld". Otherwise, they seek dismissal of the plaintiff's action.

22 The plaintiff seeks a declaration from the court that he is a beneficiary of the estates of his father, grandfather and uncle, in accordance with the 2001-2002 determinations. Further, he seeks reimbursement by the Trust of royalties that should have been paid to him, and an order against the Curator requiring reimbursement to the plaintiff of his share of funds, wholly distributed to others by the Curator in 2009, from the estates of Alfred Abatir Ika and Adiorin Ika.

23 An interim injunction was granted on 8th July 2010, restraining both the Trust and Curator from further distributions until judgment in this action.

24 The relief sought by the third defendants appears to be primarily by way of declaratory relief. The Nauru Lands Committee would be directly affected by such orders, were they to be made, and yet the Committee is not a party. However, there are contradictors to the claims for declarations and any other relief sought by the third defendants. As I shall discuss, while I think it is now appropriate to join the Committee as a party to these proceedings, if the Committee's determinations in 2001-2002 were patently ultra vires then the absence of the Committee as a party would not prevent the Court making a declaration that the decisions were void, if in the exercise of its discretion the Court so resolved.

25 As may be seen, if the plaintiff succeeds in his claim then the third defendants may be required to refund part or the total amounts paid to them by the Trust and Curator.

26 To succeed in his claim, the plaintiff must first establish that he is entitled to the beneficial interest in land which has been mined. The first defendant accepts that since 2001 the plaintiff has been so entitled; the third defendants deny that to be so. The plaintiff seeks a declaration of his entitlement.

27 The third defendants contend that the 2001-2002 determinations of the Committee were void, the Committee having had no power to change the 1985-1991 and 1986-1999 determinations, as published in the Gazette up to sixteen years earlier. Furthermore, the decision to reverse its earlier determinations denied them procedural fairness, they contend, because it was made without their knowledge, and without them having an opportunity to put their case to the Committee.

28 At the moment, the contentions that the 3rd defendants were denied procedural fairness have not been tested; they are merely assertions contained in the affidavit of Ms Buramen.

29 Against that background, I turn to identify the primary and some subsidiary preliminary issues that I am asked to resolve.

The Preliminary Issue: Can the 3rd defendants challenge the validity of the 2001-2002 determinations of the Nauru Lands Committee?

30 Although the preliminary question was never precisely articulated on behalf of the 3rd defendants, the threshold issue is whether the 3rd defendants can go behind the 2001-2002 determinations, at all.

31 That primary question requires consideration of a number of related questions:

(a) Can the Supreme Court go behind the 2001-2002 determinations, to test their validity, or is a challenge to a determination of the Nauru Lands Committee permitted only by way of an appeal brought in the Supreme Court within 21 days of a determination, pursuant to s.7(1) of the *Nauru Lands Committee Act* 1956-1963?

(b) In the course of these proceedings, having regard to the state of the pleadings, is it open to the 3rd defendants, or any other party, to challenge or seek to affirm the validity of the 1985-1999 determinations or the 2001-2002 determinations, by seeking declarations?

(c) Must new proceedings be commenced (whether by the 3rd defendants or any other party) specifically seeking judicial review by way of certiorari, mandamus or prohibition?

(d) Should leave be granted to issue such proceedings pursuant to Order 38 of the *Civil Procedure Rules* 1972?

Are the 2001-2002 determinations open to challenge as proof of entitlement?

32 Both the plaintiff and the first defendant contend that the 2001-2002 determinations can not be challenged in these proceedings. The plaintiff seeks to have their status confirmed by way of a declaration. To have challenged the validity of the determination, they say, the third defendants would have had to do so by way of a successful appeal under s.7(1) of the *Nauru Lands Committee Act* 1956-1963. They did not do so, and time to appeal has long since expired.

33 The third defendants contend that it has long been held by the Supreme Court that a challenge could be made to a decision of the Committee, notwithstanding that the 21 days time limit under s.7(1) had expired, where it was alleged that the decision of the committee was void or irregular[7]. Although sometimes expressed by judges as an "appeal", an application seeking such an order in the context of a time-barred appeal in reality sought a declaration of invalidity.

The power of the Court to give declaratory relief is wide ranging, and will not be held to be excluded by legislation except by clear and express words[8]. Likewise, the power of the Court to quash a determination of a tribunal by way of an order for certiorari (or to compel remedial action by way of mandamus) will not lightly be held to have been removed.

Appeals under the Nauru Lands Committee Act v Judicial Review proceedings

34 It is important to appreciate the differences between appeals under the *Nauru Lands Committee Act* and judicial review proceedings. The former allow a re-hearing on the merits and the appeal court may deliver the result that it thinks appropriate in the circumstances of the case. Certiorari, however, is not a remedy which is concerned with the merits of the decision, but with the process in which the decision was reached.

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[7] See the cases discussed in *Giouba v NLC* [2011] NRSC 1, per Eames CJ.
[8] *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 437 per Gibbs J; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2;

35 In *Edwards & Ors v Santos Limited & Ors* [9] Hayne J cited R *v Northumberland Compensation Appeal Tribunal; Ex parte Shaw*[10]*:*

> "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 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."

36 Hayne J also referred to the statement in *Craig v South Australia*[11], that certiorari "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*" (emphasis added by Hayne J).

37 Gillard J in *Kabourakis v Medical Practitioners Board*[12] summarised the position as follows:

> "Judicial review is concerned with the authority of the statutory body and the legality of what it has done or seeks to do and is not concerned with the merits of the case. This is to be contrasted with an appeal where the question usually is whether the original decision was right or wrong, whereas the question on a judicial review is whether the decision is made within authority and in accordance with the law. Judicial review is not concerned with whether the decision was fair or correct."[13]

38 In England, three primary grounds for intervention by way of judicial review (which includes remedies by way of declaration and injunction[14]) have been identified: illegality, irrationality (ie. *Wednesbury*[15] unreasonableness) and procedural impropriety.[16]

Declaratory relief

39 In *Edwards v Santos Limited* Heydon J,[17] with whom the other members of the Court

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[9] [2011] HCA 8 at [18]
[10] [1952] 1 KB 338 at 357.
[11] (1995) 184 CLR 163 at 175; [1995] HCA 58.
[12] [2005] VSC 493
[13] *Kabourakis v Medical Practitioners Board* [2005] VSC 493 at [10]. The same distinction is drawn in England: see *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 1173, per Lord Brightman; *Re Amin* [1983] 2 AC 818 at 829.
[14] Per s.31 *Supreme Court Act* 1981 (c.54)(UK) [subsequently renamed *The Senior Courts Act* 1981] which set out the procedures to be taken in the High Court, when seeking judicial review relief by way of orders for mandamus, prohibition or certiorari, as well as declarations and injunctions.
[15] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.
[16] *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410, per Lord Diplock. See generally, *Halsbury's Laws of England*, Vol 61 (2010) 5th Ed, at par 602 ff, Lexis Nexis.
[17] *Edwards v Santos* at [37]

agreed, held that the jurisdiction to grant a declaration "includes the power to declare that conduct which has not yet taken place will not be in breach of … a law."[18] Hayden J added that the jurisdiction also includes the power to declare that conduct which has not yet taken place will be a nullity in law. As to the breadth of power to grant declaratory relief he cited the judgment of Gibb J in *Forster v Jododex Australia Pty Ltd*[19].

40 In *Forster v Jododex* the respondent sought a declaration informing the Mining Warden that it held a validly renewed exploration licence, over land to which the Warden was contemplating granting a licence to the appellant. Legislation prohibited the Warden granting rights of entry where a licence had at an earlier time been awarded to someone else. The appellant challenged the right of the primary judge to grant a declaration, and alternatively submitted that the court should decline to issue a declaration, in the exercise of its discretion. Gibbs J held that the jurisdiction of the NSW Supreme Court to grant declaratory relief was as wide as that of a judge in the High Court in England[20]. Gibbs J held that "the jurisdiction to make a declaration is a very wide one", citing authority to the effect that the court's power to make a declaration for the purpose of defining rights between two parties is "almost unlimited . . only limited by its own discretion".

41 Gibbs J held that the jurisdiction to grant declarations may be ousted by statute: "although the right of a subject to apply to the court for a determination of his rights will not be held to be excluded except by clear words"[21]. The appellant contended that the legislation manifested the intention that the Warden's decision could not be reviewed by way of a declaration. His Honour rejected that contention, there being no reason why the court's jurisdiction was removed to deny it the power to declare rights between parties. His Honour added:

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[18] *The Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 305 per Barwick CJ; [1972] HCA 19. On the breadth of the jurisdiction to grant declarations, see also *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438; [1972] HCA 61.

[19] *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438, per Gibbs J.

[20] By s.4(1) of the *Customs and Adopted Laws Act* 1971 (Nauru) the common law and statutes of general application, including rules, regulations and orders of general application, that were in force in England as at 31 January 1968 applied to Nauru. By s.4(2) the principles and rules of equity as at that date were adopted. By s.4(4), inserted in 1976, the principles and rules of common law and equity (but not, it seems, statutes) as they had been altered and adapted in England since 1968 could also be adapted by Nauru courts.

[21] *Forster v Jodadex*, at 436.

> "There is no provision in the Act that gives to any other tribunal exclusive jurisdiction to decide the question whether a person is the holder of a valid exploration licence, or that otherwise withdraws the determination of that question from the jurisdiction of the Supreme Court.[22]"

The *Nauru Lands Committee Act* 1956-1963: – An exclusive jurisdiction over land?

42 In the present case, it is argued that the Court's power to grant a declaration, or other relief by way of judicial review, has been denied, by virtue of the language of s.6 and s.7 of the *Nauru Lands Committee Act*.

43 The plaintiff argues that a decision of the Nauru Lands Committee, not overturned on appeal, is the sole authority on the question of the ownership of particular allotments of land. The *Nauru Lands Committee Act* 1956-1963 provides, in s.6(1), that 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". Subject to the appeal provision, "the decision of the Committee is final (S.6(2))"

44 By s.7(1) a person who is dissatisfied with a decision of the Committee may within 21 days of the decision appeal to the Supreme Court, which is given jurisdiction by s.7(2) to hear and determine an appeal under this section and "may make such order on the hearing of the appeal . . as it thinks just". Section 7(3) provides:

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

45 In his examination of the provisions relating to the Mining Warden in *Forster v Jodadex* and the legislation relevant to other cases he discussed, Gibbs J noted:

> "There is nothing in the provisions considered in those cases that indicates a clear intention to exclude the power of the court to make a declaratory order. The Act does not provide a specific remedy to which the holder of an exploration licence who

[22] *Forster v Jodadex*, at 436.

seeks to establish the rights which it gives him is bound to resort".[23]

46 In the present case the provisions of the Act do provide that the decision of the Committee is final, subject to appeal to the Supreme Court. The decision of that Court on appeal is final. The desirability that there be finality in the resolution of disputes as to interests in land is an important factor that might underlie a legislative intention to exclude judicial review remedies (which were not constrained by a 21 days time limit), but the legislation must nonetheless clearly demonstrate that intention. Although the terms of s.6 and s.7 do provide some support for the contentions of the appellant, the legislation does not expressly exclude judicial review proceedings seeking declaratory or other relief with respect to decisions of the Committee.

47 In *R v Board of Visitors of Hull Prison, Ex parte St Germain*[24], the Court of Appeal held that the fact that there was an alternative remedy provided by legislation is relevant to the exercise of the Court's discretion, but does not demonstrate that Parliament intended to exclude the remedy of judicial review. The Courts have been slow to find that judicial review jurisdiction has been ousted even when the decisions of administrative tribunals are described as final.[25]

48 The Nauru provisions do not in my opinion, preclude the Supreme Court (having not heard and delivered judgment on an appeal) declaring a decision of the Committee to be a nullity, or else, by way of certiorari, quashing a determination, notwithstanding that the proceedings are not brought by way of an appeal, within time, under s.7(1). Much clearer words would be required if the inherent jurisdiction of the court to make a declaration, or to exercise the judicial review jurisdiction, were to be taken to be denied to the Court[26].

The availability and scope of declaratory power

49 As to the scope for the application of declaratory power. Gibb J held[27] that it was neither

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[23] *Forster v Jododex* at 437
[24] [1979] QB 425 at 455-456.
[25] *Halsbury's Laws of England*, "Judicial Review", Vol 61 (2010) 5th Ed, Lexis Nexis, par 655
[26] See *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 437 per Gibbs J; See too, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2;
[27] *Forster v Jododex*, at 437-8

possible nor desirable to fetter the broad discretion, but the question must be a real and not merely theoretical one, and the person seeking the order must have an interest to raise it, and must have a contradictor, that is, a person with a current interest to oppose the order. Beyond that, he held, little guidance could be given, but he adopted the statement of Lord Radcliffe in *Ibeneweka v Egbuna*[28]:

> "After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration".

50 Walsh, J, in dissent on another issue, but not as to the declaratory power, agreed with Gibbs, J. that the legislation did not oust the Court's jurisdiction to grant declaratory relief, but took the view that in the exercise of the court's discretion, the procedure for determining such disputes (as provided for in the legislation), by way of a hearing in the Mining Warden's court, should be regarded as the "normal procedure" for dealing with such cases, and not by the exercise of declaratory power, unless there was "some special reason for intervention" by way of declaratory orders[29]. Gibbs J agreed that there were obvious reasons why a judge would hesitate before making an order when proceedings were about to be heard before the Mining Warden, but he held that the case justified intervention by the Supreme Court because there were pure questions of construction of statutes that were appropriately decided by the Supreme Court, being "difficult questions, and apparently rights of considerable value depended on them"[30]. Stephens J agreed with Gibbs J, as to the appropriateness of exercising the discretion by making an order, as did Mason J.

51 In *Edwards v Santos Ltd* Heydon J[31] identified the relevant prerequisites for a declaration as being that the court had jurisdiction to grant declaratory and injunctive relief, that the applicant had a sufficient interest to make the claim (in that case, the interest being that a declaration in the terms sought would advance its position in negotiations), that the questions were not merely hypothetical, but of real practical and/or commercial

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[28] [1964] 1 W. L. R. 219 at 225.
[29] *Forster v Jododex* at 427
[30] *Forster v Jododex* at 439
[31] *Edwards v Santos Ltd* at [37]-[38].

importance, that there was a contradictor to the application, and that there was a real controversy to be resolved, the opinion sought from the Court not being merely advisory. Each of those prerequisites is met in this case.

52 In the present case, although there is an appeal remedy, the expiration of the 21 day time limit means that is not now available to anyone to challenge either the 1985-1999 determinations or the 2001-2002 determinations. Of course, the fact that such a remedy was available, at all, is a matter relevant to the exercise of the Court's discretion, but it was a remedy that was difficult for anyone to employ given the difficulties of access to the Gazette, unless the person was otherwise aware of the Committee's deliberations on the matter.

53 The issues raised by the present case are indeed difficult and important. There are significant potential financial benefits and losses for those affected adversely by the Court's ruling on these questions. It is appropriate that the Court exercise the supervisory jurisdiction of judicial review unless compelling reasons are advanced to dissuade it from so doing.

54 Thus, the Supreme Court, in my opinion, has got power to declare that the 2001-2002 determinations by the Committee were ultra vires and void, as sought by the 3rd defendants. Alternatively, it could declare on behalf of the plaintiff that the 2001-2002 determinations were valid exercises of power by the Committee.

Can the Court determine and declare the plaintiff's paternity?

55 Another question arises. Even if the determinations of the Committee were declared void, might the plaintiff, by way of a declaration, nonetheless seek to establish his entitlement to a beneficial interest in the three estates by satisfying the Court that he was the son of Alfred Abatsir Ika, and was thus entitled to his estate (and to the estates of his uncle and grandfather) by virtue of paragraph 3 of *Administrative Order No 3 of 1938,* which prescribed the principles by which the predecessor of the Nauru Lands Committee, and now the Committee itself, should and did determine interests in land under deceased estates?

56 This question was neither identified nor argued before me when submissions were made on preliminary issues. Certiorari is not available to conduct a hearing on the merits, once having set aside the order of a tribunal which was charged with that responsibility. Thus, the Court could not engage in that exercise under the guise of judicial review relief by way of certiorari or mandamus; that is properly the province of the Nauru Lands Committee. However, does declaratory relief stand in a different position? Could the Court hear evidence on the question of paternity and, by way of a declaration, determine the factual issue, effectively overturning the determinations of the Committee on the subject?

57 I do not attempt to answer that question, on which I would want to hear detailed submissions. I observe, however, that even if the Court had power to investigate that issue it might well decline to do so in the exercise of its discretion. One factor that might justify that approach would be the lapse of time since that question was first agitated and then apparently finally decided by the Committee. Inevitably, key witnesses would no longer be available, and for a very long time people had received and spent royalties in reliance on the finality of the 1985-1999 determinations.

58 Furthermore, it is central to the Nauru Lands Committee Act that decisions on land entitlement, involving as they do issues of customary law, rather than common law and probate law principles, should be determined by a body of senior Nauruan people. Arguably, in those circumstances it might be inappropriate to grant a declaration purporting to determine the plaintiff's paternity claim, and his entitlement to share in the estates.

59 If the 2001-2002 determinations were held to have been ultra vires that would leave the 1985-1999 determinations in place, but the Committee in 2001-2002 declared those earlier determinations to have been factually erroneous, albeit, so it is alleged, without hearing argument from the 3rd defendants[32]. That would seem to be a high price to pay for finality of litigation, especially when the plaintiff was only a teenager when the 21 day time limit expired for an appeal against the 1985 determination. Nonetheless, the only challenge now made to the 1985-1999 determinations is the plaintiff's complaint that the Committee, in

[32] Because the Nauru Lands Committee is not a party before me, I do not know whether it agrees that its 2001-2002 decisions were motivated by a belief that it had earlier made a mistake. Nor do I know, whether it agrees that it denied the 3rd respondents an opportunity to be heard.

those determinations, made the wrong factual decision[33].

60 Whilst the broad powers of the Court on an appeal properly commenced within 21 days would extend to the court overturning a factual finding by the Committee, that has never been held to be a sufficient reason for the Court to set aside a determination of the Committee on an appeal that was commenced out of time. At their highest, statements by the Court as to the powers to review decisions where an appeal was out of time limited the power to making a declaration that irregularities rendered the decisions void[34].

61 As presently advised, having regard to the need for finality in disputes as to land ownership, it would seem highly inappropriate that by way of declaratory relief, the Court might now, in the exercise of its discretion, engage in reconsideration of the factual findings of the Nauru Lands Committee, many years after the decisions had been taken. On the other hand, declarations that the Committee acted without power, or in such an irregular manner as to render a determination void, have long been accepted in Nauru as an appropriate, albeit limited, exercise of the Court's judicial review powers.

62 A determination that was made ultra vires can still have operational effect. As was noted by Finkelstein J in *Leung v Minister for Immigration and Multicultural Affairs*[35] (and approved by Gleeson CJ in *Bhardwaj*[36]) it may be necessary to treat an invalid decision as valid simply because no person seeks to have it set aside or ignored, and he added: "The consequence may be the same if a court has refused to declare an administrative decision to be invalid for a discretionary reason".

Should the Court now resolve whether the Committee was functus officio in 2001-2002?

63 The pleadings in this case are somewhat deficient: there are, for example, two separate, albeit similar, statements of claim filed, signed by two different pleaders acting for the plaintiff.

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[33] I do not have information as to the content of some of the determinations; The most significant of the determinations are identified in the text and are the subject of specific challenge. I am presuming that some other determinations made non-contentious minor amendments and are not the subject of challenge by any party.
[34] See the cases discussed in *Giouba v NLC* [2011] NRSC 1.
[35] (1997) 79 FCR 400 at 413.
[36] At 604-5 [12]

64 The third defendants seek to set aside a decision of the Nauru Lands Committee, and yet the Committee is not a party to this civil proceeding. Where a third party who is likely to be affected by a declaratory order is not a party to the proceedings that might provide a reason for the court not to make the order[37], or alternatively, to require the third party to be joined in the proceedings[38].

65 The plaintiff and the 1st defendant complain that the third defendants are seeking to use these proceedings to make a collateral attack on the determinations gazetted in 2001-2002, which, they say, should be regarded as final and conclusive as to the issue of the plaintiff's entitlement to royalties. However, even when English Courts adopted a narrow view of the appropriate scope of declaratory orders, it was long held that declaratory actions were appropriately employed where the challenge to the validity of an administrative order was raised as a collateral issue to a plaintiff's subsequent private law claim, or by way of a defence to a private law action.[39]

Order 38 of the Civil Procedure Rules 1972

66 The defence of the third defendants, by implication, seeks declaratory relief, but not in clear terms. Furthermore, the pleadings at the moment do not amount to a claim for certiorari (even less so a claim for mandamus). Order 38 Rule 1 requires that leave be granted before proceedings seeking prohibition, certiorari or mandamus are commenced. A time limit of 3 months from the date of the impugned decision is imposed by Rule 2, but may be extended by leave. One relevant factor in the Court's exercise of its discretion as to the grant of leave, is whether there has been unaccounted-for delay in bringing proceedings for judicial review.[40]

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[37] *Gent v Robin* [1958] SASR 328 at 359

[38] "*The Form and Effect of Declaratory Relief and the Negative Declaration*", by The Hon D R Williams QC, in "*Perspectives on Declaratory Relief*", Eds, K Dharmananda and A Papamatheos, (2009), Federation Press, at 111-112.

[39] *Bunny v Burns Anderson plc Financial Ombudsman Service Limited* [2007] EWHC 1240 (ch) at [25]-[47], cited by Gordon, J. in "*Declaratory Relief – The Same Yesterday, Today and Tomorrow?*" in "*Perspectives on Declaratory Relief*", Eds, K Dharmananda and A Papamatheos, (2009), Federation Press, at 190

[40] *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] AC 738. S.31(6) of the *Senior Courts Act* 1981 (UK) gives the Court power to refuse leave, or to refuse relief, where there has been "undue delay". Order 38(2) of the *Civil Procedure Rules* 1972 (Nauru) provides that leave will not be granted unless delay is accounted for to the satisfaction of the Registrar. Curiously, Order 38 Rule (2) only applies to certiorari

67 In her affidavit Celestine Buramen offers some explanation for her own failure to initiate an appeal against the 2001-2002 determinations of the Committee. In essence, she says that until she was served with documents in this case she had no knowledge, at all, that the Committee had made new determinations 16 years after the 1985 determinations. By implication, Ms Buramen purports to speak for all of the third defendants as to their collective ignorance of those matters.

68 Ms Buramen's assertion has not been tested, but it might not be surprising if the deponent and her family were unaware of the changed situation, because payments of royalties continued to be made to her family, rather than to the plaintiff, as though there had been no change in the position as at 1985. Furthermore, she says that she had no knowledge of the meetings held by the Committee in 2001 and she would not have been aware of the gazette notices because: "Those were years when government gazette notices were not distributed and had very limited circulation due to financial hardship of the nation".

69 On their face, those explanations for delay are credible and might justify leave being granted to seek judicial review. (Order 38 does not impose any requirement for leave with respect to commencing proceedings for a declaration, but delay would be a discretionary factor subsequently taken into account by the Court when considering whether to grant a declaration.

70 No pleadings are permitted in a suit for mandamus, prohibition or certiorari (Order 38 Rule 3(3)) but parties must be served with a statement of the grounds for relief, and affidavits verifying the facts on which the application is based. In the present case, however, were I to grant leave to the third defendants to commence proceedings by way of certiorari (or mandamus), the affidavit material now on file and the outlines of arguments advanced on behalf of the third defendants may well be sufficient to alert the other parties to the basis on which the relief is sought, but greater clarity is required as to the precise nature of the relief sought and against whom. [In an attachment to this judgment, and by way of guidance to pleaders and practitioners, I provide a precedent document for proceedings

– the requirement to satisfactorily explain delay is not imposed with respect to other remedies.

seeking a declaration in a public law case].[41]

71 In the event that third defendants issued an originating summons under Order 38 Rule 1(2), then the Nauru Lands Committee should be made a party to that proceeding. The summons should be served on all existing parties. Parties served must enter an appearance (Order 38 Rule 3(2).

72 However, while the third defendants might well decide to seek relief by way of certiorari, in addition to declaratory relief, I consider that I am in a position to give a ruling and (as later discussed and qualified) make an appropriate declaration concerning the validity of the 2001-2002 determinations, notwithstanding that the Committee is not a party to the present proceedings. I have heard argument on the question whether the Committee acted beyond power, but not as to whether or not I should exercise my discretion in favour or against making a declaration of invalidity of the 2001-2002 determinations.

73 In the event that representatives of the parties indicate their intention to seek relief or orders by way of certiorari, prohibition and/or mandamus, in addition to relief by way of declaration, I will, at an appropriate time, give directions and consider whether I should grant leave under Order 38 should that be required. It is appropriate that where leave was granted to commence proceedings for judicial relief by way of certiorari, prohibition and/or mandamus and the successful applicant also intended to seek relief by way of declaration, that should be drawn to the attention of the Court in the course of the Order 38 application. The Court granting leave should give directions to ensure that intended parties are notified not only of the grounds upon which relief by way of certiorari, prohibition or mandamus was sought but also as to the grounds for relief and precise terms of the proposed declarations. All such claims should be heard in the one proceeding.

74 Insofar as the 3rd defendants seek further relief by way of any additional declaration, that relief should be specified in the originating summons and the terms of the declaration should be spelled out[42]. Likewise, if any other party chooses to seek declaratory orders, the

[41] Taken from "*Perspectives on Declaratory Relief*", Eds, K Dharmananda and A Papamatheos, (2009), Federation Press, at 218-9.

[42] The practice of litigators postponing the drafting of the proposed declarations until after judgment has been entered, has been justifiably deprecated: see Richard Hooker "*Commentary*", in "*Perspectives on Declaratory*

terms of those orders should be spelled out by amendment to the existing pleadings.

75 Subject to any arguments to the contrary, I would then make an order consolidating the present civil proceeding with the proceeding by way of originating summons which the 3rd defendants or any other party might bring. In my opinion, the Nauru Lands Committee should be joined as a defendant to any proceeding seeking relief by way of orders for certiorari , prohibition or mandamus, or by way of declarations, seeking to overturn or stay decisions of the Committee. In *Akeidu Kepae & Others v Nauru lands Committee & Others*[43], Donne C.J. noted that it was the practice to join the Committee as respondent to an appeal under s.7, but he held that a tribunal such as the Committee had "no right of audience" on the appeal and that "the law neither allows nor requires the Tribunal to justify to the Appeal Court its decision".

76 His Honour noted that it was the practice of the Committee to provide a written advice to the Court as to its reasons for decision and, in addition, the Chairman would attend the Court to answer any questions raised. His Honour held, however, that only parties were entitled to be heard and the Committee could in no circumstances be heard as a party. I do not take his Honour to thereby disapprove the practice of the Committee being joined as a respondent to a s.7 appeal, and he did not address the practice that should be adopted in judicial review proceedings as to joining the Committee as a defendant.

77 I respectfully agree with Donne CJ that a tribunal which is subject to an appeal (and, I would add, to judicial review) will ordinarily be expected to simply abide by the decision of the Court, rather than "defend" its decision. In *R v ABT; Ex parte Hardiman*[44], the High Court, in a joint judgment, said:

> "There is one final matter. Mr Hughes QC was instructed by the Tribunal to take the unusual course of contesting the prosecutors' case for relief and this he did by presenting a substantive argument. In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent

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Relief", Eds, K Dharmananda and A Papamatheos, (2009), Federation Press, at 156.

[43] Land Appeal No 6 of 1997, Judgment delivered 4 May 2000.

[44] (1980) 144 CLR 13 at 35–6; 29 ALR 289 at 306

proceedings which take place if and when relief is granted. The presentation of a case in this court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal."

78 That strict rule is not inflexible. Although the defence of the tribunal decision is normally left to the party with an interest to do so, the High Court recognised[45] that where the attack on the tribunal decision raised questions about its jurisdiction, powers and procedures the tribunal could appear to make submissions in order to assist the court. If no party appears to argue in support of the tribunal decision it may be necessary for the tribunal to assist the court by presenting argument[46].

79 Thus, I respectfully agree with Donne C.J. that a statutory tribunal would be expected to submit to the decision of the appellate court, and would not seek to defend its decision, leaving that debate to the other parties. The sort of assistance that Donne CJ welcomed from the Committee would be best provided by the formality of it being a party to the proceedings. Indeed, in my view, s.6 envisages that the Committee would be be named as a party to an appeal, and it is no less appropriate if the proceedings are by way of judicial review or a claim for declarations. It is important that the Committee be available to correct misstatements about the history of the proceecings or the processes adopted by the Committee. That is best achieved if it is a party, not represented by a mere onlooker in the audience, to whom the court might or might not refer. It is now a requirement in Victoria, for example, that a tribunal be joined as a defendant, being identified by its title, rather than by naming the members of the Tribunal[47].

Was the Committee Functus Officio in making its 2001-2002 determinations?

80 *Minister for Immigration and Multicultural Affairs v Bhardwaj*[48] was a case where the Immigration Review Tribunal, by misunderstanding on its part, conducted a hearing in the absence of the person being investigated and published its reasons for decision. Later, upon learning that the party had intended to appear but was not notified of the hearing, the

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[45] 144 CLR at 35-36.
[46] *Custom Credit Corp v Lupi* [1992] 1 VR 99, at 112. See the discussion in "*Williams' Civil Procedure*", Order 56, at O 56.01.50, Lexis Nexis
[47] Order 56.01(2) *Supreme Court (General Civil Procedure) Rules* 2005.
[48] (2002) 209 CLR 597.

Tribunal conducted a further hearing, this time with the person present and represented. The issue was whether the Tribunal was empowered to conduct the second hearing. The High Court drew a distinction between circumstances where, on the one hand, a tribunal purported to reconsider a decision after having made a jurisdictional error when it first considered the matter and, on the other hand, where the first decision had not been tainted by jurisdictional error but the tribunal simply decided later that the decision, albeit made within jurisdiction, was wrong and should be reversed.

81 The distinction between jurisdictional and non-jurisdictional error was of critical importance in considering whether the tribunal was functus officio when it conducted the further hearing.

82 As Gaudron and Gummow, JJ. held:

> "...a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all. Once that is accepted, it follows that, if the duty of the decision-maker is to make a decision with respect to a person's rights but, because of jurisdictional error, he or she proceeds to make what is, in law, no decision at all, then, in law, the duty to make a decision remains unperformed. Thus, not only is there no legal impediment under the general law to a decision-maker making such a decision but, as a matter of strict legal principle, he or she is required to do so. And that is so, regardless of s 33(1) of the *Acts Interpretation Act*."[49]

83 However, as Nettle JA emphasised in *Kabourakis v The Medical Practitioners Board of Victoria*[50], Gaudron and Gummow JJ made it clear that the situation would have been different if it had been a case of non-jurisdictional error, because a decision affected by non-jurisdictional error remains for most purposes final and binding until set aside on appeal or judicial review. Thus, as their Honours held: " . .a decision which does not involve jurisdictional error and which is not challenged within 28 days is effective for all purposes notwithstanding that . . . it involves reviewable error"[51].

84 Hayne J held:

> "The error made by the Tribunal in this case must be contrasted with other, non-jurisdictional, errors that a decision-maker may commit. In particular, a jurisdictional

[49] At 616 [53]. That provision is close in terms to s.39 of the *Interpretation Act* 1972 (Nauru).
[50] [2006] VSCA 301 at [44], Warren CJ and Chernov JA agreeing.
[51] *Bhardwaj*, at 614 [50]

error of the kind made in relation to the September decision is fundamentally different from a case where, for whatever reason, a decision-maker has second thoughts about such matters as findings of fact. No doubt the word 'error' can be applied to the circumstances last mentioned, but the legal significance of such an error is, for the reasons given by Brennan J in *Attorney-General (NSW) v Quin*[52], radically different from the significance of a jurisdictional error. As his Honour said:

> 'The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power ... The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.'

An '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."[53]

85 The question whether a statutory tribunal can revisit a decision and make a new determination ultimately depends on the statutory language. Nettle JA held that:

> "Consequently . . . the question in this case comes down to whether the statute manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen. But as was also said in *Bhardwaj*, as a rule a statutory tribunal cannot revisit its own decision simply because it has changed its mind or recognises that it has made an error within jurisdiction".[54]

86 The Court of Appeal rejected the trial judge's conclusion that the High Court had accepted a watering down of the functus officio rule. Nettle JA explained the rationale as follows:

> "More often than not, the requirements of good administration and the need for people affected directly or indirectly by decisions to know where they stand mean that finality is the paramount consideration, and the statutory scheme, including the conferring and limitation of rights of review on appeal, will be seen to evince an intention inconsistent with capacity for self correction or non-jurisdictional error. In the bulk of cases, logic and common sense so much incline in favour of finality as to permit of no other conclusion".[55]

87 In concluding that the functus officio rule was more "flexible" with respect to administrative

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[52] (1990) 170 CLR 1 at 35-36
[53] At 645 [149], see too at 603 [8] per Gleeson CJ, and at 647 [159] per Callinan J.
[54] [2006] VSCA 301 at [48]
[55] [2006] VSCA 301 at [48]

tribunals Gillard, J., the trial judge in *Kabourakis*, noted[56] that in the *Bhardwaj* case Gleeson CJ quoted with approval what Sopinka, J. said, speaking for the majority of the Supreme Court of Canada, in *Chandler v Alberta Association of Architects*[57]. Gaudron and Gummow JJ also referred with approval to what was stated. Sopinka, J. said:

> "As a general rule, once (an administrative) tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd v J O Ross Engineering Corp*[58].
>
> To this extent the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of the Court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be re-opened in order to enable the tribunal to discharge the function committed to it by enabling legislation."

88 Several observations need be made about this passage.

89 In the first place, Gleeson CJ noted that Sopinka, J., speaking for the majority, accepted that the general rule was "subject to a power to correct a slip or an error of expression"[59]. Gleeson CJ did not expressly confine the range of such slips to those identified in the *Paper Machinery Ltd* case, cited by Sopinka, J. (nor did he or Gummow and Gaudron JJ. even include the reference to that decision in the extract of the judgment they respectively cited)

90 That was a case where a court judgment had been drawn up and entered, but it had omitted certain standard terms of orders in patent cases and had not referred to a concession of counsel that had a bearing on costs. The Court there held the power to amend a judgment, once entered, arose only "where there had been a slip in drawing it up, or where there had

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[56] [2005] VSC 493 at 13-14 [49]
[57] [1989] 2 SCR 848 at 862
[58] [1934] S.C.R. 186
[59] *Bhardwaj*, at 603 [7]

been an error in expressing the manifest intention of the court"[60]. The Court held that neither exception arose in that case. The High Court did not attempt to define or confine what constitutes a slip or correctable error, and I do not think they need be understood to be as restrictive categories as the Canadian case might suggest.

91 The second matter that arises from the passage by Sopinka J is that Gleeson CJ held that the circumstances in which Sopinka, J. accepted that the functus officio rule might less strictly applied were, first, where the tribunal had failed to discharge its statutory duty and, secondly, where the legislative scheme provided an indication that a decision could be re-opened in order that the tribunal could discharge the function imposed on it by the legislation. As Gleeson CJ said, any modification of the functus officio rule "must yield to the legislation under which a decision-maker is acting. And much may depend upon the nature of the power that is being exercised and of the error that has been made".[61]

92 Thirdly, I note that unlike the situation postulated by Sopinka, J., the right of appeal from a decision of the Nauru Lands Committee is not limited to a question of law, although there is a 21 day time limit. It may be doubted, therefore, whether the Nauru Lands Committee Act provisions should be regarded as providing "very limited rights of appeal" as Nettle JA described the *Bhardwaj* provisions[62].

93 Gummow and Gaudron JJ noted that the legislation imposed no restriction or time limit on a decision being challenged for jurisdictional error, but with respect to non-jurisdictional error it provided only limited grounds for appeal, and a 28 day time limit. Thus, they held, where the decision involved non-jurisdictional error, it was intended to be effective for all purposes once the time limit had expired, and notwithstanding that the decision involved reviewable error. In contrast, there was no time limit or restriction on judicial review for jurisdictional error.

94 The legislative scheme in the present case does emphasize the need for finality in the determination of land issues, but gives a very broad right of appeal. That might suggest that

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[60] *Paper Machinery Ltd v Ross Engineering Corp*, at 186.
[61] *Bhardwaj* at 603 [6]
[62] [2006] VSCA 301 at [49]

Parliament intended there should be more emphasis on the finality of the Committee's decision (since any slips or factual mistakes could be cured on appeal), or it might suggest that there would be less concern that slips and factual errors might be corrected without the need for a hearing of an appeal (especially when the correction in the Gazette would itself create a right of appeal if it was contentious). The latter view is to be preferred, in my opinion.

95 However, save for correcting a slip or error in expression[63] - an important concession to which I will return - *Bhardwaj* provides little support for the view that a tribunal, once it has delivered its decision and acted within jurisdiction, may self-correct its decision by making a further determination.

96 As the judgments in *Bhardwaj* emphasised, what is permitted of a tribunal must first and foremost be determined by reference to the legislation which empowers the tribunal. Gleeson CJ held[64] that two questions must be asked, first, has the tribunal discharged the functions committed to it by statute, and second, what does the statute provide, expressly or by implication, as to whether the tribunal, having failed to discharge its functions, may revisit the question. That analysis leads to a consideration of the terms of the *Nauru Lands Committee Act* 1956-1963. Does that legislation permit the Committee to re-consider its decisions, and in what circumstances might it do so?

97 Sections 6 and 7 do not expressly limit the Committee to one consideration and one determination of questions of ownership of a parcel of land. Section 39 of the Nauru *Interpretation Act* 1972 provides:

> "POWERS MAY BE EXERCISED FROM TIME TO TIME
> 39. Power given by any written law to do any act or thing, to submit to any act or thing or to make any appointment shall be capable of being exercised from time to time, as occasion requires, unless the context or the nature of the act or thing indicates a contrary intention."

98 The equivalent provision in the UK and Australia was considered in passing by the High Court but without resolving its significance. Gummow and Gaudron JJ held that the decision-

[63] In the *Paper Machinery* case the expression used was a slip or error "in expressing the manifest intention" of the court (or tribunal).
[64] *Bhardwaj*, at 603-4 [8]

maker was bound to hold the second hearing because he had made no decision at all to that point, so the provision was not relevant. Kirby J, in dissent[65], concluded that the section was irrelevant but said it did not authorise the tribunal to engage in a second hearing. Hayne J held that the tribunal performed its function only once, the first hearing not having constituted performance of its duty, at all. In *Kabourakis*, Nettle JA did consider the provision in depth and concluded that even if it did authorise the tribunal to add to, subtract from or reverse previous exercises of the power (which he left open) the provision could not authorise the tribunal to "annihilate" the effects of a previous decision delivered in a separate exercise of the power given by the Act[66]. He observed that if a tribunal could reconsider and change a decision once, why not twice or a dozen times?

99 It has been held in the Supreme Court of Nauru that the Committee does have power to correct slips, where the decision as recorded does not reflect what the Committee intended.

100 In *Nauru Lands Council v Eidawaidi Grundler and Others*[67], Thompson, C.J. dealt with a case where the published determination incorrectly referred to a portion of land that had the same name, but different owners, as to one they were intending to address. The Chief Justice held that once a decision was correctly published the Committee could not "normally" change its decision; parties must appeal in order to seek a correction.

101 On the other hand, Thompson, C.J. held, a decision based on fraud or in circumstances so grossly defective as to render the decision null and void, could be challenged. Likewise, he said, where the Committee has decided a matter "but has published that decision incorrectly", the publication can be corrected "at any rate, within a reasonably short time after the incorrect publication, so that it is published as it was actually made".

102 In the *Grundler* case, it was the NLC that sought orders quashing its earlier determination. Its attempt to publish a correction by way of a new determination had also failed due to further errors, and it sought an order that it be permitted to publish a new determination correcting its earlier errors. Thompson C J. drew this distinction:

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[65] *Bhardwa*j at 634 [113]
[66] [2006] VSCA 301 at [86]
[67] [1969-1982] NLR (A) 26; Misc Cause No 2 of 1975, Judgment 27 January 1975.

> "Whether the first two orders sought in this case should be made depends on whether the Nauru Lands Committee made, before it caused [the original gazette notice] to be published, the decision which it is now applying to have published or whether the decision published as that Gazette Notice was what the Nauru Lands Committee had decided at that time and the Committee has since changed its mind as to the correctness of that decision. If it is the former, the application should be granted; if it is the latter, the application cannot be granted".

103 In *Akamwarar v Eiraidongio*[68] Thompson, C.J. considered the case where the Committee acted upon an agreement unanimously reached by family members as to the distribution of an estate. Eight days later one of the beneficiaries approached the Committee and said she had changed her mind and wanted the issue re-opened. The Committee refused, saying that it had sent its decision for publication in the Gazette. Thompson, C.J. held:

> " . . .there must be a point of time when, the matter having been decided, it is unalterable except on the ground that an injustice has been done, e.g. because of coercion, undue influence or want of understanding. That point of time is clearly the moment when the Committee has made its decision and sent it for publication. At that stage the Committee has finished its duty in the matter and cannot properly re-open it except with the consent of all the parties concerned or on the order of this Court".

104 The power of an administrative tribunal to change a determination with consent of all parties or persons affected has been accepted elsewhere: *Re 56 Denton Road Twickenham*[69], cited with approval by Nettle JA in *Kabourakis v Medical Practitioners Board of Victoria*[70] . In the former case Vaisey J held that a decision or determination of a statutory body:

> " . . . made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot in the absence of express statutory power *or the consent of the person or persons effected* be altered or withdrawn by that body".[71] (My emphasis).

105 With respect to Thompson, C.J., however, I do not agree with his statement in *Akamwarar v Eiraidongio* that the Committee has necessarily concluded its function when it sends its determination for publication. There is often a very long gap between that step and the date of publication, sometimes years. The role given to the Committee involves it in a

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[68] [1969-1982] Nauru Law Reports, Part B, 29 at 31-32, Judgment 24 February 1971.
[69] [1953] 1 Ch 51 at 56-7
[70] [2006] VSCA 301 at [50], Warren, CJ and Chernov, JA agreeing.
[71] [1953] 1 Ch 51 at 56-7.

process that may take many meetings, over months, to resolve the relevant issues and make a determination. Provided that any further investigation or consideration of the issues was conducted with full notice being given to all interested parties, I would be inclined to the view that the Committee has not concluded its function until publication occurs. That would be consistent with the terms of s.7(1), which allows a right of appeal "against the decision", within 28 days "after the decision is given". The 28 day time limit has always been taken to run from the date of publication of the decision/determination in the Gazette. Were it otherwise, it would be extremely difficult in many cases to know when the decision was actually made by the Committee.

106 Indeed, the statement in *Akamwarar v Eiraidongio* is at odds with what Thompson, C.J. held in *Egadeiy Itsimaera v Eidwaidi Grundler & Others*[72], decided three years later. In the *Itsimaera* case he held:

> "In the same way, members of the Nauru lands Committee may agree on a decision and a minute may be made of it. But, if subsequently, before the decision is "given" i.e. published, any member considers that it should be altered and can persuade the other members accordingly, I can see no reason why the Committee should not alter it or abandon it and make a new decision . . .In my view the time at which a decision of the Nauru Lands Committee becomes unalterable (except with the consent of the parties or by this court on appeal) and is final and binding is when it is given, that is to say, when it is published in the Gazette"[73]

107 Thus, were the Committee to discover prior to publication that the parties had reached agreement to vary the distribution that had previously been agreed by interested parties, and determined by the Committee, or were it to discover that it had made an error by omitting or by its manner of identification of an intended beneficiary, I see no reason why the Committee, acting with procedural fairness to interested parties, could not modify its determination.

108 The manner in which the Nauru Lands Committee operates is very different to the conduct of tribunals with which the Australian courts are familiar, and consideration of the Nauru legislation must be read against that background and legislative understanding. Section 8 of the Nauru Lands Committee Act acknowledges that the Committee is "constituted in

[72] [1979-1982] Nauru Law Reports, Part B, 107, at 111, Land Appeal No 2 of 1974, Judgment 3 May 1974
[73] [1969-1982] NLR (A) 26; Misc Cause No 2 of 1975, Judgment 27 January 1975

accordance with the customs and usages of the aboriginal natives of Nauru". Those customs may be matters of dispute, and agreement as to their content may be slowly reached, and subject to continuing debate. Also, s.3 of the *Custom and Adopted Laws Act* 1971 provides that the institutions, customs and usages of Nauruans shall be accorded recognition by every court and have full force and effect in regulating matters, including "interests in land". Further, by s.5(1) the common law, statutes, rules, regulations and orders adopted from England have effect only so far as the circumstances of Nauru permit.

109 In my opinion, even after publication in the Gazette, the Committee could publish such a correcting determination where all interested parties consented to it doing so. Were that not possible, then if the "slip" was not discovered until after the 21 day time limit expired, an injustice which was recognised to be such by all interested parties, could not be corrected (unless, perhaps the original determination could be quashed on jurisdictional grounds, thus opening the matter to re-consideration). To deny the power of correction 'by consent' would be too high a price to pay for the principle of finality, although I acknowledge that were such a correction to be made, albeit by consent, a right of appeal would be available to someone who denied that he had consented to the correction.

110 But once the determination is published, can the Committee revisit its decision, so as to publish a new "correcting" or "amending" determination, which amounts to a reversal of its earlier decision, and where the decision is contentious? On the authorities discussed above, and subject to what I say below, the answer would seem to be "no". The Committee would be functus officio, unless it was responding to a consent agreement of all relevant parties. In so responding to a consent agreement, however, then in my view the re-opening of the matter would be authorised by s.39 of the *Interpretation Act*.

Was the Committee functus officio with respect to the 2001-2002 determinations?

111 Thus, having regard to the authorities that I have discussed above, there is a real prospect that I would conclude that the Committee was functus officio when it purported to make its 2001-2002 determinations. I will not, however, express a concluded view on that question, because the great majority of the authorities I have canvassed have not been considered by

the parties' representatives. They should be given an opportunity to address me on these important matters. Furthermore, I have regard to the fact that the plaintiff was an infant when the decision was taken by the Committee, deliberately or accidentally, to exclude him from any entitlement as a beneficiary in the estate. This question has not been addressed in argument before me on the preliminary issues.

112 The obligations imposed on the Committee were not merely to identify the land that formed the estate, but also the persons who should be named as beneficiaries. Arguably, the Committee had an obligation in 1985 to consider and assess the evidence supporting the then infant's claim to be a beneficiary, whether or not his mother sought to advance his claim[74]. These are questions that may require further evidence before answers might be confidently given. If the Committee failed to properly consider the plaintiff's claim, when he was an infant, it may be arguable that the Committee had not fully discharged its s.6 duty in 1985. That may well impact on the question whether it was functus officio in 2001-2002. I do not decide that issue, nor purport to express an opinion, since the issue was not canvassed by me with the parties.

113 There is another reason for delaying or avoiding ruling on the functus officio question. A finding that the Committee was functus officio might wrongly be taken to constitute a declaration of the court. That would not be so. Were I to find that the Committee's decisions in 2001-2002 were functus officio I might nonetheless, in the exercise of my discretion, decline to give relief by way of a formal declaration of the Court.

114 There may be a number of factors to be taken into account as to the exercise of the discretion to make a declaration. Among these are:

(a) The factor of delay;

(b) Whether the declaration would have utility (and whether other relief, by way of certiorari, mandamus or prohibition will be sought);

(c) The impact of such a declaration (or other relief) on the status of the 1985-1999

[74] The accuracy and reliability of the information referred to in paragraph [10] above, and the consideration given to it by the Committee, would be of particular relevance to these questions.

determinations.

Delay as a factor in the discretion whether to grant a declaration

115 The factor of delay is of particular importance in this case and I make a couple of observations, for the purpose of inviting consideration of these issues by the parties' representatives.

116 In England the factor of delay as a barrier at common law to relief by way of judicial review has been enhanced by statute, the *Senior Courts Act* 1981 providing that a court may refuse either to grant leave to commence proceedings or refuse the order sought if the grant of the relief "would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration".[75] Whatever may be the status, if any, of that legislation in Nauru, those principles appear to me to be relevant to the exercise of my discretion.

117 In highlighting the factor of delay, however, I note that the mere fact that the third defendants had not challenged the Committee's decisions of 2001-2002 by way of appeal (assuming, for this purpose that they knew of the determinations but chose not to challenge them) would not preclude them now arguing that the decisions were void or irregular[76].

An opportunity for negotiation or mediation?

118 It is possible for parties to resolve judicial review proceedings by reaching agreement as to appropriate orders. In England a Practice Statement[77] has expressly provided the procedure whereby such actions may be compromised, the court retaining a supervisory role, particularly where the proposed orders may affect third parties who had not been party to the proceedings.

119 In the present case, there is some evidence that the plaintiff's claims as to paternity had been acknowledged in the past by some at least of the beneficiaries named as third

[75] *Senior Courts Act* 1981 (formerly *Supreme Court* Act) s.31(6).
[76] *R v Jenner* [1983] 2 All ER 46; *Wandsworth London Borough Council v Winder* [1985] AC 461; see, too *Halsbury's Laws of England* , Statutes, Vol 44(1), Lexis Nexis, par 1358
[77] Practice Statement (Administrative Court: Uncontested proceedings), per Collins, J. Queen's Bench Division (Administrative Court) [2009] 1 All ER 651.

defendants. The plaintiff must have regard to the fact that the orders made in 2001-2002 face serious challenge as to their validity. However, were the 2001-2002 determinations to be declared void that would leave the 1985-1999 determinations, which the Nauru Lands Committee considered it had wrongly decided.

120 Assuming that the third defendants sought to quash the 2001-2002 determinations and by mandamus or prohibition sought to compel the Trust to act on the basis that the 1985-1999 determinations denied the right of the plaintiff to royalties, then the Court again has a discretion. In circumstances where granting a prerogative remedy might cause substantial hardship to third parties, or would be unduly detrimental to good administration, it may refuse to grant prerogative relief, at all, but instead might make a declaration, thereby vindicating the rule of law by pronouncing that a body has acted contrary to law, but not creating those unsatisfactory outcomes.[78]

121 A winner-take-all outcome, if achievable at all, is likely to be long delayed. The dispute between the plaintiff and the third defendants as to his paternity and as to the legitimacy of the 2001-2002 determinations intrudes on and delays resolution of the claim brought against the Trust, which is willing to recognise as beneficiaries whomsoever the Court identifies to be such.

122 This is a situation where all relevant parties should consider carefully whether compromise of the dispute between the plaintiff and 3rd defendants is possible. If so that would permit narrowing, and perhaps even resolving, of the issues to be addressed in the negligence claim by the plaintiff against the Trust and Curator. I encourage the parties to explore these matters. It may well be appropriate that the Nauru Lands Committee be joined as a party in order to facilitate such discussions.

Conclusions and Directions

123 I rule that the 3rd defendant is entitled to challenge the validity of the 2001-2002 determinations of the Nauru Lands Committee, and to do so in the course of the negligence

[78] *R (on the application of Gavin) v Haringey London Borough Council* [2003] EWHC 2591 [2003] All ER (D) 57 (Nov); *R v Lincolnshire County Council Ex parte Atkinson* (1995) 8 Admin LR 529; see generally *Halsbury's Laws of England*, Judicial Review Vol 6 (2010) 5th Ed, par 719.

action brought by the plaintiff. Whether that would be dealt with as a preliminary issue is a matter on which I would give directions as required, after hearing the parties.

124 If I ruled that the 2001-2002 determinations were ultra vires the power of the Committee I could grant relief to the third defendant by way of declaration to that effect. That is the only relief by way of judicial review currently, and definitely, sought by the 3rd defendants.

125 Whether I should make a declaration to that effect would be a matter for my discretion. I would hear submissions as to that question.

126 In the event that the third defendants or any other party now intends to seek prerogative relief, by way of certiorari, mandamus, or prohibition, leave to commence such proceedings by way of originating motion will be required under Order 38 of the Civil Procedure Rules 1972. Insofar as further directions are sought as to the material that must be provided to the Court and to other parties in support of such an application, a directions hearing to that end will be held by the Registrar prior to the next sittings of the Supreme Court or by a judge during the next sittings.

127 If any party seeks leave to issue proceedings by originating summons seeking relief by way of orders for certiorari, prohibition or mandamus, or proposes to claim relief in the existing proceedings by way of declaratory orders, the party must, with precision:

(a) Set out the grounds on which such relief or remedy is sought; and

(b) Where any mistake or omission is alleged in the decision or determination of the Committee, specify the mistake or omission;

(c) Set out the terms of any declarations that are sought and such other relief that is sought against any person or body;

(d) Must make, file and serve on the present or proposed parties an affidavit or affidavits in support of such grounds.

128 I direct that the plaintiff must join the Nauru Land Committee as a party to his proceeding, and set out in his prayer for relief the relief sought against the Committee.

If fresh proceedings by way of originating motion are issued, it is appropriate that those proceedings be joined with the present civil negligence proceedings. Application to that effect should be made to the Court by the party bringing fresh proceedings.

129 I will reserve all other issues, including questions of costs.

Dated the 6th day of May 2011

Geoffrey M Eames AM QC

Chief Justice

Public Law Pleading for Declaratory Relief

1. The plaintiff is the proprietor of Lot XXY on Plan XYZ ("**The Land**") in the State of Western Australia.
2. The plaintiff has conducted a business as a leather goods repairer and cobbler from premises on The Land, since around December 2004.
3. The defendant is the Minister for Lands, authorised under Part 9 of the *Land Administration Act 1997* (WA) to take land for public works in accordance with that Act.
4. The defendant, purporting to exercise its powers under section 170 of the *Land Administration Act 1997* (WA), issued the plaintiff with a notice of intention ("**The Notice**") to take The Land on 21 August 2008.
5. The Notice is invalid as it does not comply with the requirements of *Land Administration Act 1997* (WA), section 171.

Particulars

(i) The defendant intends to take The Land for the purposes of building a licensed dance venue named the "Paradise Nightclub".

(ii) The defendant wishes to operate the Paradise Nightclub through a trading corporation for profit.

(iii) A nightclub is not a 'public work' for the purposes of *Land Administration Act 1997* (WA), section 151(1) and *Public Works Act 1902* (WA), section 2.

6. By virtue of the matters pleaded above, the plaintiff will suffer loss and damage arising from the issuing of The Notice by the defendant.

AND THE PLAINTIFF CLAIMS:

1. Declarations that The Notice:
   a. by listing the Paradise Nightclub as the public work did not specify a 'public work' as defined by *Land Administration Act 1997* (WA), section 151(1) and *Public Works Act 1902* (WA), section 2; and
   b. is not a notice of intention to take land compliant with section 171 of the *Land Administration Act 1997* (WA) and is invalid.
2. Any other relief as this Honourable court sees fit.
3. Costs of these proceedings.