IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 3 of 2019
Supreme Court Civil Appeal Case No. 43 of 2016

BETWEEN

SOPHIE OPPENHEIMER TRADING AS CAPELLE & PARTNER AND PACIFIC OOCCIDENTAL OF EWA DISTRICT

APPELLANT

AND

DARREL TOM AND GIDEON BAGAGA OF EWA DISTRICT AND AIWO DISTRICT RESPECTIVELY AS REPRESENTATIVE OF THE LESSORS

FIRST RESPONDENT

AND	**PROPRIETORS AND LESSORS OF PORTION 13 DENIGOMODU DISTRICT**
	SECOND RESPONDENT
BEFORE:	**Justice R. Wimalasena, President** **Justice Sir A. Palmer** **Justice C. Makail**
DATE OF HEARING:	**30 July 2024**
DATE OF JUDGMENT:	**8 August 2024**
CITATION:	**Sophie Oppenheimer v Darrel Tom & Others**
KEYWORDS:	COURT OF APPEAL – Civil appeal – Appeal against dismissal of proceedings – Action for breach of contract – Breach of lease agreement – Lease agreement entered between parties without approval or consent of 75% of landowners and approval or consent of President – Effect of – Lease agreement null and void – Unenforceable – Lands Act, 1976 – Sections 3 & 6 STATUTORY CONSTRUCTION – Application and construction of statute – Purposive approach to interpretation – Requirement to obtain consent or approval of President to lease land – Recognition of longstanding practice to obtain consent or approval of 75% of landowners to lease land – Whether longstanding practice constitute custom and usage of

	Nauru – Lack of proof of longstanding practice being a custom and tradition of Nauru people – Land Act, 1976 – Sections 3 & 6
LEGISLATION:	Lands Act, 1976; Interpretation Act, 2011; Nauru Lands Committee Act, 1956
CASES CITED:	Hiram v. Solomon [2011] NRSC 25 (28th November 2011); Koroa v. Landowners of Portion 15 [2011] NRSC 22 (22nd November 2011); Deireragea v. Kun [2017] NRSC 35 (14th June 2017); Adumur v. Dongabir [2018] NRSC 40 (13th July 2018); Ramanmada Kamoriki v. Sharon Sio Kamorika and Others: Civil Suit No. 2 of 2017; Chalmers v. Pardoe [1963] FJUKPC 14 (21st May 1963); [1963] 1 WLR 677; Yanner, in the matter of an application under the Torres Straits Islander Commission Act, 1989 [2000] FCA 975; Wacando v. The Commonwealth (1981) 148 CLR 1; Hedmond v. Roland [1974] NRSC 2; Audoa v. Finch [2008] NRSC 2 (12th March 2008)
APPEARANCES:	
COUNSEL FOR the Appellant:	**Mr. E Soriano with Mr. V N Clodumar**
COUNSEL FOR the Respondent:	**Mr. D Aingemea with Ms. A Lekenaua**
COUNSEL FOR the Amicus Curiae:	**Ms. B Narayan**

JUDGMENT

1. This appeal turns on the threshold question of whether a lease agreement for a parcel of land in Nauru between two Nauruans is subject to:

   (a) consent in writing of the President of the Republic (*The President*); and

(b) consent of 75% of landowners of the land subject of lease.

2. This question arises from the construction of Sections 3 and 6 of the *Lands Act,* 1976 (*The Lands Act*).

3. The question of whether the appellant is entitled to an order for specific performance of the lease agreement or damages is dependent on the threshold question.

4. These questions arise from the decision of the Supreme Court of 17th June 2019 wherein the Supreme Court dismissed civil proceedings commenced by the appellant for failing to establish a legally binding lease agreement between the parties on the grounds that the lease agreement was in breach of Sections 3 and 6 of the *Lands Act.*

5. Before proceeding further, we would like to place on record that this is a rehearing of the appeal because at the time of the first hearing, her Honour Justice Dr. Bandaranayake was the Acting President of the Court of Appeal and presiding President of the Court. We would like to also place on record that at the rehearing, the Solicitor General was invited and did make submissions on the application of Section 3 of the *Lands Act,* for which we are grateful.

Background Facts

6. The Supreme Court succinctly outlined the background facts in its written judgment, and they are, respectfully, adopted as follows, on 15th May 2014 the appellant entered into a lease agreement (*lease*) with the landowners of Portion 13 Denigomodu District (*the second respondents*). Sean Oppenheimer signed the lease on behalf of the appellant as the managing director and affixed the Common Seal of Capelle and Partners Pacific and Occidental. Mr Ken Ageidu signed the lease on behalf of the landowners.

7. The purpose of the lease was two-fold:

   (a) To enable the appellant to temporarily lay down, devanning and transit of sea/shipping containers; and

   (b) For the parking of heavy equipment required for the operation on the site.

8. The lease referred to an approval by the President in the following terms:

"I approve this land lease agreement.
His Excellency, Hon. Baron Waga, MP
President."

9. Clause 2 of the lease made provision for the extension of the lease. Sub-clauses (a), (b) and (c) stated:

   (a) The initial term of the lease shall be for 18 months from May 2014, with the right to extend for a further 12 months subject to 2(c), and

   (b) A payment arrangement for the lease of the land as set out in Schedule 3; and

   (c) The lease shall be extended for another 12 months provided that mutual agreement for extension is obtained 1 month prior to the expiry of the initial term; and

   (d) Where an expression of interest to enter into a new lease after an extended term in Clause 2(c) above, the landlord shall in good faith accord the lessee the first preference.

10. Following the signing of the lease agreement, the parties also entered into a land management and service agreement.

11. The lease agreement expired on 15th November 2015 and the parties did not extend it, however, the appellant continued to pay rent to the second respondents.

12. On 1st June 2016 the first respondents as representatives of the landowners of Portion 13 entered into a land use agreement with Egigigu Holdings Cargo and Transport Services Inc (EHCTS (JV)) for a period of 5 years.

13. On or about 10th June 2016 the appellant's counsel Mr Clodumar, attended a meeting with the landowners of Portion 13. He was told by the landowners that they had entered into a lease with EHCTS.

14. On or about 12th June 2016 the appellant prepared an extension of the lease and submitted it to the second respondents for consideration.

15. On 10th June 2016 the appellant received a letter from one of the first respondents Mr Darrel Tom, advising it that the landowners of Portion 13 had entered into a lease with EHCTS.

16. On 17th June 2016 the plaintiff filed an application for *ex parte* injunction against the respondent and was granted an injunction by the Registrar, Mr F. Jitoko. Amongst other orders, the respondents, their servants and agents including the contracting partners were restrained from interfering with the appellant's peaceful enjoyment of the land.

17. Subsequently, the Registrar granted an application by EHCTS to join as a third party to the proceedings and following an inter parte hearing, on 10th August 2016, dissolved the interim injunction.

Decision of Supreme Court

18. As to the requirement to obtain consent of the President, it was put to the Supreme Court that according to the Preamble of the *Lands Act* the purpose of the Act was to regulate dealings with land in Nauru for the purposes of the phosphate industry and had no application to dealings in relation to land between Nauruans.

19. The Supreme Court accepted the submissions of the respondents that it was a requirement that the lease agreement between the parties must have the consent in writing of the President in accordance with Section 3(3) of the *Lands Act.* The Court concluded that the consent of the President was necessary to perfect the lease agreement.

20. In reaching this conclusion, the Supreme Court adopted the decision of the Privy Council in *Chalmers v. Pardoe* [1963] FJUKPC 14 (21st May 1963); [1963] 1 WLR 677. That was a case which considered Section 12 of the *Native Land Trust Ordinance* of Fiji. It was held that it was mandatory to obtain approval from the Native Land Trust Board in dealing with a leasehold land.

21. The Supreme Court noted that as the requirement to obtain consent of the President was analogous to the requirement to obtain approval from the Native Land Trust Board, it concluded that in the absence of an approval or consent from the President, the lease agreement was absolutely void and of no effect.

22. As to the requirement to obtain consent of 75% of the landowners, the Supreme Court referred to past decided Supreme Court cases in *Hiram v. Solomon* [2011] NRSC 25 (28th November 2011); *Koroa v. Landowners of Portion 15* [2011] NRSC 22 (22nd November 2011); *Deireragea v. Kun* [2017] NRSC 35 (14th June 2017); *Adumur v. Dongabir* [2018] NRSC 40 (13th July 2018) and *Ramanmada Kamoriki v. Sharon Sio Kamorika and*

Others: Civil Suit No. 2 of 2017 and concluded at [27] of the judgment that:

> *"As can be seen from the cases above that 75% or more of the landowners need to give their approval/consent to constitute the majority and once 75% give their consent/approval then it has the effect of binding the remaining 25%. This has been the practice in this country and that practice has to be followed to provide certainty and continuity, unless of course that practice is changed by legislature."*

Application of Sections 3 and 6 of the Lands Act and Chalmers v. Pardoe [1963] FJUKPC 14 (21st May 1963); [1963] 1 WLR 677

23. Ground one and Ground three of the supplementary notice of appeal canvassed the threshold question in these terms:

> *"1. That the learned judge erred in fact and in law when he determined at paragraph 31 of the judgment that section 3(3) of the Lands Act, 1976 applied to the Lease Agreement between the parties while ignoring the preamble of the Act.*
>
> *3. That the learned judge erred in law in adopting the reasoning of the Privy Council in Chambers v. Pardoe as the facts of that case differ significantly with the facts here and therefore each case would require the application of different legal considerations. In Chambers the Court dealt with legislation pertaining to leasehold interest. Here the interest of the Nauruan landowner is one of freehold."*

24. The learned counsel for the appellant advanced two grounds to support his contention that Section 3 and moreover, the entire *Lands Act* has no application to resolving the question of validity of the lease agreement. First, the Supreme Court disregarded the preamble of the *Lands Act.* If it did, it is plain from the words of the preamble that the *Lands Act* has no application to a dispute in relation to land between Nauruans. Secondly, even on the construction of Section 3 of the *Lands Act*, it will bear the same outcome.

25. The Court is fully conscious of its role to interpret statutes and not to go into the domain of the Legislature and legislate in the guise of interpreting the law (statutes). In the discharge of its interpretative function, it is given several options. In many jurisdictions, legislation has made provision for the different forms of statutory interpretation. One of

them is to interpret statute according to its purpose. In Nauru, a purposive approach to statutory interpretation is permitted by Section 49 of the *Interpretation Act,* 2011 which states:

"Interpretation to achieve purpose of law.

(I) In interpreting a written law, the interpretation that would best achieve the purpose of the written law must be preferred to any other interpretation.

(2) This section applies whether or not the purpose of the written law is expressly stated in the written law."

26. In contending against a purposive construction of the *Lands Act,* the learned counsel for the respondents cited the judgment of Dowsett J in *Yanner, in the matter of an application under the Torres Straits Islander Commission Act,* 1989 [2000] FCA 975 where it was held that the preamble provides the context and not the authority *per se* to construe a statutory provision.

27. The learned counsel contented that while the preamble of a statute is a useful aid to statutory interpretation, as Dowsett J in *Yanner* reinforced Gibbs CJ's observation in *Wacando v. The Commonwealth* (1981) 148 CLR 1 at 15 *"if the words of the section are plain and unambiguous their meaning cannot be cut down by reference to the preamble."*

28. To reinforce this proposition in *Yanner,* the learned counsel cited the statement by Mason J at 23:

> *"It has been said that where the enacting part of the statute is clear and unambiguous it cannot be cut down by the preamble. But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object."*

29. The learned counsel contended that in the present case, it is not necessary to refer to the preamble because Section 3 of the *Lands Act* is plain and unambiguous. From the words of Sub-section (3) it is plain and obvious that the lease agreement is subject to consent of the President. Where no approval or consent is given by the President, Sub-section (4) is quite clear; the lease agreement is absolutely void and of no effect.

30. We acknowledge the helpful submissions of the learned counsel for the parties and the Solicitor General. We accept the proposition advanced by the learned counsel for the respondents that the starting point for statutory interpretation is by reading the provision of the statute to ascertain its meaning. Where the provision is *"clear and unambiguous it cannot be cut down by the preamble"*, nor would it be necessary to refer to the preamble to ascertain the meaning of the provision. However, where the words of the provision are ambiguous, it is open to resort to the preamble of the statute to ascertain the meaning of the provision.

31. It is then necessary to first establish whether Section 3 is clear and unambiguous. Section 3 states:

> *"PROHIBITION OF CERTAIN TRANSFERS, ETC OF LAND*
>
> *(1) Transfer inter vivos of the freehold of any land in Nauru to any person other than a Nauruan persons [is] (sic) prohibited, [and] (sic) any such transfer or purported transfer, or any agreement to execute any such transfer, shall be absolutely void and of no effect.*
>
> *(2) Any person who transfers, agrees attempts or purports to transfer, the freehold of any land in Nauru to any person other than a Nauruan person is guilty of an offence and is liable to imprisonment for six months.*
>
> *(3) **Any person** who, without the consent in writing of the President, transfers, sells or leases, or grants any estate or interest in, **any land** in Nauru, or enters into any contract or agreement for the transfer, sale or lease of, or for the granting of any estate or interest in **any land** in Nauru, is guilty of an offence and is liable to a fine of two hundred dollars.*
>
> *(4) Any transfer, sale, lease, contract or agreement made or entered into in contravention of the last preceding subsection shall be absolutely void and of no effect.*
>
> *(5) Any transfer, sale, lease, contract or agreement made or entered into in contravention of section 3 of the Land Ordinance 1921-1968 shall continue to be absolutely void and of no effect.*
>
> *(6) For the purposes of this section the expression "transfer inter vivos" includes transfer to a corporation or an unincorporated body of persons and the expression "a Nauruan person" does not include a corporation or an unincorporated body*

of persons of whom some ate not Nauruans." (Underlining and bold print added).

32. In the case of the term *"Any person"*, the learned counsel for the appellant contended that it means a Nauruan. Adopting this meaning would also be consistent with Subsection (1) where it refers to a Nauruan. It would follow that Section 3(3) does not apply to a Nauruan who *"transfers, sells, or leases, or grants any estate or interest in, any land in Nauru, or enters into any contract or agreement for the transfer, sale or lease of, or for the granting of any estate or interest in any land in Nauru* .... to another Nauruan.

33. On the other hand, Section 3(3) will apply if a Nauruan *"transfers, sells, or leases, or grants any estate or interest in, any land in Nauru, or enters into any contract or agreement for the transfer, sale or lease of, or for the granting of any estate or interest in any land in Nauru ...."* to a non-Nauruan.

34. In summary, the appellant submitted that in a case where a Nauruan transfers, sells, or leases, or grants any estate or interest in any land in Nauru or enters into any contract or agreement for the transfer, sale or lease of or for the granting of any estate or interest in any land in Nauru to another Nauruan, the requirement to obtain consent of the President does not apply.

35. In relation to what the term *"Any land"* entails, the learned counsel contended that it refers to freehold land because land in Nauru is one of freehold. The learned counsel for the respondents did not contest this proposition but pointed out that the lease agreement and land use management agreement clearly show that the interest in the subject land is one of a lease, that the lease agreement was purely for business purposes between the parties where an offer, acceptance and consideration in the form of a rental fee are present thus, rendering it subject to consent of the President.

36. The Solicitor General's submissions supported and reinforced the view that Section 3(1) and (2) outrightly prohibits transfer of land in Nauru to a foreigner. Hence, in this case, the issue of obtaining consent of the President to transfer land does not arise at all. On the other hand, Section 3(3) allows for transfer of land but only with the consent in writing of the President. This provision cannot be referring to transfer of land to a foreigner since Section 3(1) and (2) already prohibits it.

37. According to the Solicitor General, it will follow that the only clear and logical effect of Sections 3(1), (2) and (3) is that transfer of land from a

Nauruan person to a foreigner is prohibited, whereas transfer of land between Nauruan persons are allowed, but with the consent in writing of the President. In the same way, a lease of the land between Nauruan persons is allowed under Section 3(3), but only with the consent in writing of the President.

38. We have carefully considered these submissions and we agree with the submissions of the respondents and the Solicitor General. We are of the view that on a plain reading of Section 3(1), it prohibits a Nauruan from *"Transfer[ing] inter vivos of the freehold of any land in Nauru to any person other than a Nauruan persons....."* Where a Nauruan does so, *"any such transfer or purported transfer, or any agreement to execute any such transfer, shall be absolutely void and of no effect."*

39. Moreover, Section 3(2) makes it an offence for *"Any person who transfers, agrees attempts or purports to transfer, the freehold of any land in Nauru to any person other than a Nauruan person....."* The penalty for this offence is *"imprisonment for six months."*

40. By Section 3(1) and (2), it is abundantly clear that transfer *inter vivos* of the freehold of any land in Nauru between Nauruans is permitted. On the other and, any transfer of the kind referred to above between a Nauruan and non-Nauruan is prohibited.

41. Given this, we are of the further view that there is no ambiguity in the language of Section 3(3). First, while it refers to *"Any person"* it is a generic term. It refers to a Nauruan or non-Nauruan. Secondly, the expression *"any land in Nauru"* is also a generic term. It is used as a general description of land, for example, land may be freehold or leasehold.

42. For these reasons, as was held in *Yanner "if the words of the section are plain and unambiguous their meaning cannot be cut down by reference to the preamble...."* And it is not necessary for us to consider the Preamble of the *Lands Act* to ascertain the meaning of Section 3(3).

43. As the learned counsel for the appellant correctly referred to the statement by the Court in *Hedmon v. Roland* [1974] NRSC 2 where the Court said this of the *Lands Ordinance* 1921, which the *Lands Act* replaced:

> *".....[it] was obviously intended in 1921 to facilitate the operation of the phosphate industry by the British Phosphate Commissioners. If section 3 did incidentally afford protection to the Nauruans, that was not its main purpose....."*

44. In the present case, the appellant entered into a lease agreement with the landowners of the second respondent to lease Portion 13 at Denigomodo District. What the parties did is consistent with Section 3(3). As the learned counsel for the respondent submitted the lease agreement was purely for business purposes between the parties where an offer, acceptance and consideration in the form of a rental fee are present However, there is a condition which parties must satisfy for the lease agreement to be valid and binding. It must have the *"....consent in writing of the President....."*. The lease agreement made provision for approval by the President, but it was not signed by the President.

45. According to Section 3(4) *"Any transfer, sale, lease, contract or agreement made or entered into in contravention of the last preceding subsection shall be absolutely void and of no effect."* Here, the lease agreement would be defined as a "lease" and as it was entered between the parties without the consent in writing of the President, it is absolutely void and of no effect.

46. As was observed by the Supreme Court in *Hedmond v. Roland,* the written consent of the President acts as a protection to Nauruans from land exploitation. It is the ultimate duty by the Republic to its people. In Fiji, a similar protection is found in Section 12 of the *Native Land Trust Ordinance.* It was highlighted by the Court in *Chalmers v. Pardoe.* The Supreme Court adopted *Chalmers v. Pardoe* to reinforce its conclusion. In that case, the Privy Council dismissed an appeal from the Court of Appeal after holding that Section 12 of the *Native Land Trust Ordinance* of Fiji prohibited any dealing with land unless approval was obtained from the Native Land Trust Board. No approval was obtained and the dealing with land in the form of construction of six more buildings on the land was declared unlawful. We find this case directly on point and reinforced the conclusion of the Supreme Court.

47. For the foregoing reasons, we uphold the conclusion reached by the Supreme Court that it is necessary for the parties to the lease agreement to obtain consent of the President. Further, in the absence of a consent in writing of the President, the lease agreement is absolutely void and of no effect.

Consent of 75% of Owners of Land

48. We now turn to consider Section 6 of the *Lands Act.* Section 6 provides for the requirement to obtain consent of 75% of landowners of the land subject of the lease. It states:

"6. Where the owners of any land have been notified by the Minister under section 5 of any such requirement as is referred to in that section and not less than ***three-fourths of the owners of that land****, both by number and by interest in the title thereto, have executed the instrument granting the lease, easement, wayleave, other right or licence, as the case may be, required, then, if any of the other owners of that land refuses or fails to execute that instrument or is unable by reason of absence from Nauru or physical or legal disability to do so, the Minister shall inform the Cabinet thereof and if the Cabinet is satisfied –*

(a) that the lease, easement, wayleave, other right or licence is required for a public purpose; and

(b) that the refusal or failure of that owner to execute the instrument is unreasonable or, in the case of a person who is absent from Nauru or under a disability, that if he were present in Nauru or not under a disability his refusal or failure to execute the instrument would be unreasonable,

it may direct that the instrument is to be executed on behalf of that owner by the public officer nominated under section 15; and the Secretary to the Cabinet shall forthwith send to the public officer nominated under section 15 to execute the instrument or instruments of the class of the instrument a notice in writing under his hand requiring him to execute the instrument on behalf of that owner." (Underlining and bold print added).

49. Significantly, Section 6(1) refers to Section 5 of the *Lands Act.* The heading of Section 5 is *"Leasing, etc., of land for Public Purposes".* Sub-section (1) of Section 5 states:

"Where the Council, the Corporation or any other statutory corporation requires to obtain for the purpose of the ***phosphate industry*** *or for* ***any other public purpose*** *a lease of any land for a period not exceeding seventy-seven years.....it shall inform the Minister in writing of its requirement and of the reason for it."* (Underlining and bold print added).

50. The operating words in Section 5(1) are "phosphate industry" and "any other public purpose". These terminologies reappear in the subsequent Sub-sections of Section 5. In Sub-section (2) where the Minister is satisfied that the Council, the Corporation or any other statutory corporation require the land for the purpose of the phosphate industry or

for any other public purpose, as the case may be, he may notify the owners of the land and request them for the use of the land. Finally, Sub-section (3) refers to the same process of notification and request by the Minister to the owners of the land to obtain land to lease for any public purpose in the case of the Republic.

51. When Section 5 and Section 6 are read together, two significant features are unmistakably apparent:

51.1. Where the Minister is satisfied with the request for the use of the land, he is required to notify the owners of the land of the request by the Council, the Corporation, or any other statutory corporation or the Republic to obtain the land for use. There is no mention of a private entity such as a corporation, or company or private individual in this process of acquisition of land. This is reinforced by the definition of a Corporation or statutory corporation in Section 2 of the *Lands Act.* A Corporation is defined as the Nauru Phosphate Corporation and a statutory corporation is defined as a corporation incorporated by or under any written law of Nauru and wholly-owned by the Republic or the Council; and

51.2. The request for use of land by the Council, the Corporation, or any other statutory corporation or the Republic is for the purpose of either the phosphate industry or for public purpose. The converse of that is, there is no mention of use of land for private purposes.

52. When one reads the subsequent provisions from Section 7 to Section 17, they deal exclusively with matters of the phosphate industry or public purpose. For example:

52.1. Lease of phosphate-bearing land, non-phosphate-bearing land or worked-out phosphate-bearing land to the Republic under Section 7.

52.2. Lease of land to the Corporation for the mining of phosphate under Section 8.

52.3. Payment of surface rights capital payment or advance cash royalty for phosphate to the lessor for the lease of the phosphate-bearing land by the Republic, the Council or any statutory corporation under Section 9.

52.4. Payment of rent to the lessor for the lease of the non-phosphate-bearing land or worked-out phosphate bearing land or phosphate-

bearing land by the Republic, the Council or any statutory corporation under Section 10.

52.5. Payment for easement, wayleave, a similar or analogous right, or a licence to remove sand to the grantor by the Republic, the Council or any statutory corporation under Section 11.

52.6. In order to remove sand, a further payment of compensation for leased land, easement, wayleave, a similar or analogous right, or a licence for removal or use of trees and vegetation to the lessor or grantor, as the case may be, by the Republic, the Council or any statutory corporation under Section 12.

52.7. Payment for removal of sand for the lease of any land and a licence to enter and remove sand to the lessor or holder of the licence, as the case may be, by the Republic, the Council or any statutory corporation under Section 13.

52.8. Payment of royalty to the lessor for removal of coral or limestone for lease of any phosphate-bearing land or any land since 1st February 1968 by the Republic, the Council or any statutory corporation under Section 14.

52.9. Nomination of a public officer by the Minister to execute lease under Section 15.

52.10. Revision and publication of amounts of rent, compensation etc, by the Cabinet under Section 16.

52.11. Payment of all moneys as rent royalty, compensation or surface rights capital payments shall be paid from the Treasury Fund under Section 17.

53. To construe Sections 5 and 6 as applying to land used for "phosphate industry" or "any other public purpose" supports the view that where land is sought for leasing for private purpose or use between private persons or private entities whether incorporated or unincorporated, the requirement to obtain consent of 75% of the owners of the land is not necessary.

54. The other view which the Supreme Court preferred is that it has been recognized that land tenure system of Nauru is based on communal ownership and given its importance, it has been a long-standing practice that it is necessary to obtain consent of 75% of owners of land to show that majority of owners of the land agreed to lease any interest in land to another. The practice to obtain consent of 75% of owners of the land

under Section 6 was adopted to form the evidence of the consent of the majority owners of the land to lease any interest in land between Nauruans.

55. Several Nauru Supreme Court decisions have recognized this long-standing practice. Some of them were cited in the judgment of the trial judge. We consider it useful to comment on them. In *Audoa v. Finch* [2008] NRSC 2 (12th March 2008) it will be noted that obtaining consent or approval of owners of land was a moral and legal obligation bestowed on owners of land in Nauru to observe. That was a case where there was a dispute between two branches of the same family over a portion of land. On the land was a house. The house was demolished pursuant to the direction of the defendant. It was not disputed that both sides owned the land. It was also not disputed that the defendant did not seek the consent of the plaintiffs before having the house demolished. The issue was whether Mrs Dick should have consulted the other owners before asking the defendant to demolish the house. Milhouse CJ observed that *"The whole ethos of Nauru is toward consideration for the feelings and rights of others. The institutions of the country are based on that ethos"* His Honour concluded that *"It is more than moral obligation. It should be and is a legal obligation as well"*.

56. In *Hiram v. Solomon* [2011] NRSC 25 (28th November 2011) the Court adopted the practice of obtaining consent of 75% of landowners in a case where occupation of a house on a portion of land was in dispute. In that case the plaintiff was one of the landowners of the land on which a house was located. The plaintiff's daughter who was married to the first defendant moved into the house with her family. The landowners agreed to give the house to the plaintiff's daughter and the first defendant to occupy. They signed an agreement. The house was dilapidated and after renovating it, the plaintiff's daughter then leased it to the second defendant for rent. When she died, the plaintiff asked the first defendant to share the rent money, but he declined. She sued the defendants for the rental money and right to the house. One of the signatories to the landowner agreement was purported to be that of the plaintiff. The plaintiff denied that it was her signature and alleged that her signature was forged. The Court was not satisfied that the plaintiff's signature was forged and dismissed the action.

57. In *Anita Koroa v. Landowners of Portion 15* [2011] NRSC 22 (22nd November 2011) per Eames CJ, that was a case where the plaintiff sought a declaration and damages on the grounds that the defendant landowners of a portion of land granted to her possession of a residential property. However, it was found that the purpose for the lease was changed from one of having accessibility to electricity to one of occupation of the land

for herself. She then leased the property to the Australian Department of Foreign Affairs and Trade (DFAT). The Court held that the change in the use of the property was without the consent of the landowners.

58. In *Francis Deireragea v. Janci Kun* [2017] NRSC 35 (22nd November 2011) the Court appeared to reject the notion that a landowner may unilaterally authorize use of the land to another. That was a case where a building on a portion of land known as "Atomo" in Yaren District was used by the defendants to operate a betting shop. The plaintiff alleged that the defendants trespassed on the land and building because they did not obtain the consent of 75% of the landowners to occupy the building. Amongst other reasons, the defendant opposed the action for trespass and claimed that they were able to use the land and build the house through their late mother who was a landowner and a Rev. Roger Mwareouw, also a landowner. The Court held that the plaintiffs established that the defendants did not obtain approval from majority of the landowners to operate the betting shop. His Honour Crulci J referred to Section 6 of the *Land Act,* 1976 and observed that:

> *"49.....where section 6 refers to a requirement of 'not less than three fourths of the owners of the land' needing to give their permission in respect of granting of a lease or other licence, as the basis for consolidating the legal requirement that three-fourths or 75% of the landowners need to agree in relation to the land.*
>
> *50. Therefore, Rev. Roger Mwereouw cannot of his own volition permit the Defendants to use, built upon, conduct a business or otherwise exercise rights over land Portion 84 unless he speaks for 75% of the landowners of the land".*

59. In *Adumur v. Dongabir* [2018] NRSC 40 (13th July 2018) a decision by Jitoko CJ, his Honour rejected the notion that surviving beneficiaries may rely on an agreement between the deceased and landowners of portions of land to build a new house on one of the portions. That was a case where the building built by the plaintiffs' grandfather was razed by fire. The plaintiffs and the defendants were owners in common of both portions of land. The plaintiffs decided to build a new house. The Court acknowledged the concept of common ownership in the context of rights of inheritance in this way:

> *"It is a common expectation and accepted practice through the years on the island, that a landowner who has legitimately built on a portion of land communally owned with others can pass on the right in continuing to occupy the land to his/her beneficiaries. There is this fallacious presumption in law that the beneficiaries*

have not only inherited the deceased's shares in the land but also the right to the continuing occupation of the land upon which the house stands to the exclusion of all other landowners."

60. The Court concluded that:

> *"Family agreement only endows the recipient to the right over the land portion given him and to no other. The successor, as beneficiary to the deceased's estate should, in fact and in law, seek a new approval of the majority of the other landowners, in order to continue to live in occupation of the land and the house built on it by his/her benefactor."*

61. It is abundantly clear from these cases that the Supreme Court has consistently adopted the 75% referred to in Section 6 as a threshold limit for majority of landowners to consent to a grant of a lease or license over land to another Nauruan. The view expressed by the Supreme Court favoured the respondents, and they took that up in this appeal because it further strengthened the trial judge's finding that only 64.20% of the landowners gave their consent and the appellant failed to meet the threshold limit of 75%, hence the lease agreement is void, and of no effect and unenforceable.

62. However, in our respectful view, while we acknowledge that tradition and custom of Nauru people recognize and respect the practice of family agreement, there is no evidence preferably from a Nauru elder who is well versed with the customs and traditions of Nauru people to substantiate that it has been a customary practice and tradition of the Nauru people from time immemorial to obtain 75% of consent of owners of land to grant a lease or license over land to another Nauruan.

63. According to Osborn's Concise Law Dictionary 9th ed Sweet and Maxwell (2001) at 121, custom is defined as *"A rule of conduct, obligatory on those within its scope, established by long usage. A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to statute law, though it may derogate from common law."*

64. As to usage, Osborn's Concise Law Dictionary (supra) at 394-395 defines it as *"An established uniformity of conduct of business with regard to the same act or matter. A usage may harden into custom."*

65. What is apparent from the material is, this long-standing practice of 75% consent appeared to have been developed from the time Section 6 of the *Lands Act* came into force. Going back further in time, we note that 75%

is not expressed in Section 5(2) of the *Lands Ordinance* 1956 as the forerunner of the *Lands Act* (which repealed Section 5 of *Lands Ordinance,* 1921-1956). Additionally, the Supreme Court decisions we have highlighted above were post the *Lands Act* and reinforces the view that this long-standing practice of 75% consent would not meet the test of time immemorial to constitute a customary practice and tradition of the Nauru people.

66. On the other hand, as the Supreme Court correctly held, it has been a longstanding practice in Nauru. The Court's finding reaffirms the earlier Supreme Court decisions which we have highlighted above where none of them stated that the longstanding practice of obtaining consent of 75% of owners of land is a custom and tradition in Nauru. That said, there is no question that the Nauru people recognize and respect the practice of family agreement to maintain and strengthen peace and harmony in the society. In our respectful view, the longstanding practice of obtaining consent of 75% is nothing more than a practice of convenience. As Jitoko CJ in *Adumur v. Dongabir* (supra) observed:

> *".....the court is minded to remind the parties, especially the defendants, of the time-honored tradition and custom of the Nauru people that recognize and respect the practice of family agreement, informal and unpublished they maybe at times, as a guiding instrument in the orderly and peaceful sharing and allocation of priority both real and personal amongst the family members on Nauru. It is a devise that has served the landowners faithfully in the past to ensure and protect the peaceful co-existence of the people on the island."*

67. In the present case, the lease of the land was between a Nauruan (Nauruan entity) and group of Nauru landowners and was for a purpose other than phosphate industry or other public purposes. In our respectful view the requirement to obtain consent of 75% of owners of the land stipulated in Section 6 of the *Lands Act* does not apply. In holding a contrary view, this is where the trial judge erred.

68. It is understandable that the outcome is different to the one reached by the Supreme Court. It is clear that the Supreme Court was persuaded by past Supreme Court precedents which held a view that it is a requirement to obtain consent of 75% of the owners of the land and what appeared to be *"the practice in this country and that practice has to be followed to provide certainty and continuity, unless of course that practice is changed by legislature."* The Supreme Court has made a legitimate observation worthy of the Legislature's consideration.

69. With respect, we also make the same observation here because it is important for certainty and clarity in the future. As a way forward, we suggest that the Legislature consider adopting the requirement to obtain consent of 75% of owners of land or any percentage it may deem appropriate after proper and adequate consultation with the Nauruan people and other stakeholders. This will give it a statutory basis and it be taken up sooner than later.

Breach of Lease Agreement

70. The lease agreement was subject to statutory approval under Section 3(3) of the *Lands Act*, and no approval was given. In the result, it is absolutely void and of no effect and it is not necessary to consider the question of whether specific performance of the lease agreement or damages is appropriate.

Conclusion

71. We have found that the lease agreement was subject to consent in writing of the President under Section 3(3) of the *Lands Act,* and it is null and void because it did not meet this statutory requirement. In the case of obtaining consent of 75% of owners of the land in dispute under Section 6 of the *Lands Act,* we have found that it is not necessary, and the Supreme Court erred in holding a contrary view. Given this, the appeal will be upheld in part and each party will bear its own costs of the appeal.

Order

72. The final terms of the order of the Court are:

    1. The appeal is upheld in part.

    2. The appeal against the judgment of the Supreme Court in holding that the lease agreement is absolutely void and of no effect for failing to obtain consent of the President under Section 3(3) of the *Lands Act,* 1976 is dismissed.

    3. The appeal against the judgment of the Supreme Court in holding that the lease agreement is in breach of Section 6 of the *Lands Act,* 1976 for not having tbe consent of 75% of owners of the land is upheld.

4. Each party shall bear its own costs of the appeal.

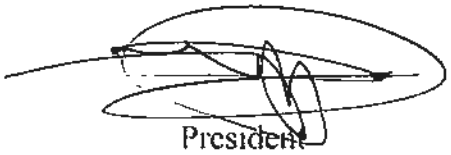
Dated this 8 August 2024

Justice Colin Makail

Justice of Appeal

Justice Rangajeeva Wimalasena

I agree



President

Justice Sir Albert Palmer

I agree

Justice of Appeal