IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Land Appeal No.22 of 2010

Between:

IVAN-HOE DANIEL, RUVAE DANIEL,
JOHN-WARRE A DANIEL, PAUL RENZO,
SONIA GARABWAN and the Estate of CYNTHIA GADABU

Appellants

V

TYRAN CAPELLE
(as representative of the Estate of the late ENNA GABADU)

1st Respondents

And

NAURU LANDS COMMITTEE

2nd Respondent

JUDGE:	EAMES, C.J.
WHERE HELD:	Nauru
DATE OF HEARING:	15 March 2011
DATE OF JUDGMENT:	6 May 2011
CASE MAY BE CITED AS:	Ivan-Hoe Daniel & Others v Capelle and NLC
MEDIUM NEUTRAL CITATION:	[2011] NRSC 6

Land appeal - *Nauru Lands Committee Act* 1956-1963 ss.6, 7 - *Administrative Order No 3 of 1938*, pars 3(a) and (b) - Determination in 2008 omitted certain land said to be owned by intestate deceased - Determinations in 2010 and 2011 purported to "correct" omission - Whether omitted land was properly part of the estate of deceased - Meaning of "returned" in 3(b) - Whether Nauru Lands Committee has power to "correct" errors and omissions - Determinations in 2010 and 2011 considered to be mere administrative corrections and signed by chairperson of Committee, without authorization from a meeting of Committee - Chairperson not party to 2008 decision but had interest as beneficiary in the estate - Determination void - Whether Committee empowered to hold new family meeting and to make a determination as to the competing interests in the land.

APPEARANCES:	Counsel
For the Appellant	Mr Pres Nimes Ekwona (Pleader)
For the 1st Respondent	In person
For the 2nd Respondent	Mr D Lambourne

CHIEF JUSTICE:

1. This is a land appeal concerning distribution of the estate of Birimad Akoga Gadabu ("Akoga") as published by determination of the Nauru Lands Committee in Gazette Notice Number 374/2010 on 28th July 2010.

2. The estate of Akoga comprised land inherited from his father, Raymond Gadabu, and land from the estate of Eirao Daniel who was the mother of the first named appellant and his siblings. Akoga Gadabu inherited property from Eirao Daniel by virtue of having been adopted by Eirao Daniel according to Nauruan Custom.

3. The Committee met on the 12th January 2004 and 24 February 2005 to determine the distribution of the estate of Akoga and also the estates of Ephraim Gadabu, the brother of Akoga, and Enna Gadabu, the mother of Akoga. Akoga had been married but died without children.

4. Darrell Gadabu, who was the brother of Ephraim and Akoga, advised the Nauru Lands Committee that Akoga's estate should be registered under the estate of his late mother, Enna Gadabu, and thereafter Akoga's estate would pass to himself and his siblings as part of his mother's estate. The Committee accepted that that approach would be in accordance with regulation 3(b) of *Administration Order No. 3 of 1938* and would also allow time to the siblings of Akoga to determine how the estate should be distributed.

5. In accordance with the wishes of the siblings of Akoga, the Nauru Lands Committee made a determination that the estate of Akoga should wholly pass to the estate of his mother, Enna, and by Gazette Notice 109/2008 sought to give effect to that determination.

6. It appears that the Nauru Lands Committee or one or more of its members subsequently decided that the determination of 109/2008 was in error because it had not stated that the estate of Akoga included land which he had inherited from Eirao and which, as the adopted son of Eirao, he shared with the natural children of Eirao, who are numbered among the appellants. The fact that Akoga had gained such an interest in the land of Airao had been confirmed by an earlier determination of the Committee published in GNN 316 of 1989 on 27 September 1989 and was acknowledged in the minutes of the meeting of the Committee on 24 February 2005.

7. In order to correct its failure to have included in Akoga's estate the land inherited by him from Eirao, the Committee purported to publish an amending determination in Gazette No. 374/2010, on 28 July 2010. That determination had been signed by the then Chairperson of the Committee, Mrs Tyran Capelle. She had not been a member of the Committee in 2008, but was appointed Chairperson on 1 December 2009. She signed the 2010 determination in the belief that it was a mere administrative correction of a slip made by the earlier Committee in publication of G.N.N 109/2008. Mrs Capelle regarded this as just one of the

jobs that she had inherited as part of the workload taken over from previous Committee members. There had not been a meeting of the Committee under Mrs Capelle to discuss what was intended to be done by way of a correcting determination, and there are no minutes explaining the decision of the Committee.

8. In the event, the attempt to correct matters by G.N.N 374/2010 yet again failed to achieve the intended result, because it once again contained errors in the description of land. A further determination proved necessary in order to state what the Committee regarded as the correct position. So by Gazette Notice No. 10/2011, published on 5 January 2011, the Committee finally, and correctly so it contends, identified the land held in Akoga's estate as including land from Eirao's estate.

9. The 2011 determination was not signed by the Chairman, Mrs Capelle, but by her deputy, Anton Ephraim. As I understand the situation, that determination was published after a meeting of the Committee authorised it. I presume that Mrs Capell deliberately took no part in that decision lest there be an appearance of bias. No complaint of bias is made with respect to the 2011 determination, but were the 2010 determination declared to be void there is a real issue as to whether the 2011 determination should also fall, because it refers to and purports to be an addendum and amendment to GN No 374/2010.

10. The validity of the 2010 determination is challenged by the plaintiffs. They seek a declaration that that determination was null and void, and an order quashing that determination[1].

The Curator of Intestate Estates

11. Counsel raised a preliminary procedural issue concerning the right of personal appearance of the 1st respondents rather than through the Curator of Intestate Estates. Although they raised that question, I did not understand either Mr Lambourne or Mr Ekwona to be taking a position of opposition to the personal appearance of the 1st respondents, so much as identifying a matter which might require procedural correction by the Court. I understand that Millhouse, C. J. on an earlier occasion queried the absence of the Curator as a party.

12. Section 37 of the *Succession, Probate and Administration Act* 1976 applies to the estates of Nauruans (whereas the provisions generally do not, see s.3). S.37(1) relevantly provides that pending a grant of probate or administration the real and personal estate vests in the Curator for the purpose of (a) accepting service of notices and proceedings, and (c) receiving and keeping in safe custody pending such grant any moneys or other property of which the

[1] No proceedings have been issued seeking relief by certiorari, thus the Court could not "quash" the determination, but no point was taken as to that, the parties treating the case as an application for a declaration of invalidity, employing the land appeal process for that purpose, and notwithstanding that the notice of appeal was not issued within time.

deceased person died possessed or which are paid or delivered to him as part of such person's estate.

13. The phrase "pending the grant of probate . . or of administration" is defined further by s.37(3), to mean pending the time when the persons entitled to the estate have been finally determined by family agreement, decision of the Nauru Lands Committee or the Court.

14. By s.7(4) the Curator shall perform such other duties in relation to the beneficiaries of estates as may be imposed by rules of court, by statute or as directed by a judge.

15. It is clear that the Court could order that the interests of the 1st respondents be represented by the Curator, and to that end the Curator be joined as a party. The Curator could equally be directed to represent the appellants. Neither the appellants nor the 1st respondents seek to be represented by the Curator. The appellants are represented by Mr Ekwona and the 1st respondents are content to have Mrs Capelle speak on their behalf.

16. Were I to order the Curator to be made a party the Curator would be represented by Mr Lambourne, as Secretary for Justice, who now appears for the Nauru Lands Committee. I see no conflict in those roles, and, as presently advised, I do not believe I would gain any additional assistance if I was to require the Curator to be represented before me. If it becomes necessary for me to make any orders directed to the Curator then I can revisit the question, but for the moment I see no need for the Curator to be made a party.

Was the Nauru Lands Committee empowered to issue the 2010 determination?

17. In *Charlie Ika v NPRT and Others*[2], I discuss the question of the limits of power of the Nauru Lands Committee to amend or vary a determination previously announced and published in the Gazette. In summary, once the Committee has performed the function which it is required to perform under the *Nauru Lands Committee Act* 1956-1963 then it is functus officio and cannot revisit that decision. To that strict rule there are some qualifications and exceptions.

18. As the High Court discussed in *Minister for Immigration and Multicultural Affairs v Bhardwaj*[3], where the decision of a statutory tribunal (such as the Nauru Lands Committee) is tainted by jurisdictional error, then it has not performed its function at all. The decision is void[4], and the Tribunal is not only permitted to perform the task again, it is obliged to do so. Where, however, the original decision is not tainted by jurisdictional error the tribunal cannot revisit the decision so as to correct what it believes to be an error, made within jurisdiction, on the first occasion. That error can only be addressed by way of an appeal,

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2 [2011] RNSC 5 at pp 21-30

3 (2002) 209 CLR 597 at 603-4, 616.

4 Whether it should be described as void, voidable, a nullity etc need not be explored. A decision without jurisdiction is no decision at all: See *Bhardwaj*, at 613 [46] per Gummow and Gaudron JJ, and at 643 [144] per Hayne J.

which in the present case - by s.7(1) of the Act - must be brought within 21 days of the decision. Thus, where the original decision is not appealed it stands for all purposes, even though it may contain errors that could have led to a successful appeal[5].

19. It would be possible to challenge the original decision either by way of an appeal to the Supreme Court brought within time under s.7(1), or else by way of judicial review proceedings, which are not subject to the 21 day time limit. Thus, if there was a failure of proper procedure in the original decision, the Supreme Court, addressing an appeal brought within time, could uphold the appeal and by s.7(2) make such order as it thinks fit (including setting the decision aside and returning it to the Committee for re-consideration, or by substituting a new decision on the merits)[6]. Alternatively, the Supreme Court , in addressing judicial review proceedings in which jurisdictional error was established, might declare the decision void and/or make an order in the nature of certiorari quashing the decision. Judicial review proceedings are not, however, available to challenge the merits of the decision.

20. Apart from the power of the Supreme Court to address error by way of appeal or judicial review the Nauru Lands Committee, itself, has power to correct a slip in drawing up its decision, or an error in expressing what was the manifest intention of the tribunal. In *Charlie Ika*[7] I concluded that the Committee retained limited power of self-correction, provided the correction did not amount to a mere re-consideration of its original decision (with or without a resulting change of mind on the part of the Committee). If it amounted to no more than a reconsideration of its decision then the Committee would be functus offico and the decision would betray jurisdictional error.

21. On the other hand, if the Committee was not seeking to correct what it believed, in hindsight, to have been an erroneous decision, but was seeking to make the published determination reflect what had been intended by the Committee (but which had not been achieved because of a slip, or an error in recording what it had intended by its decision), then the correction could be made at any time prior to publication of the decision in the Gazette, and even later where there was consent to the change.

22. The question whether in the absence of consent from all parties such a slip or error may be corrected, as such, after the decision was published in the Gazette, is more difficult. I leave this question open. It may or may not arise in the present case, and if it does I would need to hear submissions from counsel. The question whether the Committee acted within power in making its 2010 determination can be answered by another route.

23. In the present case I am unable to determine whether the 2010 determination was intended to correct a mere slip or failure to express what the Committee had intended by its 2008 decision. Mrs Capelle asserts that she signed the determination as a mere administrative

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[5] *Bhardwaj*, at 614 [50] per Gummow and Gaudron JJ.

[6] The notice of appeal in this case was filed on 26 August 2010, nine days outside the 21 day time limit.

[7] *Charlie Ika v NPRT and Others* [2011] NRSC 5, at [104]-[110].

correction to an error made by an earlier Nauru Lands Committee. Mr Lambourne, for the Nauru Lands Committee, supports her contention that the omission of the lands of Eirao from the estate of Akoga was undeniably a mere slip. The minutes record that the Committee recognized that Akoga had received land from his father and also from Eirao, so the Committee apparently knew that an interest in Eirao's real estate had passed to Akoga, he submits. The minutes should have recorded, therefore, what was to be done with that interest, and the absence of mention suggests it was overlooked, Mr Lambourne argues. The Committee knew that he had inherited that land from Eirao, but it had failed to deal with that land as part of Akoga's estate.

24. The Appellants had not been disadvantaged by the later correction by means of the 2010 determination, Mr Lambourne contends, because they had no valid claim to an interest in the land of Eirao that had passed to Akoga.

25. Mr Ekwona, for the appellant, however, submits that the 2010 determination was based on an incorrect interpretation of the provisions of the *Administration Order No 3 of 1938*, and far from being a mere correction to an administrative slip in the 2008 determination, the 2010 determination purported to pass to the 1st respondents interests in land that should have reverted to the appellants upon the death of Akoga. In other words, Mr Ekwona contends that there was no slip at all in the 2008 determination. He suggests that the failure to include land from Eirao's estate in Akoga's estate demonstrates that the Committee must have correctly applied the principles set out in par (3)(b) of *Administration Order No 3 of 1938,* which, so he argued, required that the land in the Eirao estate which Akoga had inherited would not have become part of his estate, because on his death the land should have been "returned" to the family of Eirao, that is, to the appellants.

26. Mr Ekwona submits that having made the correct decision in 2008 the Committee then in 2010 - and without hearing from the appellants - simply reversed its earlier decision and adopted a different, and wrong, interpretation of par (3)(b).

27. In support of their competing interpretations as to what the Committee had intended to achieve by its 2008 determination and as to whether it had made a slip in articulating its decision and/or correctly applied the law, both Mr Lambourne and Mr Ekwona referred to passages in the minutes of the Committee meetings held on 12 January 2004 and 24 February 2005, which preceded the 2008 determination. Those limited minutes cannot resolve the question, however.

28. As I later discuss, I accept the genuineness of Mrs Capelle's belief that she was correcting a mere administrative slip, but that is not the end of the matter. The very fact that no meeting of the Committee was held and no minutes exist that record the basis for its decision in 2010 makes it impossible to determine with confidence what motivated the publication of the new determination. However, given the conclusions I have otherwise reached about the 2010 determination being ultra vires, it is unnecessary for me to address the evidence in detail on these questions. I turn, then, to the ultra vires issues.

Was the 2010 determination authorized by the Nauru Lands Committee?

29. As I have said, no Committee meeting was held, at all, to authorize the 2010 determination. The decision of Mrs Capelle to sign the correcting determination was not a Committee decision. *The Nauru Lands Committee Act* 1956-1963 provides in s.3(2) that: "The Committee shall consist of not less than five, or more than nine members, all of whom shall be Nauruans". Section 4 provides that "the constitution and procedure of the Committee shall be as determined by the Council". The "Council" is defined in s.2 as the Nauru Local Government Council established by the *Nauru Local Government Council Act* 1951-1955.

30. Section s.6(1) provides that it is the Committee that has the power to determine questions as to the ownership or rights in respect of land, and by s.6(2) the decision of the Committee is final, subject to the right of appeal.

31. I was not advised what, if any, determinations have been made by the Nauru Local Government Council as to the constitution and procedure of the Nauru Lands Committee. In my opinion, the power of the Council to determine the "constitution" (which is not defined) and its procedure could not extend to permitting the decision-making to be performed not by the Committee, at all, but just by its Chairman. However, even assuming that the Council could authorize, or has authorized, the Chairman, acting alone, to perform the functions of the Committee, there is no evidence that Mrs Capelle was so authorized by the Council with respect to the 2010 determination.

32. In my opinion, therefore, the signing off of the 2010 determination by Mrs Capelle did not constitute the exercise of power of "the Committee", pursuant to s.6(1), to determine questions as to the ownership of or rights in respect of land arising between Nauruans. That conclusion would be sufficient to justify an order quashing the 2010 determination, but there is another basis, too, for so concluding.

An appearance of bias

33. Tyran Capelle, the Chair of the Nauru Lands Committee at the time of the 2010 determination, was a sister of Akoga, and accordingly had an interest in the distribution of the estate of Akoga at the time when she signed the 2010 determination. In addition, Tyran Capelle also had an interest in the estate of her mother, Enna Gadabu. Thus, if the determination was otherwise within power was it vitiated by virtue of a conflict of interest of the Chairman, as submitted by Mr Ekwona?

34. Mrs Capelle told me, and I accept, that upon taking the position of Chairman of the Nauru Lands Committee she had gone to considerable lengths to ensure that no matters came before her in which she had a conflict of interest and she made it a point not to speed the passage of any application for a determination that had been filed with the Committee on

behalf of members of her family. She treated her signing of the determination 374/2010 as being merely an administrative act of no consequence apart from correction of a slip. I accept that that was her understanding.

35. Mr Ekwona submitted that the failure to hold a committee meeting prior to determining in 2010 to correct the suggested error made in G.N.N 109/2008 vitiated the decision of the Committee and required that the 2010 determination be set aside. Furthermore, he submitted, the fact that the determination was signed by Ms Capelle tainted the determination by virtue of it being performed by a person who had a conflict of interest.

36. In my view, it is important in an area as contentious as the distribution of intestate estates that the body charged with the heavy responsibility of determining competing claims to land should be rigorous in ensuring that there was no appearance of impropriety and that all decisions are transparent. This should be so even for apparently minor administrative decisions which did no more that apparently correct a slip or mistake.

37. In my opinion, s.3(2) of the *Nauru Lands Committee Act* required that determinations of the Committee be the result of meetings of not less than five members of the Committee. That was not done in this case and that was capable of exciting suspicion among those who had an interest, or who believed themselves to have an interest, in the land in question. Furthermore, the problem was compounded here by having the apparent decision of the Committee signed off by a person who recognized that she had an interest in the property in question. Even though I have no doubt that Mrs Capelle was acting honestly and innocently it is important that the appearance of such matters leave no doubt about propriety. Additionally, the publication of the 2010 determination was done without giving the appellants an opportunity to be heard; yet they had a clear interest in opposing the proposed determination.

38. Accordingly, in my view the committee committed jurisdictional and procedural errors in the approach taken to the publication of the determination in Gazette No.374/2010. The 2010 determination amounted to no decision at all by the Nauru Lands Committee on the question of the ownership rights to the land that Akoga had inherited from Eirao.

39. Given that the Committee must be taken to have made no decision at all with respect to the invalid determination published in GNN 374/2010 can it now address the ownership of the land which Akoga had inherited from Eirao?

40. The Committee purported to make its 2010 determination by way of what it called both an "Addendum" and "Amendment" to the 2008 determination. Whether it could do so under the "slip" exception to the functus officio rule may be doubted. On the present state of the evidence I could not be satisfied that the 2010 determination amounted to no more than correction of a slip. However, it is not necessary to decide that question. The 2010 determination is void and had no effect. That means that - unless the 2011 determination

achieved this result - there has been no decision of the Nauru Lands Committee identifying the beneficiaries of the lands which Akoga had inherited from Eirao.

Was the 2011 determination effective to "correct" the 2008 determination?

41. Mr Lambourne submitted that that situation was addressed, and cured, by the determination in GN No 10 of 2011.

42. Having concluded that the decision recorded in GNN 374/2010 was void, the question then arises about the validity of determination GNN 10/ 2011. Mr Lambourne submitted that since the determination had not been tainted by apprehended bias, and was the result of a valid meeting of the Committee, it should stand on its own merits. It addressed and corrected all of the omissions in the 2008 determination and it should not be ruled invalid, he submitted.

43. Although the determination in GN No 10 of 2011 may well have followed a properly convened meeting of the Nauru lands Committee, in my opinion it cannot stand in the face of the overturning of the 2010 determination. A comparison of the 2010 and 2011 determinations makes it clear that the latter is, as it describes itself, an addendum and amendment to GN No 374/2010. A complete understanding of the entitlements to land inherited from Eirao cannot be achieved from the 2011 determination unless reference is made to the terms of the 2010 determination.

44. Thus, 2011 falls with the 2010 determination, with the result that the land inherited from Eirao has not been addressed by the Committee when considering the beneficiaries of the estate of Akoga.

Can the Nauru Lands Committee now address the issue of Eirao's land?

45. Having declared the determinations of 2010 and 2011 to be void that leaves the 2008 determination in place. Mr Lambourne, for the Nauru Lands Committee (his submissions were adopted by the 1st respondents) submitted that that determination mistakenly failed to include in Akoga's estate the lands inherited from Eirao, a slip that required correction. In my opinion, that error should be addressed not by way of seeking to correct a "slip" in the 2008 determination, but by requiring the Committee to now decide the question, for what, in law, will be the first time.

46. Section 6 of the *Nauru Lands Committee Act* 1956-1963 empowers the Committee "to determine questions as to the ownership of, or rights in respect of land" as between Nauruans. The Act does not require that all land interests of a deceased person must be dealt with at one time. In my opinion, the Committee has a continuing entitlement, by virtue of s. 39 of the *Interpretation Act* 1972, to exercise its powers "from time to time, as

occasion requires". The Committee is not functus officio with respect to determining ownership of this land, because, as a matter of law, it has not yet dealt with it.

47. I will direct the Committee to consider the questions of the ownership and interests in the land inherited by Akoga from Eirao. In doing so, the Committee will have to consider the competing interpretations of the meaning of par (3)(b) which the parties advance in this case. I will set out those competing arguments but, as I will explain, I will not attempt to resolve that question now.

The meaning of "returned" in par (3)(b) of *Administration Order No 3 of 1938*

48. Mr Ekwona, for the appellants, submitted that the land inherited from Eirao should have been "returned" to the estate of Eirao upon the death of Akoga, thus the 1st respondents could never have held an interest in that land; the 2008 determination was therefore correct to exclude Akoga's share of Eirao's land from the estate of Akoga. That conclusion, Mr Ekwona submitted, reflected the correct interpretation of paragraph 3(b) of *Administration Order No 3 of 1938*.

49. Mr Ekwona submitted that upon proper interpretation of paragraphs 3(a) and 3(b) of the *Administration Order No.3 of 1938* the Committee wrongly purported to determine that that portion of the estate of Akoga which represented property inherited by him from Eirao could be passed to the estate of Enna Gadabu, because that represented the transfer of the land interests to "family or nearest relatives" pursuant to paragraph (3)(b).

50. Instead, Mr Ekwona submitted, the land which had passed to Akoga from Eirao should have been returned to the estate of Eirao upon Akoga's death.

51. This argument turns on the interpretation of the words in paragraph (3)(a) and (3)(b).

52. The *Administrative Order No 3 of 1938* is notoriously difficult to understand because of its poor drafting[8]. Its title is "Regulations that govern intestate estates". They provide rules for the distribution of such estates, providing in paragraph (2) that the distribution will be as decided by "the family of the deceased person, assembled for that purpose". Where, however, there is no agreement within the family, paragraph (3) sets out the procedures to be followed. Paragraph (3) reads, inter alia, as follows:

> "(3) If the family is unable to agree, the following procedure shall be followed:
>
> (a) In the case of an unmarried person the property to be returned to the people from whom it was received, or if they are dead, to the nearest relatives in the same tribe.

[8] See, for example, *The Children of Eirenemi Samson v Eirowida Aubiat* [1969-1982] Nauru Law Reports, Part B, 115 at 119, per Thompson, C.J., Judgment 3 May 1974

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

(c) [Omitted; refers to a deceased person who was married with children; property divided equally among children with life interest for surviving parent]"

53. Mr Ekwona submits that the word "returned" which appears in (3)(b) has the same meaning as used in (3)(a). In par (3)(a) the regulation requires that the property which was held by a deceased person who was unmarried and without children must be "returned", i.e. passed, to the person or estate from whence it came. In the same way, so Mr Ekwona argued, par(3)(b) should be interpreted as requiring that property held by a deceased person who dies without issue must be returned to those from whom it was received. Thus, the property received by Akoga from the estate of Eirao (by virtue of him being her adopted son) should have been returned to Eirao's estate, which meant it would be distributed to her children, the appellants.

54. Mr Lambourne challenged that interpretation. He submitted that in paragraph (3)(a) the draftsperson dealt with the situation concerning the estate of an unmarried person and it was only in that context that it used the expression "returned to the people from whom it was received". The same language was not used in (3)(b), which merely referred to "returned to the family or nearest relative." Had the draftperson intended that irrespective of whether or not a person was married property received from the estate of someone else must return to that estate upon the death of the recipient, there would have been no point in having the two separate paragraphs and the difference in language (i.e. the additional phrase, "from whom it was received").

55. The interpretation advanced by Mr Ekwona has received support from Thompson, C.J.. The former Chief Justice many times commented on the poor drafting of the 1938 Order. In *Rubenit Dekarube & Others v Agieroudi & Others*[9] he observed that there were instances within its terms where the same words were used with apparently different meanings, in different places. He earlier made a similar observation in *The Children of Eirenemi Samson v Eirowida Aubiat*[10], which involved the interpretation of (3)(a), not (3)(b). Notwithstanding those observations about the drafting of the paragraph, Thompson, C.J. held in the last-mentioned case that the word "returned" in (3)(a) connoted that the land must pass to someone who would have been entitled to it if it had not become the property of the deceased, and he attributed the same meaning to par (b), as to which he observed:

> "It is not apparent why, if the deceased was married, the land should be returned to 'the family or nearest relatives of the deceased', not necessarily of the same tribe as either himself or the person from whom he received the land. But again, the use of

[9] [1969-1982] Nauru Law Reports, Part B, 134 at 138. Judgment 16 January 1975.
[10] [1969-1982] Nauru Law Reports, Part B, 115 at 119-120. Judgment 3 May 1974

the word 'returned' connotes that the land must pass to someone who would have been entitled to it if it had not become the property of the deceased".[11]

56. Mr Ekwona strongly submitted that the interpretation he advanced was consistent with the customs and traditions of Nauraun people, who believed that upon the death of a person, that person's estate should be returned from whence it came. Akoga's siblings had never held an interest in this land, and thus it could not "return" to them. Mr Lambourne responded that for all their defects in drafting, the 1938 regulations were acknowledged to reflect the culture and traditions of Nauruans, and the interpretation he proffered was consistent with those traditions.

57. In reaching its decisions about the disposition of land the Nauru Lands Committee is expected to bring to bear its combined experience and knowledge of cultural practices and traditions of Nauruan people[12]. That being so, I would be slow to rule on the interpretation of the 1938 regulations if my conclusion depended on knowledge of Nauruan culture and tradition, which I do not possess and about which I have no evidence on this topic.

58. In the event that the Committee now revisits the land ownership questions concerning the former Eirao estate, it will be required to conduct family meetings with persons with competing interests. It is possible that a compromise might therefore be reached, and I would not want to undermine that possibility by making an untimely pronouncement about par (3)(b). Furthermore, in conducting its investigation and consultations the Committee will bring to bear its knowledge of Nauruan customs and traditions. That knowledge and experience might well bear upon the proper interpretation of the provision. In any event, once a decision is made (assuming it is not by consent agreement) any person who disputed the decision and interpretation adopted by the Committee would have a right of appeal under s.7 of the Act.

59. With those considerations in mind, I will do no more now than to highlight the arguments put to me, and to identify some matters worthy of further consideration.

60. Whilst the drafting of the regulations has been appropriately criticised, the use of the same word in two adjoining paragraphs would normally suggest they had the same meaning, however, that assumption may not be so compelling in this case, concerning the use of the word "returned" in paragraphs (a) and (b).

61. The question is not without difficulty. In my opinion, the absence of the words "from whom it was received", in par (b), is of particular importance to its interpretation. Arguably, the absence of those words from paragraph (b) is more significant than the use of "returned" in that paragraph because that word might have been intended to mean "passed". If so, the paragraph would lose nothing in comprehension.

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[11] At 120.

[12] See *John Demaure v Adamo and Others*, Nauru Law Reports [1969-1982] Part B, page 96 at 99, Thompson, C.J., Judgment 11 May 1973.

62. There may be many cases where some members of a family or some of those who were nearest relatives may not have given the land to the deceased person. If it was intended that only those who had done so were to benefit under (3)(b) then it might have been expected that the draftsperson would have said so, rather than leave the intention unclear. In context, the intention of the paragraph might have been that the potential beneficiaries would be all those who qualified as family or nearest relatives, thus distinguishing the purpose of the two paragraphs.

63. Mr Ekwona submitted that Eirao and the children of Eirao were the "family" of Akoga. It seems clear that the fact that Akago was adopted did not affect his status as a child of Eirao[13]. The 1st respondents, he submits, were "nearest relatives", but, he argued, (3)(b) required that their interests came second to those of "family". These arguments have not been the subject of full submissions.

64. Mr Lambourne argued that if it was intended that the property of a deceased person was to be returned to those from whom it was received (or their estate) in all cases, irrespective of whether the deceased had been married with children or unmarried, then there was no reason to have two separate paragraphs.

65. Although the conclusion for which Mr Lambourne argues is at odds with the obiter of Thompson, C.J., I agree that the Chief Justice did not purport to decide the interpretation of par (b). As I have said, he acknowledged that in places in the Administration Order the same words were sometimes used with intended different meanings.

66. As I have said, I make no ruling as to the interpretation of par (3)(b). The competing contentions require careful consideration.

Conclusions

67. I rule that the determinations in GN No 374 of 2010 and GN No 10/2011 were null and void.

68. I direct the Nauru Lands Committee to determine the questions of ownership and rights in respect of that portion of the estate of Akoga that was inherited by him from the estate of Eirao.

69. I will hear counsel as to any other appropriate directions that should be given to the Committee or any other party.

70. I reserve all other questions raised by these proceedings, including the question of costs.

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[13] See *Eidawaidi Grundler v Eibaruken Namaduk and Others*, Nauru Law Reports [1969-1982] Part B, p.92, per Thompson, C.J., 8 May 1973.

Dated the 6th day of May 2011

Geoffrey M Eames AM QC

Chief Justice