

CLODUMAR v NAURU LANDS COMMITTEE & ORS (M37/2011)

Court appealed from: Supreme Court of Nauru

Date of judgment: 19 February 2002

This is an appeal as of right from a judgment of the Supreme Court of Nauru (the Nauru Court), pursuant to s5(1) of the *Nauru (High Court Appeals) Act 1976* (Cth) (the Nauru Act).

In proceedings in the Nauru Court, the appellant (Clodumar) sought, inter alia, declaratory relief to the effect that he was the owner of a one half share in certain lands, on the basis of a transfer to him from Rick Burenbeiya (the deceased), before his death in 1999. On 19 February 2002, the Nauru Court found that the transfer of land in question from the deceased to Clodumar was not approved in accordance with s3 of the *Lands Act 1976* (Nauru), namely that the transfer had not been approved by the President of the Republic of Nauru.

The 1st respondent (the Committee) is a statutory body charged with the due administration of certain aspects of land transfers in Nauru. Subsequent to the Nauru Court decision, the land estate of the deceased was the subject of a determination by the Committee, which distributed the land to certain people, as beneficiaries of the deceased's estate, according to the law and custom of Nauru. In 2010 Clodumar appealed that determination to the Supreme Court (the Land Appeal). During those proceedings, Clodumar was given some documents by a third party (the fresh evidence), which were said to have been found in a file which had been kept in a separate location and not officially recorded. Clodumar submits that the fresh evidence establishes that Presidential approval had in fact been given in 1999. The Land Appeal was, on 22 March 2011, adjourned pending this appeal in the High Court.

By his appeal in this Court, Clodumar seeks to have the fresh evidence admitted into evidence. Clodumar also seeks an extension of time for the filing of the appeal. The appeal depends on the reception of the fresh evidence, as no error of the Court below is relied upon. It is submitted that the fresh evidence, if received, points to a likelihood that the judgment below was based on a mutual mistake by the parties as to the critical fact of the existence or non-existence of Presidential approval. Clodumar submits that the power exercised by this Court, pursuant to the jurisdiction conferred by s5 of the Nauru Act, is wide enough to empower this Court to receive fresh evidence on appeal. This is because the jurisdiction conferred is original jurisdiction arising from a law validly made under s76(ii) of the Constitution, rather than appellate jurisdiction under s73 and thus the prohibition imposed by that section on the High Court receiving fresh evidence does not apply. Clodumar submits that the fresh evidence in this case meets the established stringent requirements for being received and so ought to be received. The Committee opposes the extension of time sought, submitting that any extension would be futile as this Court does not have the power to receive fresh evidence as Clodumar argues. Alternatively the Committee contends that if fresh evidence is permissible, it should not be received by this Court on the grounds of the availability of that evidence at trial with reasonable diligence and prejudice to the Committee on the basis that key witnesses have died.

On 22 November 2011, Gummow J ordered that certain persons, said to be beneficiaries of the deceased's estate, be added as second respondents. Those respondents have indicated that while they would support the Committee's position, for financial reasons they will not participate in the appeal and they will abide the Court's decision.

The grounds of appeal include:

- Whether fresh evidence, constituted by the copy of the Residential Approval, should be admitted in this appeal brought pursuant to the *Nauru (High Court Appeals) Act 1976 (Cth)*.
- Whether the fresh evidence in this case justifies its reception on appeal.