HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND BELL JJ

KINZA CLODUMAR APPELLANT

AND

NAURU LANDS COMMITTEE & ORS RESPONDENTS

Clodumar v Nauru Lands Committee
[2012] HCA 22
Date of Order: 20 April 2012
Date of Publication of Reasons: 20 June 2012
M37/2011

ORDER

1. *Extension of time allowed to enable this Court to hear and determine this appeal.*

2. *Appeal allowed.*

3. *Civil Action No 16/2000 is remitted to the Supreme Court of Nauru for retrial.*

4. *The costs of the proceedings so far in the Supreme Court in Civil Action No 16/2000 to be in the discretion of that Court.*

5. *The first respondent is to pay the appellant's costs of this appeal.*

On appeal from the Supreme Court of Nauru

Representation

D J Williams SC with L D D Keke for the appellant (instructed by Leo D. Keke, Solicitor and Notary Public)

R M Niall SC with K L Walker for the first respondent (instructed by Department of Justice and Border Control)

No appearance for second respondents

CATCHWORDS

Clodumar v Nauru Lands Committee

High Court of Australia − Original jurisdiction − Matter arising under laws made by Parliament − Appeal from Supreme Court of Nauru pursuant to s 5 of *Nauru (High Court Appeals) Act* 1976 (Cth) − Supreme Court of Nauru held that transfer of land to appellant was invalid because President of Nauru had not approved transfer − After conclusion of proceeding in Supreme Court of Nauru appellant discovered document bearing President's signature and approving transfer to appellant − Whether fresh evidence can be received on appeal to High Court from Supreme Court of Nauru − Whether appellant could have discovered document by exercise of reasonable diligence at time of proceeding in Supreme Court of Nauru.

Words and phrases – "appeal", "fresh evidence", "original jurisdiction".

Constitution, s 76(ii).
Nauru (High Court Appeals) Act 1976 (Cth), s 5.

FRENCH CJ, GUMMOW, HAYNE AND BELL JJ.

Introduction

1 This appeal, which required the grant of an extension of time, was brought in the original jurisdiction of this Court against a decision of the Supreme Court of Nauru, delivered on 19 February 2002[1]. The jurisdiction is conferred on this Court by s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth) ("the Nauru Appeals Act"). The decision of the Supreme Court effectively dismissed a challenge brought by the appellant to a decision of the Nauru Lands Committee ("the Committee") relating to land in which the appellant claimed an interest as an inter vivos transferee from their deceased owner. The Committee was established by the *Nauru Lands Committee Act* 1956 (Nauru) ("the Lands Committee Act"). It has power to determine "questions as to the ownership of, or rights in respect of, land"[2].

2 The short question raised by these proceedings was whether, on appeal from the Supreme Court of Nauru to this Court, it is open to this Court to receive evidence which was not before the Supreme Court. In this case the evidence was said to be fresh evidence not known to the appellant and not discoverable by the exercise of reasonable diligence on his part at the time of the proceedings the subject of the appeal. It was also said to be evidence directly negativing the critical finding of fact upon which the decision of the Supreme Court, adverse to the appellant, was based.

3 On 20 April 2012, this Court granted the appellant the necessary extension of time, allowed the appeal and remitted the proceedings to the Supreme Court of Nauru for retrial. The reasons for that decision follow.

Factual and procedural background

4 The appellant is a citizen and former President and Minister of the Republic of Nauru. He commenced proceedings in the Supreme Court of Nauru in 2000. He claimed injunctive relief against the Committee to prevent it from giving effect to its decision published in the Government Gazette of 12 July 2000

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1 *Clodumar v Nauru Lands Committee*, unreported, Civil Action No 16/2000, Supreme Court of Nauru, 19 February 2002.

2 *Nauru Lands Committee Act* 1956 (Nauru), s 6(1). The questions which the Committee can determine are questions arising between Nauruans or Pacific Islanders or between Nauruans and Pacific Islanders.

concerning the ownership of land described as one half of the lands known as "Dabodine" Portion 5 and "Iro" Portion 30, both at Yaren ("the disputed lands").

5 The appellant asserted that the disputed lands had been transferred to him in or about April 1999 by the late Mr Rick Burenbeiya, who died on 11 June 1999. Under s 3 of the *Lands Act* 1976 (Nauru) ("the Lands Act") the consent in writing of the President of Nauru ("Presidential Approval") is necessary to the transfer of any interest or estate in land in Nauru. Absent such consent the transfer is "absolutely void and of no effect"[3].

6 The appellant gave evidence on affidavit in the proceedings in the Supreme Court that "as a matter of course and of tradition and practice" the Committee acts on behalf of Naurans who want to transfer ownership of lands and applies to the President, on their behalf, for consent. That was not a statutory function of the Committee. On 13 April 1999, Mr Burenbeiya had written to the Committee asking it to "process for approval" the transfer of his half share in the disputed lands to the appellant.

7 By a notice published in the Government Gazette of 20 October 1999, the Committee stated that it had ascertained that Mr Burenbeiya had been determined by previous decisions of the Committee to be the owner of lands which included the disputed lands. By the same notice, the Committee determined that Mr Burenbeiya's widow was a beneficiary of his estate in respect of those lands.

8 On Mrs Burenbeiya's death, the Committee, apparently in the exercise of its statutory function, determined a distribution of her estate in relation to a number of pieces of land, including the disputed lands. That determination first appeared in Government Gazette Notice 209/2000 dated 12 July 2000 and listed a number of people as beneficiaries of the estate.

9 The appellant commenced two related proceedings in the Supreme Court on 9 August 2000. The first, Action No 16/2000, named the Committee as the defendant. The second, Action No 17/2000, named the Curator of Intestate Estates as the defendant. On 10 August 2000, the Chief Justice issued an interlocutory injunction in Action No 16/2000 restraining the Committee from taking any action to implement its decision of 12 July 2000.

10 It was not in dispute that the proceedings against the Committee in Action No 16/2000 were not by way of an appeal to the Supreme Court against a

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3 Lands Act, s 3(4).

decision of the Committee. Under the law of Nauru no appeal would lie to this Court from a decision of the Supreme Court on such an appeal[4].

11 On 12 March 2001, Connell CJ directed that Actions 16 and 17 be heard together. Memoranda of appearance were filed for the defendants but no defences. On 19 February 2002, the actions were heard by Connell CJ. On that day the Chief Justice issued final orders in the proceedings against the Committee in Action No 16. There is no record of any orders made in respect of Action No 17. His Honour found that the asserted transfer from Mr Burenbeiya to the appellant had not been perfected because of the want of Presidential Approval, required by s 3 of the Lands Act. He also held that Mrs Burenbeiya only had a life interest in her husband's estate. The estate that should have been distributed consisted of Mr Burenbeiya's reversionary interests in the disputed lands. His Honour made orders directing that the Committee withdraw its Gazette Notice of 12 July 2000 and that it call a family meeting to determine the reversionary interests in the estate of Mr Burenbeiya. The appellant was to be invited to attend the meeting.

12 There were before this Court two affidavits sworn by Mr David Lambourne, the Secretary for Justice and Border Control for the Republic of Nauru. He had reviewed the court files in Actions No 16 and 17 of 2000. He exhibited the Chief Justice's trial notes and prepared a typed transcript of them. He noted that at the hearing of the actions on 19 February 2002 the Committee was represented by its Chairman, Mr Leslie Adam. Mr Adam died in Nauru on 5 October 2011. Other than the entry of an appearance, there was no record of the Curator of Intestate Estates participating in Action No 17. According to Mr Lambourne, the current practice and the practice in 1999 was that any files relating to an application for transfer of land would have been held by the Department of Island Development and Industry[5]. Mr Lambourne noted in his affidavit that any records of the Department of Island Development and Industry that remain from 1999 are now held by the Department of Commerce, Industry and Environment. A search of the departmental records found no documents relating to this matter.

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4 *Appeals Act* 1972 (Nauru), s 45(d).

5 According to Mr Lambourne, the Department of Island Development and Industry changed its name to the Department of Industry and Economic Development in April 2000.

13 On 28 February 2002, the Committee held a meeting of interested parties at which the appellant again raised his claim to the disputed lands. The Committee met again on 13 February 2009 and 18 February 2010. The reasons for this protracted process do not appear from the materials before this Court. On 2 June 2010, the Committee published in the Government Gazette a determination listing the second respondents as the beneficiaries of the estate of the late Rick Burenbeiya in respect of various pieces of land, including the disputed lands. The determination was replaced by another determination on 11 August 2010. Its purpose was to make a minor amendment by adding an additional beneficiary.

14 The appellant appealed to the Supreme Court of Nauru against the Committee's determination of 2 June 2010, as amended by that of 11 August 2010. The appeal was evidently made pursuant to s 7 of the Lands Committee Act. It was based upon the appellant's claim as transferee from Mr Burenbeiya, to be entitled to the disputed lands. That was the claim he had advanced before Connell CJ. The appeal came on for hearing in March 2011. The appellant was represented by Mr Keke. The Committee was represented by Mr Lambourne. According to the appellant's affidavit, in the course of the hearing while he was seated in Court, he was handed some documents by Mr Pres-Nimes Ekwona, who was a pleader of the Supreme Court of Nauru. The documents appeared to be copies of documents relating to submissions made to Cabinet in 1999 in relation to land transfers. One of the documents was a copy of a signed approval of various land transfers, including one executed by the former President of the Republic of Nauru on 21 May 1999. The appellant handed the documents to Mr Keke who sought to tender them to the Court. In the event, Eames CJ adjourned the further hearing of the appeal for mention at a callover and gave the appellant 28 days to initiate an application for leave to appeal to this Court against the decision of Connell CJ in Action No 16/2000. The appellant's account of events at the hearing before Eames CJ was supported by an affidavit sworn by Mr Ekwona and filed in these proceedings. Mr Ekwona said he had noticed the Presidential Approval among papers given to him by a client in connection with proceedings concerning other lands owned by the late Mr Burenbeiya.

The issues in the appeal

15 The issues on this appeal were:

1. Whether this Court could receive fresh evidence on an appeal from the Supreme Court of Nauru.

2. Whether the Court should grant the extension of time necessary to allow the appellant to proceed with his appeal.

3. Whether the Court should receive the evidence of the Presidential Approval now relied upon by the appellant.

The fresh evidence

16 Before considering the issues, it is convenient to have regard to the evidence which this Court is now asked to receive. In an affidavit sworn on 18 May 2011 the appellant said that at the time of the hearing before Connell CJ the Committee informed the Court that there had been no Presidential Approval granted for the transfer of the disputed lands to the appellant. According to Mr Lambourne's affidavit, there was no record on the Court file or in the primary judge's notes that any representative of the Committee had so informed the Court. Mr Adam had died before Mr Lambourne could speak to him. The appellant said that he and his lawyer had tried, prior to the proceeding in the Supreme Court, to inspect government files relating to the transfer but were told by a legal representative of the Committee that if there was any such file it had been lost.

17 The appellant exhibited to his affidavit the documents which, he said, had been given by Mr Ekwona on 22 March 2011. Among those documents were copies of signed approvals of transfers including an approval executed by the President on 21 May 1999. The document contained a recommendation for approval of certain transfers, including a transfer by Mr Rick Burenbeiya of "his share of coconut bearing lands to Mr Kinza Clodumar at folio 74". The appellant stated his belief that the document was a true copy of a genuine Presidential Approval. The Committee did not dispute its authenticity.

18 The history of the document and an explanation for its unavailability appeared from an affidavit sworn on 7 December 2011 by Mr Namaduk, who was a Minister in the Cabinet of President Harris in May 1999. He recalled that there was considerable public discussion at the time of the need to regulate land transfers in Nauru. He also recalled the day upon which the approval for the transfer of the disputed lands was signed by the President. The appellant himself was a member of the Cabinet at the time, but did not attend the Cabinet meeting during discussions relating to the transfer. After approving the transfer among others, the President gave Mr Namaduk a file containing the approvals which he had signed. He asked Mr Namaduk to look after the file until Cabinet had completed its discussions on further regulation of such transfers.

19 Mr Namaduk placed the file in his office and did not disclose its existence to other members of the Cabinet including the appellant. The file remained in

Mr Namaduk's office until President Harris' government lost office following its defeat on the floor of the Parliament in April 2000. Mr Namaduk then vacated his ministerial office and took with him boxes containing files, including the file relating to the transfer approvals which had been given to him by the President. In or about November 2011, following an approach from the appellant's solicitor, Mr Namaduk located the file.

20 A copy of the contents of the file was exhibited to Mr Namaduk's affidavit. The exhibits included a copy of the Presidential Approval document given to the appellant by Mr Ekwona at the Supreme Court. That document did not itself specify the portions of the land whose transfer is approved, but refers to a folio number 74 on the file. The folio numbered 74, also exhibited to Mr Namaduk's affidavit, was a minute from the Committee setting out the proposed transfers and indicating that the Committee had no objection to their approval. The disputed lands were identified on that minute.

21 On the face of it, the evidence that President Harris was asked to approve and did approve the transfer of the disputed lands to the appellant during the lifetime of Mr Burenbeiya was cogent. That conclusion did not mean that that evidence must be accepted. It was not tested in this Court. What, if any, weight is to be attributed to it will be a matter for the Supreme Court of Nauru to determine on retrial. But it is clear that if accepted the evidence could alter the outcome of the proceedings.

22 There was also evidence tendered before this Court that there was little that the appellant could reasonably have been expected to do to ascertain the existence of the Presidential Approval at the time of the proceedings before Connell CJ. The appellant was represented in the Supreme Court by Mr Peter MacSporran, a legal practitioner in Australia and Nauru. The appellant had instructed him in July 2000 to advise in connection with the transfers of the disputed lands. His instructions were that the transferor had died before the Committee had done anything to give effect to the intention of the transferor to transfer the disputed lands. Mr MacSporran ascertained that no transfer had been gazetted. Although not a legal requirement, it was standard practice for all transfers to be gazetted once approved. In Mr MacSporran's experience, the Committee was always promptly informed when an application for approval of a land transfer had been approved or rejected. The fact that the Committee was unaware of the fate of the application for approval of the disputed lands indicated to him that the application had not been considered by the President. The proceedings in the Supreme Court were issued and conducted by both parties on the assumption that approval had not been given.

23 Mr MacSporran said that the Chairman of the Committee submitted to the Supreme Court that the transfers were invalid for want of the requisite approval. As noted above, there was no record on the Court file or in the trial notes of Connell CJ of any such statement by the Chairman. But then the notes did not record the appearances of either Mr MacSporran or the Chairman. Mr MacSporran made other submissions, relying upon customary law and the proposition that the gift was in the class of *donatio mortis causa*. Those submissions were not accepted.

The extension of time

24 The Committee opposed any extension of time on the basis that key witnesses are now deceased and its conduct of the case in this Court would be prejudiced. The President had died on 5 July 2008. The chairman of the Committee, Mr Adam, who appeared on behalf of the Committee in the proceedings before Connell CJ died on 5 October 2011. The Committee said it had no means of confirming or denying the evidence given by the appellant and is prejudiced in responding to it.

25 The most critical evidence was that of Mr Namaduk who, according to his affidavit, resides in the Republic of Nauru. There was no suggestion that he would not be available, at a retrial in the Supreme Court of Nauru, to give evidence and to be cross-examined. On the material before this Court, the delay that occurred in this case was not the fault of the appellant. The prejudice to the appellant if an extension of time were refused was apparent. The prejudice to the Committee was not. In the circumstances, an extension of time was granted to enable the appeal to be heard and determined.

The jurisdiction and powers of the High Court

26 As a matter of Australian domestic law, the jurisdiction conferred upon this Court by s 5 of the Nauru Appeals Act, was original jurisdiction conferred pursuant to s 76(ii) of the Constitution[6]. The Nauru Appeals Act gives effect to an agreement, approved by the Act[7], made between the Government of Australia and the Government of Nauru on 6 September 1976 ("the Agreement"). The Agreement is set out in the Schedule to the Nauru Appeals Act. Its Articles define the content of this Court's jurisdiction and are imported by reference into

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6 *Ruhani v Director of Police* (2005) 222 CLR 489; [2005] HCA 42.

7 Nauru Appeals Act, s 4.

the Nauru Appeals Act[8]. The background leading to the making of the Agreement and to the enactment of the Nauru Appeals Act is set out in the judgments in *Ruhani v Director of Police*[9].

27 It was submitted for the Committee that the use of the term "appeal" in s 5, and the absence of any express power to receive evidence, indicates a legislative intention that an appeal under that section is an appeal in the strict sense and is to be decided on the basis of the primary record.

28 There is no reason, either historical or constitutional, to burden the original jurisdiction conferred upon the High Court by s 5 of the Nauru Appeals Act with the restriction which limits the nature of the jurisdiction conferred by s 73 of the Commonwealth Constitution to that of an appeal in the strict sense. That characterisation of appeals under s 73 is of long standing[10]. The reasons for it were considered in *Mickelberg v The Queen*[11] in relation to appeals from State Supreme Courts and again in *Eastman v The Queen*[12] in relation to appeals against decisions of federal courts and other courts exercising jurisdiction. The reasons for the restriction included:

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8 Nauru Appeals Act, s 5 read with Articles 1 and 2 of the Agreement.

9 (2005) 222 CLR 489 at 502-506 [22]-[33] per McHugh J, 524-525 [95]-[99] per Gummow and Hayne JJ.

10 *Ronald v Harper* (1910) 11 CLR 63; [1910] HCA 43; *Scott Fell v Lloyd* (1911) 13 CLR 230; [1911] HCA 34; *Werribee Council v Kerr* (1928) 42 CLR 1 at 20 per Isaacs J; [1928] HCA 41; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; [1931] HCA 34; *Grosglik v Grant (No 2)* (1947) 74 CLR 355 at 357 per Latham CJ, Rich, Dixon, McTiernan and Williams JJ; [1947] HCA 1; *Mickelberg v The Queen* (1989) 167 CLR 259; [1989] HCA 35; *Eastman v The Queen* (2000) 203 CLR 1; [2000] HCA 29; *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268 at 282 [39]; [2009] HCA 18.

11 (1989) 167 CLR 259.

12 (2000) 203 CLR 1.

1. The historical fact that at Federation a mere grant of appellate jurisdiction without more would not have been understood as carrying with it a power to receive further evidence[13].

2. The differentiation between original and appellate jurisdiction and the different provisions for their exercise in Ch III of the Constitution, reinforcing the notion that when it refers to the appellate jurisdiction, it is speaking of appeals in the true or proper sense[14].

29 Those considerations do not affect the construction of s 5 of the Nauru Appeals Act. As Gummow J observed in *Eastman*[15]:

> "the considerations which favour a power to permit further evidence on appeal are stronger at the level of a first rather than an ultimate appeal. Contrary to what once was the case, it is extremely unusual now for an appeal to be brought directly to this Court from a decision at first instance in a State Supreme Court." (footnote omitted)

The present appeal brought in the original jurisdiction of this Court is, as the Nauru Appeals Act contemplates, an appeal against a first instance decision of a judge of the Supreme Court of Nauru exercising original jurisdiction.

30 The dispositive powers which this Court can exercise in deciding an appeal under s 5 of the Nauru Appeals Act are set out in s 8 of that Act, in the same terms as the powers conferred upon the Court by s 37 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). Both sections use the same heading "Form of judgment on appeal", although the Judiciary Act provision expressly relates to the exercise by the Court of "appellate jurisdiction".

31 Section 8, like s 37 of the Judiciary Act, may be contrasted with s 31 of the Judiciary Act which empowers this Court in the exercise of its original jurisdiction to "make and pronounce all such judgments as are necessary for doing complete justice in any cause or matter pending before it". In *Ruhani* the

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13 *Mickelberg v The Queen* (1989) 167 CLR 259 at 270 per Mason CJ; *Eastman v The Queen* (2000) 203 CLR 1 at 32-33 [104] per McHugh J, 61 [186] per Gummow J.

14 *Mickelberg v The Queen* (1989) 167 CLR 259 at 269 per Mason CJ, 297-298 per Toohey and Gaudron JJ, Brennan J agreeing at 274; *Eastman v The Queen* (2000) 203 CLR 1 at 26 [76] per Gaudron J, 97 [290] per Hayne J.

15 (2000) 203 CLR 1 at 64 [193].

difference between ss 31 and 37 was said, by McHugh J, not to be "a conclusive indicator that the Court exercises appellate jurisdiction when it uses the power of disposition conferred by the Nauru Appeals Act."[16] Nor is it a conclusive indicator of the content of the original jurisdiction conferred by that Act. As was observed in *Ruhani* the powers conferred by s 8 are analogous to those of a court exercising original jurisdiction in first instance review of an administrative decision[17]. Section 8 is neutral in relation to the nature of the jurisdiction conferred by s 5 of the Nauru Appeals Act.

32 "Appeal" being a statutory term, the nature of the proceedings it describes varies according to its statutory context. As Hayne J said in *Eastman*[18]:

> "The word 'appeal' is now used to describe many different forms of proceeding: appeals on questions of law, appeals by way of rehearing, appeals by rehearing de novo, appeals which, on examination, can be seen to be an exercise of original jurisdiction." (footnotes omitted)

Of particular significance in this context is the range of matters which may come before this Court in the exercise of the jurisdiction conferred by s 5 of the Nauru Appeals Act.

33 As was submitted by the appellant, the Agreement and the Nauru Appeals Act provide for an appeal from a single judge of the Supreme Court of Nauru to this Court in civil matters which lies as of right, save for interlocutory appeals. There is, and at the time of the enactment of the Nauru Appeals Act was, no intermediate appeal court in Nauru. The absence of a leave requirement and the absence of any interposition of an intermediate appellate decision, where the appeal lies from the Supreme Court in its original jurisdiction, militates against a restrictive interpretation of the jurisdiction conferred upon this Court by s 5 of the Nauru Appeals Act. At the time that the Nauru Appeals Act was enacted, provision for the manner and form in which evidence in the exercise of its original jurisdiction was to be received was made by the *High Court Procedure*

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16 (2005) 222 CLR 489 at 508 [43].

17 (2005) 222 CLR 489 at 508 [43] per McHugh J, see also 528 [110] per Gummow and Hayne JJ.

18 (2000) 203 CLR 1 at 97 [290]. See also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 596-597 [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10; *Turnbull v New South Wales Medical Board* (1976) 2 NSWLR 281 at 297 per Glass JA.

Act 1903 (Cth)[19]. Similar provisions are now to be found in the Judiciary Act[20]. In the exercise of its original jurisdiction s 32 of the Judiciary Act confers on this Court power to grant such remedies as the parties are entitled to, so that all matters in controversy may be completely and finally determined. The immediate controversy here is whether the appellant should have the extension of time he seeks and whether this Court should receive the evidence of the Presidential Approval. To completely and finally determine that controversy requires the exercise of a power to receive new evidence.

34 It is not necessary for present purposes to explore the limits of that power in an appeal against a decision of the Supreme Court of Nauru in its original jurisdiction. It suffices to say that the procedures of the common law courts[21] provide an appropriate analogy and that this Court can receive evidence, properly characterised as fresh evidence, for the purposes of such an appeal. Acknowledging the variations of phraseology which have been used, Dixon J in *Orr v Holmes*[22] said:

> "The fact which the new evidence tends to prove, if it does not itself form part of the issue, must be well nigh decisive of the state of facts upon which the issue depends. The evidence must be so persuasive of the existence of the fact it tends to prove that a finding to the contrary, if it had been given, would, upon the materials before the court, appear to have been improbable if not unreasonable."

Further, the applicant for a new trial must show that no reasonable diligence upon his part would have enabled him or her to adduce the evidence upon the former trial[23].

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19 *High Court Procedure Act* 1903 (Cth), ss 19-22.

20 Judiciary Act, ss 77G-77H.

21 *CDJ v VAJ* (1998) 197 CLR 172 at 184-185 [51], 196-199 [95]-[100]; [1998] HCA 76.

22 (1948) 76 CLR 632 at 642; [1948] HCA 16.

23 (1948) 76 CLR 632 at 644 per Dixon J.

Conclusion

35 The affidavit evidence relied upon by the appellant to support a finding that the requisite presidential approval had been given to the transfer of the disputed lands to the appellant was able to be received and was received in this Court. The evidence was not inherently improbable. On the face of it, it was evidence of some cogency. If accepted on a retrial in the Supreme Court, it would be very likely to determine the outcome of the civil proceedings commenced in that Court in 2000. Having regard to the circumstances in which the Presidential Approval was, in effect, concealed by a Minister of the Government at the time on the instructions of the President, the existence of the Presidential Approval could not have been discovered with the exercise of reasonable diligence on the part of the appellant prior to the hearing in the Supreme Court in 2000.

36 For the preceding reasons, the appeal was allowed and the matter remitted to the Supreme Court of Nauru for further hearing and determination. There was no practical benefit in setting aside the orders made by Connell CJ. By implication, although not in terms, his Honour had dismissed the application for final injunctive relief. Although the interlocutory injunction against the Committee was discharged, no formal order dismissing the substantive application was made.

37 The order of the Court was:

1. Extension of time allowed to enable this Court to hear and determine this appeal.

2. Appeal allowed.

3. Civil Action No 16/2000 is remitted to the Supreme Court of Nauru for retrial.

4. The costs of the proceedings so far in the Supreme Court in Civil Action No 16/2000 to be in the discretion of that Court.

5. The first respondent is to pay the appellant's costs of this appeal.

38 HEYDON J. This is an appeal against a decision of the Supreme Court of Nauru (Connell CJ) given on 19 February 2002. The decision related to an attempted transfer of certain lands. Connell CJ held that the attempted transfer was ineffective because the President of the Republic of Nauru had not approved the transfer. The appellant seeks to tender on the appeal a recently located document expressing a Presidential approval.

39 The appeal is brought as of right under s 5 of the *Nauru (High Court Appeals) Act* 1976 (Cth) ("the Act"). The appeal is more than 9 years out of time[24]. That is a procedural irregularity[25]. But this Court has power to grant the appellant an extension of time[26].

40 The issues before this Court correspond with the first respondent's three basic submissions.

41 First, the first respondent submitted that this Court has no power to receive fresh evidence on an appeal under s 5 of the Act. It argued that the reference to "appeals" in s 5 is a reference to appeals "in the strict sense" – appeals that are "to be determined on the material before the primary court [where] the introduction of fresh evidence is not permitted". The first respondent submitted that time should not be extended because without the fresh evidence the appeal is doomed to failure.

42 Secondly, the first respondent submitted that even if this Court does have power to receive fresh evidence, the evidence in question does not meet the requirements that must be satisfied before the Court could receive it, and hence time should not be extended.

43 Thirdly, the first respondent submitted that even if this Court does have power to receive fresh evidence and even if the requirements for doing so are satisfied, time should not be extended because of the prejudice this would cause the first respondent.

44 I disagree with the orders made at the conclusion of oral argument. At least in these proceedings, the first submission of the first respondent should not be rejected. In the interests of brevity, this judgment will address only the appellant's arguments on this "fresh evidence" point. Those arguments can be grouped as follows.

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24 High Court Rules 2004, rr 42.03(c) and 43.02.

25 High Court Rules 2004, r 2.03.1.

26 High Court Rules 2004, r 4.02.

Section 8 of the Act

45 The appellant contended that s 8 of the Act[27] was a source of power for this Court to receive fresh evidence. That contention must be rejected. Section 8 deals with what orders this Court can make. But it is silent about what materials this Court can consider in deciding what orders it should make.

46 The appellant submitted that s 8 of the Act requires this Court to apply the law of Nauru in hearing and determining the appeal[28]. The appellant submitted that the starting point in ascertaining the law of Nauru is the common law of England on 31 January 1968. He relied on s 4 of the *Custom and Adopted Laws Act* 1971 (Nauru) in support of this proposition. The key words in it are "the common law and the statutes of general application ... which were in force in England" on 31 January 1968. The appellant submitted that the appellate courts of England had power to receive fresh evidence. He argued that this Court "should ... adopt the same approach in relation to Nauru appeals."

47 The first respondent attacked these submissions on the following convincing grounds. The jurisdiction and powers of this Court depend on the Act, not on the law of Nauru. The relevant question is whether the Act permits fresh evidence. The law of Nauru cannot affect whether the Act permits fresh evidence. In any event, the powers of English courts to receive fresh evidence in appeals arise not from the common law but from enactments. It is questionable whether those enactments are "statutes of general application" within the meaning of s 4.

48 The appellant responded to these attacks by pointing to s 46 of the *Courts Act* 1972 (Nauru). It provided that in certain circumstances the Supreme Court of Nauru's jurisdiction is to be exercised in accordance "with the law and practice for the time being observed in England in the High Court of Justice". This has no bearing on how the High Court of Australia's jurisdiction is to be exercised in relation to the reception of fresh evidence on appeal from the Supreme Court of Nauru.

The Constitution and circumstances of Nauru

49 The appellant also relied on the Constitution of Nauru. Article 57(2) allowed for the possibility of appeals from the Supreme Court of Nauru to a court in a foreign country. The appellant submitted that the circumstances of Nauru were so totally different from those of Australia as to suggest that an appeal under s 5 of the Act was quite different from an appeal under s 73 of the

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27 See above at [30]-[31].

28 *Ruhani v Director of Police* (2005) 222 CLR 489 at 516 [66]; [2005] HCA 42.

Constitution[29]. Fresh evidence cannot be tendered in an appeal under s 73[30]. The appellant submitted that in contrast it could be tendered in a s 5 appeal. He said that it was unlikely that there ever would be sufficient Supreme Court Judges in Nauru to permit appeals from one of them to an appellate court composed of the others. He submitted that s 73 of the Constitution was the product of inter-colonial jealousies about the jurisdiction of the State Supreme Courts which would succeed the colonial Supreme Courts.

50 Even if it is legitimate to take these matters into account in construing the Act, which is questionable, they do not point to the construction that the appellant advocates. Apart from the fact that Art 57(1) of the Constitution of Nauru does contemplate appeals within the Supreme Court of Nauru, there are considerations of at least equal strength which point the other way. Nauru is a long way from Australia. To bring appeals from the Supreme Court of Nauru to this Court generates considerable expense. The reception of fresh evidence in this Court (including evidence from witnesses resident in Nauru which may have to be given and tested in cross-examination in Australia) would generate even greater expense and considerable inconvenience.

No power to receive evidence

51 The first respondent put the following argument:

> "there is no express power to receive evidence. Authority for an [appellate] court to receive further evidence must come from a grant of legislative power in addition to a mere grant of appellate jurisdiction.[31] Historically, a simple grant of appellate jurisdiction required the court to determine whether the decision was correct on the facts and law existing at the time the primary decision was given.[32] Appeals are creatures of statute and the source of the powers to receive fresh evidence must arise expressly or by implication from the statute that defines the conditions and limits the exercise of the power.[33] In s 5 ... Parliament chose to style the

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29 Section 73 of the Constitution provides that: "The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences" from various bodies which do not include the Supreme Court of Nauru.

30 See below at [53]-[59].

31 *Eastman v The Queen* (2000) 203 CLR 1 at 33 [105]; [2000] HCA 29.

32 *Eastman v The Queen* (2000) 203 CLR 1 at 35 [111].

33 *Eastman v The Queen* (2000) 203 CLR 1 at 11-12 [14] and 61-62 [186].

> proceeding as an appeal without conferring any express power in the ... Act to admit fresh evidence."

The first respondent also submitted that the "choice of the word 'appeal' combined with an absence of any power to receive evidence in relation to an appeal from Nauru should be seen as deliberate and a power to receive evidence should not be implied."

52 Perhaps it would accord with "contemporary notions of justice"[34] if this Court as the first and only tier of appellate review for some Supreme Court of Nauru decisions had the power to receive fresh evidence. Enactments commonly confer this power on intermediate appellate courts in Australia[35]. But justice makes different demands in different circumstances. In some circumstances, a legislative choice not to confer power to receive fresh evidence on an appellate court can be intelligible, whether critics agree with it or not. The measure of justice that the Act affords depends on its construction. The Act, construed in isolation, contains no express grant of power to receive fresh evidence. And it is difficult to discern in the Act, considered in isolation, any necessary implication that there is a grant of that power.

53 It is true that the Act must be construed, not in isolation, but in its constitutional context. The right to appeal from the Supreme Court of Nauru to this Court is conferred by s 5 of the Act. The Act was enacted pursuant to the power granted by s 76(ii) of the Constitution[36]. Section 5 was not enacted pursuant to Parliament's power under s 73 of the Constitution to create exceptions and prescribe regulations in relation to the appellate jurisdiction of this Court. Section 5 thus conferred original jurisdiction on this Court.

54 In *Mickelberg v The Queen*, Mason CJ said[37]:

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34 *Mickelberg v The Queen* (1989) 167 CLR 259 at 270 per Mason CJ; [1989] HCA 35.

35 See below at [70].

36 *Ruhani v Director of Police* (2005) 222 CLR 489. Section 76 relevantly provides:

> "The Parliament may make laws conferring original jurisdiction on the High Court in any matter:
>
> ...
>
> (ii) arising under any laws made by the Parliament".

37 (1989) 167 CLR 259 at 269.

> "by differentiating between original and appellate jurisdiction and by making different provisions for their exercise, Ch III of the Constitution reinforces the notion that, when it refers to the appellate jurisdiction, it is speaking of appeals in their true or proper sense."

It follows that appeals in the original jurisdiction are not necessarily appeals in what the first respondent called "the strict sense". In *Mickelberg v The Queen*[38], Mason CJ also observed: "in 1900 or thereabouts a mere grant of appellate jurisdiction without more would not be understood as carrying with it a power to receive further evidence." But that proposition has no necessary application to a statute enacted in 1976 under s 76(ii) conferring a right of "appeal" in the original jurisdiction.

55 A court hearing an appeal in the original jurisdiction can have a power to receive fresh evidence. Thus Gleeson CJ said in *Eastman v The Queen*[39]:

> "It is not uncommon for intermediate appellate courts in Australia, including Courts of Criminal Appeal, to have conferred upon them, by statute, power to receive and act upon evidence which was not before the court of first instance. When such a power is exercised, what is involved is an exercise of original rather than strictly appellate jurisdiction."

However, Gleeson CJ went on to say[40]: "The relevant statute ordinarily defines the conditions and limits of the exercise of the power."

56 The first respondent relied on the following statement of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[41]:

> "It was pointed out in [*Re Coldham; ex parte*] *Brideson [No 2]* that 'the nature of [an] appeal must ultimately depend on the terms of the statute conferring the right [of appeal]'." (footnote omitted)

The statement in *Re Coldham; ex parte Brideson [No 2]*[42] to which their Honours referred was made in the context of appeals against administrative decisions. But

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38 (1989) 167 CLR 259 at 270.

39 (2000) 203 CLR 1 at 11 [14].

40 (2000) 203 CLR 1 at 11 [14].

41 (2000) 203 CLR 194 at 202-203 [11]; [2000] HCA 47.

42 (1990) 170 CLR 267 at 273-274 per Deane, Gaudron and McHugh JJ; [1990] HCA 36.

that statement, as widened by their Honours in the *Coal and Allied* case, supports the first respondent's contention that some statutory warrant must be found to justify the reception of fresh evidence on appeals from the Supreme Court of Nauru to the High Court, even though those appeals are in the original jurisdiction.

57 Similarly, in *CDJ v VAJ*, McHugh, Gummow and Callinan JJ said that[43]:

> "apart from [a] special jurisdiction of the House of Lords, in the absence of statute there was and still is no basis for an appeal from a verdict of the common law courts. If a right of appeal is conferred by statute, the terms of the statutory grant determine the nature of the appeal and consequently the right, if any, to adduce further evidence on the appeal." (footnotes omitted)

58 Hence even though, for the reasons Mason CJ gave in *Mickelberg v The Queen*, the appeal from the Supreme Court of Nauru to this Court is not necessarily an appeal in a "true or proper sense", there must be some statutory basis for concluding that on that "appeal" it is open to the parties to tender fresh evidence.

59 The question is not whether the jurisdiction granted by s 5 should be construed amply, without any imposition on it of the restriction on fresh evidence which exists in s 73 appeals. The question is rather whether there is any provision attaching a power to receive fresh evidence to the jurisdiction granted by s 5. There is nothing in s 5, or in any other provision of the Act, or in any other statutory provision, indicating in terms that this Court has a power to receive fresh evidence.

60 However, Gleeson CJ said the relevant statute "ordinarily" defines the "conditions and limits of the exercise of the power" to call fresh evidence. The word "ordinarily" implies that there are instances where there is a power to receive fresh evidence even though the relevant statute does not in terms grant the power or define the conditions and limits of its exercise. One instance may be the doctrine stated in *Electric Light and Power Supply Corporation Ltd v Electricity Commission of New South Wales*[44]:

> "[The legislation under consideration] takes the course of referring a particular matter for hearing and determination to an existing court established as part of the judicial system of the State, the proceedings of

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43 (1998) 197 CLR 172 at 197 [95]; [1998] HCA 67.

44 (1956) 94 CLR 554 at 559 per Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ; [1956] HCA 22.

> which are regulated by a statutory enactment and a body of rules, and the authority of which is amplified by some, and qualified by other, provisions of the enactment, one qualification being the duty to state a case upon a question of law if required by a party. When such a course is adopted it is taken to mean, unless and except in so far as the contrary intention appears, that it is to the court as such that the matter is referred exercising its known authority according to the rules of procedure by which it is governed and subject to the incidents by which it is affected."

The first respondent relied on that doctrine for another purpose. But the appellant did not rely on it for the present purpose.

61 When the Act came into force in 1976, procedure in this Court was regulated by the *High Court Procedure Act* 1903 (Cth) ("the Procedure Act"). Can the *Electric Light and Power* doctrine be applied to the Procedure Act? Section 20 of the Procedure Act, for example, provided:

> "(1) On the hearing of any matter, not being the trial of a cause, evidence may be given by affidavit or orally as the Court or Justice directs.
>
> (2) At the trial of a cause, proof may be given by affidavit of the service of any document incidental to the proceedings in the cause, or of the signature of a party to the cause or his solicitor to any such document.
>
> (3) The High Court or a Justice may at any time for sufficient reason order that any particular facts in issue in a cause may be proved by affidavit at the trial, or that the affidavit of any person may be read at the trial of a cause, on such conditions in either case as are just. But such an order shall not be made if any party to the cause desires in good faith that the proposed witness shall attend at the trial for cross-examination."

Section 21 provided:

> "Except as provided by the preceding provisions of this Act, or unless in any suit the parties agree to the contrary, testimony at the trial of causes shall be given orally in open court."

Sections 20 and 21 have been repealed, but their substance now appears in s 77H of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). Is it open to this Court to find a power to receive fresh evidence by the following reasoning? When the Parliament gave the High Court jurisdiction to hear appeals from the Supreme Court of Nauru, the appeals were to be heard by the Court "exercising its known authority according to the rules of procedure by which it is governed and subject

to the incidents by which it is affected."[45] Among these procedures and incidents in 1976 was the introduction of affidavit or oral evidence pursuant to s 20 or oral testimony pursuant to s 21. The same procedures and incidents exist now under s 77H of the Judiciary Act.

62 In relation to s 21, a critic of the postulated reasoning might object that even though an "appeal" from the Supreme Court of Nauru was in the original jurisdiction, it was not a "trial" of a cause. That objection could not apply to s 20(1), which applied to the hearing of any matter which was not a trial of a cause, as does s 77H(1).

63 In *Federal Commissioner of Taxation v Lewis Berger & Sons (Australia) Ltd*, Starke J began his judgment with these words[46]:

> "This is an appeal by the Commissioner of Taxation from the decision of a Board of Review constituted under the *Income Tax Assessment Act* 1922-1925. Under sec 51(6) of that Act the appeal may be brought from any decision of the Board which, in the opinion of this Court, involves a question of law. The Board, in its proceedings, did not exercise the judicial power of the Commonwealth, but an administrative function, namely, that of reviewing the Commissioner's assessments for the purpose of ascertaining the taxable income upon which tax should be levied. The appeal to this Court submits the ascertainment of the taxpayer's liability to judicial review and ascertainment, but the so-called appeal is a proceeding in the original, and not within the appellate, jurisdiction of the Court. It follows, I think, that the parties on this appeal are not limited to the material that was before the Board of Review, but are entitled to adduce before this Court such evidence in support of, or in answer to, the appeal as is relevant to the matter. The material before the Board and its decision and reasons should be brought before this Court, and the parties may use this material if they so desire, but further or additional evidence may be adduced, or the appeal may be conducted as an original cause brought in this Court. A taxpayer, however, is limited by the Act, sec 51(2), in such proceedings, to the grounds stated in his objection to the assessment, and an appellant should be limited to the grounds of appeal stated in his

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45 *Electric Light and Power Supply Corporation Ltd v Electricity Commission of New South Wales* (1956) 94 CLR 554 at 559.

46 (1927) 39 CLR 468 at 469-470; [1927] HCA 11, followed in *Federal Commissioner of Taxation v Sagar* (1946) 71 CLR 421 at 423-424; [1946] HCA 6; *Commissioner of Taxation v Finn* (1960) 103 CLR 165 at 167-168; [1960] HCA 69.

initiating process in this Court, that is, his notice of appeal, unless he obtain leave to amend it."

64 It is not clear whether the view that fresh evidence could be received was argued or was agreed between the parties. The unusually tentative words "I think" suggest that it was not argued. Counsel for the Commissioner, in his reply, applied for leave to call evidence on a particular point. Starke J refused leave on the ground that the point was outside the grounds of appeal.

65 Does Starke J's reasoning support the appellant in this appeal? One obstacle may be that an appeal to the High Court from a decision in the exercise of the judicial power conferred on the Supreme Court of Nauru is different from an "appeal" by way of judicial review of an administrative act.

66 The appellant did not rely on the argument under consideration in any of his three sets of written submissions. He did not do so in his oral submissions either (though these were limited to questions of relief). Counsel for the first respondent was asked a single question about s 77H of the Judiciary Act. But counsel had no opportunity to conduct a calm and unhurried examination of the argument under consideration from the point of view of either principle or authority. Neither Starke J's decision nor any other authority was cited to this Court. Since the appellant did not rely on the argument, the first respondent was not concerned to refute it. It was for the parties to draw up the lines along which their battle was to be fought. They were entitled to limit themselves to those battle lines. Of course no court is bound by propositions of law on which the parties agree[47]. Similarly, no court is bound by the parameters of legal debate on which the parties settle. But if the outcome of litigation is going to depend on departure from the propositions or parameters the parties agree on, it is necessary that they be given notice sufficient to enable them to make a proper examination of principle and authority[48]. In particular, notice must be given to the party who will lose because of the departure – here the first respondent. It is undesirable to proceed much further with any examination of principle and authority without the assistance which events precluded counsel, particularly counsel for the first respondent, from giving in this case. For those reasons, the appellant ought not to succeed on the argument under consideration in the particular circumstances of this appeal.

67 Before moving from that argument, however, there are three factors which might have to be evaluated in a case in which the argument was put. They are

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47 *Chilton v Corporation of London* (1878) 7 Ch D 735 at 740; *Damberg v Damberg* (2001) 52 NSWLR 492 at 519 [149].

48 *Pantorno v The Queen* (1989) 166 CLR 466 at 473; [1989] HCA 18. See also *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 404 and 410.

analysed on the assumption that the crucial provision is s 20(1) of the Procedure Act, though they apply with equal force if the crucial provisions are ss 20 and 21 of that Act read together.

68 One factor is that s 20(1) appeared in Div 5 of Pt II of the Procedure Act. Part II was headed "Procedure of the High Court". Division 5 was headed "Evidence". None of the 10 Divisions of Pt II dealt in terms with appeals to the High Court. Part III, on the other hand, was devoted to "Appeals" to the High Court. Division 1 of Pt III dealt with "Security" and Div 2 dealt with "Procedure". But no provision of Pt III dealt with evidence. In 1903, it is likely that most, if not all, "appeals" to the High Court would have been s 73 appeals. This raises a doubt whether Pt II Div 5 was to be construed as applying to "appeals" under statutes enacted pursuant to s 76(ii).

69 The second factor is that s 20(1) was enacted at a time which renders it highly unlikely that it was to be construed as applying to appeals to this Court from the Supreme Court of Nauru. In 1903, Nauru was a German colony. Australia was part of the British Empire. Appeals lay from Australian courts to the Privy Council. But no appeal lay from any non-Australian court to an Australian court. The tumultuous circumstances of the next 70 years – the outbreak of the First World War, Germany's loss of its colony, Nauru's successive passage through the League of Nations mandate system to Japanese occupation and then to the United Nations trustee system, the evolution of Nauruan and Australian independence, and the agreement of Nauru and Australia to establish a regime for appeals from the Supreme Court of Nauru to the High Court – are quite different from those which existed when the provisions were enacted.

70 The third factor is that a construction of s 20(1), and now s 77H(1) of the Judiciary Act, as conferring a power to receive fresh evidence in "appeals" to this Court brought pursuant to statutes enacted under s 76(ii) is highly improbable in the absence of words defining the "conditions and limits of the exercise of the power", to use Gleeson CJ's expression. Legislation providing for the reception of fresh evidence in intermediate appellate courts very commonly contains words of that kind. Sometimes they consist simply in the grant of a simple discretion. One example is the simple discretion given by s 93A(2) of the *Family Law Act* 1975 (Cth), considered in *CDJ v VAJ*[49]. Another technique is found in the more

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49 (1998) 197 CLR 172. See also the discretion given by the *Federal Court of Australia Act* 1976 (Cth), s 27, regulated by Federal Court Rules 2011, r 36.57, by the Supreme Court (General Civil Procedure) Rules 2005 (Vic), r 64.22(3) and by the Supreme Court Civil Rules 2006 (SA), r 286(3)(a). The former O 63, r 10(1) of the Western Australian Supreme Court Rules gave "full discretionary power to receive further evidence".

constrained discretion granted by the *Supreme Court Act* 1970 (NSW), s 75A(7)-(9)[50]. Those sub-sections provide that, although the Court of Appeal "may receive further evidence", save for evidence concerning matters occurring after a trial or hearing, the Court "shall not receive further evidence except on special grounds". What constitutes special grounds has been treated as resting on the same principles as those the common law courts applied to motions for a new trial on the ground of fresh evidence[51]. Dixon CJ summarised those principles in *Wollongong Corporation v Cowan*[52]:

> "It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial."

An unusually elaborate discretionary regime is found in the *Supreme Court Civil Procedure Act* 1932 (Tas), s 48. It provides:

> "(1) On the hearing of any appeal a Full Court shall have power to receive further evidence upon questions of fact, and may take such evidence by oral examination in court or by affidavit, or may direct the same to be taken by a judge or an examiner, or a commissioner, or a judge of an inferior court of civil jurisdiction.
>
> (2) Upon appeals in interlocutory applications, or in any case as to matters which have occurred after the date of the judgment, order, or other determination from which the appeal is brought, such further evidence may be given without special leave.

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50 See also Uniform Civil Procedure Rules 1999 (Qld), r 766(1)(c); Court Procedures Rules 2006 (ACT), r 5052(1)(c).

51 See, for example, *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 160. The same approach has been taken to the expression "special grounds" in an enactment in England: *Skone v Skone* [1971] 1 WLR 812 at 815; [1971] 2 All ER 582 at 586. In *CDJ v VAG* (1998) 197 CLR 172 at 200 [105] McHugh, Gummow and Callinan JJ noted that the common law power was wider than that conventionally applied to statutes; see also *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 140; [1991] HCA 61.

52 (1955) 93 CLR 435 at 444; [1955] HCA 16.

> (3) Upon any appeal from a judgment, order, or other determination given or made after the trial of any cause or matter on the merits, such further evidence (except as to matters which have occurred after the date of judgment, order, or determination) shall be admitted only by special leave of the Full Court, which shall only be granted in cases in which –
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> (a) the evidence was not in the possession of the party seeking to have it admitted, and could not by proper diligence have been obtained by him, before the termination of the trial; or
>
> (b) there is some other special circumstance which, in the opinion of the Full Court, justifies the admission of it."

71 If s 20(1) of the Procedure Act is to be construed as dealing with the tender of fresh evidence on "appeals" brought in this Court's original jurisdiction pursuant to legislation enacted under s 76(ii), what are the statutory words which define what Gleeson CJ called the "conditions and limits of the exercise of the power"[53]? There are none. Even if s 20(1) were read as dealing with fresh evidence in those appeals, it did not confer a discretionary power to receive fresh evidence. In this it differs from the enactments just discussed. Section 20(1) gave this Court power to control whether evidence was given by affidavit or orally. But it did not give power to prevent parties tendering evidence which was relevant and complied with the rules of admissibility so long as it was given either on affidavit or orally. It obliged the Court to receive the evidence.

72 To find words creating restrictions on the reception of fresh evidence under s 20(1) and s 77H(1), it is necessary to add to the words which Parliament used, which are wholly inadequate for that purpose, numerous other words which Parliament did not use. Without words defining some conditions and limits, the right of appeal would create an opportunity, for example, to run the case advanced in the Supreme Court of Nauru entirely afresh in this Court. The parties could tender all evidence seen to be relevant, whether or not it was relied on in the Supreme Court of Nauru. It would mean that the right of appeal from the Supreme Court of Nauru to this Court is a right to a "hearing de novo". Mason J (Barwick CJ and Stephen J concurring) described a hearing de novo as one in which "even if it be the defendant who appeals, the [moving party below] starts again and has to make out his case and call his witnesses."[54] In a hearing de novo the parties to the appeal are unrestrained by the limits of the evidence they called at the trial. If s 77H(1) were construed favourably to the appellant, the width of the power to receive fresh evidence in appeals from the Supreme

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53 See above at [55].

54 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 620; [1976] HCA 62.

Court of Nauru to this Court would be so extensive that the trials from which those appeals were brought could be employed as a mere rehearsal or warm-up or dummy run. It is extremely improbable that s 5 of the Act read with s 20(1) of the Procedure Act or with s 77H(1) of the Judiciary Act permits that outcome. If it did, to use Lord Chelmsford's words in *Shedden v Patrick and the Attorney-General*[55]:

> "it is obvious that parties might endeavour to obtain the determination of their case upon the least amount of evidence, reserving the right, if they have failed, to have the case re-tried upon additional evidence, which was all the time within their power."

The words of Scrutton LJ in *Nash v Rochford Rural Council* are also relevant[56]:

> "in the interests of the State litigation should come to an end at some time or other; and if you are to allow parties who have been beaten in a case to come to the Court and say 'Now let us have another try; we have found some more evidence,' you will never finish litigation, and you will give great scope to the concoction of evidence."

73 These three factors support the conclusion that ss 20 and 21 had nothing to do with s 76(ii) "appeals" from courts exercising judicial power, and that s 77H has nothing to do with them either. Sections 20 and 21 related to other types of proceedings in this Court's original jurisdiction. These proceedings include suits (defined in s 2 as including "any action or original proceeding between parties"), civil matters ("matter" being defined as including "any proceeding in a Court, whether between parties or not, and also any incidental proceeding in a cause or matter"), matters which are not the trial of causes, and trials of causes ("cause" being defined as including "any suit" and also "criminal proceedings"). In s 2 of the Judiciary Act, "suit", "matter" and "cause" are defined in the same way. These three factors may also support the conclusion that ss 20 and 21 were, and s 77H is, dealing with the form in which evidence, if receivable, may be received in the High Court. Sections 20 and 21 were, and s 77H is, not dealing with the question whether evidence may be given at all in particular High Court proceedings.

74 Can the *Electric Light and Power* doctrine be applied to find a source for the reception of fresh evidence in s 32 of the Judiciary Act? It provides:

> "The High Court in the exercise of its original jurisdiction in any cause or matter pending before it, whether originated in the High Court or removed

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55 (1869) LR 1 HL Sc 470 at 545.

56 [1917] 1 KB 384 at 393.

> into it from another Court, shall have power to grant, and shall grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause of matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided."

75 The appellant did not rely on s 32. It was not otherwise drawn to the first respondent's attention before or during oral argument. It cannot, therefore, be taken into account adversely to the first respondent. Even if it were taken into account, it would not assist the appellant. Section 32 enables this Court in its original jurisdiction to grant those remedies to which the parties are entitled as necessary to achieve the goals set out in the provision. It does not stipulate what materials this Court is to have regard to in executing that mandate.

76 There is a further point which was not argued. At common law it was possible, subject to the satisfaction of quite strict but not necessarily exhaustive conditions, to move for a new trial on the ground that fresh evidence had been discovered. That procedure was not by way of appeal[57]. The appellant did not invoke that procedure. Accordingly, the appellant presented no argument that this Court had power to receive fresh evidence and grant a new trial in accordance with the common law practice. Nor did the appellant seek to gain whatever support for such an argument could be gained from Deane J's dissenting judgment on s 73 appeals in *Mickelberg v The Queen*[58].

Conclusion

77 Although the nature of the controversy in some other case may make it right to conclude that fresh evidence is receivable in a s 5 appeal, it is not right to do so in this case.

78 On the assumption that fresh evidence is receivable, the appellant presented a very strong case for the view that the fresh evidence he relied on should be received and for the view that time should be extended. The respondent presented quite detailed arguments to the contrary. In view of the conclusion just reached, it is not necessary to deal with these competing arguments.

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57 See *CDJ v VAJ* (1998) 197 CLR 172 at 196-199 [95]-[99].

58 (1989) 167 CLR 259 at 276-281.