

BETWEEN Hons L.G.N. Harris, Clinton Benjamin, Nimrod Botelanga, Remy Namaduk, Dogabe Jeremiah, Ruben Kun, and Anthony Audoa

Plaintiffs

A N D Hon. Kennan Adeang, MP  
Speaker

First Defendant

A N D HE Kinza Clodumar MP, President

Second Defendant

A N D Vassal Gadoengin MP, Minister  
for Justice

Third Defendant

A N D The Secretary for Justice

Fourth Defendant

Date of Hearing: 14/15/16 January 1998  
Date of Judgment: 27/1 February 1998

Coram: Donne C.J., Dillon J.

JUDGMENT OF DILLON J.

BACKGROUND

The Plaintiffs, both individually and collectively, seek declarations and other orders from this Court based on alleged breaches of the Constitution of the Republic of Nauru by the Speaker in his conduct of the sitting of Parliament on 12 June 1997. The breaches alleged are set out in detail in the Statement of Claim, but may be summarised as follows :

1. That a sitting of Parliament was held on 12 June 1997 when a quorum of members was not present as required by Article 45 of the Constitution of Nauru;
2. That such a sitting was in breach of the Standing Orders of Parliament;
3. That business transacted during those proceedings of Parliament are in breach of Article 45 of the Constitution; are *ultra vires*; and are therefore null and void;
4. For those reasons the Plaintiffs "... move that the Supreme Court as final arbiter over constitutional issues and upholder and protector of the Constitution cannot and should not condone the commission and/or omissions of the Speaker, the President and the Minister of Justice with procedures stipulated in the Constitution and accordingly incumbent on the Honourable Court to protect and uphold the supremacy of the Constitution by making appropriate orders to nullify the business transacted in the House at the meeting held on 12 June 1997."

The Plaintiffs refer to and acknowledge that their pleadings rely upon Articles 27, 45 and 47 of the Constitution of Nauru. Article 27 states :

"27. Subject to this Constitution Parliament may make laws for the peace, order and good government of Nauru; laws so made may have effect outside as well as within Nauru."

In this context Counsel for the Plaintiffs submits that "... before Parliament make(s) laws for peace, order and good government of Nauru it must first of all comply with any provisions of the Constitution of Nauru that are relevant to the purpose of legislating." That is Parliament must first of all comply with the provisions of Article 45 which states :

"45. No business shall be transacted at a sitting of Parliament if the number of its members present other than the person presiding at the sitting is less than one half of the total number of members of Parliament."

Attached to Counsel's submissions is a copy of the record of the "votes and proceedings of the thirteenth Parliament (3)" held on Thursday 12 June 1997. There is no reference in that record to the question of a quorum or the lack of one. In this context the Plaintiffs claim that both the President and the Minister of Justice in particular had a duty and/or a responsibility to advise the Speaker of this alleged irregularity.

Finally, Article 47 of the Constitution relied upon by the Plaintiffs states as follows :

"47. A proposed law becomes law on the date when the Speaker certifies that it has been passed by Parliament."

In this case the Speaker has certified the legislation that Parliament approved on 12 June 1997.

In reviewing those three articles relied upon by the Plaintiffs it is Article 45 of the Constitution that is of paramount consideration. Article 27 provides for "the peace, order and good government of Nauru", while Article 47 confirms that legislation certified by the Speaker becomes the law of Nauru on the date of certification. Thus the only question is whether the legislation that was passed on 12 June 1997 and which has since been certified by the Speaker is now part of the law of Nauru.

In this context the Plaintiffs concede that this Court does "... not have jurisdiction to hear matters that are procedural in nature only and are conducted in the Parliament House per se ...". The supremacy of Parliament and parliamentary procedure has always been recognised by the Courts which will not inquire into Parliamentary proceedings. That concession by the Plaintiffs and acceptance of the law applicable reduces substantially the scope of the inquiry which this Court has to undertake.

De Smith's Judicial Review of Administrative Action (4th Edition), at page 469, concisely states the position as follows :

"The courts have no jurisdiction to restrain by injunction or otherwise to pass upon any conduct that forms part of proceedings in Parliament, even though the matter in issue is not directly connected with the process of legislation."

“Assuming that the Plaintiff was right in his contention that the order of the House was based upon the misconstruction of a statute, nevertheless the Courts had no jurisdiction to interfere for the matter fell exclusively within the scope of the privilege of the House to regulate its own internal proceedings.”

But Nauru, like other Pacific Island countries, is bound not by the privileges and immunities which have as their source the English Bill of Rights of 1689, but rather by the Constitution of the Republic of Nauru. Article 2 of that Constitution states :

- “2 (i) This Constitution is the supreme law of Nauru.  
(ii) A law inconsistent with this constitution is to the extent of the inconsistency void.”

Based on Nauru’s constitution the Plaintiffs now alleged that :

1. On 12 June 1997 Parliament sat and passed legislation when there was no quorum present;
2. They claimed to have the *locus standi* to apply to this Court for the orders they now seek.
3. This Court, they submit, has jurisdiction to hear and determine the Plaintiffs’ actions.

### QUORUM

The administration of Parliament and the procedures it adopts are governed not only by the Constitution, but also by standing orders, Speaker’s rulings, and generally the practices adopted by the Speaker and the members of Parliament. It is in this context that the question of a quorum or lack of quorum must be considered. But how can this Court determine such an issue without considering in detail what the Speaker did or did not do, and what standing orders or Speaker’s rulings were applied to this sitting of Parliament which has been challenged. Such an inquiry must of course involve an investigation into the procedure adopted by the Speaker and the House on 12 June 1997 - an inquiry which the Plaintiffs concede and acknowledge that this Court has no jurisdiction to undertake.

What is clear from the record of proceedings of Parliament is that the state of the House was not drawn to the attention of the Speaker, nor was this state of affairs revealed by a division having been called for during the sitting. The significance of this situation is evident from a ruling of the Speaker recorded in "Practice and Procedure of the Parliament of Nauru" by the Parliamentary Counsel, Mr N.N. Mehra. At page 106 of that publication it records that :

"On 20 September 1989 after a member had given notice of a motion in the House the Speaker's attention was drawn to the lack of presence of a quorum in the House. Next day it was pointed out that the notice given by the member was not valid as there was no quorum at that time. The Speaker ruled that lack of a quorum stopped the proceedings, that the proceedings which had taken place before the lack of the quorum was pointed out were not annulled on lack of a quorum being pointed out and therefore the notice given by the member was valid."

Applying that ruling to the present circumstances :

- (a) It is necessary for the Speaker to be formally notified at the time that a lack of quorum exists. Once advised of this state of affairs the Speaker must adjourn the House to the next sitting day in accordance with standing orders;
- (b) But until the Speaker has been made aware that a lack of quorum exists, then all proceedings of the house up to that point in time of notification about the quorum are valid.

The Plaintiffs in this case rely on the records of the proceedings of Parliament on 12 June 1997, but those records confirm that the Speaker was not alerted to the question of a quorum or lack of a quorum; nor was a division called for during the debate on that date. The Speaker's ruling on 20 September 1989 already referred to therefore confirms that the proceedings of Parliament on 12 June 1997 are valid.

Apart altogether from that Speaker's ruling, this Court has no jurisdiction to inquire into the procedure adopted by the Speaker and the House on 12 June 1997. That limitation is accepted by the Plaintiffs. Significantly, however, it was not until 24 June 1997, some 12 days after the Parliamentary sitting had concluded, and 11 days after the Speaker had certified the legislation that had been passed on 12 June 1997 pursuant to Article 47 that the Plaintiffs gave

formal notice of the absence of the quorum through the median of these proceedings that they have issued. What the Plaintiffs are here attempting is to bypass Parliament where the question of a quorum must be dealt with by the Speaker Instead they are seeking to challenge retrospectively the legislation that has been passed by Parliament and certified by the Speaker in compliance with the provisions of the Constitution in that regard.

This Court cannot inquire into the procedure of the House which is solely within the control of the Speaker or his nominee. The Plaintiffs acknowledge and concede that limitation. If there was no quorum on 12 June 1997 as alleged and relied upon by the Plaintiffs, nevertheless the proceedings of Parliament on that day remain valid in accordance with the Speaker's ruling dated 20 September 1989, and in accordance with the Speaker's certificate which has been endorsed as required by Article 47 of the Constitution. X

### LOCUS STANDI

Whether the Plaintiffs have the right to bring these present proceedings is of course of fundamental importance. As members of Parliament they do not have inherent rights to seek the Court's assistance in correcting what they perceive to be a breach of Article 45 of the Constitution.

It is accepted that this Court in certain circumstances may enquire into compliance with and the observance due to the provisions of the Constitution. This principle was considered in great detail by the High Court of Australia in the case of Cormack v Cope 1974 C.L.R. Barwick C.J. held that a Court is justified in examining legislation that is subject to challenge because of alleged non-observance of a provision in the Constitution or its requirements in the law making process. He explained the position this way, at page 454 :

“Whilst the Court will not interfere in what I have called the intra-mural deliberative activities of the House, including what Isaacs J. called “intermediate procedure” and the “order of events between the Houses”, there is no parliamentary privilege which can stand in the way of this Court's right and duty to ensure that the constitutionally provided methods of law making are observed.”

But the Court's jurisdiction to examine whether "the methods of law making are observed" by Parliament and conform to the requirements of the Constitution is limited to the actual legislation once passed into law. Barwick C.J. identified this important distinction, again at page 454 :

"Ordinarily the Court's interference to ensure a due observance of the Constitution in connection with the making of laws is effected by declaring void what purports to be an act of Parliament after it has been passed by the Parliament and received the Royal Assent. In general this is a sufficient means of ensuring that the process of law making which the Constitution requires are properly followed, and in practice so far the Court has confined itself to dealing with laws which have resulted from the Parliamentary process."

The legislation in the present instance has "... been passed by the Parliament and received the (Speaker's) assent". The conditions therefore exist for "... the Court's interference to ensure a due observance of the Constitution ..." in accordance with the criteria suggested by Barwick C.J.

But the present proceedings are not a challenge to the legislation as such that was passed into law by Parliament on 12 June 1997. Rather the Plaintiffs attack the process and procedure that produced that legislation. They have not considered the legislation itself. Nowhere have the Plaintiffs indicated how or why they have been affected by any one of the 18 Acts that were passed on 12 June 1997; certified on 13 June 1997; and published in the Government Gazette on 18 June 1997; rather it is the alleged non-compliance of the provisions of Article 45 that the Plaintiffs have directed their challenge - a challenge to the procedural process of Parliament which the Plaintiffs have already acknowledged, this Court has no jurisdiction to investigate. The Plaintiffs, by their pleadings, are seeking to review Parliamentary conduct which they allege is contrary to Article 45 of the Constitution. But no-one, whether a member of Parliament or an ordinary citizen of Nauru, has the status of *locus standi* to institute proceedings until such time as they can, with justification, allege what effects identified legislation produces on a petitioner's legal rights.

In this case the Plaintiffs make no such allegations and consequently have no *locus standi* to initiate these proceedings.

## JURISDICTION

Having found that the Plaintiffs have no right or status to initiate proceedings of a general nature whereby they can challenge the procedure adopted by Parliament during the sitting on 12 June 1997, I turn now to examine whether this Court has the jurisdiction necessary to consider the petition which has been filed by the Plaintiffs. The Plaintiffs have quite correctly conceded that this Court has no jurisdiction to examine the procedure, either Parliament or the Speaker adopted on 12 June 1997. No Court can anticipate whether proposed legislation will in fact be valid law. Any challenge to the validity of a law is only available where a person can establish an interest in the legislation which would justify the Court undertaking an inquiry. That position is quite different to the facts in this present case. Not one of the Plaintiffs has identified an interest in any of the 18 Acts which Parliament passed on 12 June 1997. Rather the challenge is against the procedure adopted by that Parliament. This distinction between the proceedings of Parliament which this Court has no jurisdiction to investigate, and the legislation of Parliament, the investigation of which this Court does have jurisdiction, was referred to by Menzies J. in the case of Cormack v Cope previously referred to, where at page 465 he said :

“Closely associated with these principles is another principle of great Constitutional importance, namely that the Court will not interfere with the proceedings of Parliament or the Houses of Parliament. The validity of the law that follows from what Parliament has done is one thing. The proceedings of Parliament that lead to a valid or an invalid law are another. It is not for this Court to prevent Parliament from doing what in the opinion of this Court will result in an invalid law.”

Gibbs J. in the same case at page 467 explained this important distinction in this way :

“It has been emphatically laid down that the settled practice of this Court is to refuse to grant relief in respect of proceedings within Parliament which may result in the enactment of an invalid law and that the proper time for the Court to intervene is after the completion of the law making process.”

“It is after the proposed law has been affirmed that the Court should declare it to be invalid if grounds for such a declaration exist.”



Accepting that the legislation passed by Parliament on 12 June 1997 and authenticated by the Speaker is now law, there is no doubt that this Court has the jurisdiction to declare that law invalid if it is established that "grounds for such a declaration exist". But this Court has no jurisdiction to generally inquire into the procedure adopted by Parliament on 12 June 1997. It is the legislation passed by Parliament and not the procedure adopted by Parliament that the Petitioners should be challenging. This Court has the jurisdiction to adjudicate upon the legislation passed by this Parliament. But the Plaintiffs have challenged not the legislation but the procedure adopted by Parliament in passing the legislation. This Court does not have jurisdiction to inquire into the procedure of Parliament which is "free to regulate and determine its own internal procedure from time to time", as was stated by the Western Samoa Court of Appeal in Ah Chong v The Legislative Assembly & Others (C.A. 2/96 - 17-9-96).

Unfortunately the procedure used and the arguments adopted by the Plaintiffs are for those reasons misconceived. However the Plaintiffs also rely on Article 54 of the Constitution when they submitted that :

"The Plaintiffs strongly feel that because of the existing facts and reading those facts as stated above in conjunction with Article 54 of the Constitution of Nauru the Supreme Court have the full and the original jurisdiction to determine any question arising under or involving the interpretation or effect of any provision of this Constitution of Nauru."

Mr Audoa submitted that since Article 54(i) provides "... original jurisdiction to determine any question arising under or involving the interpretation or effect of any provision of this Constitution ..." that this Court should therefore determine the issue of alleged lack of a quorum and the resulting non-compliance with Article 45. But that jurisdiction is not available and cannot be exercised when it would require the Court to undertake a critical appraisal of the practise adopted by Parliament and a thorough investigation of the procedure adopted by the speaker on 12 June 1997. The Plaintiffs have acknowledged and conceded that this Court does not have jurisdiction to investigate the practise and procedure adopted by Parliament on this occasion. This Court's jurisdiction in such matters is limited not to the considerations of the practise and procedure of Parliament or its speaker, but to the legality or illegality of the legislation that Parliament has passed on that date.

The Plaintiffs have not challenged the legislation that was passed on 12 June 1997. As a consequence this Court has no jurisdiction to investigate the process of Parliament and the procedure adopted by the Speaker.

### CONCLUSION

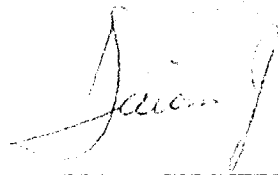
The Plaintiffs seek orders in the following terms, namely :

“For the reasons set out above the Plaintiffs move that the Supreme Court as final arbiter over constitutional issues and upholder and protector of the Constitution, cannot and should not condone the commissions and/or omissions of the Speaker, the President and the Minister for Justice with procedures stipulated in the Constitution and accordingly incumbent on the honourable Court to protect and uphold the supremacy of the Constitution by making appropriate orders to nullify the business transacted in the House at a meeting held on 12 June 1997.”

I am satisfied for the reasons already stated :

- (a) The Plaintiffs do not have the *locus standi* to institute proceedings to challenge the practise and procedure adopted by Parliament and its Speaker on 12 June 1997;
- (b) This Court does have jurisdiction to declare legislation invalid if grounds for such a declaration exist. But the Plaintiffs have not sought a declaration that the legislation passed on 12 June 1997 is valid or invalid, rather they have asked the Court to undertake an investigation limited to the practise and procedure of Parliament and its Speaker allegedly operating without a quorum. That is an inquiry the Court has no jurisdiction to undertake.

In my opinion the orders and/or declarations sought by the Plaintiffs in law should not be granted. I recommend that costs in favour of the fourth defendant to be fixed by the Register and failing agreement by reference to this Court.

A handwritten signature in cursive script, appearing to read "Dillon J.", is written above a horizontal line.

Dillon J.