Not Restricted

IN THE SUPREME COURT
REPUBLIC OF NAURU

Land Appeal No.21 of 2010

Marissa Cook, Vinson Detenamo and Others
Appellants

V

Aburuwe Fritz and Others
1st Respondents

And

Nauru Lands Committee
2nd Respondent

JUDGE:	Eames, C.J.
DATES OF HEARING:	5 June, 26 November 2012, 11 March 2013
DATE OF JUDGMENT:	13 March 2013
CASE MAY BE CITED AS:	Marissa Cook & Others v Aburuwe Fritz and others
MEDIUM NEUTRAL CITATION:	[2013] NRSC 2

CATCHWORDS:

Land appeal – *Nauru Lands Committee Act* 1956, s.6 and 7 – Nauru Lands Committee conducts field days in 1992 and 2003 concerning land known as "Aninapae", Portion 399 Buada District – Decision by NLC in 2006 to grant land to 1st respondents as descendents of Fritz (dec'd), who was named owner of land called Aninipae in 1928 Land Book – Determination of NLC not published in Gazette until 2010 –Appellants did not attend field days and unaware until 2006 they might have an interest in any land called "Aninapae"– Appellants rely on 1959 minute of NLC said to record intention of Committee to grant land called Aninapae to their ancestor Detenamo – No such determination published in Gazette – Numerous portions of land named "Aninapae" in Buada district - Appeal against 2010 determination.

Nature of Appeal - Whether appeal competent – Whether appellants "dissatisfied" by the decision or merely requiring Court to conduct an investigation into appellants' possible landholdings in the area – Whether appellants must establish error of fact, law or procedure on part of NLC – Whether appeal stricto sensu, by way of rehearing or by rehearing de novo – s.7 provides widest possible scope for an appeal – Appeal generally to be conducted by way of rehearing de novo – Appellant not required to first establish error on part of Committee in reaching its decision but Court may refer matter back to Committee if procedural or other error established.

Procedural fairness - Whether Committee denied procedural fairness to appellants by failure to notify

appellants of field days in 1992 and 2003 or by failure to give appellants a fair hearing and/or to hold a new field day, before publication in Gazette in 2010 – No denial of procedural fairness – Matter not appropriate to be referred back to Committee.

Upon rehearing de novo, Court upheld correctness of determination as to ownership and borders of Portion 399.

APPEARANCES:

For the Appellants	Mr D. Aingimea (Pleader)
For the 1st Respondents	Mr V Clodumar (Pleader)
For the 2nd Respondent	Ms L Lo Piccolo (Secretary for Justice) and on 11 March 2013, Mr S Bliim, Solicitor General.

CHIEF JUSTICE:

1 This is a land appeal brought pursuant to s.7 of the *Nauru Lands Committee Act* 1956. Over a number of years the Nauru Lands Committee ("NLC") conducted an investigation into the ownership of coconut land known as "Aninapae"[1], in the Buada district. The land was subsequently given the identification of Portion 399 by the Department of Lands and Survey.

2 In investigating ownership, the Committee conducted a field day in 1992, but no decision then resulted. A further field day was conducted in 2003, again without a determination being made or published by the Committee. The Committee considered the matter again in February 2006, and then ruled in favour of the 1st respondents. Members of the 1st respondent family attended both field days and marked out boundaries. It was not until 4 August 2010, however, that the Committee published its determination - in Gazette No 104 of 2010, being GNN 399 of 2010 - declaring the 1st respondents to be the owners of Portion 399, and providing a boundary map. The appellants appealed that decision pursuant to s.7 of the Act.

3 The sixteen year delay between the first field day and the determination was very unfortunate. The explanation proffered by the Committee is that there was a dispute as to the location of boundaries between lands that became Portions 399 and 398, both of which were named Aninapae. The Committee encouraged the owners to resolve their dispute, but it took a long time for them to do so.

4 In accepting the 1st respondents' claim to Portion 399 the Committee identified its primary source reference as being the Land Register Book of 1928, which showed land named "Aninapae" in Buada district, being coconut land owned by "Fritz (Buada)". This is a reference to Fritz Dunobo, the ancestor of the 1st respondents.

5 The appellants do not deny that the 1st respondents are owners of land in the Buada District named Aninapae, inherited from Fritz. They contend, however, that they too owned land called Aninapae in Buada District, through their ancestor Detenamo, and their claim to Portion 399 was

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[1] This is the spelling as appeared in the 1928 Land Book and as used in the determination under appeal. There are slight variations in the spelling elsewhere employed (frequently "Ananipae") but, save where discussed, nothing turns on that.

superior.

6 The appellants first contention was that the Committee denied procedural fairness to the appellants by not inviting them to attend the field days. If that was established then Mr Aingimea asked that the determination be quashed and the matter be referred to the Committee for re-consideration, including a new field day.

7 Alternatively, the appellants invite me to re-consider and uphold the merits of their claim, by way of rehearing de novo, so as to substitute my own finding as to the ownership and boundaries of Portion 399.

The 1st respondents' claim was accepted by the Committee

8 Mariata Mavis Fritz deposed to the history of the family's claim to the land. Mariata and her sister Eidamagin are the only surviving daughters of Fritz and Demaibure, of Buada District.

9 In the 1928 Land Book the listed land owned by Fritz included land called Aninapae. In 1928 many blocks named Ananipae fell within undetermined land in Buada District. The precise location, boundaries and ownership of each block was a matter for investigation by the Nauru Lands Committee, as happened in this case.

10 On the appeal Mariata Fritz deposed that she knew the history of portion 399 and she described the process undertaken by the Committee.

11 Mariata Cook said the land in question had been a gift given to her father, Fritz, by his cousin Eidadia. A record of the Council of Chiefs, in 1922, shows that Aninapae was then owned by Eidadia. Later, the 1928 Land Book lists the lands of Eidadia (spelt "Eidatia), but does not record her as then owning an Aninapae, this being consistent with the contention that she had gifted the land to Fritz between 1922 and 1928.

12 Mariata Fritz deposed that the borders of Aninapae were unknown until a field day was conducted by the Nauru Lands Committee in 1992. On that occasion the elder sisters, Eidengob and Eidameagin, set out the boundaries before the Committee members and surveyors. In his submission dated 30 January 2013, Mr Clodumar, pleader for the 1st respondents, said that many other claimants attended the 1992 field day. He added: "It took a long time for the NLC to determine the correct boundary of two lands being claimed by Fritz family and Auwebin family, as the border claimed by each family overlapped. Only in the 2003 field day (was it) that claimants corrected their boundary from overlapping".2

13 Another field day was conducted on 7 July 2003. I do not know why there was such delay. The 1st respondents were represented on the second field day by Arrow Depaune.

14 Mr Clodumar said that the 2003 field day was called only for the two adjoining claimant families (the Fritz family and that of Auwebin). Arrow Depaune marked the boundaries for Portion 399, and he was able to correct the boundaries as walked by his mother in 1992. Four members of the Auwebin family were present but only Arrow marked his boundaries. Surveyors were present in

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[2] Among those in attendance in 2003 for the Auwebin family was Palik Agir. In 2012 Palik Agir and family were determined to be owners of Portion 398, the land to the north of Portion 399, also named Aninapae.

2003. The minutes do not record any decision being taken by the Committee on that day.

15 On "30" February (sic) 2006, the minutes record a meeting of the Committee to discuss Arrow's claim to Aninapae, and that, "All agreed to accept Arrow's claim".

16 The appellants claim that Portion 399 was not Fritz's land but was land that had been inherited by their ancestor Detenamo, which had been held in the name of Eijoruwan in trust for Detenamo. They claim that the land held by Eijoruwan for Detenamo was either inherited from Detenamo's adopting father, Chief Dourwarum, or by way of a gift from a person named Iyo.

The issues raised on appeal

17 In particulars of the notice of appeal dated 30 September 2010 the appellants in objecting to the determination as to Portion 399, contended, inter alia, that:

> "2. By way of a decision made by the Nauru Lands Committee on the 15th of January 1959, the Land Committee recognised ownership of Aninapae as belonging to Samuel Detenamo".
>
> 3. That the present Lands Committee erred by not taking the relevant 1959 decision into consideration prior to making another decision awarding ownership to the respondents."

Was the appeal competent?

18 In written submissions filed 12 March 2012 Mr Aingimea, pleader for the appellants, explained the appeal, inter alia:

> "What the appellants are basically seeking is first of all a finding by the Court as to whether or not they have an 'Aninapae' (sic) portion of land. They do not dispute that the respondents have an 'Aninapae'. This may have been misunderstood as I see the respondents defending their position. That is not the intention of the appeal.
>
> There would be no point for this hearing to hear evidence with respects to the field day and evidence submitted with respects to that said field day would be secondary against the need for a finding by the Supreme Court as to whether or not based on the records presented, the appellants do or do not have an 'Aninapae' portion of land.
>
> The area where the determination was made by the Nauru Lands Committee awarding the 1st respondents a section of land is an area that (including the awarded portion given to the 1st Respondents) is considered to be an 'Aninapae' yet to be determined. In other words, there is a lot of land in the area that would be classed as 'Aninapae' that remains still undetermined today.
>
> The appeal by the Appellant allows the Appellants' claim to be looked at by the Court and for the Court to see from the Nauru Lands Committee records the entitlement the Appellants have to an 'Aninapae' portion of land.
>
> It is therefore our request that the Supreme Court firstly answers this question."

19 The submission continued: "I therefore ask the Chief Justice to deal with this question first as this will determine whether the appeal continues or not".

20 Mr Clodumar submitted that the appeal should be dismissed as incompetent, because it did not constitute an appeal against the determination of the Committee, in that it did not identify any error

on the part of the Committee in reaching its conclusion that the 1st respondents inherited Portion 399 from Fritz. He submitted that the appellants merely sought to have the Supreme Court conduct an original investigation, based on the records of the Committee, as to whether there was some other undetermined land called Aninapae, to which the appellants could claim ownership.

21 An appeal under s.7(1) is granted to a person who is "dissatisfied with a decision of the Committee". It is not a process for requiring the Court to conduct an original investigation into rights to land; it constitutes a review of a particular decision made by the Committee.

22 The submissions of Mr Aingimea filed in November 2012 sought by way of relief that:

> 1. "The Court determines the question of whether the appellant own land called Aninapae.
>
> 2. If the Court so finds, it refers the matter back to the NLC for re-determination of boundaries, which may affect the current boundaries of portion 399.
>
> 3. That the gazette notice which is the subject of this appeal be quashed."

23. Consideration of the threshold question of the competence, and scope, of the appeal, raised the fundamental question of the nature of an appeal under s.7. I heard submissions on this difficult question of statutory construction and - not without some doubt - I have concluded that the appeal is by way of re-hearing de novo, a conclusion that is relevant both as to the issues to be addressed on the appeal and as to the orders and types of relief that may be granted on an appeal.

24. A re-hearing de novo as to whether Samuel Detenamo owned some or all of what is now Portion 399 would require consideration by me of all of the records and other information available to the Committee, together with any additional evidence produced on the appeal. It would not require that error first be established on the part of the Committee before I was obliged to re-consider the evidence.

25. On the other hand, as I shall discuss, were error to be disclosed that undermined the decision of the Committee, one outcome might be to refer the case back to the Committee for re-consideration, upon correction of the error. I do not undervalue the importance of placing the decision-making process in the hands of the Nauru Lands Committee on important customary law land ownership questions.

26. The case as now presented on appeal is first concerned with the complaint that the appellants were persons with a sufficient interest in the question of ownership or boundaries of Portion 399 as to require that the Committee notify them about the conduct of any proposed field days. The failure to do so was a denial of procedural fairness, Mr Aingimea submitted. Mr Aingimea seeks the quashing of the determination on that account, and the return of the matter to the Committee for re-consideration.

27. Although the prayer for relief continues to seek determination "whether the appellant owns land called Aninapae", in his submissions filed 15 January 2013 Mr Aingimea now positively claims that "Samuel Detenamo is the owner of Aninapae and portion 399".

28. I would not conclude that the appeal is incompetent as it is now presented.

29. I will postpone until the end of my judgment discussion of the legal authorities as to the nature of an appeal under s.7. It is appropriate that I deal with the substantive issues at this point.

The appellants' claims to land named Aninapae in Buada District

23. No representative of the appellant family attended either field day concerning what became Portion 399. The appellants did not attend because they did not know that they had an interest in land named Aninapae. No claim to Aninapae had been registered with the Nauru Lands Committee or its predecessor Lands Committee by the appellants' ancestor Detenamo, from whom they now claim entitlement to Portion 399. It has been the long-standing practice of the Committee to advertise a field day to the whole community and to give specific notification to any family that had registered a claim with the Committee. They followed that practice in this case. There was a substantial area of undetermined land that was under discussion. The minutes of the 1992 field day show that many people attended to advance or protect interests they claimed to have over many lands in the area.

24. The Committee would have had no cause to notify the appellants of the field days if there was no basis disclosed by the records of the Committee, nor any other information, to suggest that the appellants could have claimed a competing interest as to ownership of land called Aninapae within or adjoining the boundaries of Portion 399.

25. Notwithstanding that Detanamo's land book did not record a formal claim that he owned land called Aninapae, the appellants contend that there was information in the records of the Committee that should have alerted its members to the fact that not only had Detenamo asserted ownership of Aninipae, his claim had been accepted by the Committee.

26. According to the appellants, Samuel Detanamo had inherited land in Buada District from his adopting parents, Chief Douwaram and his wife Eidagabo. After Eidagabo had died the father re-married, his new wife was Eijoruwan. Eijoruwan held land from her husband on Samuel's behalf on trust until he was old enough to take it over, the appellants claim.

27. The appellants contend that there were two blocks (possibly three, as I shall discuss) called Aninapae which had been held in trust, under the name Eijoruwan, for their ancestor Detenamo.

28. One of the two blocks listed in Eijoruwan's name in 1928, and titled Aninapae, was land held in trust through Chief Douwarum, the appellants claim. On all sides it was accepted that that land, which was later designated Portion 141, was unable to be claimed by the appellants, as it had been the subject of a formal determination published in the government gazette in 1957, granting ownership to another family, that of Willie Halstead and Damage. No appeal had been made against that decision, although the appellants contend that it had been erroneous. The second Aninapae, the appellants claim, was the land subject to the present appeal, Portion 399.

29. The two Aninapae blocks listed in the name of Eijoruwan in the 1928 Land Book, were both described as coconut land, as was Portion 399 in the 2010 determination.

30. The second block of land called Aninapae, as listed with Eijoruwan in 1928, was claimed by Mr Aingimea to have been gained by way of a separate inheritance. It had originally been owned by Iyo, who gave it to Eiyabo, the wife of Detenamo, who then placed it in the name of Eijoruwan. Mr Aingimea described this as "the Iyo inheritance".

The history of lands called Aninapae, held in Eijoruwan's name.

23. The 1912 German ground Book listed more than a dozen blocks of land by name "Aninapwae", or "Aninabwae". Among the named owners was Eijoruwan, as to one block of land and Ijo (or Iyo) as to another.

24. Iyo was shown as owner of one piece of land called Aninapae in the 1912 German Ground Book, but was not shown as owner of a block called Aninapae in the 1928 Land Book. Eijoruwan, in turn, had only held one block called Aninapae as listed in the 1912 German Ground Book but two in the 1928 book, so the second block listed in her name in 1928 was, according to Mr Aingimea, arguably the land that came to her by virtue of what he called "the Iyo inheritance".

25. The Committee submitted that there was no evidence of such an "Iyo inheritance", but I disagree. Such an inheritance was claimed by Detenamo in the Committee minutes in 1949, and was not expressly denied by anyone in attendance. Mr Clodumar pointed out, however, that Iyo's block was spelt "Ananibwae" rather than "Ananipwae", the spelling for Ejoruwan's block on the same page of the 1912 Ground Book. I do not think anything turns on that; there are many variations on the spelling of Aninapae, indeed also of the name Eyoruwan or Eijoruwan.

26. Mr Clodumar further noted that the 1912 Ground Book recorded the "heir" to Iyo's land to be her "children". I do not believe that excludes the possibility that subsequently the land was transferred by way of the Iyo inheritance.

27. Although it was agreed on all sides that one of the two blocks in Eijoruwan's name in 1928 was that which was subsequently designated as Portion 141, it might not necessarily be the case. Both blocks of land in Eijoruwan's name in the 1928 Land Book are described as coconut land, but the designation "Portion 141" was given to phosphate land called Aninapae (spelt "Aninepei"), which was determined to be owned by Eijoruwan, in a determination published in the Government Gazette 16/34 on 14 April 1934.

28. It is accepted by counsel that designations of phosphate and coconut land often change, so the 1934 determination might have been intended to achieve that result with respect to one of the two blocks held in Eijoruwan's name. That could be one possible explanation for this discrepancy. The 1934 Gazettal does raise the possibility, however, that by 1934 there was a third Block called Aninapae in the name of Eijoruwan. Whatever the correct position, Detenamo only ever identified one Aninapae to which he made claim, and that was coconut land gained by way of a gift from Iyo.

29. At the end of the day, it does not matter which block, if any, of the two or possibly three in Eijoruwan's name was passed to her through Iyo. What matters is whether the appellants can show that one block, other than Portion 141, rightfully belonged to Detenamo, even if it was held in Eijoruwan's name, and was situated at what is now Portion 399.

30. If it be established that Detenamo did gain an interest in an Aninapae through Iyo, then the appellants contend that it must have been the land at Portion 399, rather than being land anywhere else in the large area of undetermined land in Buada District that was also called Aninapae. The appellants' contention is based on the assumption that if there were two (or more) Aninapae held by Eijoruwan they would have been "married", and since one of them was portion 141, the other must have had a common border or borders with Portion 141. Portion 399 had one small border adjoining Portion 141 hence, so it was said, that must have been the second block.

31. Given, however, that the two blocks were said to have come from distinct inheritances - Iyo and Chief Dourewum – there was no reason why they must have been adjoining. Furthermore, Counsel for the Committee advised me that there was no record of the two blocks in Eijoruwan's name in 1928 having been combined or fused into one.

32. In any event, Portion 141 abutted other undetermined land, not just Portion 399 and could have been married to that land. I discussed with counsel a map (Exhibit "SB 10") which was prepared for a 2011 field day, which was called by the Committee concerning remaining undetermined land in Buada District. It is not clear who produced that map, but counsel agreed that it correctly showed that Portion 141 continues to share an even longer border with undetermined land than is the case for the border it shared with Portion 399. That map also shows that Portion 141 shared a boundary with Portion 398, the title to which was determined in favour of Palik Agir and family by the Committee some time after the determination as to Portion 399.

33. At no time was either of the two possible remaining Aninapae blocks gazetted, or even recorded in the land book, in the name of Detenamo. The appellants contend that that was due to the negligence of the Nauru Lands Committee, which should have interpreted the 1959 minutes as establishing ownership, or a sufficient interest, in Aninapae to require that their interest be recorded in the land book. Had that happened, the descendents of Detenamo would have been notified of the field days. That of course, depends, in the first place, on whether the appellants' interpretation of the minutes is correct.

34. It is necessary then, to look at the records of Committee meetings dealing with the claims of Detenamo to see if they disclose that Detenamo and his descendents had an arguable claim to ownership of Portion 399.

The meetings of the Nauru Lands Committee

35. At a meeting on 24 March 1949 Detenamo made claims to three lands, "Ijuae" and "Aujo" (phosphate lands) and "Aninapae coconut land in Buada which belongs to Eiyabo given by Ijo[3]". He told the Committee that Eiyoruwan had agreed to joinder of their lands so as to strengthen their ties, and he gave her these lands for that purpose. He asked Anna, Damage, Rebecca, and Willie Halstead "to give back my three lands".

36. Anna agreed that Eiyoruwan had told her of that arrangement concerning Aujo. Damage agreed that he had been told that too, but he complained that "Detenamo is asking (is) that he should share from our lands that are ours", and he wanted time to think about it.

37. It is significant that at such an early time, Detenamo claimed Aninapae through Ijo (or Iyo). He made no claim to any other land called Aninapae. His claim is consistent with the appellants' contention that there was an Iyo inheritance of land called Aninapae. It may be that the land claimed by way of that inheritance was Portion 141 (although Portion 141 was described as phosphate land in 1934, not coconut land). If so, his claim did not succeed, as the block's ownership was later determined in favour of Willie Halstead and Damage by a published gazettal in 1957.

38. Then at a meeting of 11 June 1952 Detenamo said he wanted the return of lands held under Eiyoruwan's name but inherited by him from Eidagabo. This was not a claim based on an Iyo inheritance, but on inheritance through Chief Douwarum.

39. He was asked how many lands he had inherited from Eidagabo. He named some, but said he did not know where the other lands "had gone" that Eidagabo and Douwarum had owned, nor who had inherited them. Aninapae was not mentioned. Detenamo said that Chief Douwarum had told him that he should not hate Eijoruwan "because she is the caretaker of your things because when I die all lands and properties that's under her care are all yours and anything else that is not put under her care do not touch these".

40. On 19 June 1952 the Committee met again. Detanamo made claim to lands that he said Eijoruwan had agreed were his. He said she had placed this on record on 28 February 1939. That note cannot be found today but on considering the totality of the records I am satisfied that Eijoruwan did acknowledge that she held lands on behalf of Detenamo, the names or location of which cannot now be known.

41. A motion was agreed to by a majority, at the 1952 meeting, that Detenamo did have property gained from Eidagabo and Douwarum. Aninapae was not mentioned.

42. On 2 December 1955 the minutes record that Detenamo was present. Hiram spoke on behalf of Damage and Anna. The minutes suggest to me that they were not agreeable to handing the three named and claimed lands to Detenamo, namely Aujo, Ijuae and Aninapae, but somewhat reluctantly conceded that they might have agreed to the first two blocks being placed in his name.

43. In his written submission, Mr Aingimea submitted that the minutes showed that Damage and others at the 1955 meeting "acknowledged that they had received three lands in error". Those words do not appear in the minutes. I think the minutes show merely that while they might have agreed to his claims to Ijuae and Aujo they made no concession about Aninapae. That is consistent with the fact that on 26 October 1957 the Committee published in the gazette a determination that Eiyoruwan's interest in Aninapae Portion 141 had passed to Willie Halstead and Damage. Mr Aingimea submits that that was done in error by the Committee, but in my opinion it suggests that up to 1957, at least, the Committee had not accepted Detenamo's claim to Aninapae Portion 141, and no other Aninapae was referred to in the 1955 meeting.

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[3] Spelled variously as "Iyo" or "Ijo".

44. The short minutes of 21 October 1957 record the decision taken concerning portion 141, whose original owner had been Eijoruwan. Detanamo was not present. The Committee decided that the owners were now Damage and Willie Halstead. That decision was subsequently published in Gazette No 43 of 26 October 1957, in GNN 269 of 1957 and was not appealed by Detanamo. Detenemo was very ill at this time and died on 31 January 1958 but, unfortunate as it may have been, his failure to appeal meant his descendents thereby lost any claim they may have had to that block.

45. There are two versions of the translated minutes of the meeting on 15 January 1959. I have relied on the more comprehensive or apparently precise minutes where there was a difference. It is from this meeting that the appellants' present claim to land called Aninapae is said to have derived, through decisions made by the Committee.

46. The meeting was called to discuss the ownership of phosphate lands known as Ijuae and Aujo, which those present said they thought had already been agreed. The discussion focussed on shared lands. In the case of both Ijuae and Aujo the names of Eijoruwan and Detenamo were shown together in the land records, as joint owners. There was discussion about whether there were other lands (in addition to Ijuae and Aujo) that had been shared by Eijoruwan and Detenamo. Hiram said they could be looked up in the land book and the Vice Chairman noted that Detenamo had indeed recorded his lands in the Register Book (as I have said, Ananipae did not there appear).

47. The Chairman asked, and it was agreed, that "these two lands" belonged to Detenamo but had been shared with Eiyoriwan "due to family ties". Hiram said there had also been lands owned by Eijoruwan which she had shared with Detenamo due to their "special connection".

48. Eijobo, a member of the Detenamo family, said that his family would abide by what Detenamo had said. The following exchange then took place between the Chairman, Hammer De Roburt, and Itte Detenamo :

> "Chairman: For the lands that belonged to Detenamo, he wanted them to revert to himself, without sharing them with Eijoruwan. What is your decision as regards the lands that Aijoruwan shared with Detenamo? Are they to remain as his or should this change?[4]
>
> Itte: According to Detenamo, as we are aware, the lands that Eijoruwan shared with Detenamo should be given to Detenamo alone. I ask that Hiram and Co return our lands to us in accordance with the wishes of Detenamo."

49. There was then agreement among all present. The Committee then retired and the final decision was recorded, in conclusion, by the Chairman, in these terms:

> "All lands that under Eijoruwan's Estate which Detenamo has shared from – now only to go to Family siblings who should inherit Eijoruwan's things and no longer go to Detenamo.
>
> 1. Biwitiadi. PL Buada (ref Gaz 47/1931
> 2. Iyatsi. PL Buada (ref gaz 44/1931)
>
> And the lands that belongs to Detenamo and given up to Eiyoruwan to share. Now is no longer and to delete Eiyoruwan's name as it is Detenamo's estate only and to go to those who

[4] The version in Ex SB 4 records the chairman as saying: "All lands belonging to Detenamo I want them returned to him as the sole beneficiary and to delete Eiyoruwan's name from them. What are your thoughts about lands belonging to Eiyoruwam given to Detenamo to stay as it is or separate". Itte responded "Detenamo said before as far as we know, to return Eiyoruwan lands which are hers and have put Detenamo's name on". I read the last statement as meaning that Eiyoruwan was to retain in her name alone lands which were hers but on which she had put Detenamo's name. Otherwise they would have been requiring that Detenamo gained sole title to his lands that he had shared with Eiyiruwun, and also sole title to the lands that were hers but which she had shared with him, which seems contrary to what had been agreed or directed by the Chairman.

should inherit his things"

50. The notes then listed three lots –

1. "Iyuae" PL Buada ref gaz 42/1932
2. "Aujo", PL Buada
3. "Aninapae C.L. ?? Buada R Book page . . ."

51 No page number was given for the third entry.

52 Iyuae and Aujo are joined together by a handwritten side margin line on the left side of the minute, and a note says as to them "refer Gaz 32/59". That note records that, as people at the meeting had said was the case, the claims to these two lands had already been resolved. There had been a determination gazetted on 1 August 1959 which altered the record of ownership from joint names, Eijoruwan/Detenamo (as the record had shown), to Detanamo's name alone.

53 There was no reference to a gazettal with respect to Aninapae. As I have discussed, there had been a gazettal in 1957 that had placed the coconut land Aninapae, Portion 141, in the names of Damage and Willie. There had been no gazettal concerning any other Aninapae, nor any reference made to any other Aninapae in any of the minutes.

54 On the appeal the Committee contended that the note referring to "Aninapae Cl ??" was simply inserted in error, and that the Committee had not made any decision about any block called Aninapae. I do not think it represented an error, in the sense that the Committee had not intended to refer to Ananipae, at all. More likely the note reflected uncertainty about what was the situation concerning the Aninapae that had previously been the third of the blocks claimed by Detenamo (and the only one claimed to have been inherited via Iyo). Had that, too, been dealt with by a gazettal, so as to place it in Detenamo's name? There might also have been uncertainty as to whether the Aninapae that Detenamo had claimed was coconut land or phosphate land. Whatever the explanation for the question marks in the minutes, the issue was plainly not concluded.

55 A decision as to land ownership taken by the Committee only becomes final and unalterable upon publication in the Gazette5. In *Egadeiy Itsimaera v Eidawaidi Grundler & Others Thompson* C.J. noted that until publication the Committee might reconsider its decision, and alter or abandon it, and make a new decision, if the members agreed6.

56 In my opinion, the evidence demonstrates that the Committee did not make a final decision about passing land called Aninapae to Detenamo. Once the matter was further investigated the Committee might have concluded that that it was too late to deal with the land in question because it had been transferred to Willie and Damage in 1957. If, however, it was another Aninapae, not that of Portion 141, then nothing had been presented to the Committee in the 1959 meeting to identify which block it was that was held in Eijoruwan's name but on Detenamo's behalf, as opposed to being held solely in her own right.

57 The Committee, therefore, did not publish by gazettal a determination in 1959 as to Detenamo's right to any Aninapae. That omission was not the subject of an appeal by Detenamo's descendents in 1959, nor had Detenamo appealed the decision made in 1957 to grant Portion 141 to Willie and

[5] *Egadeiy Itsimaera v Eidawaidi Grundler & Others* 3 May 1974; Land Appeal No 2 of 1974; [1969-1982] Nauru Law Reports , Part B, 107, per Thompson C.J. See, too, *Charlie Ika v NPRT* [2011] NRSC 5 at [100]-[107] per Eames C.J.

[6] At pages 110-111.

Damage.

58 Do the minutes of 1959 support the appellants' contention that any lands called Aninapae that had been in Eijoruwan's name were now to be owned by Detenamo? I think not. There had been no discussion about any Aninapae in the course of the 1959 meeting. Although there had been general discussion about lands shared between Ejiruwan and Detenamo, the only lands that were identified as required to be placed solely in Eiyoruwun's name (whereas they had been shared by her with Detenamo) were Bwitiadi and Iyatsi. And the only identified lands to be placed solely in Detenamo's name were Iyuae and Aujo, which the records showed he had unquestionably shared with Eiyoruwun.

59 It may be seen that the Committee in its 1959 minutes made a point of identifying specifically those lands it knew were affected by its decision. In the case of Aninapae, it made no final decision, and there was no indication in the land book or in the minutes as to which other shared land might have been affected and might later be the subject of a gazetted determination in favour of Detenamo's descendents.

60 There is no basis for concluding that the two Aninapae in Eijoruwan's name in 1928 were in fact shared with or held on behalf of Detenamo. As I have noted, Detenamo only ever spoke of one Aninapae that he wanted in his name alone. Nothing in the records showed that he shared any Aninapae with Eijoruwan, in contrast to the way the records showed to be the situation for Iyuae and Aujo.

61 The appellants contend that the Chairman's words at the 1959 meeting showed that any and all land held by Eijoruwan, whatever its name, was to be transferred into the name of Detenamo, if it had been land that was actually Detenamo's, and vice versa. In the translation Exhibit "SB 4" the Chairman is recorded as having referred repeatedly and generally to "all lands", but in those minutes it is recorded that the Committee members agreed with member Eoaeo, who stated that:

> "All lands that belong to Eijoruwan which has Detenamo's name on should no longer be Detenamo's as it should all be Eijoruwan's. And all lands that belong to Detenamo with Eiyoruwan's name on should all be Detenamo's."

62 In other words, the only land that was relevant was land that was in joint names or land that was in one name but was actually the sole property of the other. Neither in 1959 nor in 2003 had any information been provided to the Committee to identify which lands met that description, and the approach adopted by the Committee in 1959 suggests to me that had any block been later identified then it would have been the subject of a specific determination, and no doubt been published in the gazette.

63 Even accepting that Eijoruwan did hold some lands in her name not on her own behalf but for Detenamo, it is still necessary to identify which lands were in that category. It is pure guesswork to suggest that either block in the 1928 land book was in that category. It is clear that Eijoruwan held many lands on her own behalf, so I could not be satisfied on the balance of probabilities that either of the two 1928 blocks was one such block held in trust for Detenamo.

64 Furthermore, even if I accepted that one of these Ananipae blocks was one of the "shared" blocks of Eijoruwan and Detenamo that was to be placed in Detenamo's name alone, there is no way to show that the Aninapae in question must have encompassed or encroached on Portion 399.

65 The mere statement of intention by the Committee in 1959, taken at its highest, was not followed by a confirmation of sole ownership by Detenamo of any land called Aninapae which had been held in joint names or Eijoruwan's name, alone.

66 Before expressing a concluded view as to the 1959 minutes, I will consider whether the appellants were denied a fair opportunity to have persuaded the Committee to accept the interpretation they favoured. If so, then I must consider whether it is appropriate that the Committee first be directed to re-hear the matter rather than resolving the question myself by re-hearing de novo[7].

Whether failure to notify as to the field days was denial of procedural fairness:?

67 In my opinion, there was nothing in the records held by the NLC, either in 1992 or 2003 that should have required the Committee, as a matter of procedural fairness, to have advised the relatives of Detenamo that they might have had an interest in Aninapae 399 and should therefore attend the field days.

68 Whilst Mr Aingimea has skilfully developed an argument from the NLC documents, nothing in those documents spells out that Detenamo had been identified by the Nauru Lands Committee as an actual or potential owner of Aninapae Portion 399 or, indeed, any Aninapae that was available to be claimed.

69 In all the circumstances, it was not a denial of procedural fairness for the Committee to have failed to invite the appellants to attend the field days. The NLC is obliged to give a fair opportunity for persons to advance their claims to land, which includes drawing to the attention of those who have registered an interest in land, a proposed field day that might affect their claimed interest.

70 It is expected that people will know if they have a family claim to land. As the minutes show, the Detenamo family had been involved in the critical meetings in the 1950s in which Detenamo's claims were discussed, yet until 2006 they did not know of any interest they might have had in any Aninapae. That, coupled with the absence of an appeal from the 1957 or 1959 determinations, suggests that the family of Detenamo in 1959 did not believe that Detenamo had been named the owner of land of that name, and had not informed later generations otherwise.

71 In considering whether there has been a denial of natural justice regard must be had to the fact that no member of the Detenamo family was denied the chance to attend the field days; they did not then believe they had any claim to an Aninapae. In the absence of anyone raising the issue, it was not reasonable to expect the Committee to have considered the 1950s minutes before calling the field day and to have then drawn the conclusions from them that the appellants seek to have drawn.

72 The appellants were not denied the opportunity to put their case. The general announcement of the Committee in 1992 that a field day was to be conducted over Aninapae was sufficient in the circumstances, and it was reasonable to confine participation in the 2003 field day to those relevant to the boundary issue that had been raised in 1992, and remained unresolved. It was not the fault of the Committee that until 2006 the Fritz descendents had no belief that they might have a claim.

73 Furthermore, those who did attend the field days are themselves entitled to procedural fairness. They participated in a well understood process, where they walked their boundaries and faced anyone who challenged their claim. It is unfortunate that there has been such a long delay since the field days, but that can affect people, unfairly, on both sides. It may be that the impact of the presentation to the Committee in 1992 and 2003 by those who participated in the field days could not be replicated today if the determination was to be set aside and the Committee was to conduct its investigations afresh in 2013.

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[7] See pars [148-149]

74 I do not consider that there was a denial of procedural fairness in not giving the appellants notice of the 1992 and 2003 field days.

Did the NLC deny procedural fairness in 2010?

75 In 2000 members of the appellant family, primarily Rowan Detenamo, first began investigating possible claims to land through their ancestor Detenamo. They made enquiries with the Nauru Lands Committee. Rowan completed his enquiries in 2006. Marissa Cook deposed that it was in 2006 that she learned "that we had lands that belonged to Samuel Detenamo that were distributed to others", and she said that further research showed they included two lands called Aninapae that were "customarily married" to each other. One of those was inherited from Chief Douwarum and Eidagabo and the other was a gift to Detenamo's wife Eiyabo from Iyo. Marissa Cook said that the Department of Lands and Survey had no record of such land in the family's land records.

76 In her affidavit, Marissa Cook did not say what dealings she had with the Nauru Lands Committee between the time of those discoveries and before the Gazette publication on 4 August 2010 concerning Portion 399. She subsequently learned there had been a field day in 2003. It was her belief that the family were unaware that field days were to be conducted but, in any event, they did not then know they "had lands" called Aninapae.

77 In his affidavit, Wylie Detenamo deposed that Rowan Detenamo had first told him in 2009 that he had discovered that the family had "a land named Aninapae". Rowan said that he had requested and gained access to NLC records. He told Wylie of the NLC minute of 2 December 1955 where, so he said, it was recorded that one of three lands that Hiram agreed to return from Eijoruwan's name to Detenamo's was Aninapae.

78 Rowan told Wylie that at the request of Wylie's mother, Marie Eoaeo (nee Detenamo), he, Wiley, "made representations to the Nauru lands Committee about our lands including Aninapae and that no progress was ever made by the NLC".

79 No witness deposed that at any time between 2000 and 2010 the NLC was asked to conduct a new field day, but it seems clear that the NLC minutes on which the appellants primarily base their claim to Aninapae were drawn to the attention of the NLC. The Committee was not persuaded that the evidence showed that Aninapae Portion 399 was or might be owned by Detenamo. A field day was held in Buada on 15 August 2011, but that was in response to a request from Ronphos Corporation that the Committee determine ownership of all of the remaining undetermined land. The Appellant family were represented at the field day and advanced claims to some of the undetermined land.

80 In rejecting the Detenamo family's interpretation of the minutes, the Committee was partly influenced by its mistaken belief that there was no adoption relationship, or other special connection, between Samuel Detenamo, on the one hand, and Chief Douwarum and his wives Eidagabo and Eijoruwan, on the other hand. In support of that conclusion, the Committee in its submission, filed 28 December 2012, said that when Eidagabo died she left a will in which she left most of her land to a woman she identified as her adopted daughter, but had not referred to Samuel Detenamo. The Committee thus rejected the suggestion that Detenamo had inherited land from Eijoruwan, as an adopted son.

81 An examination of the records of meetings of the NLC satisfies me that in years past the Committee and others in the community accepted that Detenamo did indeed have a special relationship, perhaps consistent with adoption, with Douwarum and Eidagabo. For example, at the meeting of the NLC on 15 January 1959 the Chairman and persons present acknowledged the "special connection" and "her ties" that existed between Eijoruwan and Detenamo. Even if that

special connection did not amount to an adoption, those present at meetings of the Committee seem to have accepted that there was a sufficient special relationship for some blocks of land to have been held on Detenamo's behalf. A special relationship less than adoption might well have led Eijoruwan to share land or hold land on trust for Detenamo. On the balance of probabilities, the minutes supported the contention that a special relationship did exist.

82 In addition, the Committee considered that there was no evidence to support the claim that Samuel Detenamo's wife Eiyabo had been the owner of Aninapae. Thus, the Committee denied there had been an "Iyo inheritance". The Committee submitted that the 1912 German Ground Book showed that Iyo's children were the heirs to her estate, not Detenamo.

83 As to the Iyo inheritance, I note that Iyo's unnamed children are indeed shown as her "heir", but that does not necessarily deny the possibility that, as to one or more blocks, Iyo may have transferred her interest to Eiyabo, and she in turn passed it to Eiyoruwan to hold for Detenamo. It was too strong to say that there was no evidence at all of the Iyo inheritance, but certainly it was limited.

84 Detenamo had claimed such an Iyo inheritance at his meeting with the NLC in 1949. That claim had been resisted for many years by Hiram and others. In 1947, Willie and Damage were declared owners of Portion 141, which may well have been the very Aninapae that Detenamo had claimed to be his by the Iyo inheritance. If, however, the Iyo inheritance related not to Portion 141 but another block held in Eijoruwan's name, then the Committee should not have rejected outright the possibility that Detenamo could have had an interest in that land through Iyo.

85 The Committee also dismissed the 15 December 1959 reference to Aninapae as being merely an "error". As I have discussed, the reference to Aninapae in the 1959 minute was not made in error – it was understood by the Committee in 1959 that there was land of that name that had been claimed by Detenamo. However, the present Committee was right to conclude that the reference to "Aninapae CL ?? Buada" did not have the significance that the appellants placed on it.

86 The fact that the Committee therefore misinterpreted or undervalued the evidence in those ways emphasises that the claim of a denial of procedural fairness in 2010 needs to be closely scrutinised. The fact that the Committee was wrong in its evaluation of the strength of some of the arguments of the appellants does not, however, mean that the arguments were valid, or that appellants had been denied procedural fairness in 2009-2010.

87 It was open to the Committee to have called a new field day, but it was not obliged to do so in order to constitute a fair opportunity to the appellants to be heard. Given the long delay since the 2003 field day – a delay that reflected the fact that the boundaries between Portions 399 and 398 were disputed - the Committee might have concluded that a further short delay in publishing their determination in the Gazette - in the interest of allowing the appellants to present their case with respect to Portion 399 - would not have been unreasonable. On the other hand, given that the Committee rightly rejected the interpretation of the 1959 minutes that was favoured by the appellants, it would have been unfair to other parties to have re-opened the inquiry into ownership simply to allow further debate on secondary questions such as whether Detenamo had been adopted.

88 It is regrettable that there was such delay between the decision taken at the field day in 2003 and the determination in August 2010. Delays of this order are not unknown in the work of the Committee, and that fact alone would not render the determination invalid[8], but long delay between a decision and its publication might heighten concern about procedural fairness.

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[8] *Egadeiy Itsimaera v Eidawaidi Grundler & Others* 3 May 1974; Land Appeal No 2 of 1974; [1969-1982] Nauru Law Reports , Part B, 107, per Thompson C.J.

89 In *Adiedabwe v Bill*9 for example, Thompson C.J. ruled that there had been a denial of natural justice for failure to give the appellants an opportunity to be heard. In that case the appellants had attended one field day but then were not informed of a second one conducted two years later, at which the Committee made a decision adverse to the appellant. The Committee then compounded the problem by delaying publication of their decision until 12 years later, finally publishing without giving notice to the appellants. The delay in the present case, although highly undesirable, did not raise natural justice issues of that kind.

90 Mr Clodumar cited the observations of Thompson C.J. In *Beiyoun v Deirerega and Others*10:
91 "If this Court was to regard the proceedings of the Nauru Lands Committee as irregular whenever some one or more persons who subsequently alleged that he had an interest in the subject matter of the proceedings was not aware of that interest at the time of the proceedings, the door would be open to many people to challenge old decisions of the Committee on which the people concerned have based their affairs for years. The stability and certainty which the Nauru Lands Committee Ordinance is intended to provide in land matters would be shaken, if not destroyed."

92 Those remarks were made in the context of an appeal brought years out of time against a published determination, whereas in the present case the appellants claim they were not given a hearing prior to publication of the decision. The observations nonetheless have relevance in a case where the appellants (through no fault of the Committee, in my view) had not taken advantage of the opportunity to attend field days, albeit through ignorance about their ancestor's previous dealings with the Committee.

93 The Nauru Lands Committee was obliged to give to those with an interest in its decision a fair opportunity to present their claims11. What constitutes a fair hearing must be judged by the whole circumstances of the case.

94 In my opinion, the appellants were not denied a hearing by the Committee prior to publishing its decision in 2010. It is clear that the appellants were able to press their claim based on the 1959 NLC minutes. The Committee members rejected the appellants' arguments, without calling a new field day or re-opening the enquiry. In doing so, the Committee undervalued some of the evidence, but it did not for that reason deny a fair hearing to the appellants. In any event, as I shall next discuss, the Committee was correct in concluding that the 1959 minutes did not have the effect that the appellants claimed.

95 I conclude, therefore, that the Nauru Lands Committee did not deny procedural fairness to the appellants. It is not therefore appropriate to refer the case back to the Committee for re-consideration so as to provide a hearing to the appellants. They have been fairly heard by the Committee. I have ruled, however, that an appeal under s.7 is by way of re-hearing de novo, so I must therefore consider for myself whether, on the whole of the evidence now before the Court, the decision reached by the Committee was correct.

96 Rehearing de novo

97 I have had the benefit of comprehensive and careful submissions from all parties. A considerable body of additional evidence has been presented that was not available to the Committee. I am satisfied that I am able to decide this case without calling for any further investigations by the Committee.

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9 [1975]NRSC 3; [1969-1982] NLR (B) 131, 28 January 1975.
10 [1970 NRSC 4; [1969-1982] NLR (B) 26, 20 November 1970.
11 *Adiedabwe v Bill* [1975] NRSC 3; [1969-1982] NLR (B) 131, 28 January 1975, per Thompson C.J.

98 In a re-hearing de novo the court is exercising original jurisdiction and is dealing with the matter as though for the first time[12]. It is required "to consider judicially whether the application should succeed on the merits"[13]. In this case, the question becomes, whether, on the merits, the 1st respondents should have received the benefit of a favourable determination as to their ownership of portion 399.

99 Mr Clodumar, for the 1st respondents, submitted that the inheritance by the 1st respondents from Fritz of the land constituting Portion 399 was indisputable. Whether or not the appellants had an interest in land named Aninapae, it was not this land, he submitted, which no one disputed in the 1992 field day as being the Aninapae formerly owned by Fritz. The claim by the Fritz family to land called Aninapae in Buada was longstanding, whereas the appellants, both at the time of the field days and now, had no knowledge of the boundaries of their claimed Aninapae, even if such an inheritance could be established, he submitted.

100 It is accepted by the appellants that Fritz owned land called Aninapae in this general area of undetermined land known as Aninapae. Two of his descendents placed that land as being in the area later designated Portion 399. I keep in mind that Mariata Fritz said in her affidavit that: "The boundary was unknown or was not recorded until my older siblings Eidengab and Eidamagin at a field day in 1992 set out the boundary before the members of the Nauru Lands Committee". Plainly there was some uncertainty about the boundary that they walked, and the Committee did not regard the boundary as resolved at that time. That does not mean that Eidengab and Eidamagin were uncertain as to whether Fritz's land fell within the general area of Portion 399 rather than elsewhere in the undetermined land. To the contrary, the Committee minutes show that the area being claimed was the area "between Rodney Fritz residence and Glenda D", being Glenda Deireragea's residence. That would have assisted the sisters in locating the land that they claimed.

101 The minutes show that apart from the Fritz family, the 1992 field day was attended by landowners of Eatamuye and Wowota and there were other claimants to land called Aninapae, being Gadabu children[14]. Also the Grundler children claimed Yaratepo. At the end of the day the claimants other than the Fritz family were told to go to the NLC office to check their claims against the register.

102 By the time of the 2003 field day the only boundary in dispute was that between Portion 399 and what later became Portion 398, also named Aninapae. Arrow Depaune marked out the boundaries of Portion 399 on behalf of the Fritz family. Four persons were present with an interest in what became Portion 398 in 2012 ("Ananipae", determined to be owned by Palik Agir). There was no prospect of any dispute over the long southern boundary of Portion 399 - which adjoined Portion 400 - because Portion 400 ("Atta") was also owned by the 1st respondents.

103 The 2003 field day did not lead to an early determination by the NLC concerning Portion 399, because the boundary was still in dispute. In 2006 the Committee met to consider Portion 399. No claimant attended. The Committee resolved to accept Arrow's claim on behalf of the Fritz family, although as the Chairman of the Nauru Lands Committee said in its written response dated 19 December 2012, the boundary was not finally agreed to by the Portion 398 owners until mid 2010.

104 Notwithstanding the delay in resolution of the boundaries, I consider the field days provided strong support for the 1st respondents' claims to Portion 399. The attempts by the appellants in the course of this appeal to trace boundaries of an Aninapae owned by Detenamo, or to claim the

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[12] *New England Biolabs Inc v F Hoffman- La Roche AG* [2004] 63 IPR 520 at [23] and [44].
[13] *Jafferjee v Scarlett* BC3700035, per Dixon J, 11-15 June, 30 July 1937
[14] I was informed by Mrs Tyran Capelle that the claim to an Aninipae had been made by her sister at the 1992 field day, but that claim had been in error.

boundaries of Portion 399 as being those of Detenamo's land, are far less persuasive, being modern reconstructions rather than evidence based on historical or family knowledge of ownership of land at the location of Portion 399.

105 The Committee concluded that whether or not Detenamo had been adopted, that did not undermine the claim to ownership of Portion 399 by the Fritz family. Upon reconsideration, de novo, of the whole of the evidence, including all of the new evidence that the appellants have placed before me, I am satisfied that the Committee was correct in so concluding.

106 Nothing in the evidence has emerged to throw doubt on the fact that Fritz owned Aninapae, and was known to do so by his family, since at least 1928. Aninapae was long recorded in his name in the NLC records, unlike the situation for Detenamo. Nothing has been shown to suggest that Portion 399 was somehow passed into the hands of Detenamo, at the expense of Fritz. That remains the case whether there were two or three blocks called Aninapae in Eijoruwan's name in 1934. There is no evidence, only speculation, as to whether one or other of those blocks was held by Eijoruwan on trust for Detenamo, either as an inheritance from Chief Douwarum or by way of a gift to Eiyabo from Iyo.

107 I have dealt extensively with the minutes of the Nauru Lands Committee. In my opinion, and for the reasons I have discussed, the records do not show that a decision was taken by the NLC in 1959 to transfer ownership of land called Aninapae from Eijoruwan to Detenamo. Neither the minutes nor any other evidence shows that the NLC recognised that Detenamo had an interest in land at Portion 399.

108 To apply the test formulated by Dixon J, as he then was, the application of the 1st respondents to the Nauru Lands Committee to be determined the owners of portion 399 should succeed on the merits. The appeal should be dismissed.

109 I return to the discussion of the nature of an appeal under s.7

The nature of an appeal under s.7 of the Nauru Lands Committee Act 1956

110 Section 7(1) of the *Nauru Lands Committee Act* 1956 provides that: "A person who is dissatisfied with a decision of the Committee may appeal to the Supreme Court against the decision"

111 Section 7 (2) provides:

> "(2) The Supreme Court has jurisdiction to hear and determine an appeal under this section and may make such order on the hearing of the appeal (including, if it thinks fit, an order for the payment of costs by a party) as it thinks just."

112 As may be seen, the Courts' powers on the appeal are extremely broad, with no express limitation imposed at all.

113 In *Fox v Percy*[15] Gleeson CJ, Gummow and Kirby JJ held, at [20], citations omitted:

> "Appeal is not, as such, a common law procedure. It is a creature of statute. In *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*, Mason J distinguished between (i) an appeal stricto sensu, where the issue is whether the judgment below was right on the material before the trial court; (ii) an appeal by rehearing on the evidence before the trial court; (iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so; and (iv) an appeal by

[15] (2003) 214 CLR 118.

way of a hearing de novo. There are different meanings to be attached to the word "rehearing". The distinction between an appeal by way of rehearing and a hearing de novo was further considered in *Allesch v Maunz*. Which of the meanings is that borne by the term "appeal", or whether there is some other meaning, is, in the absence of an express statement in the particular provision, a matter of statutory construction in each case."

114 In Allesch v Maunz16 Gaudron, McHugh, Gummow, and Hayne JJ held, citations omitted, at [23]:

"For present purposes, the critical difference between an appeal by way of rehearing and a hearing de novo is that, in the former case, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error, whereas, in the latter case, those powers may be exercised regardless of error. At least that is so unless, in the case of an appeal by way of rehearing, there is some statutory provision which indicates that the powers may be exercised whether or not there was error at first instance. And the critical distinction, for present purposes, between an appeal by way of rehearing and an appeal in the strict sense is that, unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance whereas, on an appeal by way of rehearing, an appellate court can substitute its own decision based on the facts and the law as they then stand".

115. Those categories of appeal were restated and slightly expanded by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in Lacey v Attorney General of Queensland17 (citations omitted):

57. "Appeals being creatures of statute, no taxonomy is likely to be exhaustive. Subject to that caveat, relevant classes of appeal for present purposes are:

1. Appeal in the strict sense – in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given. Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance.

2. Appeal de novo – where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error.

3. Appeal by way of rehearing – where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error. In some cases in an appeal by way of rehearing there will be a power to receive additional evidence. In some cases there will be a statutory indication that the powers may be exercised whether or not there was error at first instance.

116. In *Dwyer v Calco Timbers Pty Ltd* (2008) HCA 13 the High Court, at [2], adopted the categories identified in Fox v Percy and added:

"But these categories cannot represent a closed class and particular legislative measures, such as those with which this appeal is concerned, may use the term "appeal" to identify a wholly

[16] (2000) 203 CLR 172

[17] [2011] HCA 10 at [57]-[58]

novel procedure or one which is a variant of one or more of those just described. It was in that vein that McHugh J pointed out in *Eastman v The Queen*:

> "Which of these meanings the term 'appeal' has, depends on the context of the term, the history of the legislation, the surrounding circumstances, and sometimes an express direction as to what the nature of the appeal is to be."

117. Practice Note No 1 of 2002, issued by Chief Justice Connell, provides (par 1) that the notice of appeal must set out the grounds of appeal and (by par 9) requires that within 21 days of lodging the notice of appeal the secretary of the Committee must provide a written statement setting out the appellant's claim, as presented to the Committee, the respondent's claim, as presented to the Committee, and the Committee's reasons for its decision.

118. It is common practice that the notice of appeal in any land appeal is accompanied by one or more affidavits filed on behalf of the appellants, and that answering affidavits are filed by respondents. That material invariably and, usually without objection, introduces fresh evidence.

119. The tenor of the Practice Note is that the appeal involves identification of error on the part of the Committee.

120. Over the decades, the Supreme Court has interpreted its powers of appeal in the broadest possible way, an approach consistent with the language of s.7(2Appeal decisions have sometimes been made by judges of the Court on the basis of findings of error of fact or law, or failure to apply proper procedure, on the part of the Nauru Lands Committee. In some cases, where an appeal succeeded, the decision would be quashed and the Committee asked to reconsider the matter[18]. The Court, however, often substituted its own decision, having regard not just to the evidence considered by the Committee but also fresh evidence[19]. Thus, the Supreme Court has not confined the appeals to a determination stricto sensu; indeed, the appeals have generally been treated as re-hearings or as re-hearings de novo (see *Etto Aingimea and Others v Bertha Agoko and Others*[20]).

121. The circumstances that the legislation grants an appeal as of right, and that it is an appeal from an administrative tribunal to the Supreme Court, with no further appeal provided for, are all factors that militate against adopting a restrictive interpretation of the legislation granting the right of appeal.[21]

122. Were the appeals to be restricted to appeals stricto sensu, that would raise serious questions about the entitlement of the parties to call fresh evidence, a course which has regularly been permitted by the Court. Nothing in the language of s.7 restricts the appeal to one conducted stricto sensu, and the grant of power "to make such orders on the hearing of the appeal . . . as it thinks just" should be regarded as enabling the Court to hear fresh evidence when it is just to do so. Thus, a rehearing is certainly contemplated by the Act.

123. The fact that the appeal comes from an administrative tribunal is one factor pointing to a legislative intention that the appeals be by way of re-hearing de novo.

124. As Handley JA held (Sheller JA agreeing, and Kirby P, likewise, in separate reasons) in *Workers' Compensation (Dust Diseases) Board v Veksans* [22], an appeal from an administrative body to a court carries a "strong presumption" that the appeal authorises a fresh hearing by the court, in the exercise of an original

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[18] For example, *Capelle v Dowaiti* [1972] NRSC 2, where the Court referred the case back to the Committee to take further evidence as to customary practices.

[19] For example, *Grundler v Namaduk* [1973] NRSC 3, where the Court heard fresh evidence as to customary adoption.

[20] *Aingimea v Agoko* [1973] NRSC 6, Land Appeals Nos 5, 7, 10, 12, 14 of 1973

[21] See *Kinza Clodumar v Nauru Lands Committee* [201`2] HCA 22 at [33]-[34].

[22] (1993) 32 NSWLR 221 at 237-8, citing *Ex parte Australian Sporting Club Ltd; Re Dash* (1947) 47 SR (NSW) 283; 64 WN (NSW) 63, *Builders Licensing Board v Sperway Constructions Pty Ltd* (1976) 135 CLR 616 at 621 and *Re Coldham; Ex Parte Brideson [No 2]* (1990) 170 CLR 267 at 273-274.

rather than an appellate jurisdiction. That was a case, like the present, in which the legislation did not, in terms, provide for a "re-hearing". In concluding that that was a case requiring re-hearing de-novo, Handley JA held:

> "In the present case neither the Board nor the authority was required by statute to conduct a hearing, to keep a record of its proceedings, or to provide reasons for its decisions. Neither body is bound by the rules of evidence and the authority in particular is entitled to act on the expert knowledge and experience of its members. These factors all point towards a conclusion that the appeal to the Compensation Court conferred a jurisdiction which is original rather than truly appellate: see *Builders Licensing Board v Sperway Constructions Pty Ltd* (at 621) per Mason J. Moreover, a period of six months is allowed for an appeal. These matters reinforce the strong presumption which arises when a right is conferred to appeal from an administrative authority to a court, and lead to the conclusion that the Compensation Court was entitled to conduct a fresh hearing."

125. With the exception of the time allowed to bring an appeal, all of those factors apply in the case of appeals from the Nauru Lands Committee. Additional factors which also point to that conclusion, and which are relevant to the present case, were identified in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd.*[23]

126. In *Sperway* the High Court also emphasised the significance of the fact that the appeal was brought from the decision of an administrative body, not a court. Mason, J.[24] observed that where the appeal was from an administrative authority it was generally the case that the legislative intention was for a re-hearing de novo, especially in a case where the nature of the administrative proceeding was such that it was unlikely the Court was to be confined to the materials considered below.

127. Mason J said that relevant factors supporting that conclusion would be the absence of any provision for a hearing at first instance, absence of a record of deliberations, the fact that rules of evidence did not apply, and the fact that the tribunal did not have to give reasons. In addition Mason J had regard to whether the parties were legally represented, whether witnesses gave evidence on oath, and were subject to cross-examination.

128. As I have discussed, the Nauru Lands Committee operated in informal ways that in many respects were similar to those discussed by Mason J. in the case of an administrative authority. Although the Practice Note required the Committee to give reasons for its decision, the Act did not so provide and written reasons were rarely comprehensive.

129. In the *Veksans* case, Kirby J held, at 231:

> " Further support from this proposition may be derived from a general principle. It has frequently been cited in determining questions analogous to that now before this Court. Where an appeal is provided from an administrative decision-maker to a court it will normally be presumed that the court will re-hear the proceedings and determine them ab initio: see *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619. So much was said in this Court in *Strange-Muir v Corrective Services Commission of New South Wales* (1986) 5 NSWLR 234 at 249. In that case, McHugh JA observed that, in an appeal from one administrative body to another, the issue will normally be whether the original decision was correct when it was made. Where an appeal lies from an administrative tribunal to a court, a presumption arises that the court is then to: "exercise

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[23] (1976) 135 CLR 616 at 619

[24] At 621-622; See too Jacobs J at 629 as to the significance of the appeal being from an administrative tribunal.

original jurisdiction and not appellate jurisdiction ... The court hears fresh evidence and determines the case as at the date of the hearing": *Ex parte Australian Sporting Club Ltd; Re Dash (1947)* 47 SR (NSW) 283; 64 WN (NSW) 63 was applied. This approach has since been reaffirmed and Strange- Muir approved in *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 273. Applied to this case, it suggests that the appeal from the Board (being an administrative decision-maker) to the Compensation Court envisages an exercise by the Court of original jurisdiction and a hearing de novo, requiring the judge of the Court to come to his or her own conclusion on the material placed before the Court;"

130. By way of illustration of the approach to date, in the case of *Etto Aingimea and Others v Bertha Agoko and Others*25 the appellants claimed that the Committee had failed to invite them to put their case to the Committee. Thompson C.J. heard evidence as to that suggested omission, but concluded that the appellant had been adequately heard, and that it was not unreasonable that the Committee believed him to have been speaking for all of the appellant/claimants who were now said to have not been heard, at all. Had the appeal been stricto sensu that would have been sufficient to dispose of the appeal, but Thompson C.J, who had great experience in conducting land appeal cases over many years, ruled that an appeal under the Act was by way of re-hearing de novo, and he directed the appellants to present evidence to the Court in support of their claim, which they did.

131. The Australian appellate decisions cited above provide strong support for the conclusion of Thompson, C. J. that appeals under s.7 are by way of rehearing de novo26 (although his Honour did not cite authority for his conclusion). If appeals were to be heard de novo that may be particularly appropriate in a case where the appellant appeared in person, as occasionally occurs.

132. There are, however, practical difficulties that could arise in conducting an appeal de novo. Such an appeal might be thought to require the Court to place itself in the position of the Nauru Lands Committee, so as to conduct an original investigation into ownership of, or rights to, land. Given that there is not a resident Supreme Court judge, it would be difficult, if not impossible for the Court to conduct site visits, public meetings and consultations, as constitute the modus operandi of the Committee. Nor would the Court either have ready access to the records of land ownership held by the Committee or possess the knowledge of customary law, history and family relationships that the Committee holds. Were it intended that the Court conduct a rehearing de novo it might (to adopt the observation in the joint judgment in *CDJ v VAJ*27, at [111]), all but obliterate the distinction between original and appellate jurisdiction. The knowledge and practical experience of the Committee need not, however, be ignored when conducting a re-hearing de novo.

133. The court is entitled to adopt procedures for re-hearing in the exercise of its discretion to govern its own process, having regard to principles of fairness and reasonableness28. This would extend to determining whether the appellant or respondent should present their case first29, notwithstanding that on a complete rehearing the respondent will carry the burden of winning the case a second time30. A party to the appeal is entitled to adduce further evidence, but is not required to do so; the parties may be content to rely on the evidence that was considered below, supplemented by such other evidence as they deem appropriate to adduce.31

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[25] Aingimea v Agoko [1973] NRSC 6, Land Appeals Nos 5, 7, 10, 12, 14 of 1973.

[26] His Honour did not cite authority in support of his opinion.

[27] *CDJ v VAJ* (1998) 197 CLR 172

[28] Per Jacobs J in *Sperway*, supra, at 629; see too, *Ex parte Currie; Re Dempsey* (1968) 70 S.R. (NSW) 1 at 10, per Jacobs J.A. and Holmes J.A.

[29] *Ex parte Currie; re Dempsey*, supra, at 10.

[30] *Ex parte Currie; Re Dempsey*, at 10; see too *Halsburys Laws of Australia*, [325-11115], Lexis Nexis

[31] See *Halsburys Laws of Australia*, "Nature of Appeal: Appeal in Strict Sense or Rehearing", par [325-11115], Lexis Nexis.

134. The investigations conducted by the Committee in each case, the documents consulted, and its reasons, are usually set out in submissions or in affidavits placed before the Court on an appeal, although not necessarily comprehensively. In most cases the parties to the appeal would, in addition to having regard to any fresh evidence, accept the Court having regard to the evidence acted upon by the Committee, without being obliged to re-trace the steps taken by the Committee. The Court would not be bound to hear afresh all of the evidence heard by the Nauru Lands Committee, nor would the Court be required to conduct its own on-site inspections and field days. Furthermore, given the wide powers granted the Court under s.7(2), to make any order that it thinks just, the Court in the course of hearing an appeal could direct the Committee to conduct further enquiries or have regard to additional information so as to provide additional evidence to the Court.

135. Although the appellant would not be obliged, upon a rehearing de novo, to first establish that the Committee erred in its approach to the law or evidence, before the Court could re-hear the evidence, the identification of alleged error made by the Committee would continue to be relevant to the Court's own consideration of the issues raised in the appeal. A demonstrable error by the Committee might point the way to an appropriate resolution of the appeal. In *Kinza Clodumar v Nauru Lands Committee*32 Heydon J cited the judgment of Starke J in *FCT v Lewis Berger & Sons (Australia) Ltd* where Starke J accepted that in an appeal in first instance to a court from the decision of an administrative tribunal the parties would not be limited to the material adduced below. Nonetheless, Starke J held that the appellant should be limited to the grounds stated in his notice of appeal.

136. Alternatively, a demonstrated error by the Committee, whether of law, fact or as to procedural fairness, which tainted its decision might well justify the Court quashing the decision and returning the matter to be reconsidered, rather than conducting a re-hearing de novo. The Court's powers under s.7 would allow that course, in an appropriate case. Indeed, if that option were not available, an appellant would be denied his right to persuade the Committee to decide the case in his favour, when applying correct principles of law or procedure. The appellant would then effectively be denied his second opportunity to succeed, by the exercise of his right of appeal, in the event that the Committee, acting fairly and without specific error, rejected his claim.

137. The judgment of Megary J in *Leary v National Union of Vehicle Builders*33 provides support for remittal to the original decision maker where there has been a breach of natural justice, regardless of the form of the appeal:

> "If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, although not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. . . . As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in the appellate body.34 (My emphasis)

[32] [2012] HCA 22 at [63]-[65], in dissent, but this issue was not discussed by the majority.
[33] [1970] 2 All ER 713.
[34] [1970] 2 All ER 713, 720 (emphasis added).

138. In Lloyd v McMahon,35 the House of Lords considered the capacity of appeals to correct a failure to accord natural justice, following a determination by a District Auditor against the Liverpool City Council. In his judgment Dillon LJ held that

> "[w]here . . . the appeal does require an examination of the circumstances of the case de novo on whatever evidence may be put before the appellate court, then the major question for consideration is . . . whether, in the context of this particular case, the procedure as a whole gave the appellants an opportunity for a fair hearing.

139. This finding was in contrast to his understanding that where an appeal against a decision for breach of the rules of natural justice does not involve a hearing de novo, 'it may well be that the appellate hearing will not cure the defects of the original decision.'36 Dillon LJ held that *Leary v National Union of Vehicle Builders* did not establish a rule of general application that an appeal cannot correct a failure of natural justice in the primary decision.37

140. Dillon LJ based his judgment on the principle set out in *Calvin v Carr*38 by Lord Wilberforce that, on consideration of the relevant rules and contractual context, there may be instances where an appeal may correct a defect in the original proceedings. While finding that the judgment of Megary J in *Leary v National Union of Vehicle Builders* was correct on its facts, Lord Wilberforce held that in certain circumstances:

> ". . . it is for the courts, in the light of the agreement made, and in addition having regard to the course of the proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association.39

141. Where the Court proceeded to conduct a rehearing de novo, rather than refer the matter back to the Committee for reconsideration, the Judge would make his or her own evaluation of the evidence, including any fresh evidence, and would exercise his or her own discretion, but the Court would continue to have regard to the advantages held by the Committee in conducting its investigations and making its determinations.40 Indeed, as was acknowledged in *Workers Compensation (Dust Diseases Board) v Veksans*41, the court hearing the appeal in that case was obliged to have regard to the decision and reasons of the expert tribunal.

142. In *Veksans* the appeal to a judge of the Compensation Court arose from an administrative tribunal with specialist expertise in medical issues concerning dust diseases. The New South Wales Court of Appeal held that the appeal was a rehearing de novo and that the appeal court was therefore bound to form and express its own judgment on the facts and law relevant to the case42. Nonetheless, as Handley, J.A. held (Sheller, J.A. agreeing and Kirby, P., likewise, in a separate judgment), the appeal court was obliged to give due weight to the opinion of the expert tribunal; it was not entitled to disregard the tribunal's expert opinion43. In my opinion, similar regard should be had to the expertise of the Nauru Lands Committee.

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[35] [1987] 1 All ER 1118, 1135.

[36] Ibid.

[37] *Lloyd v McMahon* [1987] 1 All ER 1118, 1136.

[38] [1979] 2 All ER 440, 448.

[39] Ibid 448.

[40] See *Fox v Percy* (2003) 214 CLR 118, at [22]-[27].

[41] (1993) 32 NSWLR 221, at 240-241

[42] *Veksans*, at 240, per Handley, J.A., and at 233 per Kirby P.

[43] *Veksans*, at 241, per Handlet JA, citing *Eclipse Sleep Products Inc v Registrar of Trade Marks* (1957) 99 CLR 300 at 308 and *Hoffman La Roche & Co v Commissioner of Patents* (1971) 123 CLR 529 at 543.

143. Nonetheless, even if the appeal was de novo, and the appellant was not required to first establish error an appellant is required by the Practice Note to state grounds of appeal. That would generally require identification of error of fact or law, or procedural error, in the appeal grounds. The ground of appeal might, of course, simply assert that the decision was against the weight of evidence.

144. I do not need to decide whether the Court might be asked to conduct a re-hearing de novo upon an appeal by a person who by reason of tactical considerations or negligence failed to participate in the hearing below, and could identify no error on the part of the Committee save that he now wanted to reverse its decision.

Conclusion

145. There are no procedural or other errors requiring that the decision of the Nauru Lands Committee should be quashed and reconsidered by the Committee.

146. Upon considering the whole of the evidence de novo I am satisfied, on the balance of probabilities, that the determination of the Nauru Lands Committee being GN No 399/2010 published in Government Gazette No 104 and dated 4 August 2010 was valid and should not be set aside.

147. The appeal is dismissed.

Geoffrey M Eames AM QC
Chief Justice
13 March 2013