

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY



REPUBLIC OF NAURU V WET 040

APPELLANT'S OUTLINE OF ORAL ARGUMENT

1. This outline is in a form suitable for publication on the internet.

Jurisdiction

2. The competency of the proceeding turns on whether an appeal was "instituted" before the termination of the Agreement. (Reply [7])
3. An appeal lay as of right until the termination day. The conferral of that right, and the jurisdiction of the Court to determine an appeal, were not expressed to be subject to any constraint relating to time.
 - *Nauru (High Court Appeals) Act 1976* (Authorities tab 6) ss 5-6; Schedule Articles 2-3.
4. Rule 43.02 of the Rules, in so far as it applied the time limit for the commencement of an appeal in r 42.03, was a procedural provision regulating the exercise of the Court's original jurisdiction conferred by the Nauru Act. It could not, and did not purport to, qualify that grant of jurisdiction. (Reply [9]-[12])
 - *Wei v Minister for Immigration and Border Protection* (Authorities tab 22) at [42].

5. An appeal was instituted, and the jurisdiction conferred by s 5 was invoked, by the filing of the Summons seeking an extension of time (together with a notice of appeal) on 13 October 2017 (AB 381). Rule 42.03 (Authorities tab 8) erects a barrier to the grant of relief in the absence of a grant of leave, but does not go to the competency of the appeal.

Service

6. Service of the initiating process is not an essential element of the appeal being “instituted”. While the appeal cannot proceed unless the Respondent has been served, it does not matter whether or not service was effected before (a) the expiry of the time permitted by rule 42.03 or (b) the termination of the Agreement.
 - *Whitehouse Hotels v Lido Savoy* (Authorities tab 23) at 335-336.
7. Service of the summons seeking an extension of time and the notice of appeal was effected in accordance with rule 42.05.4, by delivering those documents to the Respondent’s address for service in the proceedings below (by email on 14 October 2017 and by physical delivery on 16 October 2017). (Reply [15]-[18])
 - AB 327
 - AB 396 [7]-[8].
8. If it be the case that rule 42.05.4 does not apply to the summons seeking an extension of time, the Republic seeks and order *nunc pro tunc* directing service of the summons to be effected in that manner. The order is sought in order to clarify the efficacy of service, not in an attempt to overcome any want of jurisdiction.
 - Summons filed 4 October 2018.
9. Alternatively, personal service of the summons and the notice of appeal was effected on 7 October 2018 in Nauru. In the context of an appeal from the Supreme Court of Nauru, any particular rules in relation to service outside Australia should not be understood to apply to service in Nauru. To the extent that any leave is required to serve documents in Nauru, that leave should be granted.
 - Affidavit of Rogan O’Shannessy dated 12 October 2018.

Extension of time

10. There is no reason not to grant an extension of time to appeal. The Republic's delay was minimal and has been explained by affidavit (AB 385-386). No prejudice to the respondent can be identified. The appeal is clearly not lacking merit.

Merits of the Appeal

11. For the reasons explained in the Appellant's Written Submissions, the primary Judge erred in regarding findings by the Tribunal, to the effect that specific factual contentions of the Respondent were implausible, as involving errors of law.

Geoffrey Kennett

Nick Wood

7 November 2018

Liability limited by a scheme approved under Professional Standards legislation