IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No M37 of 2011

ON APPEAL FROM THE SUPREME COURT OF NAURU

B E T W E E N:

KINZA CLODUMAR

Appellant

10 and

NAURU LANDS COMMITTEE

Respondent

ADDITIONAL SUBMISSIONS OF THE RESPONDENT

1. Further to its submissions filed on 11 October 2011 (the **Respondent's Submissions**), the Respondent contends that the appeal should be dismissed for want of a necessary party.

2. These proceedings concern two portions of land in Yaren District, Nauru that
20 were owned by Rick Burenbeiya (the **Land**). The Appellant asserts that Mr Burenbeiya transferred to him an interest in the Land prior to Mr Burenbeiya's death in 1999. That claim was rejected by the Supreme Court of Nauru in 2002 on the basis that the transfer had not been perfected by the consent in writing of the President; and it is that decision from which the Appellant now seeks to appeal.

3. After Mr Burenbeiya's death, and after the resolution of the these proceedings in the Supreme Court of Nauru, Mr Burenbeiya's interest in the Land was distributed, by means of a determination by the Respondent, to Dora Depaune and

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others named in Gazette Notice No 416/2010[1] as the beneficiaries of Mr Burenbeiya's estate (the **Beneficiaries**), according to the law and customs of Nauru. That determination is the subject of an extant land appeal in the Supreme Court of Nauru, which has been adjourned pending this appeal.[2] However, if the Appellant succeeds on the appeal in this Court the decision of the Supreme Court of Nauru will be set aside and in any re-trial before the Supreme Court the Beneficiaries' entitlement to the land will be in contest.

4. As a consequence of the foregoing, the Respondent contends that the Beneficiaries have an interest in the outcome of the appeal in this Court and are necessary parties to the proceeding. They ought to have been joined by the Appellant as defendants to the appeal. This contention was drawn to the Appellant's notice by a letter dated 20 October 2011.[3] However, to date the Appellant has taken no step to join the Beneficiaries as parties to this appeal.

The principles

5. The principles concerning the joinder of necessary parties were explained by McHugh J in *Victoria v Sutton*[4] as reflecting the obligation of courts to accord natural justice and for the avoidance of multiple proceedings. Joinder is required where the orders sought in the proceeding will directly affect a third person's rights. Where property interests are liable to be affected the necessity for joinder is clear.

6. In *News Limited v Australian Rugby Football League Ltd*,[5] in a passage cited with approval by this Court in *John Alexander's Clubs*,[6] the Full Court of the Federal Court said this:

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[1] Exhibit DL-18B to the Affidavit of David Lambourne sworn 11 October 2011.

[2] See the draft judgment of Eames CJ in *Clodumar v Astime* (Land Appeal No 12 of 2010) at [19] (AB 32).

[3] The letter is exhibit DL-22 to the Affidavit of David Lambourne sworn 7 November 2011.

[4] (1998) 195 CLR 291 at [76]-[78].

[5] (1996) 64 FCR 410 at 524-5.

[6] (2010) 241 CLR 1 at [132].

> There are some classes of case where the ascertainment of the necessary parties who "ought to have been joined" is not difficult. Where the orders sought establish or recognise a proprietary or security interest in land, chattels or a monetary fund, all persons who have or claim an interest in the subject matter are necessary parties. This is because an order in favour of the claimant will, to a corresponding extent, be detrimental to all others who have or claim an interest. ...

7. Joinder is not required where the effect of the order on non-parties can be characterised as only indirect or consequential and the question is to be decided by reference to he pleadings and the orders sought.[7]

10 8. Most recently, the plurality held in *John Alexander's Clubs* that "[w]here a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined."[8]

Application of the principles

9. The Respondent contends that these principles apply in this case.

(1) The judgment and orders of the Supreme Court dismissed the Appellant's claims to be the owner of one half of the subject land. In this appeal, the Appellant seeks that the order be set aside.

(2) The effect of success would be to deny the Beneficiaries the benefit of
20 the orders dismissing the proceeding and would open up their title for challenge.

(3) Although the Appellant does not seek in this Court an order in his favour in relation to ownership, it unsettles the present position and places the Beneficiaries' title in jeopardy.

(4) Further, if the appeal to this Court is dismissed, so too will the appeal in *Clodumar v Astime* be dismissed, because the decision of the Supreme Court of Nauru in 2002 that any purported transfer of the Land to the

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[7] (1996) 64 FCR 410 at 524-5.

[8] (2010) 241 CLR 1 at [131].

Appellant was invalid will stand.[9] Thus the Beneficiaries will be entitled to the interest in the Land.

10. If the matter were to be remitted to the Supreme Court of Nauru, the Beneficiaries would be necessary parties on remittal; and they should be so regarded in the appeal to this Court.

11. The Respondent contends that, on this basis, the appeal should be dismissed. As French CJ, Gummow, Hayne, Heydon and Kiefel JJ observed in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*,[10] it is, "at its peril, the responsibility of the [Appellant] to see to the proper constitution of its suit".

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Dated: 4 November 2011

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[9] See the draft judgment of Eames CJ in *Clodumar v Astime* (Land Appeal No 12 of 2010) at [18] (AB 32).

[10] (2010) 241 CLR 1 at [116].