IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No M37 of 2011

ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:

KINZA CLODUMAR

Appellant

and

NAURU LANDS COMMITTEE

Respondent

RESPONDENT'S SUBMISSIONS

Ms Lisa Lo Piccolo
Solicitor-General
Department of Justice and Border Control
Government offices
Yaren district
Republic of Nauru
Telephone: (+674) 557 3075
Email: david.lambourne@naurugov.nr

I. CERTIFICATION

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

II. CONCISE STATEMENT OF ISSUES AND SUMMARY OF ARGUMENT

2. This appeal raises five issues:

(1) Whether the Appellant should be granted an extension of time for the bringing of his appeal?

(2) In a proceeding by way of appeal under s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth) (the **Appeals Act**) is it open to an appellant to lead fresh evidence in this Court?

(3) If it is permissible for an appellant to lead fresh evidence in this Court, what principles govern the admission of such evidence?

(4) Does the evidence sought to be introduced by the Appellant in this case meet the test for admission of fresh evidence?

(5) If the answers to (2) and (4) are yes, what consequence flows?

3. The Respondent opposes any extension of time on the basis that key witnesses are now deceased so that the Respondent's conduct of the case in this Court is prejudiced and if the matter was to be remitted to the Supreme Court of Nauru, the matter would not be able to be properly determined. The first question should be answered no. Alternatively, if fresh evidence cannot be admitted then an extension of time would be futile and should be refused for that reason.

4. The second question is one of statutory construction. The Respondent contends that, properly construed, the term "appeal" in the Appeals Act adopts as a point of reference an appeal in the strict sense; that is, it is to be determined on the material before the primary court and the introduction of fresh evidence is not permitted. Accordingly, the remaining questions do not arise. As the appeal depends on receipt of the fresh evidence, either the extension of time should be refused or the appeal should be dismissed with costs.

5. Alternatively, fresh evidence is only admissible if:

(1) it is cogent and plausible and would have altered the outcome of the trial; and

(2) the Appellant exercised reasonable diligence in procuring the evidence at trial.

6. The fresh evidence sought to be adduced in this case does not meet these tests because evidence of approval would have been available at the time of trial and there is no evidence that the appellant exercised reasonable diligence in attempting to obtain it.

III. SECTION 78B NOTICES

7. The Respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth). The respondent intends to issue notices in compliance with s 78B of the *Judiciary Act*.

IV. MATERIAL FACTS

8. The Respondent does not contest the facts set out in Part V of the Appellant's submissions, but contends that the additional facts set out in the Affidavit of David Lambourne (the **Lambourne Affidavit)** are relevant.

9. In proceeding No 16 of 2000[1], the appellant sought an injunction against the Respondent enjoining it from giving effect to the determination recorded in Gazette Notice No 209/2000,[2] which determined the estate of the late Mary Burenbeiya including portions 5 and 30 Yaren District, pending the determination of the separate proceedings referred to. Those separate proceedings comprised Action No 17 of 2000. In Action No 17 the appellant sought declaratory relief to

[1] The Writ of Summons and Statement of Claim in Action No 16 of 2000 are exhibits DL-1A and DL-1B to the Lambourne Affidavit.

[2] AB 18.

the effect that he was the owner of a one half share in the lands being portions 5 and 30 at Yaren.[3]

10. The Respondent is constituted under s 3 of the *Nauru Lands Committee Act* 1956 (Nauru). By s 6 of that Act, it has power to determine questions as to the ownership of, or rights in respect of, land, being questions which arise between Nauruan and also between Nauruans and Pacific Islanders. Subject to s 7 the decision of the Committee is final. Section 7 provides that a person who is dissatisfied with a decision of the Committee may, within 21 days after the decision is given, appeal to the Supreme Court. It is noted that no appeal lies to this Court "*in respect of appeals from*" the Committee.[4]

11. On 10 August 2000, the Appellant obtained an interlocutory injunction enjoining the Respondent from taking any step to implement the determination recorded in Gazette No 209/2000.[5]

12. Although not entirely clear, it appears that by order of Connell CJ made on 12 March 2001 the two proceedings were consolidated. The Curator of Intestate Estates (the defendant in Action No 17) does not appear to have taken any further part in the proceedings.[6]

13. Relevantly, the basis for the claim of ownership was alleged to be an *inter vivos* transfer from Rick Burenbeiya to the Appellant. By a combination of ss 3(3) and (4) of the *Lands Act* 1976 (Nauru) any transfer of any estate or interest in any land in Nauru required the consent in writing of the President.

14. In Action No 17 of 2000, the Appellant did not allege that approval by the President had been given.

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[3] AB 2-3.

[4] s 5 of the Nauru (High Court Appeals) Act 1976 (Cth) and Art 2 to the Agreement relating to Appeals.

[5] AB 8-9.

[6] Lambourne Affidavit para [19].

15. On 19 February 2002 Connell CJ set aside the determination recorded in Gazette No 209/2000 on the basis that the late Mary Burenbeiya, did not hold any estate in Nauru and discharged the interlocutory injunction.[7] His Honour directed that the Respondent without delay call a family meeting to determine the reversionary interest in the estate of Rick Burenbeiya. His Honour rejected the claim made by the Appellant that he was the owner of a one half share or interests in portions 5 and 30 at Yaren on the basis that the transfer to him had not been perfected in light of the Court's finding that, on the evidence before it, Presidential approval had not been given.

16. Subsequently, the land estate of Mr Rick Burenbeiya was the subject of a determination by the Respondent. The Appellant has appealed that determination to the Supreme Court of Nauru.[8] It appears that in that appeal, the appellant sought to overturn the findings of the Court in Action No 16 of 2000 including on the basis that the transfer had been perfected. That appeal has been adjourned pending this appeal.

V. APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

17. The Appellant's statement of applicable constitutional provisions, statutes and regulations is accepted, save that reference also should be made to s 49 of the *Appeals Act* 1972 (Nauru).

VI. STATEMENT OF ARGUMENT

Extension of time

18. The Appellant requires an extension of time for bringing this appeal. That this Court may grant such an extension for the purpose of doing justice between the

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[7] AB 26-27.

[8] AB 30-32 (Draft ruling of the Court)

parties[9] is not disputed. Determination of such an application requires attention to:[10]

(1) the history of the litigation;

(2) the conduct of the parties;

(3) the nature of the litigation; and

(4) the consequences for the parties of the grant or refusal of an extension of time.

19. The Respondent contends that no extension should be granted in this case because such an extension would not do justice between the parties; to the contrary, the grant of an extension of time in this case will result in prejudice to the Respondent.

20. First, the fresh evidence sought to be adduced is a document that is said to be a photocopy of an approval for the transfer of land given by the President. The best evidence of the authenticity of the document would be that of the then President, His Excellency Rene Harris. However, President Harris died on 5 July 2008. Thus this Court (and, should the matter be remitted, the Supreme Court of Nauru) will be denied access to the best evidence of the authenticity of the document.

21. Second, part of the factual background relied upon by the Appellant in relation to his asserted attempt to obtain the fresh evidence at the time of the trial and in relation to the conduct of the trial concerns the conduct of the Respondent at that time.[11] The Respondent was represented at trial by its Chairman, Mr Leslie Adam. Mr Adam died on 5 October 2011[12] and other relevant persons are either unknown or outside the jurisdiction of both Nauru and this Court.[13] The Respondent thus now has no means of confirming or denying the evidence given by the Appellant in this regard and is thereby prejudiced in responding to it.

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[9] *Gallo v Dawson* (1990) 93 ALR 479 at 480.

[10] Ibid.

[11] Appellant's Affidavit at [13]-[14].

[12] Lambourne Affidavit at [12].

[13] Lambourne Affidavit at [14]

22. Thus the Respondent is prejudiced in the conduct of its case, both in this Court and, should the matter be remitted, in the Supreme Court of Nauru, by the lapse of time between the trial and the appeal (some 9 years) and the events that have occurred in that time; and this is a reason why leave to extend time ought not be granted.

Nature of the "appeal": no fresh evidence permitted

23. Section 5 of the Appeals Act confers jurisdiction on this Court to hear "appeals" from the Supreme Court of Nauru. It provides as follows:

> **Appeals to High Court**
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> (1) Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie.
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> (2) The High Court has jurisdiction to hear and determine appeals mentioned in subsection (1).
>
> (3) Where the Agreement provides that an appeal is to lie to the High Court of Australia from the Supreme Court of Nauru with the leave of the High Court, the High Court has jurisdiction to hear and determine an application for such leave.

24. *Ruhani v Director of Police (No 1)*[14] established that the Appeals Act was a valid enactment authorised by s 76(ii) of the Constitution, conferring original jurisdiction on this Court. The rights and obligations that arise for determination are whether the judgment decree order or sentence appealed from should be affirmed, reversed, or modified and consequential orders made as provided for in s 8 of the Act.[15] What is in issue in an appeal under s 5 is the correctness of the determination by the Supreme Court of Nauru.[16] *Ruhani (No 1)* also established that the correctness of the determination of the Supreme Court is to be determined by reference to Nauruan law, which is picked up and applied as federal law.

25. In this proceeding, should the Appellant overcome delay, a critical issue is whether the correctness of the determination of the Supreme Court is to be determined on the basis of the material before the primary court and at the time

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[14] *Ruhani v Director of Police (No 1)* (2005) 222 CLR 489 (***Ruhani (No 1)***).

[15] *Ruhani (No 1)* at [104] (Gummow and Hayne JJ).

[16] *Ruhani (No 1)* at [115] (Gummow and Hayne JJ).

the decision was made. Resolution of that question will determine whether this Court is entitled to receive fresh evidence.

26. Resolution of this issue turns on the construction of the term "appeal" in s 5. Notwithstanding that the proceeding is in the original jurisdiction of the Court, the use of the term "appeal" in the context in which it is found, including the absence of any express power to receive evidence, evinces a clear intention that whether the order, decree or judgment of Supreme Court is correct is to be decided at the time at which it was given and on the basis of the primary record. The proceeding in that respect is styled an appeal because it is intended to bear the hallmarks or characteristics of an appeal in the strict sense. Acceptance of the appellant's argument would have the consequence that an appeal under s 5 would be in the nature of an appeal by way of rehearing.

27. It was these characteristics[17] that gave rise to the debate in *Ruhani (No 1)* as to whether, from an Australian constitutional perspective,[18] the jurisdiction was original or appellate. The result in *Ruhani (No 1)* that the proceeding is in this Court's original jurisdiction does not deny the similarity between a proceeding under s 5 and an appeal in the strict sense. As Gleeson CJ observed, from the perspective of the parties the description of the proceeding as an appeal is "perfectly apt".[19] And McHugh J observed that the appeal was analogous to judicial review.[20]

28. In using the term "appeal" Parliament plainly intended to describe a legal proceeding of a certain type. However, the word "appeal" can have a variety of meanings depending on the context in which it is used[21] and the issue is which meaning s 5 of the Appeals Act is intended to convey.

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[17] Discussed in *Ruhani (No 1)* at 507 [40]–[47] (McHugh J).

[18] *Ruhani (No 1)* at 529 [113] (Gummow and Hayne JJ).

[19] *Ruhani (No 1)* at 499 [9] (Gleeson CJ).

[20] *Ruhani No 1* at 508 [43] (McHugh J).

[21] *Eastman v The Queen* (2000) 203 CLR 1 at 40 [130].

29. It was pointed out in *Brideson [No 2]* that "the nature of [an] appeal must ultimately depend on the terms of the statute conferring the right [of appeal]".[22] The statute in question may confer limited or large powers on an appellate body; it may confer powers that are unique to the tribunal concerned or powers that are common to other appellate bodies. As three members of the Court observed in *Coal & Allied: "there is, thus, no definitive classification of appeals, merely descriptive phrases by which an appeal to one body may sometimes be conveniently distinguished from an appeal to another".*[23]

30. Turning to the construction of s 5, the Respondent contends that the following reasons support the Respondent's contention that the term "appeal" in s 5 is properly to be understood as conferring jurisdiction to hear a proceeding the parameters of which reflect an appeal in the strict sense.

31. First, in its ordinary meaning an appeal is *"the right of entering a superior Court, and invoking its aid and interposition to redress error of the Court below".*[24] The identification and correction of error is central to the concept. In this context, the term "appeal" is used in an Australian Act that confers jurisdiction on this Court, which has an established (and constitutionally limited) appellate jurisdiction.[25] *Prima facie*, the Parliament should be understood to have intended[26] to confer on this Court the same kind of appellate jurisdiction as this Court exercises in other appeals.[27]

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[22] (1990) 170 CLR 267 at 273-274; see also *Coal & Allied v Australian Industrial Relations Commission* (2000) 203 CLR 194 202-203; *Building Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621;

[23] (2000) 203 CLR 194 at 203 [11] (Gleeson CJ, Gaudron and Hayne JJ)

[24] *Attorney-General v Silllem* (1864) 10 HLC 704 at 724; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109 (Dixon J) (**Victorian Stevedoring**);

[25] *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 203 CLR 1 **(Eastman)**

[26] In the sense used by this Court in *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28].

[27] The Respondent does not contend that the Parliament is constitutionally precluded from conferring on this Court anything other than appellate jurisdiction in the strict sense in relation to conferral of original jurisdiction to hear appeals from Nauru. Rather, the contention is one of statutory construction.

32. As a general proposition, when an Act confers jurisdiction on a court to hear a matter then absent contrary intention, it is to the court *as such that the matter is referred exercising its known authority according to the rules* of procedure *by which it is governed and subject to the incidents by which it is affect*"[28]. In this context, it is to be expected that when jurisdiction was conferred on this Court to hear an appeal and give judgment in accordance with s 8 of the Appeals Act, the process to be adopted would reflect that which is applied in the Court's appellate jurisdiction under s 73.

33. Second, there is no express power to receive evidence. Authority for an appellant court to receive further evidence must come from a grant of legislative power in addition to a mere grant of appellate jurisdiction.[29] Historically, a simple grant of appellate jurisdiction required the court to determine whether the decision was correct on the facts and law existing at the time the primary decision was given.[30] Appeals are creatures of statute and the source of the powers to receive fresh evidence must arise expressly or by implication from the statute that defines the conditions and limits the exercise of the power.[31] In s 5 of the Appeals Act, Parliament chose to style the proceeding as an appeal without conferring any express power in the Appeals Act to admit fresh evidence.

34. To the extent that there has been any departure from the ordinary meaning of an appeal, it has been done expressly by statute.[32] As Dixon J explained in *Victorian Stevedoring,* the English position, on which the appellant relies, has its source in the *Judiciary Act 1873* (UK). Following that Act, appeals within the English judicial hierarchy have been by way of rehearing and the reception of evidence is expressly authorised.[33] Provisions to like effect were adopted in some of the

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[28] *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 559 (the Court)

[29] *Eastman* at [105] (McHugh J)

[30] *Eastman* at [111] (McHugh J).

[31] *Eastman* at [14], [186] (Gummow J).

[32] *Victorian Stevedoring* at 108; *Eastman* at 63 [192] (Gummow J).

[33] See, eg, *Eastman* at 60 [185] (Gummow J); *Mickelberg* 167 CLR at 267-269; *Victorian Stevedoring* 46 CLR at 109-109 (Dixon J).

Australian colonies.[34] They are seen in many Australian intermediate courts. No counterpart to those provisions is present here.

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

36. Third, to the extent that the appellant points to s 8 of the Appeals Act as a source of legislative power to receive fresh evidence, that submission should not be accepted.[35] As a matter of text, s 8 refers to a judgment, order decree or sentence that ought to have been given, made or imposed in the first sentence. That directs attention to what should have occurred at the time the order was made.

37. Further, the form of judgment for which s 8 of the Appeals Act provides reflects the form of judgment for which s 37 of the *Judiciary Act* provides[36]. Section 37 has never been considered as a potential source of statutory power to admit evidence on an appeal this Court under s 73. This again supports the contention that Parliament intended to confer on this Court a jurisdiction that mimics its appellate jurisdiction.

38. Fourth, there are problems with admitting fresh evidence in this Court.

(1) The laws governing the admissibility of evidence in this proceeding might depend on federal law not Nauruan law, with the consequence that the proceeding might turn on evidence that could not be admitted in the primary court;[37] and

(2) it would involve a trespass on Nauruan judicial power.[38]

39. The applicant relies on two matter in support of his contention that fresh evidence is permitted in an appeal to this Court from the Supreme Court of Nauru:

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[34] *Eastman* at [185] (Gummow J).

[35] Appellant's Submissions at [11].

[36] *Ruhani (No 1)* at 508 [42] (McHugh J); and 527 [106] Gummow and Hayne JJ

[37] *Eastman* at [112] (McHugh J)

[38] cf s 73; *Mickelberg* at 269.

(1) the position in England, which it is said reflects the law of Nauru[39]; and

(2) the fact that this Court is exercising original jurisdiction in such appeals.[40]

Each of these arguments is misplaced.

40. As to the position in England, the Appellant contends that because the Court is to apply the law of Nauru in hearing and determining the appeal, it must apply Nauruan law on the issue of admissibility of fresh evidence; and Nauruan law on that issue is the common law of the United Kingdom on 31 January 1968.[41] However, this argument fails to recognise that the task confronting this Court in determining the nature of the appeal is to construe an Act of the Commonwealth Parliament — the Appeals Act. It is only once that Act has been construed, and the nature of the jurisdiction conferred by it ascertained, that the Court is called on the apply the law of Nauru. The Respondent contends that in undertaking that exercise in statutory construction, the law of Nauru is not the applicable law.

41. Further, and alternatively, the Respondent contends that the English position relied upon by the Appellant is an inapt analogy.[42] As submitted above, the reception of evidence in appeals in the English Court of Appeal and the House of Lords turns on statute and no similar provisions are found in the Appeals Act.

42. Section 49 of the *Appeals Act* 1972 (Nauru) refers to the powers of this Court on an appeal. However, that Act does not assist the Appellant. First, the Nauruan Act cannot confer powers on this Court. There is nothing in the Appeals Act which expressly picks up the provisions of the Appeals Act Nauru. Second, s 49(1) states that this Court is to have "all the power, authority and jurisdiction" which it has from appeals from State Courts. To the extent that the provision has any relevance, it reinforces the conclusion that an appeal is analogous to a s 73 appeal.

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[39] Appellant's Submissions [10]
[40] Appellant's Submissions [9]

[41] Appellant's Submissions at [10].

[42] *Victorian Stevedoring* at 109

43. The fact that the matter is heard in the original jurisdiction of this Court, requires no different answer to the question whether fresh evidence is permitted on an appeal under the Appeals Act. The fact that this Court's jurisdiction is original, rather than appellate, as a matter of Australian constitutional analysis, does not *require* a conclusion that fresh evidence must be permitted. Nor does the nature of the jurisdiction affect the interpretation of the term "appeal" in the Appeals Act, except in so far as the constraints of s 73 are not operative. As explained above, the Respondent contends that conferral of a power to receive fresh evidence is constitutionally permitted; but that this is not what Parliament has in fact done in enacting s 5 of the Appeals Act.

44. Section 76(ii) of the Constitution does not require or mandate a single form of judicial process. For example, it is permissible for the content of the matter to be limited to determination of a question of law arising from the exercise of judicial power[43]. It is also permissible for that determination to be undertaken subject to the same constraints that operate in respect of a strict appeal. On its correct construction, that is what s 5 of the Appeals Act provides. It follows that there is no power to admit the evidence and, in any event, it is irrelevant to the issue to be determined on the appeal namely whether the decision was correct on the material before the primary court.

Alternatively, fresh evidence should not be admitted in this case

45. In the alternative, if the introduction of fresh evidence is permissible on the hearing of an appeal from the Supreme Court of Nauru, the Respondent contends that the Appellant ought not be permitted to adduce fresh evidence.

46. As the Appellant accepts, the test for the reception of fresh evidence is a stringent one and a new trial should be granted on the basis of fresh evidence only in exceptional circumstances. As Dixon CJ observed in *Wollongong Corporation v Cowan,*[44] "*it is essential to give effect to the rule that the verdict, regularly obtained, must not be disturbed without some insistent demand of justice. The*

[43] *Hembury v Chief of General Staff* (1998) 193 CLR 641 at 653 (Gummow and Callinan JJ)
[44] *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444.

discovery of fresh evidence in such circumstances could rarely, if ever, be a ground for a new trial unless certain well-known conditions are fulfilled".

47. The principles governing the reception of fresh evidence on appeal are well-established.

(1) First, it must be reasonably clear, or highly likely, that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced.[45] One aspect of this principle is that the fresh evidence sought to be adduced must be cogent and plausible, or credible, as well as relevant.[46]

(2) Second, "a new trial should not be granted on such a ground if by the exercise of reasonable diligence the 'fresh' evidence could have been discovered in time to be used at the original trial".[47]

48. The Respondent contends that, in this case neither criterion is satisfied.

49. It is notable that the Appellant did not plead in either Action No 16 or 17 that approval had been given. Approval was a necessary element in establishing a valid transfer, yet the appellant made no attempt to allege or prove it. The rules permitting fresh evidence ought not apply to proving an essential element of a cause of action that the Appellant made no attempt to either plead or prove.

50. In substance, the Appellant seeks the admission of fresh evidence to run a new point on appeal. Principle dictates that an appellant should not be permitted to run a fresh point on appeal if it involves disputed questions of fact or might have

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[45] *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444 (Dixon CJ). Other formulations have also been used to encapsulate this requirement, but none are materially different: see discussion in *Orr v Holmes* (1948) 76 CLR 632 at 640-42.

[46] *Gallagher v R* (1986) 160 CLR 392 at 396, quoting Rich and Dixon JJ in *Craig v The King* (1933) 49 CLR 429. While "the rules appropriate in this respect to civil trials cannot be transplanted without qualification into the area of the criminal law", the principles underlying the rules concerning fresh evidence, namely "the adversary nature of a trial, be it civil or criminal, and of the desirable finality of its outcome" are applicable to both criminal and civil matters: *Ratten v R* (1974) 131 CLR 510 at 516-517.

[47] *Orr v Holmes* (1948) 76 CLR 632 at 635 (Latham CJ).

affected the course of evidence below[48]. That principle should be applied in this case as an additional reason why leave to admit the evidence should be refused.

51. Further, in the absence of proof of the authenticity of the document, it cannot be said that the evidence is cogent and plausible, or credible; and thus it cannot be said that it is "reasonably clear" that had the document been produced at trial, an opposite result would have been produced. The Appellant, who bears the burden of proof in this regard, has adduced no evidence as to the authenticity of the document;[49] and its authenticity ought not to be assumed by this Court.

52. The evidence sought to be adduced (or the original of that evidence) was, on the Appellant's case, in existence at the time of the trial. The Appellant failed to adduce the evidence at trial. Further, the document would not have been the only evidence of approval. In this proceeding, the Appellant has failed to demonstrate that he exercised reasonable diligence to procure the evidence.

(1) The Appellant knew that the approval of the President was required and was in issue, as these matters were the subject of submissions and evidence in the proceedings before the trial judge.[50]

(2) The Appellant has given evidence that he and his lawyer sought to inspect "files held by the government of Nauru" and that he and his lawyer were "told by the lawyers for the [Respondent] that if there ever was any such file, it had been lost".[51] In relation to this evidence, the Appellant makes two points:

(a) The Appellant cannot verify the accuracy of this evidence because the Chairman of the Respondent, Mr Leslie Adam, who represented the Respondent in the proceedings at trial, died on 5 October 2011.

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[48] *Coulton v Holcombe* (1986) 162 CLR 1

[49] While the Appellant has deposed that "as far as [he is] aware, the Presidential Approval [document] is a true copy of a genuine document" (Appellant's Affidavit, AB 43), this does not constitute proof of the authenticity of the document.

[50] Appellant's Affidavit at [13]-[14]; Exhibit DL-3 to the Lambourne Affidavit.

[51] Appellant's Affidavit at [14].

(b) In any event, assuming (but not conceding) the evidence to be correct, a request to inspect government files directed to the Respondent did not constitute "reasonable diligence" to procure the evidence.

(3) The Appellant, at trial, should have but did not:

(a) issued a subpoena to produce documents to the President and/or the relevant Department; and

(b) issued a subpoena to the President to appear and give evidence in relation to whether he had given approval.

Such steps were reasonable in the circumstances.

(4) To the extent that the Appellant claims to have assumed that, because the Respondent, a "responsible government body", provided information to the trial court that information "must have been correct", this provides no foundation for concluding that the Appellant exercised reasonable diligence in seeking to procure the evidence.

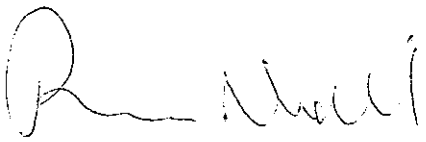
(5) Finally, it may be noted that the Appellant was legally represented at trial,[52] thus it cannot be asserted that the issuing of subpoenas was something he, as a lay person, might not reasonably be expected to have considered.

53. For the foregoing reasons, this Court should decline to receive the fresh evidence the Appellant seeks to adduce.

54. Finally, the only relief sought by the Appellant is that the mater be remitted for rehearing. If, contrary to the Defendant's submissions, this Court decides to remit the matter to the Supreme Court of Nauru for re-hearing, the form of remittal should not constrain the parties as to the issues to be determined and should leave open all of the issues that may be in dispute.

[52] Appellant's Affidavit at [14].

Dated: 11 October 2011



RICHARD NIALL
Melbourne Chambers
Telephone: (03) 9640 3285
Facsimile: (03) 9640 3108

KRISTEN WALKER
Melbourne Chambers
Telephone: (03) 9640 3281
Facsimile: (03) 9640 3108