IN THE COURT OF APPEAL OF NAURU AT YAREN **CIVIL APPELLATE JURISDICTION**	**Civil Appeal No. 05 of 2019** **Supreme Court Civil Case No. 01 of 2016**

BETWEEN

NAURU REHABILITATION CORPORATION

FIRST APPELLANT

AND

DERIO NAMADUK of Ewa District, Leading Hand.

SECOND APPELLANT

AND

JOSEPH ADAM of Yaren District, Labourer.

RESPONDENT

DATE OF HEARING: **31 July 2024**

DATE OF JUDGMENT:	**31 October 2024**
CITATION:	**Nauru Rehabilitation Corporation & Derio Namaduk v Joseph Adam**
KEYWORDS:	Claims against the Republic; instrumentality of the Republic; leave of the Cabinet; can requirement for cabinet leave be waived; whether a condition precedent is procedural or jurisdictional; memorandum of appearance; notice of change of counsel; notice of appointment of counsel; notice of intention to claim against the State; Secretary of Justice to represent the Republic; nullity;
LEGISLATION:	Sections 2, 3(1), 3(2), 3(3), 11(2) of the Republic Proceedings Act 1972; O.10 R.2, O.44 R.3, O.50 R.2 of the Civil Procedure Rules 1972; Section 3 of the Nauru Rehabilitation Corporation Act 1997; Regulation 4 of the Proceedings Against the Republic Regulations 1973; Section 6 of the Vanuatu State Proceedings Act No 9 of 2007; Section 5(1) of the Papua New Guinea Claims by and Against the State Act 1996; Section 18(1) of the Ontario Crown Liability Proceedings Act 2019; Section 151C of the NSW Workers Compensation Act 1987; Section 6(4) of the NSW Law Reform (Miscellaneous Provisions) Act 1946; Section 12(2) of the State Proceedings Act 1951of Fiji;
CASES CITED:	Republic of Vanuatu v Napuat [2023] VUCA 8; Essy v Bomal [2021] PGSC 24; SC2085 (29 March 2021); Paul Tohian & The State v. Tau Liu [1998] PGSC 25; SC566; Noddle v. The Ontario Ministry of Health, 2019 ONSC 7337; Commonwealth of Australia v. Verwayen (1990) 95 ALR 321; Gordon v Berowra Holdings Pty Ltd [2005] NSWCA 27; National Mutual Fire Insurance Co Ltd v Commonwealth of Australia [1981] 1 NSWLR 400; Project Blue Sky Inc and Others v Australian Broadcasting Authority (1998) 153 ALR 490; Bolaitamana v Registrar of Births, Deaths, Marriages [2022] FJHC 284;
APPEARANCES:	
COUNSEL FOR the	**D. Aingimea**

Appellants:

COUNSEL FOR the Respondent: **V. Clodumar**

JUDGMENT

1. This is an appeal against the judgment of the Supreme Court delivered on 4 October 2019. The statement of claim was filed by the Plaintiff (Respondent) in the Supreme Court, seeking damages for an injury to the middle finger of his right hand, allegedly caused by the negligence of the Second Defendant (Second Appellant), during the course of his employment under the First Defendant (First Appellant), on or about 20 April 2015.

2. The Respondent filed the claim in the Supreme Court on 12 January 2016. On 24 February 2016, the First Appellant filed a Memorandum of Appearance pursuant to Order 10 Rule 2 of the Civil Procedure Rules 1972 through Mr. David Aingimea. Subsequently, on 15 March 2016, the First Appellant filed a General Defence denying the claim. On 5 July 2016, the Second Appellant filed a Memorandum of Appearance to defend the claim in person, and on 12 August 2016, he filed a General Defence in person, also denying the claim.

3. On 09 April 2018 the First Appellant filed a Summons to strike out in the Supreme Court on the basis of abuse of process. The First Appellant submitted:

   i) That Cabinet leave has not been granted pursuant to Section 3 of the Republic Proceedings Act 1972
   ii) An application for compensation under the Workers Compensation Act 1956 has not been made in accordance with Section 7(1)(b)

4. On 02 May 2018, the learned Judge of the Supreme Court dismissed the application for strike out stating the following reasons:

> "[15] The first defendant failed to raise the issue of non-compliance of s.3 of the Act in its defence. In filing this application, the first is now 'departing' from his pleading and raising a new ground and under Order 15 Rule 10(2) it was required to obtain leave of the court to do so as the Commonwealth did in Verwayen's case. This application is non-compliance of the rules and is therefore defective.
>
> [16] The other issue which is of concern to me is that by delaying this application and by not raising the issue of not obtaining the consent of the Cabinet prior to filing this claim, the plaintiff's position has been prejudiced in that this claim became a statute barred on 20 April 2018."

5. Subsequently, on 07 November 2018, the First Appellant made an oral application to the Supreme Court to amend the statement of defence. On 15 November 2018 the learned Judge of the Supreme Court allowed the application to amend the statement of defence.

6. Accordingly, on 19 November 2018 an amended statement of defence was filed by the First Appellant along with an application to strike out. The Summons to strike out, based on the ground of abuse of process, stated:

    i) That Cabinet leave has not been granted pursuant to Section 3 of the Republic Proceedings Act 1972.
    ii) The proceedings lacks legal standing due to non-compliance in (i) and with Rule 50 of the Civil Procedure Rules 1972.
    iii) An application for compensation under the Workers' compensation Act 1956 has not been made in accordance with Section 7(1)(b).

7. On 16 April 2019 the Supreme Court dismissed the application for strike out again, stating:

> "[15] In this matter the relationship between the plaintiff and the first defendant changed when it admitted liability and an order to that effect was made and the matter was set down for assessment of damages. In admitting liability, the first defendant waived its right to raise noncompliance of s. 3 of RPA and O.50 r.2 and is now precluded from doing so."

8. Subsequently, the Supreme Court proceeded with a hearing limited to assessing the quantum of damages, apparently based on a purported admission of liability. At this juncture, it is pertinent to examine how this admission of liability came about. Upon reviewing the Supreme Court file, it appears that the last time the Second Appellant personally appeared before the court was on 29 November 2016. From that point onward, the Supreme Court minutes are silent regarding the Second Appellant's presence in court. However, on 21 April 2017, counsel for the First Appellant entered an appearance on behalf of the Second Appellant. Additionally, on 8 June 2017, the counsel for the First Appellant appeared in the Supreme Court and informed the court that she represents both Appellants. It remains unclear whether the Second Appellant was present in court when the counsel entered an appearance for him.

9. Order 44 of the Civil Procedure Rules 1972 (CPR) clearly specifies when a notice of change of counsel or a notice of appointment of counsel should be filed, in addition to a memorandum of appearance. Furthermore, Order 44, Rule 3 of the CPR outlines the procedure for a defendant who initially appeared in person to subsequently appoint a legal practitioner. Since the Second Appellant had filed a Memorandum of Appearance to defend the claim in person, it was mandatory for the legal practitioner to comply with Order 44, Rule 3 and file a Notice of Appointment of Legal Practitioner before entering an appearance on

his behalf. Nevertheless, without proper compliance with these rules, Ms. Lekenua admitted liability on 8 June 2017 on behalf of both Appellants.

10. Be that as it may, based on the said admission of liability by the counsel, the Supreme Court proceeded with the hearing to determine the quantum. On 04 October 2019 the Supreme Court delivered the judgment awarding $ 89,782 to the Respondent.

11. Aggrieved by the judgment of the Supreme Court, DA LAW & Associates filed a Notice of Appeal on 4 November 2019, naming Nauru Rehabilitation Corporation and Derio Namuduk as the First and Second Appellants, respectively. The grounds of appeal, as stated in the Notice of Appeal, are as follows:

    1. That the Learned Trial Judge erred in law and in fact in failing to consider that this entire proceeding is highly irregular due to non-compliance of Nauru Civil Procedure Rules and Republic Proceedings Act 1972.
    2. The Learned Trial Judge erred in law and in fact in failing to take into account that the sanction contained in Section 3 of the Republic Proceedings Act 1972 is absolute.
    3. That the Learned Trial Judge erred in law and in fact by proceeding with the judgment of this case without having proper legal justification pursuant to the Amended Defence filed on in November 2018.
    4. In terms of damages, the Learned Trial Judge erred in law and in fact in applying the provisions of Section 19 of the Workers Compensation Act 1956 for the basis of validating the damages awarded.

12. The parties filed their submissions, and the appeal was heard on 31 July 2024. I will consider the first and second grounds of appeal together, as they revolve around the same argument.

13. The main argument of the Appellants was that the Respondent did not comply with section 3 of the Republic proceedings Act 1972 (RPA) where it stipulates that no civil proceedings may be taken against the Republic unless before the commencement of the proceedings the Cabinet has given leave. For the convenience of reference section 3 of the RPA is reproduced below:

> 3. Claims against the Republic
>
> (1) In this Section:
>
> ***'Republic'*** means the Republic or any Government department or instrumentality of the Republic or the President, the Cabinet, any Minister or any public officer in his or her official capacity; and
>
> ***'Proceedings'*** includes a counter-claim in proceedings against the Republic.
>
> (2) No civil proceedings may be taken against the Republic to enforce a claim against the Republic unless:
>
> (a) before the commencement of the proceedings, Cabinet has given leave for them to be taken; or
>
> (b) the claim is of a kind mentioned in subsection (3).
>
> (3) A person may take civil proceedings, without leave of Cabinet, to enforce any of the following claims:
>
> (a) a claim for the enforcement of a contract validly entered into by or on behalf of , the Republic;
>
> (b) a claim for judicial review of administrative action;
>
> (c) a claim to enforce the payment of debt charges which are a charge on the Treasury Fund; or
>
> (d) a claim in respect of which it is provided in an Act that the provisions of this section do not apply.
>
> (4) The cabinet shall prescribe by regulations the manner in which application may be made to the Cabinet for leave to take proceedings against the Republic.

(5) Where leave to take proceedings against the Republic is granted by the Cabinet, the proceedings, if taken, shall be taken in accordance with the provisions of this Act.

14. I will now consider if the First Appellant comes within the definition of the 'Republic'. In section 2 of the RPA an instrumentality of the Republic is interpreted as follows:

Instrumentality of the Republic

(a) means a body established by statute, which statute expressly provides that the body is subject in some respect to Cabinet or Ministerial direction; but

(b) does not include:

(i) a statutory body that is deemed, by regulation made under Section 2A, not to be an instrumentality of the Republic; or

(ii) a statutory body that, in the statute establishing the body, is expressly provided not to be an instrumentality of the Republic for the purposes of this Act;

15. Nauru Rehabilitation Corporation is established under section 3 of the Nauru Rehabilitation Corporation Act 1997. It provides:

"Establishment of the Corporation

(1) There is hereby established for the purposes of this Act, a body known as the Nauru Rehabilitation Corporation which is a body corporate, having perpetual succession and a common seal.

(2) The provisions of Schedule 1 shall have effect as to the constitution of the Corporation and otherwise in relation thereto."

16. The Nauru Rehabilitation Corporation Act 1997 expressly provides that the body is subject in some respect to Cabinet and Ministerial direction. In the circumstances, it is clear that the First Appellant falls within the definition of the 'Republic'. Moreover, the parties also concede that the First Appellant falls within the definition of the 'Republic' pursuant to section 3(1) of the RPA, as it is an instrumentality of the Republic.

17. Since the First Appellant falls within the definition of the 'Republic,' the Appellants argued that Cabinet leave must be obtained before initiating the civil proceedings against the First Appellant. The Respondent does not dispute that such leave is required to bring this claim against the Republic. But, the Respondent contended that grounds 1, 2, and 3 of the appeal should be dismissed, as the Appellants are barred from raising matters that were previously addressed in strikeout motions, either by the doctrine of estoppel by conduct or, alternatively, by the doctrine of acquiescence.

18. As such, the Respondent argues that, without appealing the Supreme Court's interlocutory orders, the Appellant cannot now raise the issue of non-compliance with section 3(2) of the RPA. While it is true that the Appellant could have appealed those interlocutory orders, this issue goes to the core of the entire action. I see no reason to preclude the Appellant from raising it in an appeal against the Supreme Court's final judgment. Furthermore, non-compliance with this statutory requirement is fundamental to the case and must be examined to determine its impact on the claim against the Republic.

19. The Respondent's claim against the First Appellant is a tort action based on vicarious liability. The Republic is subject to all liabilities in tort subject to the provisions of the Act as per section 4 of the RPA. Nevertheless, pursuant to Section 3(2) of the RPA, leave from the Cabinet is required to commence proceedings. However, as outlined in Section 3(3) of the RPA, it should also be noted that not all civil proceedings against the State require Cabinet leave.

20. This requirement for leave of the Cabinet appears to be a unique condition precedent in this jurisdiction, differing from procedures in other common law jurisdictions. In certain jurisdictions, a pre-action notice to the State is required before the commencement of civil proceedings, whereas here, the requirement is more stringent, granting the Cabinet full discretion to either grant or deny leave. The purpose of this provision is explained in the Explanatory Memorandum for the Republic Proceedings Amendment Bill 2010, which introduced section 3:

> "This Bill seeks to amend the Republic Proceedings Act to ensure that appropriate instrumentalities of the Republic are given the protection they require so that essential government services can continue to be delivered without interruption. In order to achieve this result, it is necessary to balance the interests of litigants wishing to take legal action against such instrumentalities with the national interest."

21. Therefore, the legislature's intent appears to be for the Cabinet to retain authority to balance the interests of litigants wishing to pursue legal action against Republic instrumentalities with the broader national interest. Thereby, under section 3(2) of the RPA, commencement of certain civil claims against the Republic is made subject to the authority of the executive. Article 17 of the Nauru Constitution states that *the executive authority of Nauru is vested in a Cabinet constituted as provided in this part, granting the Cabinet general discretion and control over the Government of Nauru*. In this context, obtaining leave from the Cabinet represents a much higher threshold than simply giving notice to the State through the Solicitor General or the head of a department, as required in certain other jurisdictions.

22. I will now examine some authorities in other jurisdictions to understand how non-compliance with pre-action notice requirement has been dealt with. In Vanuatu section 6 of the State Proceedings Act No 9 of 2007 stipulates that *no proceeding against the Government, other than an urgent proceeding, is to be instituted*

under section 3 unless the party intending to do so first gives written notice to the State Law Office of such intention.

23. In Republic of Vanuatu v Napuat [2023] VUCA 8, the respondent filed a claim to recover judgment debt against the Republic of Vanuautu. The Republic of Vanuatu filed an application to strike out the claim, arguing non-compliance with Section 6 of the State Proceedings Act No 9 of 2007, which requires a notice to be served on the State Law Office before initiating proceedings. Although notice was given, it was filed eight months before the claim, exceeding the statutory limit of six months. The trial court dismissed the application to strike out the claim, but the Republic of Vanuatu appealed. The appellate court ruled that the notice requirement under the State Proceedings Act No 9 of 2007 is an absolute statutory obligation and must be strictly followed. As a result, the appeal was allowed.

24. A similar provision is observed in the Claims by and Against the State Act 1996 of Papua New Guinea where section 5(1) provides that *no action to enforce any claim against the State lies against the State unless notice in writing of intention to make a claim is given in accordance with this section by the claimant to the Departmental Head of the Department responsible for justice matters; or the Solicitor-General.*

25. In Essy v Bomal [2021] PGSC 24; SC2085 (29 March 2021), the Papua New Guinea Supreme Court addressed the requirement of pre-action notice under Section 5(1) of the Claims by and Against the State Act 1996 (State Proceedings Act). The appellant, Francis Essy, initially filed a claim in 2015 against the State and several police officers, then discontinued it, and filed a new claim in 2017 with similar allegations but additional defendants. However, Essy failed to re-issue a Section 5 notice to the State before commencing the 2017 action. The Court held Section 5(1) mandates that notice of intention to sue the State must be provided as a condition precedent for any legal action against the State and failure to comply renders the action invalid. The Essy (supra) case reinforced the judgment of the Supreme Court in Paul Tohian & The State v. Tau Liu [1998]

PGSC 25; SC 566 on the requirement to give pre-action notice after Parliament introduced Section 5 in 1996. The Supreme Court held:

> "It is clear to us that the notice of intention to make a claim is a condition precedent to issuing a writ of summons in all circumstances."

26. Also, section 7(1) of the Proceedings Against the Crown Act 1990 of Ontario provides that *Subject to subsection (3), except in the case of a counterclaim or claim by way of set-off, no action for a claim shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the action, served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, and the Attorney General may require such additional particulars as in his or her opinion are necessary to enable the claim to be investigated..*

27. In Noddle v. The Ontario Ministry of Health, 2019 ONSC 7337, Noddle sued Dr. Todd Levy and the Ontario Ministry of Health, claiming that Dr. Levy's prescription of the drug Aldara caused him harm and alleging that Ontario Ministry of Health was negligent in approving the drug without sufficient warning of its side effects. The court struck out the claim against Ontario Ministry of Health, rendering it a nullity because Noddle failed to provide the mandatory 60-day notice before suing the Crown, as required under the Proceedings Against the Crown Act 1990. Additionally, the court found that the Ontario Ministry of Health is not a separate legal entity capable of being sued, as it is part of the Crown. Furthermore, it was stated in para 32 of the judgment that:

> [32] Proper notice is a necessary pre-condition to a claim in damages against the Crown, which cannot be waived or abridged: *Beardsley v. Ontario Provincial Police* (2001), 2001 CanLII 8621 (ON CA), 57 O.R. (3d) 1 (C.A.), at paras. 10-12. An action against the Crown that is commenced without providing the required statutory notice is a nullity: *Miguna v. Ontario (Attorney General)*, 2005 CanLII 46385 (Ont. C.A.), at paras. 7-8.

28. These authorities from other jurisdictions elaborate that the requirement to give notice before commencing proceedings against the State is considered a mandatory pre-action requirement that cannot be waived and failure to give notice renders the proceedings a nullity.

29. On the other hand, it is important not to mistake the requirement set out in section 3(2) of the RPA, for a defence that a party can simply choose to exercise or waive. Unlike a statutory time limitation, which provides a benefit or right to a party that may be waived at their discretion, section 3(2) establishes a condition precedent for initiating proceedings against the Republic. This condition specifically requires obtaining Cabinet leave, and it is not a defence available for the benefit of a defendant. The distinction is illustrated in Commonwealth of Australia v. Verwayen (1990) 95 ALR 321 at 342:

> "As it is a characteristic of a right susceptible of waiver that it is introduced solely for the benefit of one party, a condition precedent to the jurisdiction of a court to grant relief cannot be waived: *Park Gate Iron Co Ltd v Coates* (1870) LR 5 CP 634. It follows that, if the jurisdiction of a court to entertain proceedings is conditioned on the commencement of the proceedings within a specified time, a defendant cannot waive the time requirement and thereby confer jurisdiction on the court. Conversely, where a case is fought on the issue whether a time limitation in a particular statute is or is not a condition precedent to jurisdiction, an argument that another statute overrides the time limitation can be raised on appeal though conceded in the court below: *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 547, 548. However, a defence under s 5(6) of the Limitation Act does not create a condition precedent to jurisdiction. It is merely a right conferred on a defendant to defeat a claim brought outside the time limited by the Limitation Act."

30. In my opinion obtaining leave from the Cabinet is quite distinct from merely giving notice of an intention to claim against the State. Notice does not involve

any threshold that must be met, and once served, there is no mechanism to halt or impact the commencement of legal proceedings. This requirement functions more as a procedural step that regulates the court's exercise of jurisdiction. In contrast, section 3(2) of the RPA sets a threshold that involves another mechanism which could impact the commencement of the proceedings against the Republic. This threshold provides the Cabinet with an opportunity to review a prospective claim and to decide whether to grant leave. If the Cabinet denies leave, the party intending to proceed is barred from commencing action against the Republic. Therefore, this statutory prerequisite is more jurisdictional than procedural. As noted in Verwayen (supra) if the jurisdiction of a court to entertain proceedings is conditioned on the satisfaction of specific statutory requirement a defendant cannot waive the requirement and thereby confer jurisdiction on the court. Thus, I am of the view that satisfying the condition precedent in section 3(2) of the RPA is mandatory to enliven the court's jurisdiction to commence proceedings against the Republic.

31. In a case with factual similarities to the present one, the Supreme Court of New South Wales discussed the consequences of non-compliance with a procedural condition precedent. In Gordon v Berowra Holdings Pty Ltd [2005] NSWCA 27, the plaintiff, who was injured at work, commenced proceedings against his employer before the statutory six-month waiting period had elapsed, violating Section 151C(1) of the Workers Compensation Act 1987 (NSW). The defendant did not initially raise this non-compliance in its defence, nor did either party recognize the statutory requirement until after the defendant made a settlement offer, which the plaintiff later accepted. The defendant subsequently sought to retract the offer, citing the statutory non-compliance. The primary judge ruled that non-compliance with Section 151C rendered the proceedings a nullity, invalidating all related actions, including the settlement offer. However, the Court of Appeal disagreed, ruling that Section 151C was not a jurisdictional barrier but a procedural condition. The court held that proceedings initiated in breach of Section 151C were not automatically void. Additionally, the defendant had waived its right to rely on Section 151C by participating in the

proceedings and making a settlement offer. Accordingly, the Court of Appeal allowed the plaintiff's appeal.

32. However, Gordon (supra) is notably different due to the nature of the condition precedent. In Gordon (supra), section 151C(1) of the Workers Compensation Act 1987 (NSW) establishes a procedural prerequisite that can be waived by the defendant. In contrast, section 3(2) of the RPA imposes a requirement that is not simply procedural. It is a jurisdictional barrier.

33. The next question that arises is the consequence of non-compliance with the condition precedent outlined in section 3(2) of the RPA. As mentioned before, unlike a defence available to a party that can be waived, courts in various jurisdictions have regarded the satisfaction of a condition precedent, such as providing notice before commencing civil proceedings against the State, as mandatory. In Noddle (supra), it was discussed that failure to comply with such statutory pre-action conditions can render the proceedings a nullity.

34. To address this issue, I will now consider whether non-compliance with section 3(2) of the RPA could nullify the proceedings. In this context, it is essential to ascertain the intention of the legislature. Section 3(2) of the RPA confers discretion on the Cabinet to grant leave to commence civil proceedings against the Republic. As previously discussed, the legislature's intention is to balance the interests of litigants seeking to pursue legal action against Republic instrumentalities with the broader national interest. Allowing parties to bypass this legislative intention by waiver or consent would invariably undermine the purpose intended by the legislature.

35. Moreover, under section 11(2) of the RPA, civil proceedings against the Republic must be initiated against the Secretary for Justice. However, in this case, the Secretary for Justice was not made a party to the proceedings. According to Regulation 4 of the Proceedings Against the Republic Regulations 1973, when Cabinet leave is required to initiate proceedings, the Cabinet seeks

advice from the Secretary for Justice. If the Respondent's assertion that the need for Cabinet leave was waived is to be a tenable argument, then, at the very least, the Cabinet should have been represented in the proceedings through the Secretary for Justice. In my view, since the statute explicitly mandates Cabinet leave to initiate proceedings, this requirement cannot be waived by the Appellants' counsel, even if they wished to do so.

36. In National Mutual Fire Insurance Co Ltd v Commonwealth of Australia [1981] 1 NSWLR 400, the Court of Appeal dealt with the enforcement of a statutory charge over insurance moneys and the requirement of prior court leave to initiate such proceedings under Section 6(4) of the Law Reform (Miscellaneous Provisions) Act, 1946. The Commonwealth sued National Mutual Fire Insurance for indemnity, claiming a charge on the insurer's policy after incurring liability in a separate lawsuit. The Commonwealth had failed to obtain prior leave from the court, a statutory requirement under Section 6(4), to directly enforce the charge against the insurer instead of the insured. The Court ruled that non-compliance with the requirement for prior leave invalidated the proceedings, which could not be retroactively validated. This decision clarified that Section 6 aims to provide a mechanism for enforcing a statutory charge in certain cases, not as an alternative to the usual requirement of establishing liability through action against the insured party. Additionally, the Court rejected the idea of granting leave based on the Commonwealth's reluctance to sue its own personnel, emphasizing that leave should be granted only to further the Act's intent of enforcing legitimate claims.

37. In ascertaining if the breach of a statutory condition precedent nullifies proceedings, the scope and the object of the legislation becomes relevant. This was discussed in Project Blue Sky Inc and Others v Australian Broadcasting Authority (1998) 153 ALR 490 as follows:

> "**[93]** In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the

"elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute". (Footnotes omitted)

38. The scope and purpose of the RPA make it clear that the condition precedent in section 3(2) for commencing proceedings against the Republic is mandatory. The legislative intent explicitly requires Cabinet leave before commencing such proceedings for a purpose, as discussed in paragraph 20 above. In these circumstances, I am of the view that the opportunity provided to the Cabinet to grant leave cannot be circumvented. Consequently, failure to satisfy the condition precedent outlined in Section 3(2) of the RPA is fatal and renders the entire proceedings a nullity.

39. Also, it should be noted at this juncture, that it is a prerequisite to tender confirmation of obtaining leave from the Cabinet to the registry along with the writ of summons. Order 50 Rule 2 of the Civil Procedure Rules 1972 provides:

> " No writ of summons to commence civil proceedings against the Republic which by virtue of section 3 of the Republic Proceedings Act 1972 cannot be taken without the leave of the Cabinet shall be issued unless prior to its issue the plaintiff has presented at the registry of the court in which the proceedings are to be commenced a certificate under the hand of the Secretary of the Cabinet that the Cabinet has given leave for those proceedings to be commenced and such certificate has been filed."

40. According to the Rules, a certificate of leave to commence proceedings against the Republic is a mandatory requirement for the court registry to issue a writ of summons. However, in this case, it appears that the registry did not act diligently to verify whether a certificate from the Secretary of the Cabinet, confirming the grant of leave, was submitted with the writ of summons. It should be noted that it is the responsibility of the registry to ensure that the certificate is filed, and in this instance, the registry issued the writ of summons without the certificate, thereby failing to comply with the Rules.

41. It is also pertinent to note that Section 11(2) of the RPA stipulates that civil proceedings against the Republic shall be instituted against the Secretary for Justice. However, the Respondent did not comply with this requirement and instead named the First Appellant as a party. Compliance with Section 11(2) is mandatory, and failure to adhere to this provision is considered fatal to the proceedings. A similar provision is found in Fiji's State Proceedings Act. In Bolaitamana v Registrar of Births, Deaths, Marriages [2022] FJHC 284, the defendant argued that the plaintiff violated Section 12(2) of the State Proceedings Act, 1951, which requires that civil proceedings against the State be brought against the Attorney General. Since the Registrar is a statutory

body, a claim against it is effectively a claim against the State, and the plaintiff failed to include the Attorney General as a party. The court upheld the defendant's argument, ruling that non-compliance with this mandatory provision was fatal to the case.

42. In any event, as discussed above, condition precedent set by section 3(2) of the RPA is mandatory and without obtaining leave from the Cabinet, civil proceedings against the Republic, except for certain categories of proceedings as specified in section 3(3) of the RPA, cannot be commenced. Although the Respondent contended that this issue cannot be appealed against now due to doctrine of estoppel by conduct or doctrine of acquiescence, I conclude that it is not relevant in these circumstances as non-compliance with section 3(2) of the RPA invalidated the entire proceedings from the outset.

43. In the circumstance, I conclude that the learned Judge of the Supreme Court erred in law by failing to find that the entire proceedings is a nullity due to non-compliance with the mandatory statutory requirements. Accordingly, the first and second grounds of appeal are allowed.

44. I do not find any reason to consider the ground three and four as the entire proceedings is declared a nullity.

<u>Orders of the Court</u>

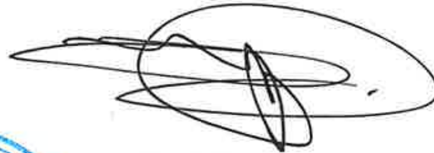
1. Appeal is allowed.

2. The Supreme Court Judgment dated 4 October 2019 is set aside.

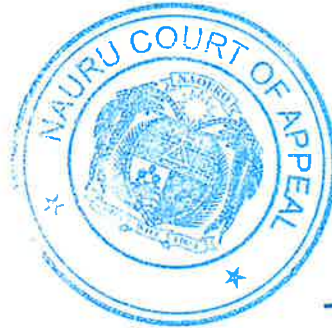
3. Having considered the circumstances of this appeal no costs ordered.

Dated this 31 October 2024

Justice Rangajeeva Wimalasena



President



Justice Colin Makail

I agree

Justice of Appeal

Justice Sir Albert Palmer

I agree

Justice of Appeal