IN THE SUPREME COURT OF NAURU CIVIL SUIT NO. 10/89

BETWEEN :

NAURU PHOSPHATE ROYALTIES TRUST

Plaintiff

-and-

WILLIAM SINCLAIR ASTLING and
PETER FREDERICK SHERMAN

Defendants.

Date of Hearing : 10:12:90
Date of Decision : 27:2.91
Keke for Plaintiff
No appearance of Defendant.

DECISION OF DONNE C. J.

Introduction:

This is an Action by the Nauru Phosphate Royalties Trust ("the Plaintiff") against William Sinclair Astling and Peter Frederick Sherman ("the Defendants") who, in proceedings in Australia in the Supreme Court of Victoria, have denied that the Plaintiff is a body corporate.

Its purpose is (inter alia) to determine whether, according to the domestic laws of the Republic of Nauru, the Plaintiff is and, at all times as pleaded, was a body corporate having, the characteristics attributed to it in the Nauru Phosphate Royalties Trust Ordinance, 1968 (the "Ordinance"). The Action is brought in the Supreme Court of Nauru by reason of the provisions of Article 54(1) of the Constitution of Nauru which provides that this Court has, to the exclusion of any other court, original jurisdiction to determine any question arising under or involving the interpretation or effect of any provision of the Constitution of Nauru. Although, under an agreement made in 1976 between Nauru and Australia the High Court of Australia was constituted the appellate Court for appeals from the Supreme Court of Nauru, it was not conferred with appellate jurisdiction in matters involving the interpretation or effect of the constitution of Nauru. (See: Article 2(a) of the Agreement and Sections 3 and 5 of the Nauru (High Court Appeals) Act, 1976 of the Commonwealth of Australia.)

The plaintiff seeks from the Court the following declarations:

(i) the Ordinance was a law in force in Nauru immediately before Independence Day and, subject to the provisions of the Constitution of Nauru, the Ordinance continued in force in the Republic of Nauru as from the commencement of Independence Day;

(ii)(a) the Ordinance was duly amended by the provisions of the Nauru Phosphate Royalties Trust Act (Amendment) Act, 1990 which came into operation on the 16th October, 1990 and, so amended, may cited as the Nauru Phosphate Royalties Trust Act, 1968-1990;

(b) save as otherwise declared, the Ordinance has not been

amended by a law enacted under the Constitution of Nauru;

(c) the Ordinance has not been repealed by a law enacted under the Constitution of Nauru;

(iii) the Ordinance is a Public Statute in the Republic of Nauru;

(iv) the Ordinance is to be judicially noticed in the Republic of Nauru;

(v) the Plaintiff is and, at all times since Independence Day, has been a body corporate pursuant to the laws of the Republic of Nauru;

(vi) the plaintiff has and, at all times since Independence Day, has had the powers conferred, and the duties imposed, upon it in the Ordinance and, after the 16th October, 1990, the Nauru Phosphate Royalties Trust Act, 1968-1990 subject only to the provisions of the Constitution of Nauru.

The Nauru Phosphate Royalties Trust was established in 1968 to administer monies from time to time derived from the sale of phosphate which is the only main natural resource found in Nauru. This is mined for the government of the Republic of Nauru by the Nauru Phosphate Corporation and the net sale proceeds are distributed in certain ways. A royalty is paid direct to each landowner whose land has been mined. Other monies are paid to certain Trust funds and the balance is retained by the government to meet its expenditure. The function of the Trust is to administer these trust funds. The administration has resulted in the Trust making extensive investments in real estate and equity

and loan portfolios outside of Nauru. It has large and valuable real estate investments in the United States of America, the United Kingdom, Australia, Fiji, Guam and the Philippines. It has entered into numerous contracts relating to such property holdings. Those contracts include development and construction agreements, leases, guarantees of leases, insurance policies and management agreements. The plaintiff's interests in real estate have been registered with the relevant government land registration authorities in those countries. The plaintiff has also both directly and indirectly, acquired investments in equity and loan portfolios in the United States of America, Japan and Australia. Interests in the share capital of other companies have been registered with the relevant government and other authorities in those countries.

In those contracts entered into by the Plaintiff where the law governing, the contract is stipulated, it is almost inevitably foreign law. Thus the plaintiff's rights and obligations under such contracts are, with very few exceptions, governed by foreign laws. Such contracts as are entered into by the plaintiff, which do not specify the law by which they are to be governed, rarely have any connection with Nauru, except to the extent that the Plaintiff is a Nauruan entity. Such contracts, essentially, concern real estate and other interests situated or created in foreign places made with foreign corporations and persons not having any connection with Nauru.

The following facts, which are not in issue, are relevant:

(a) Republic of Nauru was formerly administered by the Comonwealth of Australia, pursuant to certain international agreements; firstly under a mandate conferred by the League of Nations in 1920 and later from 1947 to 1968 under a Trusteeship Agreement approved by the General Assembly of the United Nations;

(b) pursuant to that power the Australian Parliament enacted the Nauru Act, 1965 ("the Act");

(c) Section 34 of the Act conferred upon the Governor-General of Australia power "to make Ordinances forhe peace, order and good government of the Territory" (of Nauru) with respect to "phosphate royalties";

(d) Section 35(1) of the Act provided that an Ordinance made under section 34 should be notified in the Territory Gazette of Nauru and, unless the contrary intention appeared in the Ordinance, that it would come into operation on the date of the publication of the notification;

(e) Section 35(2) of the Act provided that for the purposes of section 35(1), an Ordinance "may be notified by the publication of a Notice to the effect that the Ordinance has been made and that copies may be obtained at a place specified in the notice";

(f) Section 37 of the Act required a copy of the Ordinance to be laid before each House of the Australian Parliament within 15 sitting days of that House after the making of the Ordinance and provided that "if it is not so laid before each House of the Parliament, (it) has no force or effect";

(g) On the 25th January, 1968 the Governor-General of Australia made an Ordinance under the Act known as the Nauru Phosphate Royalties Trust Ordinance, 1968 being No. 6 of 1968 ("the Ordinance") which (inter alia) established the Trust and two funds, namely the Nauruan Community Long Term

Investment Fund (in respect of which no specific beneficiaries were named) and the Nauruan Land Owners Royalty Trust Fund (in respect of which the beneficiaries are persons who are on or after 1st July, 1967 entitled to a beneficial interest in land in respect of which royalties for phosphate which has been or is mined on the land are held in the Fund);

(h) on the same day the Governor-General made three other Ordinances affecting Nauru;

(i) on the 28th January, 1968, in issue No. 6 of the Territory of Nauru Gazette, a purported Notification of the making of the Ordinance and the other three ordinances, was published;

(j) whilst the notice stated that (inter alia) the Ordinance had been made and gave particulars (i.e.: the number and short title of the Ordinance), it did not state that copies of the Ordinance might be obtained, nor did it specify a place at which copies might be obtained;

(k) the Ordinance was not laid before both House of the Australian Parliament within 15 days sitting days after it was made. Less than one week after it was made Nauru became an Independent Nation and, by reason of Section 4 of the Nauru Independence Act, 1987 of the Commonwealth of Australia, the Nauru Act, 1985 was repealed in Australia as at the expiration of the 30th January, 1968 and, after that date, Australia ceased to exercise any powers of legislation, administration or jurisdiction in or over Nauru;

(l) the Constitution of Nauru came into operation on the 31st January, 1968 (which date is referred to therein as

Independence Day);

(m) Article 85 of the Constitution of Nauru provides as follows: -

> "(1.) A law in force in Nauru immediately before Independence Day continues in force, subject to this Constitution and to any amendment of that law made by a law enacted under this Constitution or by order under clause (6.) of this Article, until repealed by a law enacted under this Constitution.
>
> (2.) A law which has not been brought into force in Nauru before Independence Day may, subject to the Constitution and to any amendment of that law made by law, be brought into force on or after Independence Day and a law brought into force under this clause continues in force subject as aforesaid, until repealed by a law enacted under this Constitution.
>
> (3.) Clause (1.) of this Article does not apply to the Nauru Act 1965 of the Commonwealth of Australia, other than sections 4 and 53 of that Act, or to an Act of the Commonwealth of Australia that immediately before Indendpendence Day extended to Nauru as a Territory of that Commonwealth."

(n) on the 21st January 1972 the Interpretation Act 1971 came into operation in Nauru. Section 7(1) provides that the "Nauru Phosphate Royalties Trust Fund" means the Nauru Phosphate Royalties Trust Fund established under the Nauru Phosphate Royalties Trust Ordinance 1968. It also defines "Ordinance" as meaning an Ordinance of the Island which continues to be in force in Nauru by virtue of Article 85 (of the Constitution of the Republic of Nauru). "Island" is defined as meaning the Island of Nauru. Section 7(1) provides (inter alia) that the Interpretation Act shall be a public Act and shall be judicially noticed and, further, that every Ordinance shall be deemed to be, and always to have been, a public statute in Nauru and shall be judicially noticed.

(o) On the 16th October, 1990 the Nauru Phosphate Royalties Trust Ordinance 1968, as an enactment of Nauru, was amended by the Nauru Phosphate Royalties Trust Act (Amendment) Act 1990 by the Parliament of Nauru. The amending Act came into operation on the 16th, October 1990 and in section 10 thereof the Principal Act was amended by the addition of a further section as follows:

> "34(1) The Principal Act came into full force and effect on the 28th January 1968.
>
> (2) Every court of law shall be bound by the above declaration."

The plaintiff contends that the Nauru Phosphate Royalties Ordinance 1968 is a Public Statute of Nauru which confers on it the essential characteristics of a body corporate and renders it distinct from the personalities of the persons who constitute it. It says if, under the law of Nauru, it is and at all such times, was a body corporate having the characteristics attributed to it in the Ordinance, its status was a body corporate and as such, it will be recognized as such by the Supreme Court of Victoria and in all Australian and English Courts.

In support of this latter contention, I was referred to a case of Supreme Court of Victoria, The Pacific Commercial Company v Barnett and Another (1921) V.L.R. 196, wherein Irvine C. J. confirms this position at p. 198 when he said:

> "I do not regard this as a defect of form, but a defect of substance. Before any foreign corporation can obtain any standing in our Courts, it must establish that it is a foreign corporation incorporated under the law of some civilized country, and that the incorporation gives it the right to sue and be sued in its own country. That is essential to the substance of the claim."

See also Chaff and Hay Acquisition Committee and ORS v J. A.

HEMPHILL AND SONS PTY LTD (1947) 74 C.L.R. 375 per Latham C. J. at pp. 384-5; Starke J at pp. 387-90; Williams J. p. 397, Dicey and Moors on The Conflict of Laws (11th Edn) p. 1128 et seq.

The status of the Trust hinges on whether the Ordinance was a law in force in Nauru immediately before Independence Day and one which continued in force under the Constitution of Nauru. This depends on: -

(a) whether the Ordinance was or was not a law in force in Nauru immediately before Independence Day; and

(b) assuming that it was, whether by reason of the provisions of Article 85(1), the Ordinance (albeit made pursuant to the Nauru Act, 1985) remained a law in force in the Republic of Nauru after the commencement of Independence Day.

The basis of the defendant's denial that the plaintiff is not a body corporate, is that the Ordinance, which so creates it, was not a valid law of the Commonwealth of Australia and thus not a law in force immediately before Independence Day. It therefore could not have been adopted as an "existing law" in accordance with Article 85(1) of the Constitution (Supra).

The question of the validity of the Nauru Phosphate Royalties Trust Ordinance turns on the effect of the failure by the Australian Administration a few days prior to Nauru becoming independent, to comply strictly with the requirements as to publication of the making of the Ordinance laid down in section 35 and with 37 of the Nauru Act 1965 (Supra). The Ordinance was subsidiary legislation made under the authority of the Nauru Act on the 28th January 1968 by the Governor-General of Australia.

As subsidiary legislation, compliance with these sections was necessary to bring the Ordinance into operation.

"Section 35 provided as follows: -

(1) An Ordinance made under the last preceding section shall be notified in the Territory Gazette, and such an Ordinance shall, unless the contrary intention appear in the Ordinance, come into operation on the date of publication of the notification.

(2) For the purposes of the last preceding sub-section, an Ordinance may be notified by the publication of a notice to the effect that the Ordinance has been made and that copies may be obtained at a place specified in the notice.

(3) This section does not authorize the making of an Ordinance imposing a penalty in respect of an act that was done or an omission that was made before the date of notification of the Ordinance in the Territory Gazette".

In the case of Ordinance, the administration officials purported to publish in the Territory Gazette on the 28th January 1968 notification of the making of the Ordinance. However the notice failed to state the place where copies of the Ordinance could be obtained as required by subsection 2 of section 35. The Notice (No. 6 of 28 January 1968) read:

"G.N. NO. 23/1968

NOTIFICATION OF THE MAKING OF AN ORDINANCE

It is notified for general information that His Excellency the Governor-General in and over the Commonwealth of Australia acting with the advice of the Federal Executive Council has made the following Ordinances under the Nauru Act 1965:-

No	Short Title of Ordinance
3 of 1968	Nauru Phosphate Agreement Ordinance 1968
4 of 1968	Lands Ordinance 1968
5 of 1968	Nauru Phosphate Royalties (Payment

and Investment) Ordinance 1968.
6 of 1968 Nauru Phosphate Royalties Trust Ordinance 1968."

Now, if section 35(1) required more than notification of the making of an Ordinance (Section 35(2) presumes that it does and offers an alternative means of notifying the making thereof), and if section 35(2) required that notification include a statement as to where copies of the Ordinance could be obtained, the procedure adopted in the case of this particular Ordinance did not comply with either section 35(1) or section 35(2). Accordingly, if sections 35(1) and (2) were imperative in that sense that any want of strict compliance would render it null and void; the Ordinance could not be considered a valid law able to be adopted under Article 85 of the Constitution as an "existing law". Whether this is so is the main question to be here considered.

In the case of section 37, there was also a failure to comply with this section of the Nauru Act which required the Ordinance to be laid before both Houses of the Australian Parliament within 15 days after it was made. The Ordinance was never laid before the Australian Parliament.

Arising out of the argument as to the validity of the Ordinance, a question was posed as to whether if the law of Australia rendered invalid the Ordinance because of these procedural defects so that it was not "a law in force immediately before Independence Day, could any subsequent legislation of Nauru make it a valid law of Nauru? Two enactments, the plaintiff submitted had this effect. The first was the Nauru Phosphate Royalties Trust Act Amendment (Act) 1990 in which by section 10 thereof (Supra) there was a declaration that the Ordinance came into force and effect on the 28th January 1968 and a requirement that every Court should be bound by such a declaration. The second enactment was the Interpretation Act

1971 which recognised, in section 2(1) thereof, the existence ofthe "Nauru Phosphate Royalties Trust Ordinance 1968" as an "Ordinance of Nauru" and provided in section 7(1) that "every Ordinance and every adopted statute shall be deemed and to have always been, a public statute of Nauru". (supra)

The contention as to the consequences of the enactments of the Nauru Parliament on the validity of the Ordinance can be dealt with conveniently at this stage since, on my conclusions thereon, may depend whether it is necessary to proceed with the arguments on the non-compliance of sections 35 and 37 of the Nauru Act.

The 1990 Amendment Act and the Interpretation Act 1971 of Nauru.

The Nauru Phosphate Royalties Trust Act (Amendment Act) 1990 was (inter alia) an attempt by the Parliament of Nauru to ensure that the validity of the Nauru Phosphate Royalties Ordinance 1968 was unquestionable. In my opinion the effect of this provision is that the Nauru Phosphate Royalties Trust Ordinance, 1986 (which is defined in Section 1(2) of the 1990 Act as "the Principal Act") is, regardless of whether it otherwise became a law of Nauru on the 28th January, 1968 and of the Republic of Nauru on the 31st January, 1968, deemed to have come into force on the 28th January, 1968. As a matter of domestic law this enactment is binding upon this Court and is determinant of any question that may arise in the Republic of Nauru as to the validity of the Ordinance.

The amendment will also have, at least, prospective operation in foreign jurisdictions (such as the State of Victoria) which, by their own choice of law rules, recognise the law of the place of creation as governing the status of a body corporate. English, Australian and New Zealand choice of law rules recognise that the law of the state of incorporation determines the status of a corporation, its creation, dissolution and universal succession.

This is so in most common law jurisdictions. However, it is not a principle having universal acceptance. Civil law systems commonly consider a foreign corporation to be one which has its central management and control in a foreign state. If it is incorporated in a place other than the place where it so carries on business, it will not qualify for recognition unless the law of the place of central management and control itself looks to the law of the place of incorporation. Attempts to reconcile these approaches have not provided a "clear-cut" common position. (See: Articles 1-4 of the rules on Companies in Private International Law adopted by the Institute of International law in 1965 (1966) 60 Am. J. Int. L. 523-526 and, an examination of the rules in
(1968) 17 Int. & Comp. L. Q. 28.) However insofar as it may be said that the Plaintiff has its central management and control in Victoria, even a civil system of law may recognize the Trust because the law of Victoria looks to the law of Nauru to determine questions relating to its status.

But as Mr. Keke rightfully points out, an enactment will not necessarily be recognized as having a retrospective effect, even in jurisdictions which recognize that the law of Nauru is the law by which the status of the Plaintiff is to be determined, if to do so would involve an alteration or discharge of obligations which had already accrued or vested, or which would involve the subsequent ratification of purported contracts
or other acts which were null and void, according to the law of, or applied by, such jurisdictions.

In my view, if a contract purportedly made in the name of the Plaintiff was null and void under English or Victorian law because the Plaintiff did not exist as a body corporate, a law of Nauru which subsequently conferred corporate status on the Plaintiff, could not render valid in England or Victoria that which was null and void at the time the contract was purportedly

made. In Adams v National Bank of Greece S.A. (1961) A.C. 255, a House of Lords decision, the respondent bank incorporated in Greece and carrying on business in England became, in 1953, a guarantor of certain mortgage bonds which had been issued in 1927. The proper law of the bonds and the ancillary contract of guarantee was English law. In 1956 the Greek government passed legislation which discharged the bank of its obligation as guarantor. It was held that the proper law of the bondholders' contract was English law and that no subsequent Greek legislation could, retrospectively or otherwise alter this. Lord Reid, considering the case of National Bank of Greece and Athens S. A. v Metliss (1958) A.C. 509 in the course of his judgment said at pp. 279-80:

> "althouugh Greek law would have prevented him from succeeding by reason of the Greek moratorium, the nature of his right in England was such that Greek law did not affect it and the moratorium was no defence. We do not refuse in all cases to recognise a moratorium in force in a foreign country: when an action is brought here for money payable in England we recognise it as affecting rights of which the proper law is the law of that country but we do not recognise it as affecting rights of which the proper law is English law. So I think that the decision that the moratorium did not apply, necessarily implied that Metliss had acquired an English right. And he could only acquire an English right by operation of English law. Greek law cannot create an English right or obligation any more than it can annul an English right or discharge an English obligation."

and at pp. 282-3 :

> "The effect of law No. 3504, leaving aside for the moment its retrospective character, was the same as if it had merely discharged these liabilities. As I have already said, it is well settled that English law cannot give effect to a foreign law which discharges an English liability to pay money in England and the appellants' contracts were English contracts under which they were to be paid in England. So, unless the form of a foreign law is more imporant than its substance and effect, law No. 3504 must be treated as a law

> which seeks to discharge English liabilities and it cannot, therefore be effective in England. In my judgment, we must look at the substance and effect of a foreign law and that is a question of fact. I have found nothing in the evidence to show that its effect was anything other than I have stated."

I consider, therefore, the 1990 Amendment Act of Nauru cannot alter or vary any right acquired or obligation incurred in contracts entered into prior to its enactment in cases in which the proper law thereof is the law of a foreign country. It cannot validate such contracts if at the time of the making thereof, according to the proper law, they were null and void.

As to the Acts Interpretation Act 1977 the Plaintiff relies on sections 2(1) and 7(1) thereof. Section 2(1) provides that "the Nauru Phosphate Royalties Trust Fund" means the Nauru Phosphate Royalties Trust Fund established under the Nauru Phosphate Royalties Trust Ordinance 1968. It is submitted that this section recognises the Ordinance as having been always a law in force in Nauru. To support this contention, the plaintiff relies firstly on the definition of "Ordinance" in the said section as meaning "an Ordinance which continues to be in force in Nauru by virtue of Article 85 of the Constitution" and secondly on section 7(1) of the Act which provides (inter alia) that the Interpretation Act "shall be a public Act and shall be judicially noticed" and, further, "that every Ordinance and every adopted statute shall be deemed to be and always to have been, a public statute in Nauru and shall be judicially noticed." In my view, and Ordinance to be judicially noticed under the Interpretation Act is one which must have been "in force in Nauru by virtue of Article 85 of the Constitution". That means before it can be "adopted" it must be a valid law in force. The Act does not assist the Plaintiff in these proceedings. It has yet to be decided whether the Nauru Phosphate Royalties Trust Ordinance was a valid law capable of being adopted under Article 85. if it found not to be so, I am of the opinion, notwithstanding its

inclusion in the Interpretation Act, it cannot be recognised as a law of Nauru.

In view of my findings above, I now turn to consider the implications following non-compliance with sections 35 and 37 of the Nauru Act 1965. I shall first deal with the latter section.

Section 37 : non-compliance therewith

The first point to be noted is that it is beyond doubt that the Ordinance was validly made upon it being signed by the Governor-General. See Watson v Lee (1979) 144 C.L.R. 374 per Borwick C. J. at p. 378; Stephen J. p. 389; Mason J. p. 404; Aiskin J. p. 411 concurring with Stephen J. A further point is that by section 35(1) the Ordinance came "into operation" on the date of its publication in the Territory Gazette. Section 37, however provided that if the Ordinance is not laid before the Parliament as directed, it has no force or effect.

In my view, that means the laying of the Ordinance before the Australian Parliament was not a condition precedent to its validity; the omission to do this may mean that it was of "no force and effect" in Australia, but, it was nevertheless an operative law, it was a valid law and that must be the basis of its adoption as a law of Nauru. Section 37, I consider, was enacted to give the Parliament of Australia an opportunity to acquaint itself with the provisions of the Ordinance, as a law of Australia affecting Australians and, if it thought fit, to alter it. There was no right of the Australian Parliament to legislate for Nauru after Independence Day. The Nauru Act was repealed by the Nauru Independence Act 1967 as at the 30th January 1968 and section 4(2) thereof provided that as from Independence Day, Australia "shall not exercise any powers of legislation, administration or jurisdiction in and over Nauru". That such a requirement as that of section 37, is not a condition precedent to the validity of a law affected thereby was the view of the

High Court of Australia in Dignan v Australian Steamship Pty Ltd (1931) 45 C.L.R. 188 Dixon J. at pp. 205-6 said:

> "I think it an error to treat the requirement that the regulation shall be laid before each House of the Parliament as a condition precedent to the power of the respective Houses to disallow the regulation. It seems undeniable that the sole purpose of the requirement is to apprise each House of the existence and nature of the regulations, so that the question whether a resolution should be proposed for their disallowance may be considered by its members. I can find no justification for the view that if the regulations are not laid before both Houses within the time provided by the statute they cease to operate. The section does not say so, and it would be strange if such an omission of which there could often be no public knowledge operated to annul an existing law. In Darrach v Thomas Cullen C. J., Pring and Isly JJ. expressed the opinion that it would not so operate. The limitation of fifteen days for laying the regulation before the Houses is contained in the direction to lay them before each House, and not in the provision authorizing disallowance, and I think it follows that in no view could the expiration of fifteen days without the regulations coming before each House be fatal to the power."

In my opinion, therefore, the Ordinance, all other conditions for its validity having been satisfied, would have been, irrespective of the non-compliance with Section 37, a law in force in Nauru immediately before Independence Day. Apart from the fact that I consider the obligation of section 37 was one to be undertaken by Australia, the failure to undertake it affects not the validity of the enactment but the enforcement of it in Australia only. It is of relevance to note that Nauru became an independent nation before the time for compliance with the section had expired. The Ordinance was made on the 25th January 1968, the Nauru Act was repealed on the 30th January and Independence Day was the 31st January. On and after Independence Day the Ordinance could not have been laid before the Australian Parliament.

For these reasons, I am satisfied that non-compliance with section 37 did not affect the validity of the Nauru Phosphate Royalties Trust Ordinance.

This now leaves for consideration the effect on the Ordinance of the failure to comply fully with the notification provisions of section 35 which were a prerequisite with its coming into operation as a "law in force".

Non-compliance with statutory provisions.

Historically, the cases involving the effect of non-compliance with a statutory provision have resulted in a question being posed as to whether the provision is mandatory or imperative on the one hand, or directory on the other. The problem of what is imperative and what is directory only is conveniently posed by Maxell on Interpretation of Statutes, 11th ed. 364 in these words :

> "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment."

In Woodward v. Sarsons (1875) L.R. 10 C.P. 733, Coleridge C.J. lays down the general rules thus :

> An absolute enactment must be obeyed "or fulfilled exactly, but it is sufficient if a directory enactment be "obeyed or fulfilled substantially" (ibid., 746).

Maxwell's statement goes as far back as 1860 when Lord Campbell in Liverpool Borough Bank v. Turner (1860) 2 De G.F. & J. 502; 45 E.R. 715, after using the words adopted by the author in

the earlier part of the above citation, said :

> "It is the duty of Courts of Justice to try to get at "the real intention of the Legislature by carefully attending to the "whole scope of the statute to be construed" (ibid., 508; 718).

The case before him involved legislation respecting the transfer and mortgage of British ships and he had already observed that, even if the statute before him had been the first and only legislation on that topic, he would have held that the forms required by the statute must substantially be followed even in the absence of words declaring that all transfers and mortgages in any other form should be null and void. He went on to say :

> "Looking to the great peculiarity of the forms of transfer and mortgage here required and the purposes which they were to serve I cannot doubt that the Legislature intended that these and no other forms were to be used. A disclosure of the true and actual owners of every British ship is considered to be the utmost importance with a view to the commercial priveleges which British ships are entitled to, and still more, with a view to the proper use and the honour of the British flag" (ibid., 508;718).

The same view is expressed by Lord Penzance in Howard v. Bodington (1877) 2 P.D. 203 when, after quoting the words of Lord Campbell (supra), he said :

> "I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter;consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory" (ibid., 211).

A century later, in Australia, Stephen J in Scurr and ors v Brisbane City Council and Another (1973) C.L.R.242 at page 256,

with the concurrence of the other members of the Court said:

> "It is well established that a directory interpretation of a statutory requirement still necessitates, as a condition of validity, that there should be substantial compliance with the requirements.....".

Later in the case of Victoria v Commonwealth of Australia and Connor and Ors (1975-76) 134 C.L.R.178 Stephen J appears to have broadened his views as expressed in Scurr's case when at page 179 he said :

> "A directory construction will not assist in securing validity unless, despite the non-compliance which is the occasion for invoking that construction, there may nevertheless be seen to be substantial compliance with the general object at which the statutory provision aims. Sometimes the stipulation which has not been compiled with is, in its context, so relatively unimportant to the attainment of that general object that, although there has been total non-compliance, a directory construction may appropriate. In such cases, it may not matter that the non-compliance is completed, not partial. Indeed the stipulation in question may be of a kind which is incapable of partial compliance; to give to such a stipulation a directory interpretation recognises that it may be wholly disregarded without prejudice to validity because of its relative unimportance in the attainment of the general statutory object and also, perhaps, because of the far-reaching and undesirable consequences of treating its non-observance as invalidatory.
>
> Where on the contrary, a stipulation may be seen to be of importance in attaining the general object of the statute its total non-observance cannot be sought to be excused, and its intended effect circumvented, by the adoption of directory construction. A directory construction may none the less be given to such a stipulation if it is of a kind capable of degrees of non-compliance and if some degree of non-compliance can be seen as not necessarily prejudicing the substantial carrying into effect of the general object. If in such a case a directory construction be adopted, the extent of non-compliance in the particular case must then be examined to determine whether

> what has in fact occurred nevertheless gives effect to the general object of the statute."

and again at page 180 :

> "The propositions which I have stated concerning a directory construction and its consequences find support in the authorities - Howard v. Bodington, Montreal Street Railway Co. v. Normandin (1917)A.C.170 at p.175, Clayton v. Heffron (1960)CLRpp.262,266, Cullimore v Lyme Regis Corporation (1962) 1 Q.B. 718 and Plastic Enterprises Pty. Ltd. v. Southern Cross Assurance Co. Ltd. (1968) Q de R401. Instances of stipulations given a directory construction preserving validity notwithstanding total non-compliance occur among the above cases as well as in Changer v. Blackwood (1903)1 CLR39 and Pope v. Clarke (1953)1WLR1060. An instance of a directory construction where there was partial complianceand the circumstanceswere examined to determine whether it was sufficiently substantial is provided by Woodward v. Sarsons. An example of a modern case which held that, even if a stipulation were to be given a directory construction, invalidity would nevertheless ensue because of want substantial compliance with the general object of the statute is furnished by Cullimore v. Lyme Regis Corporation (1875) LR10 C.P.733 and see generally Scurr v. Brisbane City Council."

The apparent conflict of opinion as to whether in the case where statutory provisions are considered to directory there must be "substantial compliance" as a condition precedent to validity, was considered recently in the High Court of Australia by Dawson J. in Hunter Resources Ltd v. Melville & Another (1987-88) 164 C.L.R. 234 at pp. 248-9 the learned Judge said :

> "When substantial compliance is held to be sufficient overservance of a statutory requirement it is because the statutory provision containing the requirement is regarded as directory rather than mandatory. Thus in Woodward v. Sarsons (1875) LR 10CP 733 Lord Coleridge CJ said that "the general rule is, that an absolute enactment must be obeyed or fulfilled substantially". One of the difficulties of putting the matter in that

> way is that there are some statutory requirements with which there cannot be substantial compliance -either they are complied with or not - which have nevertheless be regarded as directory only. This led Gibbs J in Victoria v. Commonwealth and Connor (1975) 7 ALR 1; 134 CLR 81 at 161-1 to doubt the statement of Lord Coleridge and to prefer what was said by the majority of this court in Clayton v Heffron (1960) 105 CLR 214 at 247: -
> "Lawyers speak of statutory provisions as imperative when any want of strict compliance with them means that the resulting act, be it a statute, a contract or what you will, is null and void. They speak of them as directory when they mean that although they are legal requirements which it unlawful to disrgard, yet failure to fulfill them does not mean that the resulting act is wholly ineffective, is null and void."....

and at p. 250

> "However the matter does not end there because, as I have said, not even substantial compliance has been thought necessary in some cases and acts done in total disregard of the statutory requirements have nevertheless been held to be effective. Instances are given by Stephen J in Victoria v. Commonwealth and Connor (CLR at 180). A subsequent example is to be found in Attorney-General (NSW) ex rel Franklins Stores Pty Ltd v. Lizelle Pty Ltd (1977) 2 NSWLR 955."

But in all the cases the Court seems primarily to have scrutinised with the great care the consequences of non-adherence. In Jolly v. Handcock (1852) 7 Exch. 820, 821; 155 E. R. 1182, it was held that a deed executed by a married woman to pass real estate and endorsed with a memorandum of acknowledgment before a Judge was not effectual unless a certificate of that acknowledgment had been filed of record in the Court of Common Pleas. The judgment of Pollock C. B., concurred in by Platt B. and Martin B., points out first that there is no enactment stating that the deed shall be void unless these matters are complied with, but that none the less, because the Legislature passed the statute for the purpose of enabling married women to perform certain acts, which to be considered

as valid only when done in a certain way, the requirement was imperative. In Howard v. Bodington (supra) Lord Penzance said :

> "The real question in all these cases is this : a thing has been ordered by the Legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the Courts have decided that, if it is not done, the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the Courts hold a provision to be mandatory or directory they say that, although such provision may not have been complied with, the subsequent proceedings do not fall" (Ibid., 210).

(I note that he treats the distinction not as between mandatory and directory, but as between imperative on the one hand and mandatory or directory, as one class, on the other.) He goes on :

> There may be many provisions of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the Legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end." (ibid., 210).

What also does emerge from a consideration ofthe cases in which a lack of substantial compliance has not been regarded as rendering invalid anact done in disregard of a mandatory or directory provkision as opposed to an imperative one, is that a distinction is drawn between the performance of a public duty and the acquisition or exercise of a private right. In the case of an enactment creating a public duty, total or substantial non-compliance of theduty is less likely to result in an act done in neglecting that duty being declared null and void. In Caldow v. Pixell (1877) 11 C.P.D. 562 Lord Denman at p. 566 said:

> "..... I may say that the rules for ascertaining whether the provisions of a statute are directory or imperative are very well stated in Maxwell on the Interpretation of Statutes : thus, at pp. 330, 331, it is laid the scope and object of a statute are the only guides in determining whether its provisions are directory or imperative, and the judgment of Lord Campbell in Liverpool Borough Bank v. Turner 2 De G. F & J. 502; 30 L.J. (Ch) 379 is cited in support of this proposition; at pp. 333, 337, the distinction between statutes creating public duties and those conferring private rights is pointed, and it is stated that in general the provisions of the former are diectory, but the latter imperative; and at p. 340 it is laid down that in the absence of an express provision the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative.'

Although it is impossible to lay down any general rule for determining whether a provision is imperative or directory there appears to be general acceptance of the principle of contrasting enactments creating a public duty with those conferring rights. In Halsbury's Laws of England (4th Edn) para 933 at p. 583 it is stated (inter alia):

> "It has been observed that the practice has been to construe provisions as no more than directory if they relate to the performance of a public duty, and

> the case is such that to hold null and void acts done in neglect of them would work serious general invconvenience or injustice to persons who have no control over those entrusted with the duty, without at the same time promoting the main oυject of the legislature."

The case cited in support of this statement is the Privy Council case Montreal Street Railway Co. v. Normandin (1917) A. C 170 in which the Judicial Committee considered an appeal for a judgment of the υuperior Court of ιontreal in a case where an order had υeen sought to set aside the verdict of a jury which had υeen empannelled from a list which the sherrif of the Court had not revised in accordance with the law. Sir Arthur Channell giving the judgment of the Committee at pp. 174-5 said :

> "The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, υut it has υeen said that no general rule can υe laid down, and that in very case the oυject of the statute must υe looked at. The cases on the suυject will υe found collected in ιaxwell on υtatutes, 5th ed. p. 596 and following pages. When the provisions of a statute relate to the performance of a puυlic duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main oυject of the Legislature, it has υeen the practice to hold such provisions to υe directory only, the neglect of them, though punishaυle, not affecting the validity of the acts done."

In a New Zealand case, Simpson v Attorney-General (1955) N.Z.L.R. 271 declarations were sought setting aside a General Election held under the General Election Act 1927 on the grounds that it was void and destitute of legal effect since certain procedures which were conditions precedent to the election υeing held had not υeen properly complied with. In the Court of the first instance, the υupreme Court, Barrowclough C. J. after quoting the words of Channell J. in the Montreal Railway Co. case (supra), said at p. 275 :

> "In my opinion, the passage quoted is applicable to the circumstances I have to consider. Section 101 of the Electoral Act, 1927, relates to the performance of a public duty. The failure of the Governor-General to authorize the issue ofthe writs within seven days of October 11, 1946, was a neglect of that duty; but the case is clearly such that to hold null and void the acts which were done would work "serious general inconvenience", and at the same time would not promote the main object of the Electoral Act, 1927. The main object of that Act I conceive to be to sustain, and not to destroy the House of Representatives; and I am satisfied that those provisions of s. 101 which relate to the times when the warrant and the writs shall be issued are directory and not mandatory; and that neglect to take, within the specified times, the several steps there directed cannot invalidate the election. This is especially so when, as is the case here, the neglect of the duty is not made punishable in any way. I have no hesitation in concluding that the election was conducted in accordance with the principles of the legislation, even if not strictly in accordance with the letter of it. It follows, therefore, that I cannot possibly declare that the general election held on November 27, 1946, is either void or destitute of legal effect."

On appeal, the Court of Appeal per Stanton and Hutchison J. J. said:

> "As is pointed out on the page in Halsbury"s Statutes of England referred to by the appellant, when a provision is said to be mandatory, in contrast to directory, it means that, if the provision has not been strictly carried out, the whole proceedings are invalidated, while, if the provision is said to be directory, it means that the proceedings are not invalidated by the non-compliance although the person responsible for the failure to comply may in particular cases be punishable. In this case, the requirement that the Governor-General issue his Warrant not later than seven days after the dissolution or expiry of the then last Parliament is expressed in an obligatory or imperative form. That, however, does not necessarily mean that it is mandatory, in the of that word as contrasted with directory; and, when one turns to that question, the citation made from Montreal Street Railway Co. v. Normandin (1917) A.

> C. 170 is, in our opinion, directly relevant. It is, of course, also of the highest authority. We think it necessary to say no more on this point than that we are fully in agreement with what was said on it by the learned Chief Justice (ante, p. 275 l. 29)."

In Australia, the same principle was expressed in the High Court in Clayton v. Heffron (1960) 105 C.L.R. 214 by Dixon C.J., McTiernan, Tayor and Windeyer J.J. at p. 247 as follows:

> "On the other hand, before one reaches the conclusion that the failure to fulfil the requirement of holding a free conference will result in the invalidity of the law if adopted, it is natural to treat the fact that the Legislative Council may decline a conference of managers as a reason to be added to the other considerations for holding that it is not a matter going to validity. Lawyers speak of statutory provisions as imperative when any want of strict compliance with them means that the resulting act, be it a statute, a contract or what you will, is null and void. They speak of them as directory when they mean that although they are legal requirements which it is unlawful to disregard, yet failure to fulfil them does not mean that the resulting act is wholly ineffective, is null and void. It is unnecessary to say that the decided cases illustrating the distinction relate to much humbler matters than the validity or invalidity of the constitution of the Legislature of a State. But in them all the performance of a public duty or the fulfilment of a public function by a body of persons to whom the task is confided is regarded as something to be contrasted with the acquisition or exercise of private rights or privileges and the fact that to treat a deviation in the former case from the conditions or directions laid down as meaning complete invalidity would work inconvenience or worse on a section of the public is treated as a powerful consideration against doing so."

See also Hunter Resources Ltd v Melville and Another (supra) and in particular the dictum of Dawson J at page 250 (last para).

There is what has been described as a "plethora of reported decisions" in New South Wales on this question. Opposing propositions have been expressed in the Court of Appeal on the

mandatory/directory concept. In Tasker v Fullwood (1978) N.S.W. L.R. 20 at page 24 the Court said:

> "(5) It can mislead if one substitutes for the question thus posed an investigation as to whether the statute is mandatory or directory in its terms. It is an invitation to error, not only because the true inquiry will thereby be sidetracked, but also because these descriptions have been used with varying significations. (6) In particular, it is wrong to say that, if a statute is conched in directory terms, the act will be invalid, unless substantial performance is demonstrated. Attorney-General (N.S.W.) ex Rel. Franklin's Stores Pty Ltd v Lizelle Pty Ltd. and Ors (1977) 2 N.S.W. L.R. 95".

See also National Mutual Fire Insurance v Commowealth of Australia (1981) 1 N.S.W. L.R. 400, Gloss J. A. at p. 408.

In Woods v. Bate and Another (1987) 7 N.S.W. L.R. 560, Mchugh J.A. with the concurrence of Hope J. A. said at pp. 566-7 :

> "Although a directory provision need not be strictly followed, it does not mean that it can be ignored. In Scurr v. Brisbane City Council (1973) 133 C.L.R. 242 at 256, Stephen J, with whose judgment the other members of the Court agreed, pointed out "that a directory interpretation of a statutory requirement still necessitates, as a condition of validity, that there should be substantial compliance with the requirement". Nontheless, it is an error to think that his Honour intended to say that there must be substantial compliance with every element of the statutory provision. Many cases can be found in the reports where an act was held valid even though an anterior condition was not carried out at all: see, eg, Clayton v. Heffron. (1960) 105 C.L.R. 247. What Stephen J. was emphasising is the necessity for examining the whole ofthe relevant provision to ascertain whether the substance has been fulfilled after taking into account the omissions as well as the acts done pursuant to it."

and again :

> "In recent times the courts have shown great

> reluctance to invalidate an act done pursuant to a statutory provision because of the failure to comply with an antecedent condition : see Simpson v. Attorney-General; Clayton v. Heffron; Samuel Montagu & Co. Ltd. v. Swiss Air Transport Co. Ltd.; Ex parte Tasker; Re Hannon; Attorney-General (NSW); EX rel Franklins Stores Pty. Ltd. v. Lizelle Pty. Ltd. reversed on another ground sub nom Permewan Wright Consolidated Pty. Ltd. v. Attorney-General (NSW) (Ex rel Franklins Stores Pty. Ltd.), Tasker v. Fullwood; Hatto v. Beaumont. Generally speaking I think that, at the present time, the proper approach is to regard a statutory requirement, expressed in positive language, as directory unless the purpose of the provision can only be achieved by invalidating the result of any departure from it, irrespective ofthe circumstances or resulting injustice: of Hatton v. Beaumont per Mohoney J. A.".

Certainly these decisions indicate the difficulties of judges faced with these questions of construction in dealing with the mandatory/directory categories. This apparent conflict, however, is, I feel, put in its proper perspective by Lord Hailsham L.C. in London and Clydeside Estates Ltd v Aberdeen D. C. (1980) 1 W.L.R. when he expressed the opinion that the question was "not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another". There, however, has been acceptance by the New South Wales Court of Appeal that conditions governing the acquisition of private rights or priveleges are to be applied more strictly than conditions governing the performance of a public duty or the fulfilment of a publicfunction by persons given that task. The principles enunciated in Montreal Street Railway v Normandin (supra) at p. 175 have been accepted as an authoritative statement of such a distinction. Franklin's Store Pty Ltd case (supra); Woods v Bate (supra); Ex parte Tasker; Re Hannan (1971) 1 N.S.W. L.R. 804 Henson C.J. p. 809.

Two decisions of the Supreme Court of Victoria are of assistance. The first is S. S. Construction Pty Ltd v Ventura

Motors Pty Ltd (1964) V. R. 229. In this case there was a requirement made in the Town and Country Planning Act 1961 (Vic) that when it was proposed to grant a certain permit, the responsible authorty under theAct was required to give a notice, the terms of which were specified in the Act. A permit was applied for and the requisite notice under the Act was given. It was deficient in form. The Responsible Authority resolved to grant the permit. The plaintiff sought an injunction to restrain the issue of it on the grounds that the Authority's resolution to grant it was void since the notice which was a condition precedent to such resolution did not comply with the requirements of the Act. Gillard J at pp. 237-8 said :

> "It was urged by counsel for the Board that these provisions were not mandatory, but merely directory. In order to decide whether legislative provisions are mandatory or directory it would appear that there are certain guides to indicate, but there is no conclusive test to decide into which category legislation may fall. The scope and object of the statute, it is said in the cases are primary and possibly of vital importance. Secondly, provisions creating public duties and those conferring private rights or granting powers must be distinguished. The former generally accepted as mandatory, particularly where conditions are attached to the exercise of the duty (sic) or the power, as the case may be. Thirdly, in the absence of an exspress provision, the intention of the legislature has to be ascertained by weighing the consequences of holding a statute to be directory or imperative. "When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done: per Privy Council in Montreal Street Railway Co. v. Normandin (1917) A. C. 170 at p. 175. See also Caldow v. Pixell (1877) 2 C.P.D. 566; R. v. Lincolnshire Appeal Tribunal; Ex parte Stubbings (1917) 1 K.B. 1, at p. 9; Pope v. Clarke

(1953) 2 All E. R. 704; Edward Ramia v. African Woods (1960) 1 W.L.R. 86, at p. 99; (1960) 1 All E. R. 627; Cullimore v. Lyme Regis Corporation (1962) 1 Q. B. 178; (1961)3 All E.R. 1008; McCrudden v. Borough of Horsham Waterworks Trust (1895) 21 V.L.R. 504, at p. 514; Tilbury & Lewis v. Mazorini (1940) V.L.R. 245; Greenwood v. Camberwell (City of) (1922) V.L.R. 177, at p. 185."

and again at p. 239 - 40 :

"The argument of inconvenience is generally founded on the view that it would be unjust to the applicant to suffer the consequences of error by a public authority over which the applicant would have no control : see the Privy Council in Normandin's case (1917) A. C. 170. That argument loses its cogency if the applicant itself has the obligation of complying with the statutory requirement. If an applicant should obtain a permit by non-observance of the legal requirements, then he does not deserve to benefity by his own default but should suffer the ordinary consequences of illegally obtaining a privelege. Before disposing of this argument, however, consideration should also be given to the vital question of the scope and object of the Act. In the recent decision of Miller-Mead v. Minister of Housing and Local Government (1963) 1 All E. R. 459, at p. 474, Upjohn, L. J., aptly described the (204) scope and object of this type of legislation in these words : "One must remember the words of Viscount Simonds in East Riding County Council v. Park Estate (Bridlington) Ltd. (1956) 2 All E. R. 669, at p. 672; (1957) A. C. 223, at p. 233, that the Court must insist on a strict and rigid adherence to formalities, for the rights of owners and occupiers are being subjected to interference. This interference, however, on the other hand, is for the common good and the powers are entrusted to responsible public bodies of great experience. The requirements of the section must be interpreted with reasonableness in all the circumstances of the case".

The second case is that of the Full Court in Accident Compensation Commission v Murphy (1988)V. R. 444 wherein the Full Court had to consider whether a statutory requirement that a Tribunal decision of the Accident Compensation Tribunal commence to hear an application within 60 days of it being lodged was mandatory so that a delay of 37 days in the commencement was

fatal to the application. The Court at pp. 447-9 said :

> "The classification of a provision expressed in apparently imperative terms as mandatory or directory is often, perhaps usually, a matter of difficulty. The present case is no exception. There is no question in the present case but that the provision means that the hearing of an application must be commenced within 60 days of its lodgment. That is to say, the question is not one of construing Parliament's intent. That intent is clear. It is that there must be compliance with the prescribed time limit. But what is not clear, and must be decided, is what Parliament intended should be the result if there were non-compliance with the statutory requirement. Upon this question Parliament has provided no express opinion and the Interpretation of Legislation Act affords no assistance. The provision is a procedural requirement. The question to be determined is thus whether the requirement is mandatory so that disobedience will render void what has been done or what is threatened to be done, or is directory only in which case non-compliance will be treated as an irregularity that does not affect the validity of what has been done or might yet be done. The authorities make it plain that this question is answered by determining the whole scope and purpose of the enactment. A construction given one enactment is unlikely to be of assistance in the interpretation of another. It is "the importance of the provision that has been disregarded, and the relation of that provision to the general object to be secured by the Act" that must be assessed : Howard v. Bodington (1877) 2 P. D. 203, at p. 211. It is also of assistance to ascertain whether failure to adhere strictly to the requirement has caused pejudice to those for whose benefit the requirement was introduced or whether the public interest would suffer a disservice if it were held to mandatory. However, whilst the primary necessity will always remain the examination of the statute, another important consideration, and one which we consider has relevance to the present enquiry, is that referred to by the Privy Council in the following passage from Montreal Street Railway Co. v. Normandin (1917)A. C. 170, at p. 175: (The Court then referred to the quotation set out above). An example of the application of such an approach may be found in R. v. Urbanowski (1976) 1 W.L.R. 455, a decision of the Court of Appeal. The Court Act 1971 provided that the trial of a person committed by a

Magistrate's Court shall begin not later than the expiration of the prescribed period. The prescribed period was 56 days. It was held that the provision was primarily addressed to the Crown Court and its officials to ensure that proceedings were begun within the prescribed period and, accordingly, were directory only. Then in Ex parte Tasker; Re Hannan (1971) 1 N.S.W.L.R.,804 Herron C.J., at p. 809, expressed the opinion (with which Moffitt J. A. agreed) that a failure on the part of an officer of the court to carry out a statutory requirement, being an omission that a party to the action could not remedy, ought not be allowed to prejudice the action. Finally, in this connection, we notice that in Hatton v. Beaumont (1978) 52 A.L.J.R. 589, at p. 591; 20 A.L.R. 314, at p. 318, Jacobs J., in the course of a judgment in which the majority agreed, subscribed to the correctness of a passage cited from Maxwell on Interpretation of Statutes 11th ed., at p. 364, that contained these observations: - "But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative." There is one other aspect of the enquiry that is required to be undertaken to which we should make some reference. A number of cases has referred to the necessity, if the stipulation be treated as directory, for substantial compliance with it if the requirement is one with respect to which there can be degrees of compliance. This has led in a number of recent cases in the New South Wales Court of Appeal to a rejection of the "directory" classification and a departure from the employment ofthe traditional dichotomy. In Tasker v. Fullwood (1978) 1 N.S.W.L.R. 20 that Court, in the course of a joint judgment, formulated a number of propositions (p. 24). Included among them were these: - "(4) The intention being sought is the effect upon the validity of the act in question, having regard to the nature of the precondition, its place in the legislative scheme and the extent of the failure to observe its requirement: Victoria v. Commonwealth (1975) 134 C.L.R. 81; 7 A.L.R.1. (5) It can mislead if one substitutes for the question thus posed an investigation as to whether the statute is mandatory or directory in its terms. It is an invitation to error, not only because the true

inquiry will thereby be sidetracked, but also because these descriptions have been used with varying significations. (6) In particular, it is wrong to say that, if a statute is couched in directory terms, the act will be invalid, unless substantial performance is demonstrated: the Franklins Stores Pty. Ltd. Case (Ex re. Franklins Stores Pty. Ltd. v. Lizella Pty. Ltd. (1977) 2 N.S.W.L.R. 955). A statute which, on its proper construction, does not nullify the act in question, even for total non-observance of the stipulation, is also described as directory in its terms: Victoria v. Commonwealth." We consider that the determination of the present case does not oblige us to comment on these propositions. However, we think an analysis of the authorities discloses that the true position is, possibly, that described by Professor Pearce in his work Statutory Interpretation in Australia published in 1981, para. 248. That is to say that there may be assigned to the legislature a possible intention, not only an intent that the procedural requirement be treated as imperative or that it be treated as directory, but also a further alternative, namely, that "substantial compliance" with the requirement is necessary. This latter intent has also been expressed as one whereby "a trivial departure" will be treated as an irregularity only. We do not consider that this rationalisation of the cases is in conflict with anything that was said by Gibbs J. in Victoria v. Commonwealth (134 C.L.R.) at pp. 161-2 or by Stephen J. in the same case at p. 179. We are not concerned with any question as to whether the Act evinces an intention that substantial compliance is required. It was not suggested by the applicant that a delay in the order of 37 days was substantial compliance with the sub-section. What was contended was that the 60 day time limit requirement was "unconditionally" directory. That is to say, compliance with the requirement is not a pre-condition to the authority of the Tribunal validly to exercise jurisdiction to hear an application. Its statutory obligation to hear an application always remains (so it was said) so that, whatever the delay, a party could successfully have his right to the commencement of a hearing enforced by prerogative writ: see de Smith's Judicial Review of Administrative Action 4th ed., at p. 560. This then is the question for decision - having regard to the construction principles to which we have referred, is the stipulation to be regarded as truly directory? We turn then to an examination of the

enactment."

The Full Court, in considering the conflict of judicial approach thereto took, what Mr. Keke called "a pragmatic view" of what was required in interpreting a statute intended to confer a public benefit. Its approach was to balance the working of the statutory provision under review with the principle expressed in the Montreal Street Railway case (supra). This approach coincided with that taken by the Supreme Court and Court of Appeal in Simpson's case (supra).

In De Smith's Judicial Review of Administrative Action (4th Edn) the learned author commented at page 142 :

> "The law relating to the effect of failure to comply with the procedural requirements resembles an inextricable tangle of loose ends. Although it would be futile to attempt to unravel or cut all the knots, it is possible to state the main principles of interpretation that the courts have followed."

With that review I certainly agree, and, having considered the above expositions of the law, I shall now state the principles which I consider apposite to the matters concerned in these proceedings to decide whether or not the declarations sought can be made.

1. There is no conclusive test to decide whether legislative provisions are mandatory or directory. It is the duty of the Court to get at the real intention of the Legislature by considering the whole scope and object of the enactment. Liverpool Borough Bank v Turner (supra); Howard v Bodington (supra); Hatton v Beaumont (supra); Tasker v Fullwood (supra).

2. An absolute enactment is better classified as "imperative" as opposed to a "mandatory" provision which can be either "directory only or obligatory". No universal rule can be laid down for the construction of statutes as to whether mandatory provisions should be considered directory only or obligatory with an implied nullification for disobedience. In each case, there is to be considered the subject matter of the statute, the importance of the provision that has been disregarded, the harm resulting from such disregard, the relation of that provision to the general object intended to be secured by the Act and upon a review of the case in, that aspect, it is then decided whether the matter is imperative or only directory. Liverpool Borough Bank v Turner (supra); Howard v Bodington (supra); Caldow v Pixell (supra). Accident Compensation Commission v Murphy (supra)

3. The intention of the Legislature as to whether a notice not sufficiently complying with the provisions of section 35 of the Nauru Act sought to be considered valid or invalid, can be tested by weighing the consequences to those for whose benefit the Ordinance was enacted of holding the notice to be a nullify, as against holding it to be operative. Caldow v Pixell (supra) per Lord Denman at p. 566; S. S. Construction Pty Ltd v Ventura Motors Pty Ltd (supra) at p. 490.

4. A further factor to be considered is the object of the statutory provision, in this case section 35, since distinction may be drawn between those statutory provisions which create public duties and those which create private rights. It has become a practice to construe provisions as no more than directory if they relate to the performance of a public duty and the case is such that to treat a deviation from the condition on direction laid down as mandatory meaning complete invalidity, would work inconvenience or worse on a section of the public which has no control over those entrusted with the duty. Caldow v. Pixell (supra); Montreal Railway Co. v Normandin (supra);
Simpson v. Attorney-General (supra); Clayton v Heffron (supra); Hatton v Beaumont (supra); Hunter Resources Ltd v Melville and Another (supra).

It is in the light of these principles, that I now examine the object and scope of the Nauru Act. The evidence establishes, as does a reading of the Act, that its object was mainly to deal with the phosphate industry and generally to benefit Nauru. It would be inconceivable that the Australian Parliament would have intended that the enactment's object should be other than to benefit Nauru which Australia was administering as a Trustee under the United Nations Charter. As such, it must be deemed to have acted for the benefit of its beneficiaries, the Nauruan people. It would have known of Nauru's advancement to independence and it provided, in the Nauru Act, a framework to

ensure the validity of the country as an independent nation. In particular, sections 35, 36 and 37 provided mechanism to facilitate the making of laws by the Governor-General for the good government of Nauru under section 34. This procedure was used to the substantial benefit of Nauru in enacting the Nauru Phosphate Royalties Trust Ordinance in 1968. It established the Trust which was envisaged as being central to the operation of the long term trust funds created thereby for the benefit of Nauruan landowners and the people of Nauru generally and to the investment of other funds for the development of housing and rehabilitation provided for in the Nauru Phosphate (Payment and Investment) Ordinance enacted at the same time. This underlines the intention of the Australian Parliament in enacting the Nauru Act that it be for the benefit of Nauru. It therefore is a major factor to be considered in deciding what consequence was intended to flow from the failure to comply with the requirements of section 35 thereof. The section itself significantly, does not extend to the provision for invalidity for non-compliance thereof.

Nevertheless, in the legislative scheme, section 35 is important. It provides the primarily means of notifying the terms of an Ordinance made under the Nauru Act, viz. by publication in full in the Territory Gazette. In my opinion, notification of the Ordinance involves bringing to notice of its actual terms. That is what is required under section 35(1). Section 35(2) provides an alternative method of notification which allows notification of a place where a copy of the Ordinance may be had in lieu of the publication of the Ordinance in full in the Gazette. It is a trite principle that no citizen shall be bound by a law the terms of which he has no means of knowing. Both the aforesaid methods of publication are aimed at providing the citizen of knowing the terms of the law covered by the Ordinance which affects him. Under the "alternative method", the object is to ensure that he learns of the contents of the Ordinance by obtaining a copy and this

underscores the importance of the notification of where the copies can ᴂe oᴂtained. In guaging, the importance of such notification in the present case of the Nauru Phosphate Royalties Trust Ordinance, the effect of the failure to notify in the statutory notice as to where the copies thereof could ᴂe oᴂtained, must ᴂe judged in relation to the conditions in Nauru at that time. The evidence of ᴍr. Bowditch, which was adduced ᴂy way of affidavit, tells of these conditions. He was the legal officer to the Administration of the Territory of Nauru and a ᴂenior Legal Officer during the period ᴂetween June 1966 and Feᴂruary 1970. He was personally involved in the events relating to the making and publishing of the Ordinance. His evidence shows that upon the Australian Government and the People of Nauru agreeing that Nauru would ᴂecome independent on the 31st January 1968, many legislative, administrative and commercial arrangements were proceeded with, one ᴂeing the formation of the Nauru Phosphate Royalties Trust which, it was decided, should ᴂe a statutory corporation. Before the Bill to effect this was drafted, it had ᴂeen discussed extensively at a Constitutional Convention set up comprising 36 Nauruan representatives. When drafted, the Ordinance was laid ᴂefore the Legislative Council of Nauru on the 21st Novemᴂer 1967 for discussion in accordance with the requirements of ᴂection 36 of the Nauru Act. This draft was suᴂsequently enacted in the same form ᴂy the Governor-General. ᴂince the phosphate industry and earnings from mining were critical to the future economic viaᴂility of Nauru and the Trust was to ᴂe central to the operation of suᴂstantial funds, estaᴂlished for the ᴂenefit of Nauruans, the Ordinance undouᴂtedly was the suᴂject of extensive discussion in Nauru. ᴍr. Bowditch has deposed as to the many discussions on it that he had with ᴂoth community leaders and ordinary Nauruans. ᴍany copies of the Ordinance were distriᴂuted. The 36 memᴂers of the Constitutional Convention of which he was secretary each received many copies as did the memᴂers of the Legislative Council and District leaders. ᴂince the Nauruan language was primarily oral,

it was the practice at the time for the Nauruan leaders to adopt the procedure of explaining to their people the terms of existing and proposed laws at regular formal and informal meetings within their respective Districts. During his term of office, Mr. Bowditch had experienced the effectiveness of this practice in his conversations with Nauruans who held no official positions, but, who displayed detailed knowledge of matters occurring within the Administration and of current and proposed legislation. Nauru is a small island. The total Nauruan population at the time of the enactment of the Ordinance was about 3,060 (census June 1968). They lived in close proximity to each other on the periphery of the island which is 11 miles in circumference. It follows that knowledge of local matters, particularly at the time in question, would be fairly general. It is improbable, therefore, that the failure to notify Nauruans formally of the fact that copies of the Ordinance could be obtained and from where, would have resulted in their being ignorant of it and its contents. On the contrary, it is highly probable all knew of the Ordinance, its provisions and objects.

Likewise the evidence strongly supports the view that the failure to specify where the Ordinance could be obtained, was of little importance, since the Administrative set up then in Nauru ensured that it would be highly unlikely the Nauruans would be unaware of how to obtain copies of Ordinances and Acts. Mr. Bowditch has said :

> "It was notorious in Nauru that anyone who wished to obtain a copy of an ordinance, or the bill for a proposed ordinance, could simply ask for it at those offices and a copy would be supplied, free of charge. At one stage legislation was supplied from the Records Office, and at a later stage from the Nauruan Affairs Officer's office, which was only 50 metres away down a passage. The Clerk of the Legislative Council had his office in the Legislative Council building a further 50 metres away; and the Constitutional Convention held its meetings in the Legislative Council building. If a

> person requested legislation at the wrong office, he would ɒe directed to the correct one. The Clerk of the Legislative Council also kept a stock of copies of ɒills and ordinances. These were availaɒle on request, wihtout charge. There were no other places in Nauru where legislation or proposed legislation was supplied to the puɒlic. Occasionally stocks would run short, and further copies could ɒe readily made as the original stencils were retained for further use. During my years on Nauru this method of making legislation availaɒle to the puɒlic worked well."

On the ɒasis of this evidence, I am driven to the conclusion that Nauruans, at the time of its enactment, would have ɒeen aware of the Ordinance and its terms ɒy reason of the custom of oral communication as well as the wide distriɒution of copies to the small population. It is my view that formal notification would have done little to increase that awareness. In such circumstances, it would seem that the importance of formal puɒlication of the notice was minimal. On the ɒalance, therefore, I feel that no harm resulted ɒy reason of the failure to puɒlish in the Gazette Noticeall the particulars required ɒy section 35(2).

It is, of course, a relevant factor in this exercise, to question what would ɒe the consequences to those who ɒenefit, for the Ordinance, the Nauruans, if it were held to ɒe a nullity ɒecause of the non-compliance with section 35. The answer is manifestly clear. No good could flow from an invalidity finding. As counsel has said, such a result would ɒe "disastrous". I agree. Such a result could involve holding that the Nauru Phosphate Royalties Trust was not a ɒody corporate and as the Chairman of the Trust, Mr. Moses, has said :

> "The Trust would ɒe placed inan extremely unsatisfactory commercial position if its status prior to the 16th Octoɒer, 1990 depended solely upon the provisions of ɒection 34 of the Nauru Phosphate Royalties Trust Act, 1968-1990. There are numerous transactions favouraɒle to the Trust which other

> contracting parties might seek to dispute having regard to the prevailing economic conditions in most of the places where the Trust has property and other investments. The Trust holds commercial rights which are of considerable benefit to the trust funds which it administers and it is concerned that if any of these rights are challenged in a foreign Court this could give impetus to further litigation. This would lead to time and expense being incurred in defining the Trust's position and, where possible, re-negotiating agreements, and this would deleteriously affect its pursuit of new business opportunities to the benefit of those whose money it administers. The Trust is concerned to preserve its international reputation and, any doubts as to its status or the assets it acquired prior to the 16th October 1990, would have the potential to affect such reputation and that of the Republic."

If there be a benefit to accrue from a declaration of nullity, it is of dubious value - the enabling of holders of commercial agreements with the Trust to challenge the validity of them with the aim of freeing themselves of the obligations thereunder.

Out of the consideration, so far, of the Nauru Act and, in particular section 35 thereof, there has emerged, I consider, a strong indication that the Legislature did not intend an imperative approach to be taken in interpreting the section. A further factor which militates against such an approach is that the duty to publish required by section 35 is a public duty imposed under the provisions of an Act which, as has already been pointed out, was enacted to provide a framework to ensure the economic viability of Nauru. It made provisions for the continuity of the phosphate industry; it provided for self government on Nauru. It created no private rights nor did it acquire any. It was an Act generally for the benefit of the public of Nauru. The Nauru Phosphate RoyaltiesTrust Ordinance which was to be notified had a like purpose. To hold that the failure to carry out properly the public duty of notification would render the Ordinance invalid, would "work serious general inconvenience or injustice to persons (the Nauruans) who had no

control over those entrusted with that duty". It would "not promote the main object of the Legislature". Indeed it would frustrate it. If the Ordinance were held to be void, the evidence establishes it would result in dire consequences to an "economic aim" of the Republic of Nauru. It cannot be supposed that the Australian Parliament intended that such subordinate legislation as the Ordinance would be rendered null and void if it was not "notified" in the manner prescribed by section 35(1) or (2).

Having regard, therefore, to the lengthy submissions made hereon and applying the said principles which I have considered apposite to my findings of facts hereon, I am of the opinion, there are weighty and compelling reasons for my holding that the provisions in section 35(1) and (2) are directory and that the failure to comply in part with the form of notice required to be published in the Territory Gazette bringing into operation the Nauru Phosphate Royalties Trust Ordinance 1968 does not render the Ordinance invalid and I so hold.

Having reached this conclusion, I consider it is necessary to examine an additional authority to which I have been referred, to determine if any aspect of it might be persuasive to the degree that I should follow it. That authority is Watson v Lee (1979) 144 C.L.R. 374. In this case the High Court of Australia considered the precise issue with which we are here concerned. When the case was presented, the question was posed as to whether, since the High Court was also the Court of Appeal from this Court, the decision was binding on it. The position, as I see it, is that the High Court in sitting on appeals from Nauru is a Court of Nauru. Its jurisdiction arises consequent upon a special convention agreed to by Nauru and Australia in 1976.

This convention does not in any way confer Australian jurisdiction on Nauru. In the result, as I see it, only decisions of the High Court on appeals from this Court are binding.

Nevertheless it is obvious that all decisions of the High Court must be considered "very persuasive".

In Watson & Lee the Court was concerned with regulations which imposed restrictions upon persons who decided to take Australian currency out of Australia. It was an offence to do so without the authority of the Reserve Bank of Australia which limited the rights of individuals to take money out of Australia and created a punishable offence for contravening or attempting to contravene the regulations. Section 48(1) of the Acts Interpretation Act 1901 (Cth) required all regulations to be notified in the Australian Gazette and upon notification they come into operation. It was also provided (inter alia) by section 5(3) of the Rules Publication Act 1903 that "Where any statutory rules are required by any Act to .....notified in the Gazette, a notice (therein) of the rules having been made and of the place where copies ofthem can be purchased, shall be sufficient compliance with that requirement". (The requirements of section 35(1) ofthe Nauru Act aresimilar to those in section 48(1) of the Interpretation Act; section 35(2) is in similar terms to those in section 5(3) of the Rules Publication Act.)

At page 379, Barwick C.J. said that Section48(1)(a) required notification of terms of a regulation, and not merely notification of the making of a regulation. Gibbs J., at p. 383-4, said that, but for the provisions of section 5(3) (supra), he would have held that section 48(1)(a) only required a formal announcement that a regulation had been made, stating the number

of the statutory rule, and the name of the regulation. Stephen J., at pages 392-3, substantially concurred with the opinion of Barwick C.J. Mason J., at p. 405, said that the requirement in Section 48(1)(a) that a regulation "shall be notified in the Gazaette" may mean something less than publication of its full terms but he did not consider it necessary to determine that issue. Aickin J., at p. 411, concurred with Stephen J. Thus, for the purposes of Section 35(1) of the Nauru Act, the form of notification in the Territory of Nauru Gazette may have satisfied Mason J., but not the other members of the Court.

Again at pp. 380-381, Barwick C. J. said in effect, that Section 5(3) (supra) required strict compliance in the sense that copies of the regulations referred to in the notice must be available at the time the regulations comes into operation. Whilst Gibbs J., at p. 385, was of the opinion that literal compliance with the terms of Section 5(3) (supra) was unnecessary, he considered that a regulation would take effect if the notice stated the place where copies could be purchased, and copies could be purchased at that place, although not until sometime after the Gazette was published. He said that this would be sufficient compliance and the regulation would take effect "at least from the date when the copies became available for purchase at that place". Stephen J. (with whom Aickin J. concurred), at pp. 386-7 and 390-1, viewed Section 5(3) (supra) as requiring strict compliance. At pages 390-1 he said that the requirement that the "place where copies..... can be purchased" be stated was not satisfied by stating a place where copies could not be purchased. Mason J. said, at p. 407, that Section 5(3) (supra) resulted in a regulation coming into effect from the date when its making is notified in the Gazette or from the date specified in the regulation, so long as the Gazette nominates the place where it can be purchased, not from the date when it became available for

purchase by the public. Thus, even those members of the Court who considered section 5(3) (supra) to be directory would not have found that what passed for publication of the notice of the Ordinance in the Territory of Nauru Gazette amounted to sufficient compliance so as to render it operative immediately prior to Independence Day.

Watson's case is distinguishable from the present case. The notification in that case was of legislation concerning foreign exchange which affected private rights. It provided for penal sanctions and affected the rights of people in relation to how they might conduct their financial affairs. The legislation, while it might be said to have been made for the benefit of the public, predominantly was concerned with the private rights' and the curbing of them. The notification in the present case was clearly a public duty; it was conferred by the Nauru Act which relates to public matters only and was intended to bring into operation and effect the Nauru Royalties Trust Ordinance which was concerned with a matter of public benefit. Furthermore neither of these enactments proscribed, or prescribed conduct; they did not provide for penal sanctions. Also, while in Watson's case finding the Australian regulations invalid would have affected those who promoted them and gained to benefit from them. In our case, the Australian government which enacted the legislation would not suffer from a finding of its invalidity; it would be the government of Nauru which had no control over the events leading tosuch a conclusion.

For these reasons, therefore, I am satisfied the reasonings in **Watson's case** are clearly distinguishable and do not affect my conclusions in the present case.

It follows from my finding of the validity of the Nauru Phosphate Royalties Trust Ordinance 1968 that it was a law in force in Nauru within the meaning of Article 85(1) of the Constitution of

Nauru (supra). It thus by virtue of the Article has continued in force after Independence Day and is part of the law of the Republic of Nauru. Detudamo v Deireragea & Others (1987) L.R.C. (Const.) 164. By virtue of sections 2(1) and 7(1) of the Acts Interpretation Act 1971 (supra), the Ordinance is a public statute. It was amended in 1990 (supra). The record shows it has not been repealed.

The Plaintiff, the Nauru Phosphate Royalties Trust, is established by section 4 of the Ordinance as a body corporate as from the 25th of November 1967. Its powers and duties are conferred by the Ordinance. That is the position now. That has been the position since Independence Day save that the Ordinance (now the Nauru Phosphate Royalties Trust Act 1968-1990) has been the subject of the 1990 amendment above referred to.

I accordingly make the following declarations as prayed -

(i) The Ordinance was a law in force in Nauru immediately before Independence Day and, subject to the provisions of the Constitution of Nauru, the Ordinance continued in force in the Republic of Nauru as from the commencement of Independence Day;

(ii)(a) The Ordinance was duly amended by the provisions of the Nauru Phosphate Royalties Trust Act (Amendment) Act, 1990 which came into operation on the 16th October, 1990 and, so amended, may be cited at the Nauru Phosphate Royalties Trust Act, 1968-1990;

(b) Save as otherwise declared, the Ordinance has not been amended by a law enacted under the Constitution of Nauru;

(c) The Ordinance has not been repealed by a law enacted under the Constitution of Nauru;

(iii) The Ordinance is a Public Statute in the Republic of Nauru;

(iv) The Ordinance is to be judicially noticed in the Republic of Nauru;

(v) The Plaintiff is and, at all times since Independence Day, as been a body corporate pursuant to the laws of the Republic of Nauru;

(vi) The Plaintiff has and, at all times since Independence Day, has hadthe powers conferred, and the duties imposed, upon it in the Ordinance and, after the 16th October, 1990, the Nauru Phosphate Royalties Trust Act, 1990 subject only to the provisions of the Constitution of Nauru.

I have been informed that the order prayed as to costs is not now sought.

Paven Parmu

CHIEF JUSTICE

Solicitors for the Plaintiff : Justice Department, Nauru.

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