IN THE SUPREME COURT OF NAURU
(CIVIL JURISDICTION)

CIVIL CASE NO. 5/92

BETWEEN : NAURU LOCAL GOVERNMENT COUNCIL
HAMMER DEROBURT
KENNAN ADEANG
PAUL JEREMIAH
DETONGA DEIYE and
RUBY DEDIYA

PLAINTIFFS

AND : BERNARD DOWIYOGO
VINCI CLODUMAR
KINZA CLODUMAR
VINSON DETENAMO
PRES NIMES and
THE SECRETARY FOR JUSTICE

DEFENDANTS.

Date of Hearing : 8th and 9th June 1992
Date of Judgment: 21 August 1992.
Howard for Plaintiffs
Larkins Q.C. with Powles for first 5 Defendants
Halm in person

JUDGMENT OF DONNE C. J.

This is a claim by the plaintiffs for a declaration that the Nauru Local Government Council Dissolution Act 1992 is void and of no effect and for an injunction

restraining the defendants from acting on or exercising any of the powers given them by the Act in relation to the Nauru Local Government Council.

The Nauru Local Government Council Dissolution Act 1992 (hereinafter called "the Act") was on the 2nd day of March 1992 enacted by the Parliament of Nauru being approved by a simple majority thereof. It was certified as having been so passed on that day by the Speaker of Parliament. The Long Title to the Act states it to be "an Act to dissolve the Nauru Local Government Council; to make interim provision for the protection of employees and others; to vest certain activities of Councillors in Cabinet; to provide for the Council to report to Parliament and for other related purposes".

The plaintiffs apart from the first named are Members of Parliament, and were also members of the Nauru Local Government Council (hereinafter called "the Council"). They now number six, one of the original plaintiffs having been given leave to withdraw from the proceedings. The defendants comprise the Cabinet. Application was made to dismiss the first plaintiff from the suit it being contended that it was no longer in existence. The application was deferred and is not considered in this decision.

Since the questions to be considered are those of

law only, no evidence was called and it is not necessary either to traverse the reasons for the Act or decide on the pros and cons of its purpose and effect. By consent, there was produced an affidavit of a disaffected Member of the Nauru Island Council, a newly formed body, which apparently undertakes some of the functions formerly possessed by the Council. Nothing in the affidavit touches on the questions here in issue and as I see it, the material in it and the views expressed by the deponent are directed to involve the Court in political considerations which cannot, and must not, have any bearing on whether or not the Act is valid. It has no relevance here and I am disappointed that Counsel introduced it and allowed it to be introduced in these proceedings.

The plaintiffs claim is that the Act was unlawfully enacted since it was passed in Parliament by a simple majority when, because of the constitutional significance of the Council, it should have been dealt with under Article 84 of the Constitution requiring passage by a two-thirds majority and a special procedure in the voting process. They also claim that the Act is void in that it infringes the Constitution in respect of certain specific powers given therein. The defendants deny the Council is of constitutional significance and contend that the Act is lawfully enacted and "intra vires" the Constitution.

THE COUNCIL AND ITS ENACTMENTS.

The Council was created in 1951 by the Nauru Local Government Council Ordinance, an Ordinance made by the Administrator of the Trust Territory of Nauru pursuant to powers given to the Administering Authority by the Trusteeship Agreement approved by the United Nations in 1947. The Council took over from an Advisory Council of 14 Chiefs known as the "Council of Chiefs" which was established by the Administrator in 1927. Its powers, however, were spelt out in the Ordinance and were thereby limited.

The Council continued as an entity in the Republic by virtue of the transitional provisions of the Constitution. The Nauru Local Government Ordinance was adopted as an "existing law" under Article 85(1) and became an Act of Nauru "until repealed by a law enacted under" the Constitution.

The Council is now by the Nauru Local Government Council Dissolution Act 1992 (the Act) called "The Nauru Council". Its control, as stated above is vested in the Cabinet.

For the plaintiffs it was argued that the alleged consitutional significance of the Council is emphasised by (inter alia) the following provisions in the Nauru

Local Government Council Act:

1. Section 4(2) which confers on the Council any power or authortiy which by law or custom was conferred previously on the Council of Chiefs subject to such power or authority not being inconsistent with the provisions of the Ordinance.

2. Section 41 giving the Council the power to advise the Administrator on any matter affecting the Nauruans and the right to be given reasons should he not accept the advice.

3. Section 42(b) general powers to administer the laws of Nauru.

4. Section 43 giving powers to conduct businesses, carry out works and provide social services for the benefit of Nauruans.

5. Section 44 giving a wide range of legislative powers including in Section 44(1)(l) the regulating of dealings in land between Nauruans and the handling of estates of deceased Nauruans in accordance with the customs of the Nauru.

6. Section 45 the power to levy taxes.

The plaintiffs also point to two further functions possessed by Council, firstly, in the Nauru Community Act 1956 and secondly under the Nauru Lands Committee Act 1956-63. In the former enactment the Council had the power to grant and take away any membership of the Nauruan Community, a power which, they say, is effectively a power to confer and remove nationality. In the latter Act the Council appoints the members of the Nauru Lands Committee which is given jurisdiction to deal with disputes relating to ownership or interests in Nauruan land.

With these powers, they contend, the Council is no subordinate institution of government, but rather an institution of constitutional status of equality with those of the executive, legislative and judiciary which are enshrined in the Constitution.

Nevertheless in the years between its creation and the advent of independence, the influence of the Council as a body representing the Nauruan people in the affairs of government became of less significance and importance. The establishment of the Legislative Council by the Nauru Act 1965 and the formation of the Executive Council resulted in the diminishing of the influence of the Council on Nauruan affairs. The

Legislative Council, consisting of elected Nauruans, became the instrument of self government for the territory of Nauru with legislative powers which the Council never possessed, namely, the power to make laws for the peace order and good government for Nauru. In 1966 by the Revision Ordinance, the Nauru Local Government Ordinance was amended to remove powers of the Council to make Ordinances and Regulations and also the power to advise the Administrator in matters affecting the peace order and good government of the territory. In the same year the Executive Council, by the Executive Council Ordinance No. 3 of 1966, was given the power to make regulations of a similar nature but broader than those given to the Council.

The overall effect of these legislative changes I shall consider later in this judgment. Suffice it here to say that at the time of independence, the Council indeed was an institution of less political significance in Nauru than it was when it was first established 17 years earlier.

THE COUNCIL AND THE CONSTITUTIONAL ARGUMENT.

By the Constitution, Nauru came into being as a Republic (Article 1). For almost 100 years prior to this the Island was occupied and administered, firstly,

by Germany and then, by the mandatory Powers of Great Britain, Australia and New Zealand who later jointly became the Administering Authority under a Trusteeship Agreement emanating from the United Nations. As its preamble records, the Constitution was prepared, adopted and enacted by a Constitutional Convention of Nauruans. It came into force on the 31st day of January 1968. By comparison with those creating the other independent Pacific states over the past three decades, the Constitution is not lengthy. It contains 100 Articles with very few entrenched provisions. Entrenched however are the institutions of government - the Legislative, Executive and Judiciary. The Council is not mentioned in that document except in Article 93. This Article entrenches an Agreement made the previous year, 1967, between the Council and the Powers constituting the Administering Authority to ensure the supply of phosphate to them after independence. This entrenchment was made on the insistence of the Administering Authority, so as to bind the new nation since presumably it was considered the Council was not possessed of the status to do this.

Against this historical background, I now embark upon a consideration and ruling on the arguments presented on the claim relating to the constitutional significance of the Council and the application of Article 84 to the passage of the Act by Parliament.

(a) The "non exclusivity" of the written Constitution.

It is the plaintiffs' case that, despite the absence in the written Constitution of any provision acknowledging it as an instrument of government, the Council was a body possessed of constitutional status. They argue that this status does not depend upon its specific entrenchment in the written document.

The basis of this contention is that it is fundamental that the Council, with the authority in relation to Nauruan affairs given to it by the Nauru Local Government Act, is demonstrably an institution affecting profoundly the Constitution and that to ignore it as such would be wrong and contrary to reality. Counsel relies on the views expressed by Professor Mitchell in his work on "Constitutional Laws" (2nd Edn) and in particular at page 8 which reads:

> "The importance of these general ideas is then seen, not only in determining the existence of the principles of constitutional law, but also in determining their interpretation. It is frequently true that, because of their fundamental nature, principles are laid down in general terms. Their interpretation in particular instances thus becomes a matter of considerable importance, and often of greater practical importance than the formulation of the principles themselves. Even when constitutional principles are embodied in formal documents, or statutes, their interpretation cannot be governed exclusively by normal canons, but will be guided and informed by general ideas of the same order as those that determined the existence of the

> principles themselves. Thus constitutional interpretation tends to enjoy peculiar characteristics, and, at times, to lack the consistency of other types of legal interpretation."

and at page 10

> "Written and unwritten constitutions. These characteristics of constitutional law are universal and to a great extent they reduce the importance of the fact that a constitution happens to be written or unwritten, or that constitutional liberties are specifically guaranteed or protected in some way."

and again at page 11

> "The existence of a written constitution may certainly be of importance in providing a framework which facilitates judicial intervention, though the importance of that framework may be overemphasised. ..... The fundamental importance of a principle does not (save on a very simple view) depend upon its being written down. At best the process, in modern times, of importing limitations upon legislatures, eased by having a written document as a convenient starting-point for argument."

Although no specific example was given of an instance of the application of these principles in countries possessing an analogous situation to that with which we are here concerned, I accept that there can, in certain circumstances, be implied in a written constitution certain constitutional principles not therein expressed, but, it seems to me that in the written document there must be found "a starting point" from which they can be implied.

The defendants, however, stress that there is need, in this case, for particularity, and say that the plaintiffs cannot from the Constitution point to any provision which can allow therein any implied principles as claimed to be adopted. It is their argument that a constitution must set the status of the principal organs of government and how they relate to each. The Council, if it is to be accorded a constitutional status, should therefore be specifically entrenched in the Constitution and its relationship with other divisions of government so entrenched made clear. Also if the plaintiffs' contention that the Council's importance as a Nauruan institution ranks equally with those three divisions is a fact then it follows its entrenchment in the Constitution must be implied and this, the defendants say, does violence to the principles of constitutional construction. Rather, they submit the Council's omission from the Constitution leads inevitably to the presumption that the enactment creating it and also the Council itself, have no constitutional significance. On this point, they refer to a decision of the Court of Appeal of Western Samoa (Cooke P., Mills and Keith JJ) in A-G v Saipa'ia Olomalu and others (1984) 14 V.U.W.L.R. 275 a case dealing with the position in Western Samoa where there was no universal franchise to vote at Parliamentary elections, voting rights being given only to the matai (or head of the family) and a class of citizen known as the individual votes. The

question was whether this limited franchise was "ultra vires" the Constitution which, while containing no reference to universal suffrage, had enshrined therein an Article (15) giving equality before the law and equal protection under the law. The Court held that the omission in the Constitution of any direct reference to universal franchise was significant and that Article 15 did not extend to voting rights. At page 288 the Court said:

> "The omission has added significance in the Western Samoan context. It is a well-settled principle of interpretation that momentous constitutional changes are not held to be brought about by a side wind or loose and ambiguous general words. Illustrations of the principle are Nairn v University of St. Andrews [1909] A.C. 147 and Viscountess Rhondda's Claim [1922] 2 A.C. 339; compare Commissioner of Inland Revenue v West-Walker [1954] N.Z.L.R. 191. Having regard on the one hand to the general commitment of the United Nations to universal suffrage, as evidenced by article 21 of the Universal Declaration, and on the other to the strongly-rooted matai traditions of Western Samoa, it is an inevitable inference that the extent of the suffrage was a prominent issue as independence approached. Confirmation that this must have been so is not really needed, but in fact it is supplied by the United Nations Plebiscite Commissioner's report previously quoted and the earlier report of the 1959 Visiting Mission.
>
> Against that background, if the Constitutional Convention had intended to introduce and entrench universal suffrage, we have no doubt that provision for it would have been made in plain and specific terms. It would never have been left merely to general language such as the language of article 15.
>
> For the foregoing reasons we are convinced that article 15 does not have the scope

> contended for by the respondents and accepted in the judgment under appeal. In short we are satisfied that the article was not intended to and does not relate to voting at general elections. When the Constitution is considered as a whole, we do not think that the question is left in any true obscurity."

The reasoning of the Court in Olomalu's case is persuasive and I am impelled to give consideration to the significance, if any, which should be attributed to the omission in our Constitution of the entrenchment of the Council as an instrument of government. Since the Constitutional Convention, in drafting the constitutional document enshrined in it the Legislative, Executive and Judicial arms of government and adopted it in that form, the question can properly be posed as to why, if the Council was regarded as the fourth repository of power, it was not likewise entrenched. The answer, I believe, can be found in the records of the proceedings of the Convention.

Although the deliberations of the Convention spread over many days, there was but brief mention therein of the Council. This occured on the 15th May 1968 when Article 93 was considered. The discussion then centered around the negotiation of royalties. There was never any question of enhancing the Council's status by constitutional entrenchment. Nor was it suggested. Rather some members contemplated that the Council would be either dissolved on independence or at least its

functions substantially lessened by their being taken over by the Government of the Republic. Neither was there mention of its traditional functions. I am therefore led to the conclusion that the Council was not regarded by the Convention as an institution of government to be preserved by the Constitution.

I conclude therefore that its omission from the Constitution is significant. The omission was deliberate and intentional. The question of institutions of government was one of paramount importance and I have no doubt that had the Convention regarded the Council as an effective and essential arm of the government of the Republic as a fourth repository of power, it would have ensured its entrenchment in the Constitution along with the Legislative, Executive and Judiciary.

(b) The Practical Approach to Interpretation of the Council's Status.

However, I am urged by the plaintiffs that in consideration of the Nauru Local Government Council Act in relation to the status of the Council I should give due weight to the principles of interpretation adopted by the New Zealand Court of Appeal in the case of New Zealand Maori Council v Attorney-General (1937) 1 N.Z.L.R. 461. This case was concerned with the question

of whether the proposed transfer to State Owned Enterprises of certain land, the subject of claim to a tribunal known as the Waitangi Tribunal asserting the land to be formerly Maori owned land, would be inconsistent with the terms of a treaty, the Treaty of Waitangi, made in 1840 by the Crown with the Maoris.

The basis of counsel's submission on this point is that the New Zealand case dealt with a situation significantly analogous to this present case, in that a question in issue was, whether the Republic acted reasonably and in good faith in dissolving the Council, and further that the case also was of exceptional importance to the future of Nauru. I have carefully considered the sections of the judgment to which he refers. There is no dispute that question here "should not be approached with the austerity of tabulated legalism. A broad unquibbling and practical interpretation is demanded" (p. 655). However, the references to "partnership", "duties to consult", and the historical significance of the Treaty of Waitangi and the value to be placed on the possession of Maori land and the rights thereto in relation to economic utility and Maori culture, seem to me to be matters of no relevance in this case. I cannot see the analogy to the degree suggested. In the Maori Council case, the Court was concerned with the possible acquisition of land which belonged to the indigenous

people of New Zealand, not of Crown or public land belonging to all New Zealanders. In this case the land and property in question are public property not owned by the Council but owned by all Nauruans. The ownership of it can never be changed, only the "trustee" administering it. The duty of the Crown in its dealings with the Maori land owners is not identical with that of the Republic in its dealings with this public body, the Council.

Nevertheless I adopt here the "practical approach" in interpreting the role of the Council. I propose therefore to examine the Council and its place in the affairs of Nauru on the advent of independence to consider whether, if the institution had not been preserved by the adoption of the Nauru Local Government Council Act as an existing law by Article 85 of the Constitution, the organs of state without the Council would have been inadequate to ensure the good government of Nauru.

This is in effect what the plaintiffs say. They underline the powers of the Council which, they assert give it the status as the fourth repository of power of government. Such powers are contained in Division 4 of the Nauru Local Government Council Act. With them could the Council, on independence, qualify as an integral part of the government of Nauru? To answer this

question I analyse the powers as follows:

(a) Section 41 - the Advisory powers. The power to advise was limited to "matters affecting Nauruans" - a rather nebulous power. The original power the Council possessed of advising on the peace, order and good government of Nauru and on legislation concerned therewith, was taken away from it two years prior to independence. This meant that it had no longer any ability to influence the law making process of government. The Administrator was not bound to accept any advice.

(b) Section 43 - the power to engage in business, carry out works and co-operate with the Administration of Nauru or other body, providing a public service. This gave the the Council a commercial and trading character which could be useful to Nauru, but, its right to trade was not exclusive. How it traded, whether it did so locally or internationally, profitablly or at a loss, could scarcely be matters of constitutional importance.

(c) Section 44 - Power to make rules. There

can be no question that at the best the rules that could be made under this section amounted to subordinate legislation. They were rules of local significance, the equivalent of by-laws as opposed to laws for the peace, order, good government of the nation.

(d) Section 45 allowed the levying of taxes and fees for Council services.

(e) The rules made under Section 44 could be vetoed by the Administrator.

(f) The general powers of the Council, those of maintaining the peace, and of making rules were not absolute. They were to be exercised subject to the laws of the Territory in force and enacted by the Administration.

The plaintiffs also place significance on what they call the customary powers of the Council given in Section 4(2) of this Act. The section confers on the Council any power or authority previously conferred on the Council of Chiefs by law or custom. Certainly the institution of custom is an integral part of Nauruan life and affairs. It did, indeed, concern the Constitutional Convention when a delegate sought

provision be made in the Constitution for the recognition of Nauruan custom, written or unwritten. It was then pointed out that at that time, custom was already part of the law of Nauru under the Law Repeal and Adopting Ordinance 1922 and that this Ordinance would become part of the law of the Republic as an existing law received under the proposed Article 85 of the Constitution giving it the status of law. This meant that "proper regard for custom would be paid in the executive acts of government or in the forming of laws or in the recognition of the proper field of custom in regard to matters such as land ... " (Record of Constitutional Convention 4 January 1968). This custom and custom as a source of law found recognition in the Law Repeal and Adopting Ordinance of 1922 well before the Council was established. The place of custom in Nauru does therefore not depend on the existence of the Council. In short, the Council is not the repository of custom or customary law. Although the Nauru Lands Committee, the members of which were appointed by the Council, administers customary law in the determination of land matters and administers the deceased estates of Nauruans, that body functions through the powers given to it under the Nauru Lands Committee Act 1956. Its existence does not depend on that of the Council.

The other power of the Council put forward as indicative of its constitutional status is that of the

granting of or taking away of nationality. This was given to it by the Nauru Community Ordinance 1956 which allowed it to confer or take away membership of the Nauruan Community. This important power, however, was to be effectively replaced by Part VIII of the Constitution which provided for the granting of of Nauruan citizenship, the supreme constitutional status of nationality.

In the result, I consider the powers and functions of the Council at the advent of independence as above analysed, could not support a contention that it was a repository of any significant power of government. Its lawmaking powers limited to local rules had to be consistent with the laws of the Territory and were subject to veto; its advisory powers no longer extended to the tendering of advice to the executive on matters of government i.e. to the making of laws for the peace order and good government of Nauru. What advice it could tender could be rejected. The existence and application of Nauru custom did not depend upon its existence. It was about to lose the right to confer or remove nationality. Consequently while the Council once had a significance as the sole local institution representing Nauruan interests in a territory governed by a foreign Administering Authority, it is not suprising that with its powers so substantially reduced, it was not accorded recognition in the Constitution as

an instrument of government. It had no effective powers of government. It had nothing of significance to offer as an arm of government.

(c) The Council and Parliament - the Legislative Role

The defendants submit that to give constitutional status to the Council would result in there being impliedly entrenched in the Constitution an instrument of Government, whose functions would be inconsistent with those of Parliament which by the Constitution has enforced on it the power of the supreme legislative body. The powers of Parliament, they say, are plenary (Article 27). It has the absolute power to legislate. On the other hand the Council's power to legislate is limited to the making of laws consistent with the laws of Parliament. This submission is sound. It would I consider be clearly inconsistent with the expressed constitutional intent to endow the Council with a status equal to that of Parliament.

(d) The Application of Article 84

The defendants contend that this Article which provides special procedures for alteration to the Constitution, applies only to the Constitution as written. They refer to subarticle (1) which says "this Constitution shall not be altered". If it is accepted

that it is in accordance with constitutional principles for a statute, although not entrenched in a written constitution, to be accorded the status of a constitutional statute and by implication be written into the Constitution (and I have expressed the opinion that such can be the case), then it seems to me that the applicability of Article 84 to legislative alteration of the statute is valid. The term "this Constitution" in Article 84, in my view, includes all the constitutional constituents of government, either written into the Constitution or implied from its terms. To hold that in the pursuit of the extent of Constitutional covers one cannot, in such research, look beyond the written document, would mean the adoption of the impracticable tabulated legalism approach not favoured in modern jurisprudence. Consequently I am of the opinion that if the Council notwithstanding its omission from the written Constitution were a constitutional institution, the Nauru Local Government Council Act must be regarded as a constitutional instrument and accorded the procedure specified in Article 84 should it be the subject of amendment by Parliament.

(e) The Primacy of the Constitution

It is argued by the defendants that, even if the Constitution is not exclusively confined in the written instrument, the primacy accorded by Article 2(2) thereof

is limited to the adopted written Constitution of Nauru only and while laws inconsistent with that written Constitution are void, the powers of Parliament to legislate for the peace order and good government of Nauru being plenary, it can enact lawfully a law which is inconsistent with a "constitutional document" not specifically entrenched in the Constitution. So that if the Nauru Local Government Council Act were in fact a constitutional enactment, the Act which amends it, although is inconsistent with it, would be a lawful enactment. In my view this submission is tenable, and is one which is not inconsistent with the view expressed on the application of Article 84 above.

THE STATUS OF THE COUNCIL AND ITS ENACTMENT.

It is evident, therefore, that from the findings on the above submissions, I must and do conclude that:

A. The Council and the Nauru Local Government Council Act 1951-85 at the time of independence, possessed no constitutional significance in the polity and law of Nauru since:

1. The Constitution does not include the Council as an instrument of government nor is there any starting point in that document from which

there could be implied that it possessed constitutional status.

2. The omission in the Constitution of any reference either to the Council as an instrument of government or to the enactment, is significant. This omission and the fact that the Constitutional Convention considered the Council's status and failed to accord it recognition in the Constitution allows the conclusion that it did not possess constitutional status.

3. The Council was never an instrument of government because:

(a) it was never autonomous; its powers were never absolute being substantially the subject of veto and control by the Administration from time to time of Nauru.

(b) it was never an institution of custom, a repository of customary law. Custom and custom as a source of law had been recognised and preserved well before its establishment by the Ordinance in 1951, by the enactment in 1922 of the Laws

Repeal and Adopting Ordinance which was carried forward on independence by Article 85 of the Constitution.

(c) it was acceptable as an institution of the new Republic of Nauru only by virtue of the transitional provisions of the Constitution in Article 85(1) and therefor was subject of the Constitution and to any amendment of the Nauru Local Government Council Act accepted as an "existing law" thereunder.

B. 1. In the Constitution in Article 84 the term "this Constitution" means and includes all the constitutional constituents of government either written into the Constitution or implied from its terms. Consequently in the passage of any amendment to an enactment of constitutional status within this context, Parliament is required to observe the requirements of the Article.

2. The primacy accorded by Article 2(2) of the Constitution which provides that a law inconsistent with the Constitution is, to the extent of the inconsistency, void, is limited to the provisions of the adopted Constitution

of Nauru and that while laws inconsistent with the terms of the written constitution are void, the powers of Parliament are plenary in relation to all other laws and it can lawfully enact a law inconsistent with a "constitutional document" not entrenched in the written Constitution.

3. Since the Nauru Local Government Council Act 1951-85 has no constitutional significance; it is not a "constitutional document". Its amendment or repeal by an enactment of Parliament does not require the observance by Parliament of the procedures prescribed by Article 84 of the Constitution.

4. The passage by Parliament of the Nauru Local Government Council Dissolution Act 1992 by a simple majority of Parliament pursuant to Article 46(1) of the Constitution is in accordance with the law and the Act is lawfully enacted.

I turn now to the second arm of the plaintiffs' claim that certain provisions of the Nauru Local Government Council Dissolution Act are inconsistent with the Constitution and in consequence it is invalid and of no effect.

A summary of the argument of the plaintiffs on this claim is:

(a) The effect of the Act is to deprive Nauruans of the right to have their disputes heard by a Nauru Lands Committee comprising members appointed under the Nauru Lands Committee Ordinance (supra) by the Council. Instead the Act by section 3(3) thereof vests the power of appointment in the Nauru Island Council and this effectively is appointment by the Cabinet; the executive government. This section it is contended is a manifest infringement of the Constitution in that it constitutes a direct interference with the membership of a judicial body.

(b) The abolition of the Council abolishes the right given by the Nauru Local Government Council Act (sec. 41) for the Council to advise the Administration. This, it contends, is a special constitutional right removable only by the special procedure of constitutional amendment and, in any event the removal of it is in direct contravention of Article 12(1) of the Constitution giving to Nauruans the freedom of expression.

(c) The Act by section 5(9) purports to authorise Cabinet to vest any property of the Council in the Republic. Such a provision, it contends, allows the acquisition of property otherwise than on just terms and therefore contravenes Article 8 of the Constitution.

(d) The Act by section 3(2) and the Schedule thereto vests in the Cabinet the power of appointment possessed by the Council under the Nauru Phosphate Royalties Trust Act 1968 to appoint two members to the Nauru Phosphate Royalties Trust. This is contended to be in contravention of the Constitution in two respects; the right to appoint is a constitutionally protected power which can only be taken away by amendment in accordance with Article 84 and the transfer of the power is an acquisition of property other than "on just terms" contrary to Article 8.

(a) <u>The Appointment of Lands Committee.</u>

The plaintiffs point out that the Act by section 3(3) thereof removes the power of appointment of the Members of the Nauru Lands Committee from that formerly possessed by the Council. Section 3(3) reads:

"(3) Any reference to Nauru Local Government Council in any Act, Ordinance or Statute shall, unless the context otherwise requires, be a reference to Nauru Council established by this Act."

The Act of course does not affect the existence of the body corporate, the Council; it still exists, but, the purpose of this section is to give effect to the new name provided for it by section 5(1) of the Act.

It is the plaintiffs submission, that by the vesting by section 5(2) of the Act of the composition and control of the Council in the Cabinet, the power to appoint to the Committee is given to the executive and that is in violation and a manifest infringement of the Constitution, being an interference with the administration and membership of a judicial body.

The question of the judicial status of the Nauru Lands Committee aside, there is clearly a recognition in the Constitution of the right of the executive to appoint judicial officers. Article 49(1) gives the President the power to appoint Supreme Court judges. In the case of inferior Courts, the Constitution provides by Article 56 for their establishment and Parliament has enacted the

Courts Act 1972 which establishes and sets the jurisdiction of the District Court. It provides for the appointment of the District Magistrate by the President.

There is nothing I can find in the Constitution to prevent "a direct interference with the administration of a judicial body" and, I feel it is inconsistent with sound argument to assert that the conferring of the power of appointment of the members of the Nauru Lands Committee is inconsistent with the Constitution. This power of appointment by the executive is legally correct.

(b) The Abolition of the Right of the Council to Advise.

The history of the acquisition and extent of this right to advise already has been considered. The plaintiffs seek to confer constitutional significance on this right in two respects; firstly as a right of the Nauruan people it is impliedly entrenched in the Constitution and secondly, to take the right away is to interfere with the freedom of expression conferred by Article 12 thereof.

Section 41 of the Nauru Local Government

Council Ordinance originally gave the Council the right to advise the Administering Authority of Nauru on matters of government - on matters affecting the peace, order and good governemnt of the island of Nauru. It is arguable that this right to advise on govenment, under certain conditions, could be considered a constitutional right. However the Administration was not bound to act on the advice, which is contrary to the usual constitutional requirements of independent nations.

As we have seen, however, the right to advise on matters affecting government was taken away in 1966 and in substitution there was given what I have described as a "nebulous right" to advise on matters affecting "the Nauruans", a right of some doubtful worth since Administration was not bound to act on it.

This being the extent of the right which the Council possessed when it was assimilated into the Republic, I am of the opinion it is a right of no constitutional significance.

As to the submission that by the Council being deprived of the right to advise, Nauruans have been deprived of the right of freedom of

expression given by Article 12 of the Constitution such submission is untenable. In my view, the tendering of advice is a means only of expressing views. The means in question are now not necessary. That fact does not in any way prevent from the right of Nauruans to express themselves in any way they please. The Act does not affect that right.

I therefore hold the right to advise as possessed by the Council under the Nauru Local Government Council Act was of no constitutional significance and its removal does not infringe the Constitution.

(c) The Vesting of Property Other than "on just terms".

The defendants answer the plaintiffs' argument hereon in part by submitting that section 5(9) of the Act does not confiscate any property and that the question of unjust acquisition of property does not arise. That, of course is correct, since the vesting of the property occurs only if an Order is made and notified in the Gazette. I therefore think that submission is one of substance. Article 8(1) does not prohibit property being taken; it specifies the conditions

under which it can be acquired and it follows a provision in an enactment, such as the one in question, which allows property to be taken but does not specify the terms under which it may be taken, is not, ipso facto, in violation of the Article. Until, therefore, Council property is vested in the Cabinet and the terms under which it is acquired ascertained, the question of the infringement of Article 8(1) cannot be considered.

Nevertheless, the argument of the plaintiffs should be considered and for the purpose of doing so, I proceed on the basis that Council property has been acquired by Cabinet. In my view, Sub-Article 8(2)(b)(iv) would apply in such circumstances. It reads:

> "8(2) Nothing contained or done under the authority of a law shall be held to be inconsistent with or in contravention of the provisions of clause (1) of this Article to the intent that that law makes provision -
> (b) for the taking of possession or acquisition of any of the following property: -
> (iv) property held by a body corporate established by law for public purposes."

There can be no question the establishment of

the Council in 1951 was for public purposes and that it has remained a body corporate of this character. Its property is held for public purposes. Article 8(2)(b)(iv), it seems, clearly would allow Council land to be acquired by Cabinet for public purposes by the Republic by a vesting order under Section 5(9) of the Act. Acquisition of Council land in this way by Cabinet for the Republic would, I am satisfied, be within the exception of the said Article 8(2)(b)(iv) and there would be no Constitutional requirement for the acquisition to be "on just terms".

Further argument was addressed on the relevance of Article 8(2)(b)(iii) to this issue based upon the fact that the property to be dealt with belongs to the people of Nauru, the beneficial owners thereof, the Council hold and the Republic if it took it would hold the property as trustees for the people. In view of my findings above I do not pursue further the point other than to observe that trustee nature of the Council's ownership of the property would appear to be incontrovertible.

(d) <u>The Nauru Phosphate Royalties Trust - Appointment of Members</u>.

Under the Nauru Phosphate Royalties Trust Act

1968 under which the Nauru Phosphate Royalties Trust was formed, the control of the Trustees was placed in the hands of four trustees. One was to be appointed by the Governor-General of Australia, one by the Administrator and two by the Council. The effect of the Act is that by section 5(2)(supra) that power of appointment is now exercisable by the Cabinet. This means the right to appoint all Trust members is given solely to the Cabinet, the executive.

The plaintiffs argue on the basis of the allegation in their Statement of Claim that this right to appoint is "property" within the meaning of Article 8(1) of the Constitution, it has been taken away from the Council without compensation and this contravenes the Article.

The worth of this submission depends on whether this right given to the Council to appoint is, in fact, taken away from it and, if so, is the right a property capable of valuation on the basis of measurable "terms".

I consider it unquestionable that the Act does not affect the original right to appoint to the Nauru Phosphate Royalties Trust. That right is still intact and is excercisable by the original

body corporate, now renamed under the Act "the Nauru Council". However does the fact that the effect of the vesting under section 5(2) of the Act of the powers of the Council in the Cabinet justify the claim that this means the executive, the Cabinet, have acquired for the Republic a property in the form of a right to appoint other than on "just terms". There is no substance in that submission. Firstly, as has been held, the right to appoint is still that of the Council, secondly, I cannot accept that such a right constitutes property within the meaning of Article 8(1) of the Constitution. I am satisfied that counsel for the defendants is correct when he submits that in its application the Article refers to property in the sense that it is capable of being valued. There can be no question of "just terms" in relation to property incapable of valuation and, in my view, a right to appoint, if it be property, is in that category.

The plaintiffs also claim that the right to appoint to the Trust is a "constitutionally protected power". Argument on this proposition was scant. The right is not entrenched in the written constitution so presumably it is to be regarded as an implied power. I was referred to an address by the then President to Parliament on the

presentation of a Bill amending the Nauru Phosphate Royalties Trust Act in 1968. The President mentions the fact that the Council traditionally represented the landowners in royalty negotiations and that the Bill provided for the continuance of the arrangements. This is correct. The Council originally was the only body of Nauruans in existence to call upon to represent the landowners in their negotiations with the foreign Phosphate Company. I cannot see constitutional significance in its role as a negotiator for royalties on behalf of a section of Nauruans, as opposed to Nauruans generally, being perpetuated in the Nauru Phosphate Royalties Trust Act. I do not find from any source, evidence of a constitutionally protected right as claimed and I hold such did not exist.

Finally, one further matter was raised obliquely in argument on the question of alleged violation of the Constitution and I should consider it. It was put that the Act took away the right of Nauruans to vote for the Council and that this was in breach of Article 12, which gives the freedom of the right of expression. I cannot see how the right to vote, which procedure is one of selecting candidates for some office is a right of expression. Freedom of expression is the freedom to say what one likes; to express oneself. To vote is a freedom to choose. That fact aside, it seems to me that

since the Council has been found to have no constitutional significance and the Nauru Local Government Council Act has been lawfully altered by Parliament in the Act with the result that the Council has been lawfully reorganised in a way which now does not require voting for its membership, then the question of any right to vote for it does not exist - there is no one to vote for; there is no constitutional right in issue.

CONCLUSION:

In view of my findings hereon and for the reasons stated herein I am satisfied there are no grounds for granting the claims of the plaintiffs and the orders prayed are accordingly refused.

There will be an order for costs to be fixed by the Court on application of the defendants.

CHIEF JUSTICE

Solicitor for the plaintiffs: Mr. David Aingimea
Nauru.

Solicitor for the defendants: The Department of Justice, Nauru.