

SABINE DEBEB

PLAINTIFF

v.

EIREIBWOBWE AGIBIRI AND OTHERS

DEFENDANTS

JUDGMENT

In this action the plaintiff claims to be the beneficiary of a secret trust. Her case is that her son, Auriria, during his lifetime was the owner of a one-fifth undivided share in a portion of land named ATOEAEOW, portion no. 199, in Denigomodu District, and that during the year preceding his death and at the time of his death he was the licensee of a part of that land. She alleges that the licence given to him was to occupy that part of the land for the purpose of carrying on the business of a restaurant on it, and that it was irrevocable for a period of five years from 16th January, 1979, and transmissible as part of his estate. She says that, although he made no will and in consequence, in default of agreement to the contrary by his family, Auriria's undivided share in the land and the licence passed to the defendants, they are bound by the rules of equity to hold that undivided share and the licence on trust for the plaintiff at least until 15th January, 1984. She claims that the trust arose because Auriria during his lifetime told the first defendant, Eireibwobwe, that the restaurant business was to belong to the plaintiff after his death and the first defendant acquiesced in that.

The ownership of the land is not in dispute, nor the manner in which the present owners came to own it. It belonged to a man named Appe who died in about 1968. Appe had a wife and three daughters, Eingoa, Eouda and Eiriog. He also kept the plaintiff, who was his wife's sister, as his mistress. She bore him two children, Auriria and Eireibwobwe. Eireibwobwe is the first defendant, Eingoa is the second defendant, and the other defendants are a daughter and the trustee of the other children of Eouda and Eiriog, who are now both dead. Appe died intestate and his three legitimate daughters, Eingoa, Eouda and Eiriog, could have inherited the whole of his estate without Auriria or Eireibwobwe having any share. However, all the children had grown up as a family and the three legitimate children agreed to the two illegitimate children sharing the estate equally with them. As a result, in 1978 Auriria owned a one-fifth undivided share in the land ATOEAEOW, as did Eingoa, Eireibwobwe and the children of Eouda and Eiriog per stirpes.

The land had been leased to the Nauru Phosphate Corporation since long before 1978. It is not phosphate land and was leased for occupation rather than mining. However, part of it was not used by the Corporation. It was situated in a commercially most advantageous place, adjacent to the Corporation's location and the shopping centre there. It might appropriately

be described, in American realtor terms, as "a prime piece of real estate in down-town Nauru".

Both Eingoa and Auriria saw its potential. However, it had been a Government policy of long-standing, well pre-dating Independence, that approval (required now by virtue of section 3 of the Lands Act 1976) would not be given to the leasing of Nauruan land to a non-Nauruan. Further, it had also been the Government's policy for many years not to grant trading licences to persons other than Nauruans. So there was no possibility of letting a part of the land to a Chinese businessman. But neither Auriria nor Eingoa had the commercial experience required for them to have set up a business on it on their own. So each of them began negotiations with a Chinese businessman for the establishment of a business, with the Chinese businessman providing the capital and actually operating the business but with Auriria or Eingoa obtaining the licence and possibly participating in the management of the business. Eingoa's negotiations were inconclusive but Auriria succeeded in reaching agreement with Cheng Yun Fat. The broad terms of the agreement are clear. Cheng was to erect on the land a building suitable for use as a restaurant; he was then to provide the staff and operate a restaurant business on the premises; he was to bear all the expenses of the business; he was to pay Auriria \$1,280 a month; he was to keep whatever balance of profits there might be and to bear any loss. Auriria was to obtain a licence for the business in his own name and pay to Cheng, out of the \$1,280, \$500 each month for five years as reimbursement of the cost of the building. In addition, Auriria attended at the restaurant for much of the time when it was open - in the words of Cheng, "to see that nothing went wrong". However, it is doubtful whether he was under any contractual obligation to attend. Cheng gave evidence that he regarded the business as belonging solely to himself and his ten Chinese partners and that Auriria was merely the holder of the trading licence which authorised the business to be carried on.

It is unnecessary at this stage to make any firm findings as to the legal effect of the agreement between Auriria and Cheng. What is more important is to ascertain the rights of Auriria in relation to the other owners of the land. Although both Eingoa and Auriria apparently had no intention initially to seek the approval of the other owners before using the land, the Vice-Chairman of the Nauru Lands Committee - who is most experienced and knowledgeable on matters of Nauruan customary law relating to land - gave evidence that no one owner of an undivided share in a portion of land can occupy or use any part of that portion without the consent of all the other owners. I have no hesitation in accepting that that is correct; with almost all portions of land now owned in undivided shares by several, and in most cases, numerous owners, there would be chaos and the risk of strife or even bloodshed if it were not so.

In any event, although Auriria wished to use the land without first obtaining the consent of the other owners, he was prevented from doing so by Eingoa and the other owners. Eventually they sought the assistance of the Nauru Lands Committee to sort out their differences. As a result they agreed to his using the land for a business but Eingoa, on behalf of herself and the children of Eouda and Eiriog, insisted that they be paid a share of what most of the witnesses have called "the rent" to be received by Auriria from Cheng. Whether they were to receive an equal share, as Eingoa asserts, or something less is not conclusively established. It is probable that Eingoa thought that that was what Auriria was agreeing to and that he thought that he was obliged to pay only what he considered fair. However, although much of the evidence was concerned with this narrow point, I consider that it is not of any great importance in deciding the real issue.

That issue is what right Auriria was granted as licensee, i.e. was the licence personal or transmissible, and was it irrevocable for a period of five years, or longer, or terminable by the licensors at will. The plaintiff originally pleaded a contractual licence; but, as the only consideration which she alleged to have been given by Auriria was vague and uncertain, she amended her pleadings to allege a licence not based on contract but enforceable under the rules of equity because the other owners had allowed Auriria to alter his position and enter into his agreement with Cheng in reliance upon their promise that he could use the land. In presenting her case to the Court, Mrs Billeam relied also on what she alleged was the effect of Nauruan custom.

In order to consider whether Auriria was entitled to use the land for the business for five years and whether such a licence was transmissible, it is necessary to consider both the nature of his agreement with Cheng and the evidence given by several witnesses as to the way the Nauruans regard licences given for use of land. I think it best to deal first with that evidence. The first of the witnesses was Ray Gadabu, the Acting Director of Lands and Survey. He said that he, his mother and his uncle were allowing another Nauruan to use for a business land which they owned and that, if that Nauruan died, his family could go on using it. He said that that was because of the verbal agreement which he had with the Nauruan concerned. He did not purport to state that any general customary right existed for the licensee or his family to remain in occupation. The second witness was Edwin Tsitsi, the Councillor for Aiwo District, where Appe, Eingoa and Auriria lived. He said that Auriria "was the apple of Appe's eye", that in Nauru normally, if there is only one son, he is regarded "as the leader of the family" and that the plaintiff ought to receive Auriria's share of the land. In expressing that opinion, however, he conceded that his views were personal to himself and did not necessarily coincide with Nauruan custom as it had developed. The final witness was James Aoko Doquane, the Vice-Chairman of the Nauru Lands

Committee. He said that, if land-owners allow someone to use their land for his business, they can tell him to "get off" the land, but that it is not easy to do so. He was unsure whether they would have to compensate him for any improvements he had made to the land. It is noteworthy that none of these witnesses even suggested that by Nauruan custom a non-contractual licence to use land for business purposes can be or become irrevocable or transmissible as of right. The licence apparently is and remains terminable at will - although many Nauruans may lack the will to terminate such a licence.

It is necessary now to consider whether Auriria did anything which, in spite of his not having any customary or contractual right to an irrevocable or transmissible licence, nevertheless made the licence given to him irrevocable and transmissible. The actions which Auriria took to make use of the opportunities accorded to him by the licence were to negotiate and enter into the agreement with Chen Yun Fat, to obtain from the Nauru Phosphate Corporation the surrender of the part of the land ATOEOEOW on which the restaurant building was to be erected and to obtain a trading licence for the restaurant business. The first of these required no real effort; as already noted, the land was ideally located for commercial purposes and there was obviously no lack of Chinese businessmen anxious to establish a business on it and willing to enter into an agreement with the land-owners of the type into which Cheng Yun Fat entered with Auriria. In other words, Auriria was simply turning to financial advantage the obvious commercially valuable attributes of the land, which any of the other land-owners could equally as easily have turned to similar advantage. He had to do some work in obtaining the surrender of part of the land by the Nauru Phosphate Corporation and the trading licence. But his contribution to the exploitation of the land for the business was insignificant in comparison with the contribution made by the intrinsic commercial value of the land itself. That value properly belonged to all the owners of the land; it was, in effect, their joint contribution to the commercial venture. That being so, I find that there is no basis in Nauruan custom or in equity for holding that the licence granted to Auriria became irrevocable or transmissible; I am satisfied that it remained personal and died with him.

So far as the legal ownership of the building is concerned, it was built on land belonging to Auriria and the defendants and so belonged to all of them. Auriria was paying for it with part of the moneys paid to him by Cheng; if he had lived and the licence had continued in force, he would have continued to be entitled to use it until the licence was terminated. As the licence was terminated, the defendants are entitled to use it, subject, however, to the rights of Cheng. It is clear that they authorised Auriria to enter into his agreement with Cheng and, because Auriria entered into it as their agent, <sup>they are bound by it</sup> to allow Cheng to continue to carry on his business on the premises

they are bound to obtain a trading licence to enable him to do so; and they are bound to pay him \$500 each month until January, 1984. Cheng is bound to pay them \$1,280 each month as the licence fee for the use of the premises for his business. That agreement cannot be varied or terminated before 15th January, 1984, except by agreement between all the defendants and Cheng.

In my view, no injustice is done to Auriria's estate by the termination, upon his death, of the licence given to him to use the land. Although he did more work than the other land-owners to bring about the commercial use of the land, his contribution was insignificant compared with the contribution made by the intrinsic commercial value of the land. To the extent that he contributed more than the other owners of the land, he was amply recompensed by having received and kept for himself the whole of the moneys (approximately \$10,000) paid to him by Cheng Yun Fat, other than the \$500 a month repaid to Cheng as part of the price of the building and moneys paid for air fares for Eireibwobwe and two of her children to go to Majuro.

In view of my finding that the licence terminated on the death of Auriria, it is not necessary for me to consider whether there was any secret trust. However, had it been necessary for me to do so, I should have found that the only one of the defendants who might have been bound by such a trust was Eireibwobwe. If the English rules of equity are applied, for an alleged trustee of a secret trust to be bound to honour the trust, he must have indicated to the deceased during his lifetime his acceptance of it (R. v Stead [1900] 1 Ch. 237, 241). None of the defendants other than Eireibwobwe knew anything about the alleged secret trust and it is quite clear that none of them would have acquiesced in it. However, Mrs Billeam has argued that the rules of equity should be adapted to Nauruan custom. I accept that they should but the Nauruan custom on this subject is clear. Effect may be given to the orally expressed wishes of a deceased Nauruan as to the distribution of his estate, but only if all the persons who will be adversely affected by effect being given to them give their consent. None of them is bound to give consent; it is a matter for the personal conscience of each of them. If a Nauruan wishes to make a testamentary disposition of any part of his estate, he must do so by a written will. Nauruan custom, therefore, does not afford any basis for an extension or adaptation of the English rules of equity in the manner proposed by Mrs Billeam.

The plaintiff's claim against the second, third and fourth defendants must be dismissed. However, the first defendant served a separate Defence in which she admitted most of the facts alleged by the plaintiff in her Statement of Claim. Indeed, it is fair to say that, throughout the hearing, Eireibwobwe supported her mother's claim. In respect of facts admitted

I have found that the facts are not as admitted by her. She has admitted, by paragraph 14 of the Defence, that Auriria created a secret trust in respect of his rights to the AJS restaurant and that she accepted that trust and, more importantly, regards herself as bound by it. In paragraph 15 of the Defence Eireibwobwe has admitted paragraph 30 of the Statement of Claim "in so far as it was the deceased's intention that the plaintiff should have the deceased's interest in the AJS restaurant". The meaning of that qualification of the admissions is not clear, as paragraph 30 does not relate to Auriria's intention but states only what the plaintiff means in paragraph 29 by her reference to Auriria's "rights to the restaurant". The plaintiff states in paragraph 30 what Auriria's interest in the restaurant was, that is to say -

- (a) a one-fifth share in the land ATOEAEOW;
- (b) an irrevocable licence for five years from 16th January, 1979, as against the owners of that land to operate the restaurant; and
- (c) two contracts with Cheng Yun Fat for the construction and management of the restaurant with a net benefit to Auriria of \$780 per month from 16th January, 1979, for five years.

As Eireibwobwe has not denied those facts, she must be taken to have admitted them and the plaintiff is entitled to judgment against her to the extent of her admissions. That is to say, the plaintiff is entitled to a declaration that until 15th January, 1984, the first defendant holds on trust for her one-fifth of her one-quarter undivided share of the ownership of the part of the land ATOEAEOW, portion no. 199, Denigomodu District, of which the lease was surrendered by the Nauru Phosphate Corporation, and the whole of her one-quarter share of the rights of the defendants under the agreement entered into by Auriria and Cheng Yun Fat for a restaurant business to be operated on that part of that land. All other claims by the plaintiff are dismissed.

The plaintiff must pay the costs of the second, third and fourth defendants. As judgment against the first defendant has been given on her admissions in her pleadings, she is to pay the plaintiff one-quarter of the plaintiff's costs up to and including the service of the original writ of summons on the first defendant, but no part of the plaintiff's costs thereafter. An order relating to costs in respect of the fifth defendant made on 5th November, 1980, is to remain unaltered.

*I.R. Thompson*

CHIEF JUSTICE