REPUBLIC OF NAURU

IN THE SUPREME COURT OF NAURU **Civil Suit No. 13/99**

Between	**Gogoma Sam Amwano**	**Plaintiff**
And	**Nauru Lands Committee**	**First Defendant**
	William Teabuge and Ors.	**Second to Sixth Defendants**
	Curator of Intestate Estates	**Seventh Defendant**

Hearing dates: 10, 17 February 2004, and 20 February in Chambers

Mr. Pres Nimes for Plaintiff
No Appearance for First Defendant
Mr. P. Aingimea for Second to Sixth Defendants
Mr. W. Togamae for Seventh Defendant

Judgment

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1. This case turned on a relatively small issue though a little complex. The issue, however, was plagued by the extraordinary length of time that it took procedurally to get the matter before the Court. To a very large extent this was due to the inaction and dilatoriness of the Plaintiff in the first two years. The case was originally filed on 7 May 1999. It was not in a fit state to be tried until April 2003. Little or nothing was done between May 1999 and May 2001 despite orders of the then Chief Justice.

2. Simply put, upon the death in 1998 of the Plaintiff's partner, Lily Grundler, with whom he lived from 1987 but never married, the Plaintiff claimed that the contents of two savings accounts 15167-31, 15,167-90 and an interest bearing deposit 15167-81, all in the name of Lily Grundler, were, in fact, his own moneys and were not properly moneys of the estate. This was disputed by the family of the deceased but, recognising his long association and partnership with the deceased, the family had agreed to grant the Plaintiff an equal share of those moneys along with the five family beneficiaries.

3. Before considering the claim, it is important to say something of the roles played by the Nauru Lands Committee and the Curator or Intestate Estates.

Nauru Lands Committee

4. The Nauru Lands Committee ('NLC') was joined in the action, as it was the body primarily responsible for decisions made in relation to the estate of Lily Grundler. The NLC derives its powers from the Nauru Lands Committee Ordinance, Section 6. The NLC determines questions as to the ownership of, or rights in respect of, land, being questions which arise -

   (a) between Nauruans or Pacific Islanders; or
   (b) between Nauruans and Pacific Islanders.

5. In other words, the NLC has limited powers restricted to real property and not personalty. Nevertheless, the practice has developed where the NLC has assumed a power of determining personalty in the case of an intestate estate largely accounted for through the prevailing administration undertaken under Administrative Order No. 3 of 1938, Regulations made under Section 3 of the Native Administration Ordinance No. 17 of 1922, Regulations governing Intestate Estates.

6. On a number of occasions, the Supreme Court has drawn attention to the antiquated and curiously drafted regulations contained within Administrative Order No. 3. This may have been tolerable in times when personalty under a Nauruan intestacy was constantly ancillary to questions surrounding realty. However, the situation is very different today when personalty can produce some acute difficulties and where the amounts at stake are considerable. The wise Nauruan will often overcome any possible problem by a Will but that practice is not yet sufficiently widespread and one is then left to the oddities of the intestate estate regulations.

7. The issue at stake in this matter was what was the extent of the property of the deceased. Until that was established, a family meeting could not decide the issue of distribution of the personalty. The three bank accounts, the subject of this action, were all in the name of Lily Grundler. In the ordinary course of events that would have been sufficient to place the bank accounts within the deceased's property. However, this claim raised the prospect that the moneys in these three accounts were, in fact, not those of the deceased but of the partner, the Plaintiff. It was not then within the competence of the NLC to determine the issue as it has no powers over personalty let alone determining legal questions as to the nature of certain personal property. At that point, as soon as the NLC was cognisant of the problem, it should have referred the matter to the Supreme Court for its determination. However, it did not take that course, although a letter dated 20

September 1999 was sent to the Registrar of the Court informing the Court of the NLC decision and its gazettal on 24 March 1999. The letter from the Chairman informed the Court basically that it was *functus officio* and that any decision, on the action commenced in the Supreme Court, would be left to the Court.

Curator of Intestate Estates

8. Apart from the beneficiaries, the other party, eventually joined in the action, was the Curator of Intestate Estates. His arrival came about through a Minute of the then Chief Justice, where the Chief Justice made the point that by 1 May 2000, the date of the Minute, the Curator was the holder of the moneys in the estate and that the Curator should, therefore, be one of the Defendants so that any claim could be made against the holder of the fund under Section 37 of the Succession Probate and Administration Act 1976 ("the Act"). The Curator was not joined by the Plaintiff until one year later. This delay by the Plaintiff created a significant difficulty in the resolution of the matter as the Curator had distributed the estate in August 2000, a little more than three months after the Minute of the Chief Justice.

9. In the meantime, administratively, some action had been taken much earlier in March 1999. Arising from the actions of the NLC in February 1999, following a family meeting and the determination of personalty, the Plaintiff approached the President of Nauru the Honourable Bernard Dowiyogo, who was also Minister of Finance at the time.

The Letter of the Minister of Finance

10. As a result of that meeting, the President, as Minister of Finance, wrote a letter to the Curator of Intestate Estates dated 29 March 1999. He informed the Curator of the claim to the money in bank accounts of the deceased and that Gogoma Amwano, the Plaintiff was proceeding to file a claim in the Supreme Court. The Minister of Finance had ministerial responsibility for the Succession, Probate and Administration Act 1976.

11. On 30 March 1999, the Curator replied and I quote in full the terms of his letter -

> "Your Excellency,
>
> **Estate of the Late Lily Amwano**
>
> Thank you for your kind letter concerning the personal estate of the late Lily Amwano. I understand the issues involved.
>
> The determination for beneficiary (sic) by the Nauru Lands Committee was already in process of getting published in the Gazette however, the deceased estate

will not be distributed as instructed. The undersigned presumes a court order to be received on this matter in due course.

For your kind information.

With highest respect,

Nahesson Harris
Curator of Intestate Estates"

12. As the estate was subsequently distributed in August 2000 in accordance with the gazetted terms of 24 March 1999, the Plaintiff placed some reliance on this letter and that of the President for the purpose of saddling some responsibility on the Curator as well as the NLC for the distribution of the estate.

13. The terms of the letter need to be considered. The Curator has accepted the prevailing practice that the determination of the personalty estate will be made by the NLC, and that he will simply gazette the determination as sent to him, with the proviso that creditors and others having claims against the estate have 21 days to lodge notice of such claims before distribution is made. In this case, however, the Curator stated that the distribution of the estate will not take place, but added that he presumes a court order will be received in due course. The Curator was clearly placed on notice at that moment by his own Minister. But that is an administrative direction and not a court order . As the holder of the funds, as the then Chief Justice said, it was a necessary step to join the Curator and get him before the Court. The Plaintiff commenced the action on 7 May 1999, which is about two months after the actual publication of the gazette. At that stage, no distribution of the estate had occurred. It is noteworthy that Defendants two through to six, the Grundler family beneficiaries, all entered an appearance on 11 May 1999 to the Plaintiff's action. Whilst notice of the impending action was notified to the Curator in the letter of the President, no attempt seems to have been made by the Plaintiff to notify the Curator at the commencement of the action. As earlier stated, the Curator was not made a party until May 2001.

14. So far as the Curator is concerned, his duties regarding the administration of estates of Nauruans, who either die intestate or leaving a Nauruan Will not in accord with Section 2 of the Act, are circumscribed by Section 37 of the Act. The duties are limited though the Curator may be liable for loss suffered by the estate as a result of wilful default or of failing to exercise in the performance of his duties the degree of care, which a reasonably prudent man would in like circumstance exercise in respect of his own affairs. (see Section 37(2) and (3).)

15. On account of Section 37(3) of the Act, it is clear to me that the Court must give some cognisance to the supplementary sections such as Sections 39, 53, 55, 56, 57, and 58 of the Act.

Whilst the Act by Section 3 does not apply to a Nauruan unless so expressly provided, it is so expressly provided in Section 37. The sections immediately following in Part VIII of the Act fill out and provide the clothing, as it were, to Section 37 in Order to assist the Curator or an executor in an administration of an estate. In these more complex days when Nauruan intestacies, particularly, with respect to personalty, are larger in money terms, the duties in part VIII of the Act need to be carefully followed and evaluated by a competent Curator. At the same time, it is the duty of a claimant to inform and keep the Curator abreast of his court claim if the claim has not already been met by the Curator. In the context of Nauru, such a claim is most unlikely to be met by the Curator acting unilaterally due to the prevailing practice to await and act upon an NLC determination on both realty and personalty. It is always open to the Curator to seek a Court direction, and it is a practice that merits consideration.

16. As noted above, the Curator had stated to his Minister in March 1999 that he would not distribute but presumed that he would be informed of a court order . The facts in this case reveal that at the behest of the gazetted beneficiaries, he distributed personalty in August 2000. The case was commenced against the NLC and beneficiaries in May 1999 but without notice to the Curator. The Curator was not made a party until May 2001.

Liability of Curator Under the Act

17. In such circumstances, could any liability be cast upon the Curator? The claim was to the effect that moneys in certain bank accounts of the deceased were, in fact, property of the Plaintiff and not of the deceased. In August 2000, the Curator, though the gazettal of the estate was made in March/April 1999, was still without legal notice of the claim. He had, of course, responded earlier to his Minister. But his decision to distribute was an administrative one and in accordance with Section 37(3) of the Act and was not precluded by legal Order or any notice of claim. Whatever liability the Curator may have had, it was one restricted to the confines of public service administration, at best, for disobedience to an administrative direction. A more prudent administrator, acting upon a beneficiary request, might well have, in the circumstances, made inquiry of the Court whether the action was afoot. Curators necessarily must act with care and prudently, nevertheless there must be also some doubt in terms of Section 37(1) as to any liability that may attach where there is a claimant to certain property rather than a beneficiary to the estate.

18. The Court, however, was not assisted, as it should be, when the Curator, once joined as Defendant, at various times failed to appear. The Court, having called up the file of the Curator regarding the deceased estate of Lily Grundler as little assistance had come directly from the Defendant Curator, was surprised to find it had little relevant material in it either as to the

President's letter, or even an account of the work undertaken on the estate. It has to be said that the Curator who originally handled the matter, Nahesson Harris, had died but the office of the Curator is statutory and it was extraordinary to the Court, based on the contents of the file, that an estate of some considerable worth was not better administered or, perhaps, I would say administered at all.

19. Nevertheless, when the Curator on 10 August 2000 distributed the money held in the bank accounts it was approximately two years after the death of the deceased and sixteen months from the date when the personalty determination by the NLC was gazetted. Whilst the Curator was put on notice by his Minister regarding a possible claim, the Curator was never notified of such claim by the Plaintiff or the Court. The Chief Justice's Minute of 1 May 2000 which addressed the question of bringing the Curator before the Court was a date some three months before the Curator took action to distribute. No action was taken by the Plaintiff in that period to join the Curator or even to notify him of the position. The Curator was, in fact, not joined until leave was granted on 8 May 2001. In such circumstances, I cannot, however poor the Curator's administration, find the Curator liable under the Act, and he has not acted, moreover, in defiance of any order of the Court.

The Issue Whether the Property was that of the Deceased

20. That, however, does not end the matter. The question still arises was the property that was distributed actual property of the deceased?

21. The evidence of the Plaintiff was that he had lived together with the deceased for some eleven years prior to her death. She had died in Australia and he was with her at the time of her death.

22. In the partnership, he was the money-earner and he had put aside funds under her name in separate bank accounts in the Bank of Nauru. He did this as he was busy with his business and she was able on his instructions to withdraw money when required. He kept the passbooks and produced them to the Court. It was his intention to purchase a house in Australia, as he had travelled to Australia many times and looked forward to a permanent residence there. The Plaintiff's evidence on the relationship and management of the moneys was not contradicted by any other evidence.

23. As a result of his desire for an Australian residence, he negotiated with the assistance of a David Chong Gum to purchase a house with the moneys contained in accounts under his wife's name. The arrangement was for Chong Gum to get a loan from an Australian bank and for the Plaintiff to pay off the loan. The house was duly bought in a sub division near Tullamarine, Victoria. He

lived at the house for some time. He gave evidence that he paid the bank about $1000 per month. The actual cost of the house and land at the time of purchase was $120,000.

24. Upon Lily Grundler's death, he was denied access to these accounts and so he was not able to meet the house payments. The bank, thereupon, sold the property.

25. The bank accounts were produced and revealed the following:-

    a. Account No.: 15167-31 27 October 1998 Credit balance $41,630.64
    b. Account No.: 15167-90 7 April 1997 Credit balance $103.42
    c. Interest bearing deposit Account No.: 15167-81 22 March 1999 $70,499.36

    Also produced were two deposit books -

    (1) National Bank - 271 Collins Street, Melbourne
    (2) Commonwealth Bank - Chancery House, 141 Queen Street, Melbourne

26. In respect of the deposit books the first was for the credit of Victorian Group No. 1 C.H.S.L. and the second at the Commonwealth Bank was for credit of Victorian Group (No. 3).

27. In regard to Victorian Group (No. 3) payments, which appeared to commence on 29 May 1995, were at the rate of $900 or $1000 per month. So far as the National Bank deposits were concerned, these commenced later on 21 May 1998 and were for sums of $650 or $700 per month. It would appear that the National Bank deposits took over when the Commonwealth Bank deposits ceased. The total amounts paid appear to add up to $23,600.

28. The Plaintiff is a man of some age and is severely handicapped and in a wheelchair. His recollection of events surrounding the house was at times hazy. He did not know why he was paying the monthly amounts to a particular deposit account, and had not given the date of original purchase of the house. He had not spoken with Chong Gum after the sale of the house and apparently had not checked to see whether there was any equity in the sale for himself.

29. The NLC when dealing with the question of personalty determined that it would distribute the property in accordance with the instruction of the family, which was to the effect that the family beneficiaries should share equally and that the Plaintiff would share with them on the same basis. That was at a family meeting on 16 February 1999, to which the Plaintiff was not called.

30. On Tuesday 9 March 1999, the Plaintiff and one of the beneficiaries, Heather Atsime, appeared before three of the five members of the NLC who had met on 16 February 1999. This followed a letter addressed to the NLC by the Plaintiff. At that meeting, Heather Atsime stated that the

funds contained in passbook 15167-81 and passbook 15167-31 must not be shared out nor touched because the funds are payment for the house. The Plaintiff expressed agreement with this.

31. On Wednesday 10 March 1999, one of the beneficiaries Joskie Teabuge appeared before the Lands Committee in respect of the deceased's passbooks. He stated that the Plaintiff's letter was unknown to him but that the passbooks were his mother's, and stated that the distribution should stand. The following day Joskie Teabuge appeared again before the NLC and requested copies of all documents including the letter of the Plaintiff that had alluded to the passbooks and loans.

32. This evidence of NLC meetings was taken from the NLC Minutes Book produced by Mr. Anton Ephraim of the NLC. In his evidence, Mr. Ephraim who sat on the case on 16 February 1999 queried whether a decision had in fact been made on that day. No later decision is recorded and there is nothing in the Minutes of 9, 10, and 11 March, which indicates that any action was taken with respect to proceedings of those days.

33. It was a major point made by the Plaintiff that there had been, in effect, no decision made by the NLC and that whatever proceeded, thereafter, was absolutely void. Mr. Ephraim gave evidence that the Minutes should record the proceedings and the outcome and decision of the meeting. He believed that this had not been achieved and that there was no record in the Minutes of a decision.

34. On balance, I am prepared to accept the 16 February 1999 Minute where the NLC states at the conclusion of that family meeting, at which the Plaintiff was not present, that the Committee will distribute the property in accordance with the instructions of the family with respect to the three passbooks: 15167-31, 15167-81, and 15167-90. The Curator was informed of this decision and proceeded to gazette it. The fact that the NLC did not appear to take any action on the later meetings gives credence I believe to this sequence.

35. Mr. Ephraim was unsure whether the Plaintiff had been invited to the original 16 February 1999 family meeting but was aware of his later appearance. The Plaintiff asserted he was not invited. From the evidence of Mr. Ephraim there may have been some reticence in acknowledging the Plaintiff at a family meeting as he had not married the deceased and was regarded only as being in a de facto status even though the partnership had extended for many years and the union was well-known. This stems in a sense from the terms of Administrative Order No. 3 where the widower or widow is granted some LTO rights. It was pressed on the Court that a person in a de facto relationship should be accorded, in the least, attendance at a family meeting upon the death

of the deceased. I reach no conclusion on this matter without further argument, and, as it is not necessary for my decision, I do not record any statement other than to say the matter would need to be canvassed and argued more fully on another appropriate occasion.

36. Before proceeding further, I should draw attention to Detamaigo v Demaure a Land Appeal, No. 7 of 1969. In that matter, the learned Chief Justice struck out an appeal on the question of persons beneficially entitled to the personalty of the estate of a deceased Nauruan. The Chief Justice took this step on the short point that the Supreme Court only had jurisdiction to entertain appeals from decisions by the NLC on land under the terms of the Nauru Lands Committee Ordinance. In doing so, he raised the doubt then whether the NLC could decide beneficiaries of the personalty estate. As he said, it had no jurisdiction to do so under the Ordinance but may have derived this from customary law.

37. There is still a real problem in law whether the NLC has jurisdiction to ascertain beneficiaries to personalty. However, Detamaigo v Demaure is not applicable to the matter before the Court since the question at stake here is not who are the beneficiaries but rather whether certain property is that of the deceased or that of the Plaintiff. This is simply a question of law taking into account the facts and sequence of events.

38. There was no evidence tendered by any of the Defendants that contravened or conflicted with that of the Plaintiff as to the manner in which he conducted his business, paid in money through his de facto wife into bank accounts that were in her name, the purchase of the Australian house, and his manner of payment for the house through the moneys held in the said bank accounts of the deceased. I accept that evidence. It was clear to me that money from May 1995 had been regularly taken from one or other of the bank accounts, with the apparent exception of 15167-90, to make regular loan payments on the house. This was done clearly under agreement between the deceased and the Plaintiff.

The Equitable Position

39. I would hold that, in so far as moneys from the bank accounts were to pay out the loan on the Australian house, there was a constructive trust established and the deceased was a constructive trustee. The failure of the Plaintiff, upon her death, to gain access to the moneys for the payment of the loans may have constituted a breach of fiduciary duty on the part of the person having control over these assets.

40. 'When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.' Beatty v

Guggenheim Exploration Co (1919) 225 NY 380 at 386 per Cardozo J. as quoted by Mason J. in Hospital Products Ltd v United Surgical Corporation and others 55 ALR 417 at 463.

41. The constructive trustee, therefore, during the period of administration of the intestate estate is the Curator of Intestate Estates. Clearly, the equitable interest of the Plaintiff as the beneficiary of the trust should have been recognised. The prudent course would have been for the Curator to apply to the Court for a ruling on the estate once notice of the question was brought to his attention. It is unfortunate indeed that administration of the estates are not more carefully administered through the office of the Curator but rely on the 'catch as catch can' arrangements of the NLC which, as I have already alluded to, has no statutory power in regard to personalty. But the Curator has raised in his defence '*plene administravit*', and there is no doubt in the mind of the Court that he has fully administered the estate and is not holding any assets to meet the claim.

42. Upon the death of the deceased, the assets in the intestacy both personal and real vest in the Curator pursuant to Section 37 of the Act. The bank accounts in question in this case will be held by the Curator as a constructive trustee for the Plaintiff as stated above. Assuming, as I have done, that the Curator is neither personally liable in terms of Section 37 nor otherwise liable as the Republic in terms of the section, for the manner of distribution, may liability, nevertheless, be attributed to him for his actions as a constructive trustee? What assistance did he provide that brought about any misapplication of property that was subject to a trust? The essential factor was that the property, subject of the trust, reached the hands of a third party through his assistance. In terms of equity, the constructive trustee, to be liable, would have had to act with 'knowing assistance' in respect of the property. The receivers of the property, in this case the beneficiaries of the estate, to be liable would have to have been in a state of 'knowing receipt'.

43. 'Knowing assistance' and 'knowing receipt' have been the subject of much consideration in the Courts and with variations of opinion. Millet J. in Agip (Africa) Ltd v Jackson [1992] 4 All ER 385 at 405 states -

> "Knowledge may be proved affirmatively or inferred from circumstances. The various mental states which may be involved were analysed by Peter Gibson J. in Baden's case [1992] 4 All ER 161 at 235 as comprising: '(i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on

inquiry.' According to Peter Gibson J. a person in category (ii) or (iii) will be taken to have actual knowledge, while a person in categories (iv) or (v) has constructive notice only. I gratefully adopt the classification but would warn against over refinement or a too ready assumption that categories (iv) or (v) are necessarily cases of constructive notice only. The true distinction is between honesty and dishonesty. It is essentially a jury question. If a man does not draw the obvious inferences or make the obvious inquiries, the question is: why not? If it is because, however foolishly, he did not suspect wrongdoing, or, having suspected it, had his suspicions allayed, however unreasonably, that is one thing. But if he did suspect wrongdoing yet failed to make inquiries because `he did not want to know' (category (ii)) or because he regarded it as `none of his business' (category (iii)), that is quite another. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge."

44. There was some doubt that all five categories by Peter Gibson J. in Baden's case could be applicable. It appears in England and New Zealand that now `knowing assistance' can found liability in a stranger constructive trustee if he falls within the first three categories identified by Peter Gibson J. in Baden's case. (See commentary by A.J. Oakley - Liability of a Stranger as a Constructive Trustee in Equity-Issues and Trends (The Federation Press - 1995) at page 77.)

45. In Polly Peck International v Nadir (No. 2) [1992] 4 All ER 769, 777, Scott L.J. stated -

"There is a general consensus of opinion that if liability as constructive trustee is sought to be imposed ... on the basis that the defendant has assisted in the misapplication of trust property (knowing assistance), `something amounting to dishonesty or want of probity on the part of the defendant must be shown" (see per Vinelott J. in Eagle Trust v S.B.C. Securities Ltd [1992] 4 All ER 488). Vinelott J. described as `settled law' the proposition that `a stranger cannot be made liable for knowing assistance in a fraudulent breach of trust unless knowledge of the fraudulent design can be imputed to him ...'. I respectfully agree".

46. The above statement is clear enough, and this Court agrees with such a formulation. Indeed, Vinelott J., a renowned equity judge in the Chancery division, was concerned primarily in Eagle Trust v S.B.C. Securities Ltd, above cited, with the situation involving `knowledge receipt'. To establish knowledge, he applied the same tests whether it was `assistance' or `receipt', namely, the first three categories of Baden's case, and the broader criterion of dishonesty or want of probity was also required where imposition of liability on the constructive trustee is sought. A

person would not be liable merely because he had reason to suspect that there had been a breach of trust disentitling the trustee to make the payment. It had to be shown that the circumstances were such that knowledge that the payment was improper could be imputed to the recipient of the money, but, in the absence of any evidence or exploration by the recipient, knowledge of the breach of trust could be inferred if the circumstances were such that an honest and reasonable man would have inferred that the money was probably trust money and was being misapplied and either would not have accepted it or would have kept it separate until he had satisfied himself that the payer was entitled to use the funds in discharge of the liability.

47. If such principles are now applied to the case in point, I find that there is no evidence that the Curator, as constructive trustee, had actual knowledge of the breach of trust. Nor do I find that he had shut his eyes to anything obvious or had wilfully and recklessly failed to make the type of inquiries which an honest and reasonable man would have made. Were a finding of liability in the Curator to be made then it would have to be for the latter reasons, namely, that he had wilfully or recklessly failed to make the type of inquiries which an honest and reasonable man would have made.

48. There was, indeed, some evidence in the administration of the estate of some lack of attention to the requirements of good administration, as divulged by the lack of material on the file. There was also the statement of the Curator that he would not proceed to distribute under the terms of the gazette notice but presumed that in due course there would be a court order . The Curator held to that position from the time of receiving the Minister of Finance's letter of 29 March 1999 until 10 August 2000 when distribution took place following a request from the beneficiaries of the estate. Apart from the letter of the Minister of Finance written before this action, the Curator had no knowledge of the dispute and, as he said, presumed that at some point he would be subject of a court order . He was not made a party to the dispute until May 2001, a long period after distribution, and he was not informed of the commencement of proceedings by the Plaintiff. Under the Act, he was entitled to distribute at the conclusion of the period contained in the proviso to Section 37(2) of the Act. Under the ordinary course this would have been 21 days after publication in the gazette unless there had been a land appeal. Under the proviso, the term appeal `taken against such decision of the Nauru Lands Committee' is a reference to an appeal on realty under the Nauru Lands Committee Ordinance and has no reference to personalty. That is clear enough from the decision, earlier referred to in Detamaigo v Demaure. The Curator may well have made inquiry but the fact that he did not, given the circumstances and delay, is far from indicating a wilful or reckless disregard of duty that may have been expected from an honest and reasonable man. There was no evidence of dishonesty advanced and it was not until a request came from the beneficiaries some sixteen or seventeen months later that he made the distribution.

There is, no doubt, that the lack of activity and long delay by the Plaintiff in both joining and injuncting the Curator was the prime factor in enabling the Curator to act without knowledge of the position. I do not find the Curator liable as a constructive trustee.

49. The money in the bank accounts was distributed to the five beneficiaries of the estate and the Plaintiff who was entitled to an equal portion with the beneficiaries. Could the beneficiaries as 'knowing recipients' be liable, and could the money be traced to each of them?

50. Liability for 'knowing receipt' does not depend on the existence of any dishonest or fraudulent design on the part of the person who misapplied the property. (see Polly Peck International v Nadir and others (No. 2) [1992] 4 All ER 769 at 777.) However, the recipient must have had some knowledge that these were trust funds whether by actual knowledge or with knowledge of such facts which would have put an honest and reasonable man on enquiry. It must be remembered that the Defendant beneficiaries who are the recipients were already Defendants in this case before the Curator had distributed the funds and before the Curator was joined in the suit. In fact, the evidence was that he had ultimately distributed upon a request of the Defendant beneficiaries. The matter of the claim by the Plaintiff was before the Court with the involvement of the Defendants when the distribution took place. It may not be difficult, therefore, to draw the conclusion that the recipients acted will full knowledge not only of the claim but also with knowledge of the facts both at the NLC and thereafter that could have put 'an honest and reasonable man on enquiry'.

Unjust Enrichment

51. There is a further matter connected closely with the funds the subject of the case. Where it is clear that the funds in the bank accounts were held by the deceased as a constructive trustee, and found their way to persons who were not entitled under the trust, then there is a question whether these persons were unjustly enriched and were liable to make restitution to the beneficiary under the trust.

52. As Lord Wright said in Fibrosa Spolka Akcyna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122 at 137, 'the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment, aided by the various methods of technical equity which are also available'. The High Court of Australia has been expansive of this notion more recently in David Securities Pty Ltd and Others v Commonwealth Bank of Australia 109 ALR 47, (1992) 175 CLR 353, in which it was determined that a mistake, whether of fact or of law, is a factor which can make an enrichment

unjust or unjustified. The emphasis is on enrichment and not on any narrow principle embodying the type of mistake.

53. In Pavey v Mathews (1987) 162 CLR at 256-7, 69 ALR at 604, Deane J., in analysing unjust enrichment, he said, "it constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case." Recovery, indeed, depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality (see David Securities 109 ALR 57 at 75).

54. I hold that the beneficiaries of the estate of the deceased, apart from the Plaintiff, have been unjustly enriched by the distribution by the Curator of the funds in the bank accounts, to the extent that they were the subject of a constructive trust, the subject of this case, such distribution brought about whether by a mistake of law or a breach of fiduciary duty.

The Defences

55. However, there are defences to such a restitution of property. The first, particularly with reference to unjust enrichment is where the recipients of the funds have changed their position in good faith since the distribution. Such a defence was spelt out in the House of Lords decision Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548, [1992] 4 All ER 512 at 513. If, indeed, the position had been changed then it would be inequitable to require the Defendants to make restitution, or alternatively full restitution. But it should be noted that the defence is not open to a Defendant who has paid away the money with knowledge of the facts entitling the Plaintiff to restitution, or who has simply spent the money, in whole or in part, where such expenditure might have been incurred in the ordinary course of events.

56. Furthermore, in the question of the constructive trust, a Defendant would have the opportunity of putting a defence of laches. Laches is available where it can be demonstrated that there was unreasonable delay on the part of the Plaintiff in the commencement or prosecution of proceedings, and, secondly, in view of the nature and consequences of that delay it must be unjust in all the circumstances to grant restitution whether absolutely or on appropriate terms and conditions. (Spry on Equitable Remedies 6th Edition p.431.)

Custom and Adopted Laws Act 1971

57. Under the Custom and Adopted Laws Act 1971, Section 4, Sub-sections (1) and (2), the principles and rules of the common law and equity in force in England on 31 January 1968 were adopted in Nauru. By Section 4(4) of that Act, principles of the common law and equity adopted by Section 4, Sub-sections (1) and (2) may from time to time in their application to Nauru be altered and adopted by the Courts to take account of the circumstances of Nauru, and of any changes of those circumstances of Nauru, and of any alterations or adaptations of those principles and rules which may have taken place in England after the 31st day of January 1968. However, a principle or rule of the common law or equity adopted shall not be altered or adopted in its application to Nauru unless the Court which makes the alteration or adaptation is satisfied that the principle or rule so altered or adopted will suit better the circumstances of Nauru than does the principle or rule without that alteration or adaptation.

58. In the view of the Court, there is nothing in this judgment, with one exception, which requires an alteration or adaptation of a principle or rule of common law or equity. The possible exception is the common law rule precluding recovery of moneys paid under a mistake of law. On this question, this Court, consistently with many common law jurisdictions and presently accepted practice, declares that moneys paid under a mistake of law will not necessarily preclude recovery of moneys so paid and that it is satisfied that it better suits the circumstances of Nauru that the common law rule so described above, forms no part of the law of Nauru. Henceforth, moneys paid by mistake whether of fact or law may be recovered.

59. In this case, whether the payments made by the Curator arose from a mistake of law or fact may be arguable, but, in any event, as found by the Court, such payments also constituted a breach of fiduciary duty and were thus tainted with illegality.

Conclusion

60. In his amended statement of claim the Plaintiff sought various remedies by way of a Declaration. As disclosed in the judgment, I am not prepared to saddle either the Nauru Lands Committee or the Curator of Intestate Estates with liability. Apart from the moneys claimed in bank accounts 15167-81 and 15167-31, there was no credible evidence provided to the Court regarding monetary losses in respect of the Australian property. However, it was clear that moneys in the two bank accounts, the main subject of the case, were distributed to the beneficiaries of the estate and the plaintiff in equal portions of one-sixth. I have held that these moneys, in whole or in part, were the subject of a constructive trust and that the persons to whom distribution took place were knowing recipients. I have also held that the persons to whom the moneys were distributed

other than the Plaintiff were unjustly enriched and that these moneys may be the subject of restitution.

61. However, probably because of the way the matter was argued and presented to the Court little attention was paid by defendants two through six to the defences open to them regarding change of position and a plea of laches. Indeed before any order of this Court can be made it would be inequitable were such an opportunity to be denied.

62. I have, therefore, determined that the suit be returned to the Court for further argument which will be confined to specific questions which I outline below. Argument will not be required from the first or seventh Defendants though they may, of course, be present at the bar table if they wish but would only be entitled to intervene on the question if given leave by the Court.

63. The issues to be the subject of evidence and argument are -

i. Whether all or only part of moneys that were contained in bank accounts 15167-81 and 15167-31 were the subject of the constructive trust.

ii. Whether restitution should be denied in full or in part because of unreasonable delay in commencement or prosecution of proceedings.

iii. Whether the second, third, fourth, fifth, sixth ~~and seventh~~ Defendants changed their position, singly or collectively, on the faith of receipt of the payments from the Curator.

iv. Whether in all the circumstances it would be unjust to grant specific relief whether absolutely or on appropriate terms and conditions.

64. I shall hear the above matters on a date to be fixed by the Registrar after consulting the parties.

Barry Connell
CHIEF JUSTICE

14 April 2004