THE SUPREME COURT OF NAURU

CIVIL ACTION NO. 4/96

BETWEEN: **PATRINA BOTELANGA AND RONALD DEDUNA**

PLAINTIFFS

AND : **NAURU PHOSPHATE CORPORATION**

FIRST DEFENDANT

SECRETARY FOR JUSTICE

SECOND DEFENDANT

Date of Hearing (Submissions) : February-July 1997
Date of Judgment 10th March 1998 :
V. Clodumar for Plaintiffs
Kaierua for First Defendant
Dwivedi for Second Defendant.

JUDGMENT OF DONNE C.J.

This is a claim by the Plaintiffs as part owner of portions 362, 365 and 377 Meneng District praying for relief against alleged unlawful breaches by the Defendants in respect of the leases and occupancy of the leased land.

The portions 362 and 365 are the subject of leases made in 1962 with the British Phosphate Commission. Portion 377 was leased to the Republic in 1986. The particulars and extent of the Plaintiffs' claim is adequately covered in the judgment. The relief sought is:

> "11. A declaration that leases of phosphate bearing lands over portions 362,365 and 377 in the district of Meneng and any rights thereunder:
>
> (a) are void and of no effect, or
> (b) have expired, or
> (c) are unenforceable by the defendants or either of them

12. A declaration that buildings constructed upon the said Lands are the property of the landowners and a declaration that any buildings which have been removed have been removed unlawfully.

13. A permanent injunction preventing the plaintiffs or either of them interfering with the plaintiffs enjoyment of their lands.

14. A permanent injunction preventing the defendants or either of them mining for phosphate upon the said lands other than in accordance with law.

15. A permanent injunction preventing the defendants or either of them removing or demolishing buildings erected upon the said lands other than in accordance with law or the approval of the owners.

16. Such other orders as in the circumstances are considered appropriate.

17. Costs."

This action was commenced in 1996, the amended Statement of Claim being filed in May, 1996. There was a period of inactivity for a considerable period of time until February 1997 when it was agreed

by the parties that no evidence would be necessary and that written submissions would cover adequately the case for all parties. These submissions were completed in July 1997 and they were presented to me at the end of my last Session for my consideration during my period away from Nauru. Unfortunately certain information and references were unavailable to me until my return here. I am now able to conclude my judgment.

I shall deal firstly with the claim in respect of portions 362 and 365 Meneng District and secondly with the claim in respect of portion 377.

The Leases of Portions 362 and 365.

The leases are made between Ategan Bop as lessor and the British Phosphate Commissioners as lessee. They are leases of

"Phosphate Bearing Lands" and entered into on the 24th October 1963. Each lease contains identical terms which (inter alia) provide for: -

1. A payment of a monetary sum and a royalty as consideration for the granting of the lease.

2. The right of the lessee to "remove and retain for its own benefit the Rock and Alluvial Phosphate that may be found" on the leased land.

3. An incorporation therein of the conditions expressed in section 4(a) of the Lands Ordinance 1921-1968.

4. An agreement which reads:

> "It is agreed between the Lessor and the Lessee that the Lessee shall have the right to permit the land to be occupied by the Administrator of Nauru for the purpose of using the said land as a site or sites for permanent buildings or facilities required or related to the usual activities of the Administration of Nauru."

Each lease is made subject "in all respects" to the provisions of "The Lands Ordinance 1921-1968.

The Administrator of Nauru gave an approval to each lease expressed to be in accordance with section 3 of the Lands Ordinance 1921-1968 on the 24th October, 1963. Section 3 of the Ordinance provides:

> "3. - (1) Any person, firm, or company who, without the consent in writing of the Administrator or a person duly authorised by the Administrator to give such consent, transfers, sells, or leases, or enters into any

> contract or agreement for the sale, or lease of, or for the granting of any estate or interest in any land, shall be guilty of an offence and shall be liable to a penalty not exceeding L10 (Ten pounds), or in default, imprisonment for a period not exceeding two months.
>
> (2) Any transfer, sale, lease, contract, or agreement made or entered into, in contravention of this section, shall be absolutely void and of no effect."

I now turn to the question of legality of these leases which is in issue.

The Legality when executed.

As stated therein, the leases were subject to the provisions of the Nauru Lands Ordinance 1921, or as it was known at the time of their execution, the Nauru Lands Ordinance 1921-1956. In that Ordinance, provision is made for the British Phosphate Commission

to lease phosphate bearing lands subject to certain conditions. Section 4(a) of the Ordinance provides:

> "4. Phosphate bearing lands may be leased to the British Phosphate Commissioners (hereinafter called the Commissioners) subject to the following conditions: -
>
> (a) The Commissioners have the right –
>
> (1) to lease any phosphate-bearing land on the Island of Nauru, to mine the phosphate thereon to any depth desired and to use or export such phosphate;
>
> (2) to remove any trees on any phosphate-bearing land leased for mining purposes;
>
> (3) to remove, subject to the approval of the Administrator and the owner, which approval shall not be unreasonably withheld, any trees on any other phosphate-bearing land required by the Commissioners to be cleared for use in

connexion with the operations of the Commissioners;

(4) of way over any unworked, partly worked or worked out phosphate-bearing land required by the Commissioners for or in connexion with the operations of the Commissioners, subject to the approval of the Administrator and the owner, which approval shall not be unreasonably withheld.

The Administrator shall determine what lands shall be classed as phosphate-bearing lands for the purposes of (1), (2), (3) and (4) of this sub-section. ..... "

(the underlining is mine)

My underlining emphasises that leasing of phosphate bearing lands on the conditions referred to in the section, is not mandatory. The provision allows the incorporation of the conditions laid down in

subsection 4(a) but it does not require that leases must incorporate them. In the case of these leases, the conditions are so incorporated by agreement of the parties.

The mandatory provision of section 4 is in subsection (b) which reads:

> "(b) During the period of twenty year commencing on the first day of July, One thousand nine hundred and forty seven, the Commissioners shall –
>
> (i) pay to each landowner from whom phosphate bearing land is leased - ....."

(the underlining is mine)

Briefly, section 4 gives the parties to the leasing of the phosphate bearing lands, the option to incorporate the conditions set out therein. It does not require that they be so adopted. The mandatory requirement of the section relates to the monetary payments prescribed in subsection (b).

To complete the significance of the Ordinance, it should be noted the only other mandatory requirement therein is imposed by section 4A which imposes on the Commissioners, the lessee, to revert to the landowner (lessor) their lands which are not required fo or in connection with the "operation" of the Commissioners.

Having thus considered the leases and the statutory provisions applicable thereto, I am satisfied they were made in compliance with

the law then existing. They were lawfully authorised by the Administrator as is witnessed by his signature endorsed thereon.

The Legality Now.

The Plaintiffs challenge the legality of the leases under the present law. They contend they do not comply with the existing laws of the Republic. By way of further contention, they argue that the leases cannot be enforced by the Nauru Phosphate Corporation since they have never, in law, been assigned to it.

This claim of non-assignment is, I consider, untenable. On the 14th November 1967, an agreement was made preparatory to the attaining of the independence of the Republic on the 31st January 1968. It was made by the governments of Australia, New Zealand

and the United Kingdom, the trustee powers in authority, with the only legal entity then representing Nauruans, the Nauru Local Government Council. The agreement in its terms dealt with the future operation of the phosphate industry on Nauru. It, inter alia, transferred to the Council "the capital assets" of the current operator of the phosphate industry, the British Phosphate Commissioners and required the Council to effect "as soon as reasonably practicable" the establishment of the "Nauru Phosphate Corporation" to take over the industry. The main purpose of the agreement was to give effect to the desire of the parties to ensure the operation of the phosphate industry until the necessary legislative changes to that end were made.

In pursuance of this agreement, the Commonwealth of Australia, the administrative authority of Nauru, by enactment of its Parliament created the Nauru Phosphate Corporation by the Nauru

Phosphate Ordinance 1968, just prior to independence. The Ordinance also gave effect to the said Agreement.

On independence, therefore, the Nauru Phosphate Corporation was a statutory corporation acquired by the Republic, the Nauru Phosphate Ordinance 1968 becoming an "existing law" by virtue of Article 85 of the Constitution.

As stated above, this Agreement transferred the capital assets of the industry operated by the British Phosphate Commission to the Nauru Local Government Council with the requirement that, in turn, the industry would be owned by the new Corporation when it was established. In this way these capital assets became and are assets of the Corporation. Those assets would include all the leasehold interests of the Commission of which the leases here being

considered were part. They have therefore been effectively and lawfully vested in (as apposed to assigned) in the Nauru Phosphate Corporation which is entitled to the benefit and subject to the obligations accruing therefrom and I so hold.

The legality of these leases, in my opinion, cannot be challenged. They were valid and legally enforceable at the time they were entered into. They complied with the legislation then applicable, the Lands Ordinance 1921-1956. That Ordinance was inherited by the Republic as an "existing law" and although it was repealed by Lands Act 1976, that repeal does not in any way alter the position as to the present legality of the leases. It is trite law that the repeal of an enactment does not affect the exercise of a power or interest lawfully undertaken pursuant thereto prior to the repeal unless such undertaking is expressly repealed thereby or a contrary intention as

to its validity is expressed in the repealing enactments – see section 14(i) (c) and (d) Interpretation Act 1971.

The Plaintiffs, however, raise the issue of compulsion of landowners and, in particular, the lessor here, by the law then in force, to lease to the British Phosphate Commissioners. It is not clear what is claimed would flow from such a finding. Nevertheless, it is a serious plea and it must be addressed. I am not able on the case as presented to me, to find any facts which could support such a conclusion. The Land Ordinance (supra), they say, in its terms, provided for compulsory alienation requiring phosphate rock to be mined for the Commission. In my view, that submission cannot be sustained. To the contrary, the Act would appear to protect Nauruans from alienating land contrary to their interest. No obligation could be effected without the authority of the Administrator of Nauru (sec. 3). Leasing of land for other purpose of phosphate mining is not

compulsory (sec. 4). The only compulsory requirements in the relevant legislation applicable are imposed on the lessee (sec. 4(b) and 4A). I should also add that, from my observation of the execution of these leases, I was impressed by Mr. Bop's signature and the fact that no interpreter was required to assist in the leasing procedure. Mr. Bop would seem to be a gentleman fully aware of what he was doing and of agreeing without compulsion.

The Effect of the Leases.

There is given in the leases the right to the British Phosphate Commissioners to mine the phosphate on the leased lands and, in addition, there is the right for them to permit the Administrator to occupy them (supra). This, the Plaintiffs argue, cannot lawfully be done in leases of phosphate bearing lands. They rely on section 4 of the Land Ordinance 1921-1956 (supra).

I accordingly hold, for the above reasons, the leases are valid and can be applied in accordance with the terms and conditions therein contained.

Section 8 Lands Act 1976.

The Plaintiffs raise section 8(2) of the Lands Act 1976 in support of their plea that these leases have expired by powers of law at the expiration of 5 years after they had been assigned to the Nauru Phosphate Corporation instead of in the year 2000 as provided therein.

The relevant parts of section 8 of the Lands Act in a consideration of this submission are:

> "8. (1) Where land is leased to the Corporation, whether the lease is executed before or after the commencement of this Act, for the mining of phosphate on that land, the Corporation shall, in the absence of express provision to the contrary in the lease be entitled to - .....
>
> (2) Where land has been leased to the Corporation for the mining of phosphate on that land, the lease shall expire on the first anniversary of the day on which the mining of phosphate thereon is completed or on any earlier date notified by the Corporation in the Gazette not less than one month before that date, and in any event not late than five years after the date of the execution of the lease.
>
> (3) ..... "

Subsection 2 is poorly drafted and it is difficult to ascertain with certainty, from a reading of it, the intention of Parliament. The opening words "where land has been leased" could, arguably, allow

an interpretation that the subsection was intended to apply to all leases to the Corporation irrespective of when they were entered into.

The subsection, however, cannot be considered in isolation. Section 8 must be read as a whole. Its structure provides the key to its interpretation. Subsection 1 is expressed to apply to leases "to the Corporation whether the lease is executed before or after the commencement of the Lands Act". The leases to which subsection 2 apply are not so categorised. It is my view, this difference clearly indicates that it was intended that the subsections applied to different classes of leases. If that were not so, the leases would be described in identical terms in both subsection. I am satisfied, therefore, that the leases the subject of subsection 2 are those which are made after the commencement of the Act. The leases in this case being entered into before the commencement of the Lands Act 1976 are not subject

to provisions of subsection 2 of section 8 of the Act.

I am also of the view that subsection 2 was included in the Lands Act to replace section 4A of the repealed Lands Ordinance 1921-56.

Laches.

The Defendants have raised the defence of laches and, while I have held the leases, in law, are valid, I would add that, in my view, that defence could have been successfully raised had the pleas of the Plaintiffs as to compulsion and adverse occupation by the Administrator been of substance. Both of these pleas were available and any action in respect of them arose at the time the leases were entered into over 35 years ago and action by the lessor would have

then been available. A plea of laches in such circumstances is certainly a sustainable one.

The Lease of Portion 377

This lease was entered into on the 21st March 1986. The land leased is Phosphate Bearing Land and it is leased to the Republic. The lessors are Eiwita and Others. There is no dispute as to their right as owners of the land nor the right of the Plaintiffs to sue as part owners. The relevant provisions in the lease are:

"PURPOSE OF LEASE	Domaneab weaving hut, Kitchen and other State house facilities for State function.

COMMENCEMENT	On approval of this lease by His Excellency the President.
EXPIRY	The 31st day of December, 1999 or until the Lessee no longer requires the land for the above purpose, in which case the lessee shall give to the Lessors one calendar month's notice in writing of intention to discontinue the lease upon the expiration of which the lease shall cease and determine."

The lease contains no right of re-entry. It was approved by the President. No notice has been given by the Lessee (the Republic) to

terminate the lease in the terms of the above provision relating to "Expiry".

The Legality of the Lease.

The significance of this lease is that it is of phosphate bearing land which is not worked out. As such it is subject to the provisions of section 9 of the Lands Act 1976. It is a valid lease.

The Applicability of the Lease.

The Plaintiffs' case is that the lease was for the specific purpose stated in the section "Purpose of Lease" in the document (supra). They argue that if the land ceases to be used for that purpose, the lease should be terminated. An order to that effect is not sought in these proceedings.

I am satisfied that the provision in question "Purpose of Lease" contains a binding condition as to the permitted use thereof, the breach of which could probably entitle the lessors to an award of damages. The lease is clear and unequivocal and although the land is phosphate bearing, there does not flow from that status any right in the Republic to mine it or grant to any other person that right.

It should also be said that, if the land being leased for a specific purpose, is used by the lessee for any other purpose, such use can be restrained by injunction. **Kehoe v Marquess of Lansdowne** (1893) A.C. 481. Clearly, of course, there would be need for a claim to that effect.

CONCLUSION.

This judgment has considered the legality of all the leases in question and ruled thereon.

However there are two questions which, I consider, cannot be the subject of final adjudication without the taking of evidence. The first concerns the allegation of waste and the other the position in relation to fixtures on the leased lands. Bearing in mind that the leases are all valid and their respective terms still enure, if action in request of fixtures or user are to be sustained at this time, the Court must hear first evidence as to the present position before it can adjudicate thereon.

I accordingly adjourn this matter for the parties to consider whether they desire evidence to be adduced on these matters.

It seems appropriate to observe that, with the shortness of the terms remaining in all the leases, it seems obvious that the parties could usefully discuss the future course of the proceedings with a view to settling the remaining issues.

If settlement is not possible, the parties (or any of them), should apply to the Court for a fixture for final adjudication of this action.

CHIEF JUSTICE

Solicitor for the Plaintiffs	:	V. Clodumar, Nauru
Solicitor for First Defendant	:	Robert Kaierua, Nauru
Solicitor for Second Defendant:		The office of the Secretary for Justice, Nauru

Mr. Registrar
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