IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Case No.28 of 2012

CLARA AGIR

Plaintiff

V

DANIEL AEOMAGE and Others — 1st Defendant
NAURU LANDS COMMITTEE — 2nd Defendant
CURATOR OF DECEASED ESTATES — 3rd Defendant

JUDGE:	Eames, C.J.
DATES OF HEARING:	6-7 June 2012
DATE OF JUDGMENT:	31 July 2012
CASE MAY BE CITED AS:	Clara Agir v Daniel Aeomage and Others
MEDIUM NEUTRAL CITATION:	[2012] NRSC 14

CATCHWORDS:

Judicial Review – Appeal - Distribution of personalty of intestate Nauruan – *Nauru Lands Committee Act* 1956 ss.6 and 7 – Whether Nauru Lands Committee solely exercising customary law power when determining distribution of personalty estate of deceased, insofar as it comprises rental and Ronwan payments derived from land held on Life Time Only (commonly referred to as "LTO") basis – Whether right of appeal against decisions as to rights in respect of Ronwan and rental monies - *Giouba v NLC; Agir v NLC* [2011] NRSC 7 reconsidered.

Intestate Estates - Personal property - Whether estate of deceased includes Ronwan and rental payments falling due to deceased from land held on Life Time Only basis but not paid until after death – Whether payments received after death revert to the beneficiaries of the land, being the "blood family" of the former spouse of the deceased - Whether such payments remain part of estate of deceased, to be distributed to nearest family of deceased- Relevance of *Administrative Order No 3 of 1938* and *Succession, Probate and Administration Act*

1976 ss. 3(2), 15-16.

Life Time Only principle – Scope of the Life Time Only principle - *Administrative Order No 3 of 1938* – Whether the Life Time Only principle applies to personalty or only to land – "Fruit of the land" – *Nauru Phosphate Royalties Trust* Act 1968 ss.19(6)(9)(10) – Whether statute overrides or modifies power of Nauru Lands Committee to follow Life Time Only principle with respect to outstanding Ronwan payments delayed until after death of Life Time Only holder.

APPEARANCES:

For the Plaintiff	Mr R Kun (Pleader)
For the 1st Defendant	Mr D Aingimea (Pleader)
For the 2nd and 3rd Defendants	Ms L Lo Piccolo (Secretary for Justice)

CHIEF JUSTICE:

1 The plaintiff, Clara Agir, has applied for judicial review of a determination of the Nauru Lands Committee concerning her right to inherit the personalty estate of her late mother, Augusta Harris, who died, intestate, on 13 May 2006. Leave to bring this action was granted pursuant to Order 38 of the *Civil Procedure Rules* 1972, and the plaintiff commenced the action by writ of summons seeking relief including by way of certiorari or declarations.

2 In earlier proceedings, No 4 of 2011[1], the plaintiff had sought to appeal against the determination, pursuant to s.7 of the *Nauru Lands Committee Act* 1956 ("the Act"). In a preliminary ruling I expressed what I said was a tentative opinion that in making decisions about the distribution of personalty the Nauru Lands Committee was solely exercising a customary law function. I also opined that s.7 of the Act did not grant a right of appeal with respect to decisions of the Nauru Lands Committee concerning personalty, the right of appeal being confined to decisions as to land. I invited further submissions on those issues. As I shall discuss, upon re-consideration of those questions I do not maintain my tentative opinions.

3 It is regrettable that the plaintiff was obliged to bring these proceedings in lieu of continuing her appeal, but she will not be prejudiced in the outcome, since in these judicial review proceedings I have concluded that the decision of the Committee was wrong and should be quashed.

The scope of the dispute

4 The issues raised by this case are complex and affect very many people in the Nauruan community. Although the appeal relates to a determination concerning personal estate, it emerged that the disagreement between the parties concerns only

[1] The preliminary issue was considered jointly in two appeals: *Giouba v Nauru Lands Committee*; *Agir v Nauru Lands Committee* [2011] NRSC 7. The other appellant, Ms Giouba, subsequently brought proceedings for judicial review on which she succeeded, the Committee's decision being quashed: *Giouba v NLC and Alfonso Hartman* [2011] NRSC 23.

the entitlement to particular types of personalty, namely, rents and royalty payments that flow from land (in particular, Ronwan payments[2]). There is no dispute concerning the plaintiff's entitlement to inherit the balance of the personalty estate - such as chattels or cash - that formed part of the estate of the deceased at the date of her death.

5 Furthermore, the dispute concerns only royalties and rents that arose from land that Augusta Harris held on a Life Time Only basis. There is no dispute that the plaintiff inherited beneficial interests in some land that had been held outright by her mother, and that she was entitled to royalties that flowed from that land.

6 Finally, there is no dispute that with respect to her mother's Life Time Only land the plaintiff was entitled to inherit whatever money remained from Ronwan and rental payments that had fallen due to her mother and had been paid to her while she was alive.

7 The issue in dispute is whether the estate of the deceased should be regarded as including such payments of Ronwan royalties (and rent, although that was not of direct relevance here) that fell due to the plaintiff's mother from her Life Time Only land during her lifetime but which had not actually been paid before her death.

8 The background to the present dispute needs brief elaboration.

9 Due to the financial crisis that befell Nauru, the Government, Ronphos and the Nauru Phosphate Royalties Trust were unable to ensure that Ronwan royalty payments that fell due were paid in a timely manner. Delays of up to seven years occurred, with the result that some Life Time Only holders did not receive their due payments during their life time. In the case of Augusta Harris, she missed out on payments that were due to her in 2004 and 2005. Funds to make those payments finally became available in 2011. The 1st defendants submit that those payments should be made to those persons (including themselves) who were the beneficial

[2] The determination was limited to personalty that consisted of "Income" comprising "All monies, rentals, Ronwan interests (if any)". In this case the only item as to which I heard submissions was Ronwan interest.

owners of the lands that had been held by Augusta Harris on a Life Time Only basis. The plaintiff's entitlement, they submitted, was confined to so much of the balance of the royalties and rents as had been paid to Augusta Harris before her death and remained in her estate at the date of death.

10 That result is claimed to be consistent with Nauruan custom concerning the rights and restrictions attached to Life Time Only interests, as interpreted by the Nauru Lands Committee. The Nauru Lands Committee believed that it was following that custom when it made its determinations as to the distribution of the personal estate of Augusta Harris. It believed, too, that that custom was also dictated by *Administrative Order No 3 of 1938.*

Administrative Order No 3 of 1938

11 *Administrative Order No 3 of 1938* ("the 1938 Order") was titled "Regulations governing Intestate Estates". It is still in effect. It was promulgated pursuant to power given to the Administrator by s.3 of the *Native Administration Ordinance* 1922-1967. That gave power to make regulations, inter alia, regarding:

> "(b) the succession to property in case of intestacy;
>
> (d) the rights to real and personal property."

12 The 1938 Order states that it deals with "the division of property of the deceased", which division "shall include all real and personal property".

13 By par (1) the "Chief of the District"[3] was required to "make a list of all property of the deceased". Paragraph (2) provided that "the distribution of the property shall be decided by the family of the deceased person, assembled for that purpose".

14 In the event that the family members were unable to agree then par (3) set out the principles that should be followed in resolving the question. Under three sub-paragraphs those principles addressed the cases where the deceased was unmarried,

[3] This role was later taken by the Lands Committee, and then the Nauru Lands Committee: see *Ralph Eoe v James Bop and Hiwata Adimim* Land Appeal No 18,19 of 1972, 16 February 1973, per Thompson C.J.

married but without children, and married with children.

15 As has been remarked many times in judgments of this Court, the terms of the 1938 Order are somewhat confusing[4]. The Life Time Only principle is most clear in paragraphs (3)(b) and (c), but for convenience I set out all sub-paragraphs in par (3):

> "(3) If the family is unable to agree, the following procedure shall be followed:
>
> (a) In the case of an unmarried person the property to be returned to the people from whom it was received, or if they are dead, to the nearest relatives in the same tribe;
>
> (b) Married - No issue – the property to be returned to the family or nearest relatives of the deceased. The widower or widow to have the use of the land during his or her lifetime if required by him or her";
>
> (c) Married – with children – the land to be divided equally between the children, and the surviving parent to have the right to use the land during his or her lifetime. When an estate comprises only as small area of land the eldest daughter to receive the whole estate and other children to have the right to use the land during their lifetime".

16 The 1938 Order has not been repealed and has been long accepted to govern the Nauru Lands Committee, which came into existence in 1956, just as it governed the former Lands Committee. The existence of that predecessor committee is recognised by the *Nauru Lands Committee Act* 1956 (s.8).

The competing parties

17 The deceased, Augusta Harris, outlived three husbands. Upon the death of her first husband, Kiki Bededoun, with whom she had no children, she gained a Life Time Only interest in many allotments of land, pursuant to the principles governing the distribution of his estate as set out in paragraph (3)(b) of the 1938 Order. Kiki Bededoun had many children from an earlier marriage. As provided by par (3)(b), upon the death of Kiki Bededoun the beneficial interest in the lands over which his widow Augusta Harris gained her Life Time Only interest, was "returned" to "the family or nearest relatives" of the deceased, i.e. Kiki Bededoun (known in Nauruan

[4] See, for example, the *Children of Eirenemi Samson v Eirowida Anbiat* [1968-1982] Nauru Law Reports, Part B, 115 at 119, per Thompson C.J., 3 May 1974; *Rubenit Dekarube & Others v Agieroudi & Others*, [1969-1982] Nauru Law Reports part B, 134 at 138, per Thompson C.J. 15 January 1975.

terms as his "blood family").

18 In her second marriage, to Robert Tamakin, Augusta Harris had one child, the plaintiff, Clara Agir[5]. Robert Tamakin also had children by a previous marriage. Upon the death of Robert Tamakin, paragraph (3)(c) of the 1938 Order applied. I highlight its opening sentence:

> "(c) Married – with children – the land to be divided equally between the children, and the surviving parent to have the right to use the land during his or her lifetime. . . ."

19 Thus, on the death of Robert Tamakin, Clara Agir became a beneficiary of his land, but she shared that with his other children. Her mother, Augusta Harris, gained only a life time interest in that land.

20 Augusta's third marriage produced no issue, and her husband died without any estate to distribute, so that marriage has no relevance to the present case.

21 The 1st defendants were the blood family of Kiki Bededoun and of Robert Tamakin.

22 Upon the death of Augusta Harris, her Life Time Only interest in those allotments ceased. The beneficial interest in her Life Time Only land reverted to (or remained with) the two families from whom the Life Time Only interest arose, namely, the blood family of Kiki Bededoun and Robert Tamakin. This is known as "the Life Time Only principle", and I will refer to it as such. The question in this case is whether the Life Time Only principle applies to personal estate, not just real estate.

The Determinations

23 On 16 April 2008 the Curator of Deceased Estates published in the Government Gazette a purported determination, GN No 155/2008, as to the rights to distribution of the personal estate of Augusta Harris. That determination was not tendered, but it seems that it named the plaintiff as having the sole interest in the personalty estate.

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[5] Clara was adopted but there is no dispute that she thereby gained the same rights as she would have had as a natural child: see *Eidawaidi Grundler v Eibaruken Namaduk & Others*, Land Appeals Nos 14/1972, 8/1973, 8 May 1973, per Thompson C.J.

In so concluding, the Curator had regard to the decision that was shortly to be published by the Nauru Lands Committee concerning the beneficiaries of land owned outright by Augusta Harris.

24 Thus, the Nauru Lands Committee published in Government Gazette No 54 of 14 May 2008 a determination, being GN No. 217 of 2008, as to the real estate of Augusta Harris. It listed many allotments that were owned outright by Augusta Harris and named the plaintiff, Clara Agir, as the sole beneficiary of that real estate.

25 Then, in Gazette No 60/2008 published 28 May 2008 the Committee published a determination, GN No.234 of 2008, which set out the lands of Augusta Harris on which she held a Life Time Only interest. In that determination the Committee identified the persons to whom the beneficial interest in those lands had to be returned, upon cessation of the Life Time Only interest. For some of those lands Clara Agir was named as a beneficiary sharing an interest with others, and there were many other people named as beneficiaries, comprising an apparently incomplete list of blood family of Kiki Bededoun and Robert Tamakin.

26 As is now accepted on all sides, the Curator had no power to make his determination as to personalty. In 2010 the family of Kiki Bededoun issued proceedings against the Curator and he subsequently published a withdrawal of his determination. The intervention of the Curator is no longer of any relevance to the present proceedings, but is referred to only by way of explanation for delays that occurred and confusion that surrounded the administration of this estate.

27 This brings us to the determination which the plaintiff now seeks to have quashed.

28 In Government Gazette No.14 of 9 February 2011 the Committee finally addressed the personalty estate, as was its responsibility under the 1938 Order. On that day it published Determination No. 76 of 2011. The list of named beneficiaries of the personalty estate, some fifty people, comprised a large number of blood relatives of Kiki Bededoun and Robert Tamakin, all of whom were said to have an entitlement to personalty arising from the Life Time Only land that Augusta Harris obtained from

the estates of Bededoun and Tamakin. Clara Agir was named as gaining only a one sixth share in personalty, limited to the Life Time Only land that derived from Tamakin. She was not granted any entitlement to personalty that derived from the Life Time Only land that her mother had gained through Kiki Bededoun.

The 2011 Determination as to personalty

29 Determination GN No.76/2011 specified that the personalty it dealt with was "Income" comprising "All monies, rentals, Ronwan interests (if any)".

30 That determination announced that the Committee "hereby revokes Gazette No.60/2008 Re Augusta Harris Personalty Estate 2008". That was a somewhat confusing statement, since the Committee purported thereby to revoke the entire Government Gazette. Most likely, it was referring to the determination that the Nauru Lands Committee published in that Gazette, being GN No 234 of 2008. That, however, was a determination as to the beneficiaries of the land of Augusta Harris (i.e the Life Time Only land), not her personalty. There is a good deal of force in Mr Kun's complaint that the Committee was addressing both land and personalty issues in a confusing manner.

31 In any event, GN No 234/2008 had listed a large number of allotments of land held both outright by Augusta Harris and as on a Life Time Only basis. It had also listed a large number of beneficiaries of those lands (the plaintiff being one among the many), but the number of beneficiaries of personalty listed now in the 2011 Determination was much larger than the list of beneficiaries of former Life Time Only lands that had been published in the 2008 Gazette.

32 The issues I must now resolve, however, do not require me to explore the correctness of the list or any discrepancies as to those named as blood relatives of Kiki Bededoun or Robert Tamakin, or the shares to which they might have been entitled. The broader question is whether, whoever they be, the blood relatives gained the right to share all Ronwan payments that are received after the death of Augusta Harris, even if her right to payment arose prior to her death.

33 With consent of all parties, the Chairman of the Committee, Mrs Tyran Capelle, gave evidence before me. She told me that the Committee had decided that the beneficial owners of land from which the Life Time Only interests had derived should also receive any Ronwan payments for those lands made after the Life Time Only holder died. That was to be so even if the payments had fallen due before death but been delayed until after the death of the Life Time Only holder.

34 It is clear from the evidence of Mrs Capelle that the Determination was intended to have the effect that any Ronwan payments received after the death of Augusta Harris were to be shared by all those named in GN No. 76/2011, being (mostly) blood relatives of Bededoun and Tamakin. This was to be the result even if the payment had fallen due before death. The Committee intended that result, believing that in doing so it was appropriately applying the Life Time Only principle which, it believed was applicable both to land and personalty. That outcome, the Committee members believed, was not only what customary law dictated but was also dictated by the terms of the 1938 Order.

Distributing personalty: solely a matter of customary law?

35 As noted earlier, I had tentatively opined that in dealing with personal estate the Nauru Lands Committee was not exercising statutory power but was guided solely by its interpretation of customary law. I had also concluded, tentatively, that any decisions made on customary grounds about personalty were not subject to appeal to the Supreme Court under the *Nauru Lands Committee Act* 1956. On reflection, and after hearing further submissions, I consider that my tentative opinions as to both matters was correct only with respect to a particular category of personalty, such as chattels and cash, that were in the estate of the deceased at the time of her death.

36 The *Nauru Phosphate Royalties Trust Act* 1968 draws a distinction between the Trust Fund into which royalties for phosphate are paid, on the one hand, and Ronwan Interest, being interest earned on the capital in that fund[6], on the other hand. The

[6] See s.19, as discussed later in this judgment.

interest of a beneficiary of the fund who is a land owner is deemed to be an interest in the capital held in trust. This is categorised by the Act as "real property". Ronwan Interest paid to a beneficiary in line with their beneficial interest in the capital, is deemed "personal property". Notwithstanding those distinctions, I am now persuaded that the *Nauru Lands Committee Act* 1956 does empower the Nauru Lands Committee to make determinations concerning the distribution of personalty comprising Ronwan interest payments.

37 That is so because questions concerning rights of an Life Time Only holder to payments of Ronwan interest (and, even more clearly, rental payments) would fall within the plain words of s.6(1) of the Act[7], being questions concerning "rights in respect of land"[8].

38 It follows that since the Committee can make decisions as to those matters, there is also a right of appeal, since s.7(1) provides that right to any person "dissatisfied with a decision".

39 It also follows that there could be no doubt that in making determinations concerning personalty the Nauru Lands Committee, a public body exercising statutory power, is also open to judicial review.

40 Thus, there is legislative direction as to the Committee's determinations concerning those types of personalty with which the present case is concerned. That legislative guidance is given both by statute - the *Nauru Lands Committee Act* – and by subsidiary or subordinate legislation - the Regulation titled *Administrative Order No 3 of 1938* (which was enacted pursuant to powers given to the Administrator by the *Native Administration Ordinance 1922).* In addition, as I shall discuss, there are significant provisions in the *Nauru Phosphate Royalties Trust Act* 1968 and some additional, albeit limited, guidance is provided by the *Succession, Probate and*

[7] *Project Blue Sky Inc v Australian Broadcasting Authority* (1976) 135 CLR 616, at 619.
[8] At common law a 'royalty' is a payment received by a taxpayer as owner of a property in return for the exercise of some right by another in connection with that property: *Stanton v FCT* (1955) 92 CLR 630 at 642. That includes taking some substance out of the land of the taxpayer; *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480. See *Halsbury's Laws of Australia* "Taxation and Revenue/Income from Property/Royalties", Lexis Nexis, [405-2505].

Administration Act 1976.

41 The *Nauru Lands Committee Act* provides little, if any, guidance to the Committee as to what principles or procedure it should follow. Some guidance, albeit confused and uncertain, is given to the Committee by the *Administrative Order No 3 of 1938*.

42 As is clear from its opening terms, the 1938 Order was intended to apply to both "real property" and "personal property" of an intestate Nauruan. It was intended to set out principles that conformed to customary practices that applied in Nauruan society.[9]

43 Paragraph (2) of that regulation provided that the distribution of "the property" was to be decided by "the family of the deceased", assembled for that purpose. I will deal later with an argument raised by the plaintiff concerning the failure to call a meeting to consider personalty.

44 I am satisfied, however, that even when exercising customary power the Committee is governed by the provisions of the above legislation, to the extent that the terms of the legislation provide guidance.

Legislative guidance for Customary law decisions concerning personalty.

45 Paragraph (3) of the 1938 Order provided that it was only "if the family is unable to agree" that the principles in the paragraph were to be applied by the then Lands Committee. Mr Aingimea submitted, however, that "the family of the deceased" were not given unfettered power by par (2) to determine the distribution of property. He submitted that not only the family but also both the former Lands Committee and the Nauru Lands Committee were obliged to follow what he said were the Life Time Only principles set out in paragraph (3), particularly in sub-pars (b) and (c).

46 Sub-paragraphs (3)(a) and (b) set out principles as they affected "the property" of the deceased (which would include personal property). However, par (3)(c) expressed

[9] For example, see the discussion in *Eidawaidi Grundler v Eibaruken Namuduk,* Land Appeals Nos 14 of 1972 and 8 of 1973, 8 May 1973, per Thompson C.J.

principles only as to "the land". That paragraph said nothing about personalty, and did not use the words "the property".

47 Mr Aingimea submitted that the failure to use the word "property", rather than "land", in par (c), was a mere draftsperson's slip. In any event, he submitted, the Committee was right to conclude that personalty was to be dealt with by reference to the same principles that governed Life Time Only land. In other words, personalty which derived from Life Time Only land reverted back to those persons who were the beneficiaries of that land immediately upon the death of the Life Time Only holder.

48 Thus, he submitted, where the Life Time Only land derived from the estate of a married person who had died without issue, then par (3)(b) directed the personalty was to revert to the family who held the beneficial interest in the land, from which the Life Time Only interest derived. Where the Life Time Only interest was in respect of land that had been owned by a married person with children, then Mr Aingimea submitted that par (3)(c) stated a principle that was intended to apply both to land and personalty, even though it did not specifically mention personalty.

49 In my opinion, paragraph (3)(b) should be read as stating that upon the death of Augusta Harris both her real property (excluding, of course Life Time Only land) and personal property was to be returned to her "family or nearest relatives"[10]. The terms of (3)(b) seem to me to be consistent with a direction that personal property, both in existence and due to the deceased at the time of her death, were to be given to her immediate family, i.e the plaintiff, Clara Agir. In the case of Augusta Harris' Life Time Only land, that would be returned on death to the blood family who held the beneficial interest in the land from which derived the Life Time Only interest. That result flowed from applying par (3)(b) to the estate of Kiki Bededoun, not that of Augusta Harris.

[10] I did not hear argument as to who might constitute "the family of the deceased person", the "family or nearest relatives of the deceased", or "the children", as those terms are used in the 1938 Order. Those terms have been the subject of interpretation by this Court, but no cases were cited to me, nor did I receive submissions as to whether any or all of the blood relatives of Augusta Harris's spouses might meet those descriptions.

50 Upon Kiki Bededoun's death, Augusta Harris gained Life Time Only interests in his land, which carried with them her right to receive royalties and rents from that land. Par (3)(b) provided, in effect, that the beneficial interest in his land went to his blood relatives. His personal property also went to his blood family, but that would not have comprised the royalties to which Augusta, alone, would become entitled during the term of her life time interest. As to whether she had a right to Ronwan Interest paid after her death, (3)(b) said nothing or, at least, nothing that clearly pointed one way or the other. The use of the word "returned" does not help resolve the question. Ronwan payments due and paid to Augusta during her lifetime were not the property of Kiki Bededoun, and nothing in the sub-par suggests that her estate should be denied the right to receive payments that fell due to her during her lifetime.

51 Thus, I do not read par (3)(b) as supporting the extension of the Life Time Only principle to personalty in the way sought by Mr Aingimea.

52 As to par (3)(c), the use of the word "land" rather than "property", means that, in terms, the paragraph does not deal with personalty at all. If, however, it was intended to do so (and I am not required to decide that question), then the reference to "the children", rather than "the family" or "the family or nearest relatives", might support the interpretation adopted by the Nauru Lands Committee in its determination as to personalty. The Committee determined that personalty relating to Augusta Harris' Life Time Only land that she gained through Robert Tamakin's estate, was required to be shared by Clara Agir with her half-siblings, the children of Robert Tamakin.

53 However, whether or not paragraph (3)(c) applied to personalty, and whether or not it meant that both siblings and half siblings were entitled to share in the personalty from the land that had been held on a Life Time Only basis by Augusta Harris, that would not decide the question whether the children gained rights to Ronwan Interest that had been due during the lifetime of Augusta Harris but was only received after her death.

54 Thus, even if par (3)(c) was accepted to apply to personalty, and not just to land, that does not provide support for Mr Aingimea's contention that the personalty must include such Ronwan payments as were received after the death of Augusta Harris.

55 It is true, of course, that there is no express statement in par (3) to the effect that personal property, royalties or rents, falling due during her life, did form part of Augusta's estate even if they were paid after her death. Mr Aingimea submitted that in the absence of any clear direction to the contrary the Committee was entitled to apply its interpretation of customary law so as to achieve that result. Insofar as that amounted to an extension or variation of the Life Time Only principle, the Committee was entitled to do so, and their ruling should not be the subject of review by the Court, he submitted.

56 Certainly, there was nothing inherently unreasonable in the approach the Committee adopted. Mrs Capelle provided a rationale for the approach the Committee adopted that was perfectly logical.

The rationale for the decision of the Committee

57 Mrs Capelle said that a person holding a Life Time Only interest in land was entitled to "eat the fruits" of the land. Just as the Life Time Only land immediately reverted back to the beneficiaries - the blood family - from which it derived, so too should the payment of royalties and rents that flowed from the land. It was not possible for a person whose Life Time Only interest had come to an end to still be able to eat the fruits of the land.

58 Mrs Capelle said the Committee was only concerned with personalty in the nature of rents or royalties, "since Ronwan came from the land". Mrs Capelle said that the Committee regarded it as appropriate that - in the same way that the land reverted - the personalty that flowed from land that had been held on a Life Time Only basis should also "go back" to the spouse and his blood relatives, because the spouse would be best placed to look after all the children.

59 She said, however, that the Committee accepted that other personal property, such as chattels or cash, possessed by the deceased at the time of death, formed part of the personal estate and were to be exclusively dealt with by the family of the deceased, unless there was disagreement among them. That differentiation between different categories of personalty was reflected in the Committee's 2011 determination. As to Life Time Only lands, the listed beneficiaries (including the plaintiff, with respect to the "Tamakin" Life Time Only land) shared personalty that was listed as "all monies, rentals and Ronwan interests". However, with respect to land owned outright by Augusta Harris, the plaintiff was listed as the sole beneficiary of personalty, and no limitation as to the categories of personalty to which she was entitled was stipulated.

60 Mr Kun submitted that there could be no difference in treatment of different categories of personalty. In all cases, it was for the family of the deceased to decide what to do with personalty. That principle had never been doubted, he submitted, and the approach now adopted by the Nauru Lands Committee was neither consistent with any principle of customary law, nor was it dictated by the 1938 Order.

61 Mr Kun submitted that the customary law principle was that all personalty was the property of the nearest family of the deceased – in this case, her sole child, Clara Agir[11]. That had never been denied until very recent years. The proposed change in approach was being contemplated solely in response to the serious delays in payment of Ronwan royalties - up to seven years' delay – that had occurred. As a result of those delays Life Time Only beneficiaries sometimes died before they received Ronwan payments which fell due during their lifetime. When it had been otherwise, and payments were made soon after they fell due, then it was accepted, Mr Kun submitted, that any unspent royalties formed part of the deceased estate and that the distribution of all personalty was a matter for the family of the deceased, not

[11] Throughout the hearing, those who were entitled by par (2) of the 1938 Order to attend a meeting – and were agreed to thereby have a right to determine the distribution of some personalty, at least - were variously described as being "family", "nearest family", or "closest family". As noted earlier, I am not required to resolve the scope of those descriptions, nor whether for the purpose of par (2) Clara Agir, alone, meets any or all of those descriptions, although it seems to have been accepted that she had sole right to determine the distribution of cash and chattels in the personalty estate.

the family of his or her spouse. That was so, although on Augusta's death her Life Time Only interests in land reverted to the family of her late husbands.

62 I understood Mrs Capelle to agree with Mr Kun that that had been the position, and that it was only the delays in payments that caused the Committee to adopt a new policy. She said that it had only been in two cases, Clara Agir and Celia Giouba, that the Committee had applied this new policy to personal estates.

63 The Committee believed that the policy they adopted was merely applying the Life Time Only principle to personalty, as it had been applied to land. The Committee considered that in adopting this approach they were following principles set down by *Administrative Order No 3 of 1938* that were equally applicable to land and personalty. Mrs Capelle said that although the Committee thought it was correct to adopt this approach, she now thought that it had been wrong to do so, because the issue was really governed by the terms of s.19 of the *Nauru Phosphate Royalties Trust Act 1968*. I will address that issue later.

64 Mr Aingimea tendered some limited evidence suggesting that in three other cases in 2010 and 2011, the Committee had followed the same principle, applying the Life Time Only principle in the 1938 Order to personalty. Even assuming that was the case, it remains the fact that it was not until about 2010 or 2011 that the Committee adopted the approach it had taken in this case. Customs can, of course, change over time and the principle adopted here by the Committee was their response to a new factor, delay in payments over which neither the beneficiaries nor the Committee had any control.

65 It may be stretching the description to describe the approach first adopted in 2010 as a pronouncement of "customary law" by the Committee, but subject to any legislation prohibiting them adopting that course, it might be argued that the Committee was generally empowered to interpret customary law as it did, on behalf of the community.

66 As I have said, and as I understand her evidence, it is not denied by Mrs Capelle, nor

by Mr Aingimea in his submissions[12], that had the right to payments fallen due and been paid during the life of Augusta Harris, then any Ronwan money unspent at the time of her death would have been treated as part of her personal estate, to be dealt with by Clara Agir, alone. Mrs Capelle said she would be regarded as "nearest family" by the Committee. The new policy which the Committee adopted in this case denied what had been considered the "right" of the nearest family of a deceased person to all of the personalty of the deceased. That "right" was granted by par (2) of the 1938 Order, which permitted the distribution of personal property to be "decided by the family of the deceased, assembled for that purpose". That provision, however, did not spell out whether debts owed to the deceased at the time of her death were assets which formed part of her personal estate. The 1938 Order should be read with the provisions of the *Succession, Probate and Administration Act 1976 ("the SPA Act").*

67 Save for limited purposes, the SPA Act did not apply to the intestate estates of Nauruans (s.3(2) and s.15). However, by way of exception, s.37(1) and s.37(3) are deemed to apply to the estate of Nauruans.

68 Section 37(1) provided that "the real and personal estate" of the deceased were vested in the Curator pending distribution. Section 37(3), provided that s.37(1) "shall apply to the estates of Nauruans", with the effect that the property remains vested with the Curator:

> ". . . until the time when the persons entitled to receive the estate as beneficiaries have been finally ascertained, whether by a family agreement, a decision of the Nauru Lands Committee, or where any appeal is taken against such decision of the Nauru Lands Committee, the decision of the Court on that appeal".

69 "Personal estate" is defined by s.2 to mean:

> " . . . the personal property to which a deceased person was entitled at the time of his death, and extends to all other property whatsoever to which he was entitled at the time of his death, which is not real estate, and to any share or interest therein". (My emphasis)

[12] There was some suggestion that the Curator might have made some payments to which Clara Agir was not entitled, but no details were provided, and I am not making any finding as to that matter.

70 The word "property" is defined to include "any debt".

71 Those provisions in the 1938 Order and the SPA Act support the contention of Mr Kun that personal property, including debts outstanding to the deceased at the time of death, formed part of the personal estate, which was to be distributed by the family of the deceased. It was only if the family members were in disagreement that the principles in par (3) of the 1938 Order came into effect. As I understood her evidence, Mrs Capelle agreed that that had been the accepted position, and it was only in the recent cases that the Committee had to grapple with the issue of delayed Ronwan payments.

72 Mr Aingimea submitted that it was just a matter of bad luck for the family of the deceased if payments were not made when they fell due, but were received after the death. To accept that view would mean, however, that as to this category of debts - those that arose during the lifetime but were paid after death, rather than at a time when they would have supported the deceased and her family – the right to recovery was lost to the family for all time. Instead, the benefit went to people who were not part of the family, as a mere windfall.

73 There is no doubt that the rather vague provisions of the 1938 Order and the limited provisions of the SPA Act allowed a good deal of room to the Committee to interpret customary law. In the event that those provisions did not give clear direction, then the Committee, as the body entrusted with decision-making about the distribution of realty and personalty - in the event of a dispute - would have been empowered to apply an interpretation of customary law that seemed reasonably open and appropriate.

74 There was nothing manifestly unreasonable about the way the Committee approached the question, but it seems to me that the Committee did apply an interpretation of personal property (as excluding debts due) that ignored such direction as the legislation did provide.

75 In my view, therefore, the Committee was obliged to treat Ronwan payments

received after the death as falling within the personal estate of the deceased, to be distributed by the family of the deceased, unless there was disagreement. In this case there was no meeting of family of the deceased called by the Committee. Mr Kun submitted that there could have been no disagreement among "the family", in any event, as Clara Agir was the sole child of the deceased.[13]

76 I have not been asked to consider whether Clara Agir was the sole person entitled to attend a family meeting. Nor have I been asked to consider how par (3) of the 1938 Order would have applied in the event of disagreement among the family of the deceased, and I leave those questions open.

77 However, even assuming that there had been disagreement among the family of the deceased and assuming further that the Committee would then have been entitled to apply its Life Time Only approach to personalty, there was another, insurmountable, legislative barrier to it doing so, in the case of Ronwan payments that had fallen due as at 30 June 2005.

Customary law and the Nauru Phosphate Royalties Trust Act 1968

78 Mrs Capelle said that the Committee was aware that the question of the rights to Ronwan payments may have been affected by provisions of the *Nauru Phosphate Royalties Trust Act 1968.* Neither she nor the other Committee members fully understood how those provisions applied, and she sought advice from the then Secretary for Justice, Mr Aingimea. Mrs Capelle said that there was a good deal of confusion among Committee members as to what course they should or could take.

79 It was not clear to me from Mrs Capelle's evidence what advice she received, but the Committee apparently understood that the legislation did not prevent it from adopting the approach they did, namely, applying the Life Time Only principle to Ronwan payments in the same way they believed would have applied to the

[13] As noted elsewhere, the expression "family of the deceased" in par (2) of the 1938 Order is not defined. It has been the subject of judicial interpretation, but was not the subject of submissions in the present case. It may be contrasted with the clear directions given, and principles stated, in the SPA Act (ss.15,16) with respect to non-Nauruan intestate estates.

distribution of the real estate of an intestate estate.

80 Mrs Capelle told me that she is now of the opinion that, subject to any ruling I make as to the effect of the provisions, the Committee had been in error in adopting the approach it did, a conclusion that Mr Kun and Ms Lo Piccolo agreed with, in their submissions.

81 The NPRT Act established the Nauruan Land Owners Royalty Trust Fund (s.19(1)). Ronwan interest earned by the fund was to be ascertained as at 30 June each year (s.19(3)). On or before 31 October each year the trust was to issue each beneficiary with a statement of the amount owing to him or her (s.19(4)). At the time of issuing that statement, and with approval of the Minister, the Trust was to pay to each beneficiary the sum ascertained as due for the preceding financial year (s.19(5)). For our purposes the critical sections are ss.19(6)(9) and (10). They read:

> (6) (a) Subject to paragraph (b) hereof a beneficiary of the Fund is a person who, on and after the first day of July 1967, is entitled to the beneficial interest in land in respect of which royalties for phosphate which has been or is mined on the land are held in the Fund;
> (b) A person who is entitled to a life time interest only in any land as aforesaid is, while living, a beneficiary of the Fund, in respect of the Ronwan Interest, to the exclusion of the person who has the beneficial interest in that land.
>
> (9) For the purposes of any written law and any custom of the Nauruan people, the interest of a beneficiary in the Fund is real property and the interest of a life tenant and of a beneficiary in the Ronwan Interest of the Fund is personal property.
>
> (10) (a) Notwithstanding anything to the contrary herein or in any written law, upon the death of a beneficiary and before the estate of the deceased is finally distributed any payment made pursuant to subsection (5) shall be made to the Curator of Intestate Estates:
> (b) Upon the death of a beneficiary with a life time interest only, the interest of the beneficiary in the Fund ceases forthwith but any Ronwan Interest which is payable in respect of the year ended 30 June preceding the date of death shall form part of the estate of the deceased and shall be paid accordingly.

82 Thus, the Life Time Only holder, "while living", has the right to Ronwan interest to the exclusion of the beneficial owners of that land, i.e. the blood relatives of Kiki Bededoun and Robert Tamakin. Mr Aingimea submitted that that was entirely

consistent with the advice he gave the Committee, namely, that upon death the Life Time Only holder no longer has any claim as beneficiary of the Fund with respect to Ronwan interest payments. He submitted that consistent with s.19(6)(a) the Committee could itself determine "who was entitled to the beneficial interest in land", thereby who was a beneficiary of the Fund. In that regard s.19(5) provided:

> "(5) Subject to any direction given in accordance with subsection (7) the Trust shall (in such manner and upon such proof of entitlement as the Trust, with the approval of the Minister, determines) pay to each beneficiary, or where there is a trustee for a beneficiary, to the trustee, at the time of issue of the statement pursuant to subsection (4) or if the statement is issued before 31 October, not later than that date, the Ronwan Interest credited to the account of the beneficiary in respect of the preceding year ended on 30 June."

83 The Trust does follow the advice of the Nauru Lands Committee as to who should be regarded as having the beneficial interest or Life Time Only interest in phosphate land, and in determining that question as to land, the Committee does apply the Life Time Only principle, which it considers is provided in the 1938 Order, and accords with customary law. However, making a determination of those persons who hold the beneficial interests in the land or Life Time Only interests, would not resolve the question of whether Ronwan payments made after death, but falling due "while living", were part of the estate of the deceased. That question, however, was decided by the terms of s.19(10).

84 Section 19(9) provides that Ronwan interest is personal property of the Life Time Only holder. That provision, of itself, does not determine that interest payments due to the Life Time Only holder "while living", but not paid until after death, also form part of the personal estate of the deceased. That question, however, is answered conclusively by s.19(10)(b).

85 Section 19(10)(b) recognises that upon death the Life Time Only holder's "interest" as a beneficiary in the fund ceases, but it specifically addresses the question of outstanding interest. By providing for Ronwan interest "which is payable in respect of the year ended 30 June preceding the date of death", the legislators make it clear that the estate of the deceased Life Time Only holder has no claims on interest

payments which fell due and were payable in respect the period following that date. It follows, however, that the personal estate of the Life Time Only holder must be entitled to receive (whenever it is paid and however long it had been outstanding) all interest which was payable but unpaid as at 30 June previous to death. In the case of Augusta Harris there would be multiple years' interest that would have accumulated as falling due as at the preceding 30 June prior to her death.

86 The Nauru Lands Committee was bound to follow that legislation. If the provisions of the NPRT Act are to be overridden so as to apply the Life Time Only principle to Ronwan interest in the way the Committee first thought appropriate in this case, then it will require legislative intervention.

87 In the result, the legislation meant that Ronwan interest payments that had fallen due but not been paid in the years up to 30 June 2005 (the deceased died 13 May 2006), belonged to her personal estate, whenever they were actually paid. Any Ronwan interest that fell due with respect to the period after 30 June 2005 did not form part of her estate.

88 It is to be noted that none of this legislation expressly addresses the question of "monies or rental payments", being other personalty that might have fallen due before death but remained unpaid. Monies might include, for example, unpaid wages. I did not hear argument concerning such items of personalty in this case: it was not suggested that any such payments were received after the death of Augusta Harris. Rental payments, of course, do flow from the land, unlike unpaid wages. Given that the issue does not arise in this case, I will not express any conclusion as to whether rentals or unpaid wages would constitute debts owed the estate, and forming part of the personal estate.

No meeting of the family of the deceased

89 The 1938 Regulation requires the "Chief of the District" to make a list of all property and provides that the distribution of property shall be decided "by the family of the deceased person, assembled for that purpose". As discussed above, the real and

personal property vests in the Curator of Intestate Estates pending determination as to its distribution by the family of the deceased, the Nauru Lands Committee or the Court.

90 It is conceded that a meeting of the family was not convened by the Committee when it considered distribution of the personal estate. There had been an earlier meeting when distribution of the land was discussed.

91 Mr Kun submitted that failure to hold a meeting rendered the decision a nullity, because the holding of a meeting was a pre-condition to the exercise of power by the Committee. Mr Aingimea submitted, in response, that the requirement for a meeting did not arise, since any determination concerning personalty had to be based on the same principles as those governing land, and there had been a family meeting to address the land issue. He submitted that the Life Time Only principle was a customary principle, namely, that upon death the Life Time Only holder no longer ate the fruit of the land. There would be no point in holding a meeting; that principle was irrevocable, he submitted.

92 In my opinion, the holding of a meeting of the family of Augusta Harris to discuss the distribution of personal estate went to the jurisdiction of the Committee. That is so even if, as Mr Kun contended, the only person who could constitute "the family of the deceased" was Clara Agir. I do not have to decide who should have been present at that meeting; the issue was not discussed in any detail[14]. There was, however, a real point to conducting such a meeting, and undoubtedly Clara Agir had to be given the opportunity to attend the meeting. Furthermore, the family members who attended the meeting were entitled to consider and agree upon the distribution of all forms of personalty; the Nauru Lands Committee had no power to remove that entitlement by invoking a supposed overriding Life Time Only principle.

[14] Among many cases or relevance to that question, see *Ikirir v Duburiya & Others* Land Appeal Nos 10 of 1971, 25 January 1972, per Thompson C.J.; *Simpson Scotty & others v Bertha Agoko,* Land Appeal No 9 of 1975, 17 February 1976, per Thompson C.J.

93 This was the first time that the Committee was contemplating adopting a policy that would have denied to the family of an intestate person the rights to Ronwan interest that fell due during lifetime. The Committee, which now concedes that it was wrong in its failure to apply s.19, ought to have given Clara Agir the opportunity to argue against the proposed course.

94 Publication of a determination in the absence of a family meeting as required by the 1938 Order has been held to constitute "not a determination at all"[15]. Likewise, failure to call a meeting in this case was a jurisdictional error, and the determination should be quashed.

Conclusions and Orders

95 1. The Nauru Lands Committee when dealing with the ownership of or rights in respect of land, being Ronwan payments, rentals or other interests that flow from land, is not solely performing a customary law function but is also subject to direction by way of statute (*The Nauru Lands Committee Act* 1956; the *Succession, Probate and Administration Act 1976*) and Regulation (*Administrative Order No 3 of 1938*).

2. Decisions of the Committee affecting the distribution of Ronwan interest payments and other interests arising from land, such as rentals, are open to appeal under s.7 of the *Nauru Lands Committee Act* 1956.

3. Contrary opinions as to the matters in paragraphs 1 and 2, above, tentatively expressed by me in Gi*ouba v NLC and Agir v NLC*[16] are incorrect.[17]

4. In considering the rights to and distribution of personal property other than property arising from rights in respect of land the Nauru Lands Committee is exercising a customary law function, subject to *Administrative Order No 3 of 1938* and

[15] *Eimut Edward v Deliah Deduna, Tagamoun Family, and Nauru Lands Committee*, Land Appeal No 4/2000, 20 February 2002, per Connell C.J.
[16] [2011] NRSC 7
[17] Likewise, similar statements in *Detamaigo v Demaure* Nauru Law Reports [1969-1982] Part B, 7, per Thompson C.J., at 8 and *Lucy Ika& Kinza Clodumar v Nauru Lands Committee* Civil Cases Nos 2/91, 3/91, 8/91, unreported judgment of Donne C.J., 21 August 1992.

the *Succession, Probate and Administration Act 1976.* Decisions as to such personal property, such as chattels and cash, are not subject to a right of appeal under the *Nauru Lands Committee Act* 1956.

5. The Nauru Lands Committee fell into jurisdictional error in making its Determination as to the Personalty Estate of the late Augusta Harris (Life Time Only), which was published by G. N. No 76/2011 in Government gazette No 14 of 9 February 2011. The determination was a nullity. The plaintiff's application for relief by way of certiorari should be granted. The Determination is hereby quashed.

6. I direct the Nauru Lands Committee to conduct a meeting of family and to reconsider the distribution of the personalty estate of Augusta Harris according to law.

7. I declare that the personalty estate of Augusta Harris includes Ronwan Interest that fell due to Augusta Harris on or before 30 June 2005 but remained unpaid to her as at that date.

8. I will hear the parties' representatives as to any other orders in this case. I grant liberty to each party to apply to the Court.

Geoffrey M Eames AM QC

Chief Justice

31 July 2012