IN THE SUPREME COURT
REPUBLIC OF NAURU

CIVIL CASE No 23 of 2010

GRUND DETABENE AND OTHERS

Plaintiff

V

RONPHOS

1st Defendant

And

The ASIA ENERGY (THAILAND) CO. LIMITED 2nd Defendant

WHERE HELD:	Nauru
DATE OF HEARING:	11 March 2011
DATE OF JUDGMENT:	23 March 2011
CASE MAY BE CITED AS:	Detabene v Ronphos and Anor
MEDIUM NEUTRAL CITATION:	[2011] NRSC 8

Trespass to Land – Expiry of Lease – Ronphos Act 2005 – ss.9, 10, 27, 28 – Large water tank erected on land by Nauru Phosphate Corporation under lease that expired in 2000 – Ronphos assumes assets of NPC in 2005 - authorises agent to demolish tank and salvage scrap – Ronphos not a leaseholder – Whether tank a fixture – Whether Ronphos a tenant at will or on sufferance – Whether Rohphos entitled to remove tank – Whether unjust enrichment - Damages.

APPEARANCES:	Counsel
For the Plaintiff	Mr D Aingimea (Pleader)
For the Defendant	Mr R Kun (Pleader)

CHIEF JUSTICE:

1. The plaintiff, Grund Detabene, is one of a number of owners of land known as portion 62 in Aiwo District, Nauru. The then owners had leased the land to the Nauru Phosphate Corporation[1] (N.P.C) and N.P.C erected on the land a large water tank. Four Identical tanks were erected by NPC on land which adjoined that of the plaintiff.

2. The lease agreement between NPC and the owners was not tendered. Counsel agreed that no copy of the lease can be found but it was agreed that the lease expired in 2000. Upon expiration of the lease NPC continued in possession of the areas of land on which the tank sat.

3. NPC had intended to renew the lease in order to house employees in buildings which existed on the plaintiff's land and on adjoining land. NPC had also intended to continue use of the storage tanks. I am unable to say when the storage tank on the plaintiff's land was last put to any use, but it is clear that by 2010 it was not used by Ronphos nor, it seems, by anyone else.

4. In 2000 negotiations commenced with the landowners towards agreement to execute a new lease. Six of the thirteen land owners agreed to execute a new lease over the plaintiff's land and those six land owners together held 75% interest in the land Given the approval by owners with 75% interest, Cabinet could have authorized the execution of the lease, notwithstanding that the remaining landowners did not agree[2]. Grund Detabene, who held a 1/28 interest in the land, was one of the remaining land owners who did not agree with the proposal for a new lease.

5. In 2005 the Ronphos Corporation was established pursuant to the *Ronphos Act* 2005[3]. By section 27(1) of the Act, Ronphos was vested with ownership of all of the assets owned and managed by the former NPC, including leases, real and personal property and equipment, to the full extent of the previous ownership by NPC.

6. By section 9 of the RONPHOS Act the objects of the Ronphos Corporation were as follows:

> (1) to maintain and operate the phosphate industry on Nauru in a safe, efficient and profitable manner;

[1] It may well have been the British Phosphate Commissioners, a predecessor to NPC, that was the lessee, but nothing turns on that.
[2] By virtue of s.6 *Lands Act* 1976.
[3] The Act came into effect on 1 July 2005: s.2 of the *Ronphos Act* 2005

(2) to establish, maintain and operate such activities as are, or may be ancillary to the maintenance and operation of the phosphate industry on Nauru; and

(3) to establish, maintain and operate such other activities, including those recommended to the Executive Committee by the Minister, as the Executive Committee shall, with the approval of the Cabinet, from time to time determine.

7. Senior officers with the Corporation held discussions with the Government as to the desirability of rehabilitating the land which had been leased for the purposes of the phosphate industry and as to the removal of hazardous and unsightly structures and scrap so as to facilitate the return of the land to the landowners in the best possible condition. I heard evidence from the officer in charge of RONPHOS, Mr Tasio Gideon, which I accept, that RONPHOS management regarded it as their obligation under s.10(g) and (h) to remove all scrap and derelict property and equipment in the interests of the landowners.

8. Mr Gideon did not assert that the decision, when taken, was based on the belief that in addition to being unsightly and unusable the tanks were dangerous to members of the public. The defendants did not plead a defence of necessity as being the basis on which they entered the plaintiff's land[4].

9. Section 10 of the RONPHOS Act provides:

(1) Subject to this Act, and the limitations described under section 11, the Corporation has the power to do all thing necessary, convenient or appropriate to be done, whether at Nauru or elsewhere, for the fulfillment of its objects

(2) Without limiting the generality of the last preceding subsection, and subject to the provisions of this Act and any Regulations related thereto, the powers of the Corporation include the power-

(a) To enter into contracts in relation to any sale or disposal of phosphate or any other products of the Corporation;

(b) To enter into contracts in relation to any service to be performed by the Corporation whether in connection with the sale of phosphate or other products or otherwise;

(c) To purchase, lease, hire or otherwise acquire land, buildings, plant, machinery and any other capital assets;

(d) To sell or dispose of any capital assets of the Corporation;

(e) To appoint agents for the purpose of any business conducted by the Corporation and to terminate any such appointment;

[4] See *SO Petroleum Co Limited V Southport Corporation* [1956] AC 218 at 228, per Lord Devlin; and see fn.[37].

(f) To act as agent for other persons;
(g) To surrender or return to the owners thereof land leased or acquired, but no longer required, for use in the phosphate industry;
(h) To rehabilitate and develop lands including through the removal of materials, scrap and structures used for the mining of phosphate, in-line with environments laws."

10. RONPHOS contracted with Asia Energy (Thailand) Co Limited ("Asia Energy") to demolish the tanks and remove all of the scrap metal. That work proceeded over time, with employees of Asia Energy entering the plaintiff's land on or about March 2010 and demolishing the tank on his land at or about the same time as two of the four other tanks on adjoining land were also demolished.

11. The statement of claim does not plead that the tank was owned by the plaintiff's by virtue of it being a fixture. The plaintiffs' claim is brought in trespass, alleging that the defendants wrongly entered the land and removed the tank, which had value as scrap metal. In essence, the plaintiffs' claim is that the defendants had no right to enter pursuant to a lease and, I presume, no propriety interest in the tank. On the plaintiff's case, the landowners alone had rights in the tank, whether it was a fixture, on the one hand, or a chattel - valuable to the plaintiffs' as scrap metal or being otherwise capable of being put to good use - on the other hand. The defendants had no entitlement to enter the land for the purpose of removing it, so it is contended.

12. In their Defence the defendants called in aid the provisions of the proposed, but unexecuted, new lease. The evidence was quite unclear as to whether and when negotiations for the execution of a new lease were conducted by Ronphos, rather than by NPC. Having achieved agreement from those holding 75 percent interest in the land, the new lease was drawn up and signed by the six landowners, but it was not executed by all parties, and thus did not take effect. The proposed lease is dated "2000". Mr Gideon of Ronphos gave evidence that he had anticipated that all of the owners would eventually agree to execute the lease.

13. As the lease between the owners and NPC had expired in 2000, well before the commencement of the Ronphos Act, it seems that NPC, and thereafter Ronphos, simply remained in possession of the land. The Defence pleading asserted that even if the lease had expired and had not been replaced by a new executed lease (which seems to have been conceded), then Ronphos nonetheless acted pursuant to the terms of the former lease, the provisions of which, it was pleaded, were identical to those of the proposed new lease, which was tendered. They pleaded that cl.8 of that lease obliged Ronphos to remove the tank so as to "deliver possession" in good order and condition. That clause provided:

"Hold Over

8. The lessee shall deliver possession of the land in good order and condition at the end of the term of the Agreement".

14. That "obligation" was said to also be imposed by s.10(2)(g) and (h) of the Act. As I have said, despite the pleaded defence, I received no evidence as to the terms of the former lease, a matter which I pointed out to Mr Ekwona during the hearing. Thus Clause 8 of the proposed lease can provide no assistance, since its relevance has not been established. Whether s.10 imposed a similar obligation, however, does require consideration.

15. As may be seen, s10(2)(g) empowered Ronphos to surrender land which was leased or acquired, but was no longer required by Ronphos. However, although the evidence suggests that Ronphos had no further use for the tank or the plaintiffs' land, there was no evidence that Ronphos "surrendered" the land or removed the tank in order to return land to the landowners that had been leased or acquired. As will be seen, Mr Gideon gave evidence that Ronphos had not disclaimed the leasehold land in question. As to s.10(2)(h), that gave power to Ronphos to remove scrap materials from land, but did not authorise, let alone oblige, it to do so on land which was no longer leased or over which it had no proprietary interest, or to do so without the approval of the owners.

16. It is conceded by the defendants that they did not seek the approval of the landowners for the removal of the tank. Mr Gideon said that he thought there was a "gentlemen's agreement" in existence by virtue of having obtained the agreement for a new lease from those landowners with 75% interest in the land. Plainly, the company management believed that they were doing the landowners a favour in removing the tank at Ronphos' expense. It did not occur to them that any owner would disagree, however the plaintiff sought an Interlocutory Injunction to stop incursions on the land and to restrain Asia Energy from exporting any of the scrap metal or performing further work on the removal of the remaining tanks.

17. The entitlement of the defendants to enter the land and remove the tank was the critical issue in the case. The defendants pleaded that the plaintiffs "cannot suffer any loss or damage over something that does not belong to them".

18. If the defendants entered the land under a wrong but honest belief that they had a right to do so, they would still be trespassers, if they had no proprietary basis to justify their entry. In *Shattock v Devlin*[5] the defendant entered a contract to purchase land, and with the agreement of the vendor, prior to settlement, erected a barn. The defendant subsequently re-entered the land in order to remove the barn. Wylie J held that the barn was a fixture and the defendant was a trespasser, although he had

[5] [1990] 2 NZLR 88 at 113-4

an innocent belief that he was entitled to remove the barn. Wylie J ordered nominal damages only.

19. Although this was not pleaded, in terms, Ronphos might contend that its entry was with the consent of the landowners, or the consent of those with a majority interest. In that event the entry would be by licence, and the defendants would not be liable in trespass[6]. Entry under a licence would, however, constitute trespass if the licence was exceeded either in duration or purpose[7]. The onus of proof of consent is on the defendants[8]. There is no evidence that any landowner in fact consented to Ronphos entering the land, at all, let alone to do so for the purpose of removing the tank. Thus, Ronphos could not escape a finding of trespass on the basis that it had an express or implied licence to do what it did. More to point, Mr Gideon conceded that RONPHOS did not consult with the landowners prior to taking the decision to remove the tank. Its decision, however, was justifiable, he contended, because the tanks were unusable and were a hazard.

20. The defendants advanced several alternative bases for their contention that they were entitled to enter the land and remove the tank. First, they said their entitlement flowed from Clause 9 of the expired lease, which they pleaded was identical to Clause 9 of the proposed new lease. That provided:

> "**Improvements**
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> 9. If the lessee agrees, improvements to the land may become the property of the Lessor at the conclusion of this Agreement or upon termination by mutual agreement, whichever occurs first".

21. The Defendants pleaded that cl.9 meant that the tank was the property of Ronphos, because at the expiration of the lease neither NPC nor Ronphos had agreed to transfer property in the tank to the lessor landowners. Once again, that pleading assumes that a similar clause was contained in the lease that expired in 2000, which has not been established by evidence.

22. In the alternative, Ronphos' entitlement to enter the land and remove the tank is said to be found in s.27(1) and s.28 of the Act. I have summarized s.27 earlier, but it is appropriate to set out its terms in full:

> **TRANSITIONAL**
>
> **27**. (1) The Corporation is vested with ownership of all the assets

[6] Halsbury's Laws of Australia, Trespass to Land, Lexis Nexis, [415-525], [415-485]
[7] *Halsbury's Laws of Australia*, [415-485], [415-525]
[8] *Plenty v Dillon* (1991) 171 CLR 635 at 647.

owned and managed by the former Nauru Phosphate Corporation, including leases, concessions, contracts, real and personal property, equipment and intellectual property rights to the full extent of the previous ownership by Nauru Phosphate Corporation.

23. Section 28 of the Act, titled "Disclaimer of Property", provides:

> 'Upon the commencement of this Act the Executive Committee may within the 6 months following, disclaim any leasehold properties previously held by the Nauru Phosphate Corporation. ***Any leasehold property not so disclaimed shall remain an asset of the corporation***[9] and the corporation shall be liable for all of the obligations applicable thereto. If any leasehold property is disclaimed the Corporation may remove all fixtures and fittings erected or upon the land by the Nauru Phosphate Corporation or its predecessor in title the British Phosphate Commissioners, and upon completion of such removal the property shall revert to the owner thereof.' (my emphasis)

24. Section 28 provided that RONPHOS might within six months of its commencement 'disclaim any leasehold properties previously held by the Nauru Phosphate Corporation.' The Act does not provide guidance as to what would constitute disclaiming such an interest in leasehold property. Mr Gideon contended that RONPHOS had not disclaimed any leasehold property 'previously held ' by NPC. Accordingly, he contended, the plaintiff's land constituted leasehold property not disclaimed, and therefore remained an asset of Ronphos and the corporation could enter the land and remove its equipment, namely, the tank.

25. Mr Aingimea submitted that s.28 was irrelevant. He submitted that it only applied in circumstances where Ronphos took over an existing lease, that is, a lease "previously held" by NPC. Within 6 months of doing so, it could signify that it wanted to terminate the lease and remove its improvements from the leasehold land. However, he submitted, where a lease had already come to an end by the time the Ronphos Act commenced, any improvements (fixtures or not) had become the property of the land owners, and s.28 had no relevance. It was not possible for the property to "**remain** an asset of the corporation", because it had ceased to be an asset of NPC before s.28 came into effect. Likewise, s27 had no application in this situation, Mr Aingimea submitted, because the lease with NPC no longer operated: there was no leasehold property to vest with Ronphos, and title to the tank had vested with the landowners either as a fixture or, was merely "personal property" or "equipment" that was no longer the property of NPC when Ronphos took over.

[9] Defined by s.6(1) to mean the Ronphos Corporation.

26. The alternative view would be that the words "previously held" in s.28 are very wide, and a lease that had expired would nonetheless constitute leasehold property previously held by NPC, thereby becoming leasehold property of Ronphos even though there was no lease in existence at all, in the name of either NPC or Ronphos. If this interpretation was adopted, it would mean that a lease once held by NPC that had expired 20 years earlier would become an asset of Ronphos, which it could decide to retain or disclaim, notwithstanding that there was no existing lease which grounded its right of ownership. In my view, that interpretation could produce absurd results.

27. Mr. Aingimea submitted that at the time when Asia Energy entered the plaintiff's land, acting on behalf of RONPHOS, it was entering as a trespasser and had destroyed and removed fixtures or chattels on the land which belonged to the plaintiff. He referred to the judgment of Dillon J in *Ben Deireragea the Nauru Phosphate Corporation*[10] in which His Honour held that lessors, upon the expiry of the lease, would have the option to retain fixtures or else to demand their removal but that the lessee could not remove permanent installations if they had become fixtures. No authority was cited for that proposition, but, as I shall discuss it is undoubtedly correct.

28. In my opinion, the first question should be whether the tank had become a fixture to the plaintiff's land. If it had become a fixture then the tenant, NPC, was obliged to return it to the owner together with the land at the end of the lease, and failure to return that property with the leasehold land renders the tenant liable in an action for waste[11]. An exception to that obligation is when the improvements constitute what are known as tenant's fixtures.

29. The determination whether a chattel has become a fixture requires a review of all of the circumstances, in particular the nature of the object itself and the manner and purpose of its annexation to the land[12]. Where a chattel has become fixed to land, with the obvious intention that it shall remain there for an indefinite time, it is prima facie a fixture, and the burden of proof falls on the person who put it there to demonstrate that it is not a fixture: see *Australian Provincial Assurance Co Ltd v Coroneo*[13]. In that case Jordan, CJ. held (citations omitted):

> "The question whether a chattel has become a fixture depends upon whether it has been fixed to land, and of so for what purpose. If a chattel is actually fixed to land to any extent, **by any means other than its own weight**, then prima facie it is a fixture; and the burden of proof is upon anyone who asserts

[10] Civil Action No.11/1993, Judgment 19th December 1997
[11] See Australian Encyclopedia of Forms and Precedents, Landlord and Tenant, Par [550-555].
[12] *N H Dunn Pty Ltd v L M Ericsson Pty Ltd* (1979) 2 BPR 9241 at 9243-4, per Mahoney J.A.
[13] (1938) 38 SR (NSW) 700 at 712, Davidson and Nicholas JJ concurring.

that it is not; if it is not otherwise fixed but is kept in position by its own weight, then prima facie it is not a fixture."[14] (My emphasis)

His Honour later added:

"If a thing has been securely fixed, and in particular if it has been so fixed that it cannot be detached without substantial injury to the thing itself or to that to which it is attached, this supplies strong but not necessarily conclusive evidence that a permanent fixing was intended".[15]

30. Notwithstanding the huge size and weight of the tank, the answer to the question whether it was a fixture is by no means clear-cut. I received no submissions on the question. As I have said, Mr Aingimea was content to advance his case on the basis that since there was no lease, Ronphos and Asia Energy had no right of entry and were trespassers, having no rights to the tank, whether it was a fixture or a chattel.

31. I did not receive evidence as to the precise dimensions of the circular tank, but upon my inspection of identical tanks the dimensions pleaded in the statement of claim are likely to be accurate. Thus, it was 15 metres in height with 12 metres radius. The circumference consisted of a series of steel bands of 8 millimetres black steel sheets welded together. The tank had a capacity to hold 1.2 million litres of water. It was intended to be one of a number of tanks that stored water for the use of citizens of Nauru, including those who worked in the phosphorus industry.

32. The entire structure was attached to a steel floor. The tank and its steel floor sat on a base of bitumen which was raised from the ground, and enclosed by a circular concrete wall approximately half a metre in height. The weight of the structure, even when empty of water, would have been very great, and it was held in place by virtue of its weight, not by way of any further attachment between the floor and the bitumen base.

33. The tank was intended to remain for a very long time, but it was presumed that the land would one day revert to the landowners, and that the tenant would take steps to ensure that it was returned in best possible condition. A tank in good condition might well have been regarded as a valuable asset by the landowners, but one rusted and dangerous perhaps less so. The tank sat in place by virtue of its own weight, not by being attached to the land.

34. Although the answer is not clear-cut – in my opinion the tank was not a fixture. I will proceed for the moment, however, to consider the situation as if it was a fixture.

[14] At 712
[15] At 712

35. Fixtures may be landlords' or tenants' fixtures. Whilst fixtures must be delivered to the landlord at the end of the lease, items properly regarded as tenant's fixtures may be removed by the tenant[16]. Items which a tenant places on the land for the purpose of his trade, but which do not become part of the land itself would be regarded as tenant's fixtures and could be removed when the tenancy came to an end[17].

36. In *New Zealand Government Property Corp v HM & S Ltd* Denning MR discussed *Pool's case*, an early case in which a soap boiler was tenant of a house at which he plied his trade. He brought on to the property vats and coppers, and paved the backyard. Holt CJ held that whilst the tenant could have removed the items during the term of the lease, they became the property of the owner upon expiry of the lease. Lord Denning, however, rejected the view that tenant's fixtures had to be removed before the end of the lease, or else they would become the property of the landlord. He held that the tenant was entitled to remove tenants fixtures so long as he remained in possession, even after the expiration of the lease.

37. The right of a tenant to delay removal of tenant's fixtures even after the lease had expired, has been extended to cases where the tenant remained under a bona fide claim of right as a tenant[18], or as a tenant at sufferance[19], or pursuant to a holding over clause[20]. No argument was advanced on behalf of the defendants to suggest that Ronphos claimed an interest in the tank on any such basis, but I should nonetheless consider whether there is any evidence to support a claim made on one or more such basis.

38. In *D'Arcy v Burelli Investments Pty Ltd*[21] Young, J. observed: "The rule that a tenant who affixes chattels to realty donates them to the landlord is one that has come down to us from very early times"[22]. After reviewing the authorities, in particular a decision of Casey J in *Concept Projects v McKay*[23], his Honour held:

> "The true rule, apart from the way in which Casey J stated it, seems to be that if there is a termination of an uncertain period, such as a tenancy at will or a life tenancy, then there is a reasonable period to remove fixtures, but if the period is certain, such as a lease for five years fixed, then unless there is

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[16] *Australian Encyclopaedia of Forms and Precedents*, "Landlord and Tenant", Lexis Nexis, par [555].
[17] *New Zealand Government Property Corp v HM & S Ltd* [1082] 1 All ER 624, at 627, per Denning MR
[18] *D'Arcy v Burelli Investments Pty Ltd* (1987) 8 NSWLR 317. As noted by Casey J in *Concept Projects v McKay*, at 567-9, the mere fact that a tenant held over at the expiration of a lease would not be sufficient to constitute a claim of right.
[19] *Braidwood v Dunn* [1917] NZLR 269
[20] *Cockburn v Cockburn* [1921] NZLR 652
[21] (1987) 8 NSWLR 317 at 322
[22] At 320.
[23] [1984] 1 NZLR 560, at 567-9.

something special in the lease, such as there was in *Busby v Joseph* or unless there is some new lease or the tenant remains in possession under colour of right, then the tenant's right ceases at the expiration of the lease."

39. In *Braidwood v Dunn* Stout C.J. reviewed authorities concerning the right to remove tenant's fixtures after the expiration of a lease but where the tenant stayed in possession. He cited[24] with approval a passage from the judgment of the Court in *Ex Parte Brooks*[25], as follows:

> "It may be that in cases where the tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case of where an interest of uncertain duration comes suddenly to an end, and **the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and to remove then with his goods and chattels** off the demised premises, or even in cases where the landlord exercises a right of forfeiture ,and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy". (My emphasis)

40. Citing authority, Stout CJ opined that even if the relationship of landlord and tenant was one of sufferance, the right would exist to remove tenant's fixtures after the termination of the lease.

41. In the present case, the tank was undoubtedly brought on to the land for the purpose of the lessee's trade. Whether the lessee (NPC and then its successor, Ronphos) stayed in possession I am unable to say with confidence. I have not heard evidence on this issue but it appears that Ronphos did stay in possession, at least with respect to the tank and the land on which it sat. The evidence of Mr Gideon was that Ronphos had not disclaimed the property and it operated, in effect, as though a new lease was a mere formality and a foregone conclusion. The tank remained where it was until Ronphos, treating the land as if it was held under lease, permitted Asia Energy to enter, as though it had the right to so authorize it.

42. I do not, however, consider that Ronphos should be regarded as merely holding over from the NPC lease. It was NPC that held over. Although Ronphos took over the leasehold assets of NPC the original lease was not an asset of NPC at the time when Ronphos was established. Thus, Ronphos simply took possession of the land not by way of holding over after the expiry of a lease, but as a trespasser, from the outset, or perhaps initially as a tenant at will, or on sufferance. Furthermore, even if Ronphos

[24] *Braidwood v Dunn*, at 271.
[25] 10 Ch D 100, at 107.

was to be regarded as having, through NPC, a continuing possession traced back to the time when the lease expired, more than reasonable time had passed before it undertook the removal of the tank.

43. In all the circumstances, the tank had either become a landlord's fixture by virtue of its character and purpose, or else, if it remained a tenants' fixture or chattel, then Ronphos had had sufficient time to remove the chattel, and not having done so it became the landlord's property. Of course, if they did not want the chattel to remain on their land after the expiration of the lease - or upon termination of the tenancy at sufferance or tenancy at will (if it was either) - the landlords/landowners had a common law right to insist that Ronphos remove its equipment from their land, as I discuss elsewhere. Furthermore, by s.27(2) Ronphos was responsible for all liabilities and debts of NCP that had not been written off by Cabinet, and NPC, as tenant, could have been required by the landowners to remove such equipment at the end of the lease as was not wanted by the landlords[26].

44. In considering these possible bases for Ronphos' claimed right of entry to the land, I had regard to the fact that a number of landowners, with a 75% interest, had apparently been content for Ronphos to remain on the land and were willing to grant a new lease. At first blush, that suggests a tenancy at will or on sufferance, but could that be said to be the case here? Did a sufficient number of landowners create what amounted to a tenancy at will or tenancy on sufferance with Ronphos?

45. The learned author of Woodfall[27] explains the difference between a tenancy at will and a tenancy on sufferance. The author observes:

> "If a tenant whose lease has expired be permitted to continue in possession pending a treaty for a further lease, he is not a tenant from year to year, but a tenant strictly at will, until some other interest is granted to him or is to be inferred from the payment of rent. . . .Slight evidence has been held sufficient to make a tenant on sufferance a tenant at will."

46. The author stated that if at the end of a tenancy the tenant becomes a tenant at will then he holds under such of the terms of the expired tenancy as are applicable to a tenancy at will[28]. As I have noted, I have no evidence as to the terms of the expired lease in this case. A tenancy at will can be readily terminated, such as by a demand

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[26] Whether the tenant landowners may have had a right of action for damages in tort, for permissive waste, by reason of the tenant creating damage to the property by permitting the tank to rust and become a hazard was not argued, and I need not determine: see *Halsbury's Laws of Australia*, "Leases and Tenancies: Waste", Lexis Nexis, [245-4435], [245-4440], [245-4445]. Voluntary waste is said to terminate the tenancy and render the lessee liable in trespass: see [245-4450].

[27] *Woodfall's Law of Landlord and Tenant*, 9th Ed, 1978, Vol. 1 at 264 ,1-0649, 1-0650.

[28] *Halsbury's Laws of Australia, at 1-0650.*

for possession, or by acts of ownership by the landlord, or by the landlord doing any act inconsistent with an estate at will[29].

47. A tenancy on sufferance arises where a person wrongfully remains in possession after the expiration of a lease, not having agreement to do so. The author of Woodfall states:"There is a great difference between a tenant at will and a tenant on sufferance: the former is always in by right; but the latter holds over by wrong after the expiration of a lawful title".[30]

48. The action is brought in the name of Grund Detabene "and Others". In response to complaint by Mr Kun, for Ronphos, that contrary to the requirement of Order 12 Rule 5(2) of the *Civil Procedure Rules* 1972 the identity of the other plaintiffs was unknown, Mr Aingimea tendered a signed list of names of some eighteen persons said to be joint plaintiffs/landowners. A perusal of that list discloses that at least two of the six who had earlier agreed to grant a new tenancy (Tars Hubert and Farrah Kephas) now joined the proceedings as plaintiffs. Those two together held a one quarter interest, thus it could no longer be said that there was an agreement to entry a new lease from landowners with 75% interest. Furthermore, even if it might be presumed that the original six landowners must at one time have been agreeable to NPC or Ronphos continuing to use the land as before, namely to hold the storage tank, that could no longer be presumed. Indeed, agreement to be joint plaintiffs must constitute an assertion that Ronphos had no right to remove the tank, and that in authorising Asia Energy to enter the land the entry was as a trespasser.

49. As to the defendants' reliance on s.27, I do not consider that s.27 gives a right to Ronphos to remove the tank. Section 27 transferred the interest in real and personal property that was owned and managed by NPC. Leasehold land over which the lease had expired was not land then owned and managed by NPC, even if it continued in occupation.

50. I conclude that if the tank was a fixture on the plaintiff's land then it was removed without authority of the owners. If, on the other hand, the tank should be regarded as a tenant's fixture or chattel, as I believe to be the case, the time for its removal at the option of a tenant had long passed, and entry to the land so as to remove it would equally constitute a trespass.

51. Since entry onto the land by Asia Energy for the purpose of demolition of the tank did constitute a trespass then Asia Energy would be liable for loss and damage suffered by the landowner, notwithstanding the action had been expressly authorized by RONPHOS[31]. It is immaterial that the agent acted innocently and

[29] *Halsbury's Laws of Australia*, at 1-0652
[30] *Halsbury's Laws of Australia,* at 1-0662, 1-0663
[31] See *Johnson v Emerson* (1871) LR 6 Ex 329

without knowledge that it's entry onto the land was unlawful[32]. Accordingly, Asia Energy entered as a trespasser and is liable in damages to the plaintiff, and Ronphos is jointly liable, being vicariously liable for the actions of Asia Energy.

Damages

52. I heard only limited submissions on the question of damages. The advocates for the parties proposed that I should hear further submissions, if appropriate, once I had determined the question of liability. I will adopt that course, but it may be appropriate, and helpful in focussing submissions on damages, that I express some tentative views concerning damages.

53. A trespass to land is actionable per se; loss and damage does not have to be shown.[33] In the Law of Torts[34], Professor Fleming summarizes the situation of damages as follows:

> "For actual damage to the land or its structures by the trespass, the plaintiff is entitled to compensation on the same principles as for negligence. Otherwise the basic measure of damages is the use value of the land, regardless of whether and how the owner would otherwise have exploited it. In this "user principle" the action reveals its primarily proprietary focus; it is not compensatory like typical tort actions, but rather restitutionary, preventing the defendant's unjust enrichment. . . For inadvertent and evanescent trespasses, only nominal damages would be appropriate; while wilful and contumacious conduct may warrant aggravated damages for any affront and indignity to the plaintiff or exemplary damages to punish him".

54. Is this a case where the circumstances in which the decision was taken to remove the tank, the motivation of the trespassers, the benefits that accrued to the plaintiffs by the removal of the tank, and the absence of profit gained by the trespassers, suggest that only nominal damages might be appropriate?

55. The plaintiff, Grund Detabene, gave evidence that the tank had value to the landowners, either because the tank could have been converted into a fish farm, or else it could have been used to hold drinking water. At the time when the tank had been removed no decision had been reached by the landowners as to which, if either, option they would pursue. As I shall discuss, it seems to me highly unlikely that either course could have been taken, having regard to the condition of the tank.

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[32] See *Baschet v London Illustrated Standard Co* [1900] 1 Ch 73.

[33] See *Halsbury's Laws of Australia*, "Torts Derived from Trespass", Lexis Nexis, [415 – 325]; *Dumont v Miller* (1873) 4 AJR 152; *Plenty v Dillon* (1991) 171 CLR 635, at 639; *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384.

[34] J G Fleming, "*The Law of Torts*", 9th Ed 1998, 53-54.

56. Further or alternatively, the plaintiffs claim damages on account of the unjust enrichment Ronphos was said to have achieved by way of a salvage price for the scrap metal. One thousand tons of steel had been shipped as scrap metal, for which RONPHOS was paid $50,000 dollars, being the agreed price with Asia Energy, namely US $50 per metric tonne. However, a review of the evidence shows that Ronphos made no profit from the demolition.

57. After the work had been completed on the plaintiff's land RONPHOS commissioned a report from engineer Mr Kris Aitchison, whose report dated 15 September 2010 was tendered, and he also gave evidence. Mr Aitchison examined two of the three demolished tanks and the two remaining tanks in the general area. He did not at that time examine the location of the tank which had been demolished on the plaintiff's land but, as I shall explain, his evidence was applicable to the condition of that tank as well.

58. In his report Mr Aitchison concluded that the two remaining tanks presented a 'very real and immediate risk' mainly to children, but not excluding adults. The internal walls of the tank were heavily rusted and were anyone to enter the confined space of the tanks they would die from the toxic air.

59. There was a ladder system attached to the remaining tanks which was in a very poor condition and presented a risk of persons using the ladders falling through the tank roof. There was severe corrosion on both the tank lid and the external floor section and inspection of the area of the demolished tank demonstrated that corrosion was so heavy as to undermine the structural integrity of the tanks.

60. Mr Aitchison said that the tanks were well past their usable life but a full survey on their structural integrity would cost in the order of a hundred thousand dollars per tank. In estimating the cost of refurbishing the existing tanks by reference to the state of the bases of the two demolished tanks, he concluded that to cut the tanks and install a new base, to then lower the height of the tanks (e.g. in producing a fish farm) would incur a cost in the order of $1.5milliion dollars per tank.

61. Were the tanks to be used again to hold water they would require sand-blasting and having a protective coating applied both internally and externally, the cost of which together with scaffolding, would be in the order of two hundred and fifty thousand dollars. He recommended that demolition was the only practical solution for dealing with the tanks.

62. In his evidence Mr Aitchison produced photographs taken at the time of his inspection of the tanks in September 2010. He said that the welding techniques used on the tanks showed that they had probably been made more than fifty years ago. He demonstrated clearly, through the photographs, the serious condition of the

tanks. He said it would cost one and a half million dollars to restore each tank. A new tank would cost in the order of one million dollars, providing the existing foundations were sound.

63. He said that sand blasting would be required in the tanks because they had most likely been painted with lead both inside and outside. He said to work on the tank would cost a hundred and twenty five thousand dollars in scaffolding alone. The scaffolding would have to be brought from Australia for that purpose if an attempt was to be made to restore the tanks.

64. Although in September 2010 Mr Aitchison did not inspect the site where the tank had stood on the plaintiff's land he did make such an examination in the course of a view conducted during the trial. I was present on that inspection. He concluded that the metal scraps remaining in the area of the demolished tank on the plaintiff's land showed that the condition of that tank would have been no better than that on the four other tanks.

65. The fish farm option like the water supply option could not realistically have been achieved without enormous expense. I am satisfied that once the costs and difficulty of either option were presented to the landowners they would have concluded that the only realistic option was to demolish the tank, remove the scrap metal and so far as possible have the land returned to it's original condition, albeit with a circular concrete wall where the tank had stood. Although Mr Aingimea claimed there was a profit to be made in conducting the demolition and selling the scrap metal, I accept the evidence of Mr Gideon that the demolition could not have been done safely without extensive scaffolding and that no profits would have been achieved through the sale of scrap metal once the expenses of the demolition were taken into account.

66. As to the potential uses identified for the tank, Mr Aitchison considered it unlikely that the tanks could be cut down so as to make a fish farm. It would be possible to do so but only with the expenditure of large sums of money. The existing foundation might support a fish tank providing it's height was no more than about 1.5 metres. If the height of the tank was reduced, the old tank base was removed, and a new base was inserted and then lined with plastic, it might be possible to construct a fish tank but his own view was that the entire tank required demolition.

67. The plaintiff alleged that the defendants were unjustly enriched by virtue of the trespass on the plaintiff's land for the purpose of removing the tank. Mr Gideon of Ronphos said in his evidence said that, far from being enriched, the process of demolition cost RONPHOS money which it could not afford. It felt it had no choice but to incur that cost in the interests of the landowners.

68. Given the honourable and innocent intention behind Ronphos' decision to authorize entry to the land and removal of the tank, and given Mr Aitchison's evidence as to the state of the tank, and the improbability of it producing a profit or being otherwise utilized by the plaintiffs, the question arises whether merely nominal damages should be awarded.

69. In *C R Taylor(Wholesale) Limited v Hepworth's Ltd*[35] May, J. considered this case of a disused billiard hall which was destroyed by fire due to the negligence of the defendant. The billiard hall was in such a state of disrepair as to render it incapable of being used or occupied in that state. His Honour held that the building would in time have been razed to the ground by developer's bulldozers, without it being used for profit in the meantime. His Honour held that there had been a diminution of value of only 2500 pounds but that it would have cost the plaintiff at least that much to clear the site to the extent that the fire had already achieved. He held that the plaintiff had suffered no loss of damage, and awarded no damages other than with respect to some remedial safety work and the cost of damage to some chattels.

70. In *Dehn V The Attorney General*[36][] Tipping J dealt with a case where police officers had entered private property to investigate the possibility that an offence had occurred but did so in circumstances that constituted trespass. The intention of the police officers was to render assistance and they acted in good faith. Tipping J considered authorities relating to the defence of necessity to trespass to land[37] and concluded that the plaintiff had suffered no loss and damage. He awarded nominal damages of $1, without costs.

71. It is arguable that the plaintiffs suffered no loss from the removal of the tank, and may well have gained a benefit in the land's clearance. That is a matter the parties may wish to address.

Conclusion

72. On the question of liability, I find for the plaintiffs. The Plaintiff's claim in trespass is made out, as against both defendants.

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[35] [1977] 2 All ER 784

[36] [1988] 2 NZLR 564

[37] A defence of necessity was not pleaded or argued. Although the report of Mr Atchison identified dangerous conditions, his report was obtained after the removal of the tank. There was no evidence that the fear of "real and imminent peril" to people motivated the removal: see *Fleming Common Law of Torts* 6th edition, 1983, at page 88-89. As to the defence of necessity generally, *see S O Petroleum Co Limited v South Port Corporation* [1956] AC 218 at 228;

73. I will reserve the question of damages or other relief, in order to allow the parties time to consider these reasons. The matter will be relisted to hear submissions on those questions, if required.

Geoffrey M Eames
Chief Justice
23 March 2011