IN THE SUPREME COURT
REPUBLIC OF NAURU

No. 23 of 2010

GRUND DETABENE AND OTHERS

Plaintiff

V

RONPHOS 1st Defendant

And

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

JUDGE:	Eames, C.J.
DATE OF JUDGMENT:	26 May 2011
CASE MAY BE CITED AS:	Grund Detabene v Ronphos and Anor (2)
MEDIUM NEUTRAL CITATION:	[2011] NRSC 9

Damages - Assessment - Trespass to land - Restitution - Unjust enrichment - Compensatory damages - Whether plaintiff elected not to pursue claim for compensatory damages - Whether nominal damages appropriate.

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

CHIEF JUSTICE:

1 I delivered judgment in this matter on 23 March 2011, concluding that the plaintiffs had made out their claims as against both defendants for trespass to land. I reserved the question of damages and invited the parties to make written submissions on that question. This they have now done.

2 The usual measure of damages for tort would be to compensate the plaintiff for the loss suffered[1]. In the case of trespass to land, damages would be awarded even if no actual damage was caused to the land, because trespass is actionable per se[2]. As an alternative to claiming compensatory damages a plaintiff may elect to claim restitutionary damages against the tortfeasor, where the tort resulted in the defendant's unjust enrichment.

3 Restitution is often an appropriate remedy for trespass to land[3], and so it was in this case that in his final written submissions Mr Aingimea, on behalf of the plaintiffs, sought damages by way of restitution, against the second defendant, Asia Energy (Thailand) Co Ltd ("Asia Energy"), on account of what was claimed to be the unjust enrichment of that defendant, rather than compensatory damages. The claim against the first defendant, Ronphos, was, in the end, confined to a claim for compensatory damages.

4 Where a plaintiff sought restitution rather than compensatory damages the plaintiff was said to have notionally "waived the tort"[4], but a plaintiff was entitled to pursue the alternative remedies (restitution or compensatory damages), without having to elect between them, at least until the point where the plaintiff applied for judgment[5]. Once the election had truly been made, by a plaintiff applying for judgment on that

---

[1] *Gates v City Mutual life Assurance Society Ltd* (1986) 160 CLR 1 at 12-13.
[2] *Plenty v Dillon* (1991) 171 CLR 635 at 639.
[3] *Halsbury's Laws of Australia*, "Restitutionary Damages in Tort", "Torts in relation to land", [370-3995], Lexis Nexis.
[4] *Halsbury's Laws of Australia*, "Restitution/ Claims based on Wrong Committed", [370-3750], [370-3755], [370-3760] Lexis Nexis
[5] See *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 521; *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 18; [1940] 4 All ER 20 at 30.

basis, then the plaintiff would have waived his right to sue in tort[6]. The election would no doubt be more readily made in cases such as this, where little or no actual damage has resulted from a trespass to land, but, as I shall discuss, no election has relevantly been made by the plaintiffs in this case.

5 In his written submissions, Mr Aingimea, pleader for the plaintiffs, did not seek to maintain the plaintiffs' claim that the first defendant, Ronphos, was unjustly enriched by its trespass, no doubt in acknowledgment of my finding of fact in the principal judgment, that the evidence did not disclose that Ronphos made a profit, at all, from its trespass. As I found, Ronphos commissioned the demolition for the purpose of removing an unsightly and unused water tank from the plaintiff's land, acting under a mistaken belief that it had a statutory duty to do so. As I also found, not only did Ronphos not profit by the endeavour, the plaintiffs themselves actually benefitted by the removal of the tank, which was an unusable and dangerous eyesore.

6 Unjust enrichment may arise either because the defendant obtained a benefit at the expense of the plaintiff or else it was a benefit gained by virtue of his tort but the defendant's gain did not come at the expense of the plaintiff.[7] In the present case, the plaintiffs, in their written submissions on damages, advance either or both bases of unjust enrichment as against Asia Energy: first, contending that the second defendant deprived the plaintiffs of the profit that the plaintiffs might themselves have earned had they demolished the tank and exported the scrap metal, and secondly, or alternatively, contending that the second defendant gained a benefit from its trespass by virtue of the profit gained under its contract with Ronphos for the demolition of the tank and removal of scrap metal, even if that profit was not gained at the expense of the plaintiffs.

---

[6] *United Australia Ltd v Barclays Bank Ltd* [1940] 4 All ER 20 at 28-31, per Viscount Simon LC, at 34-35, 37 per Lord Atkin; See, too, Encyclopaedic *Australian Legal Dictionary*, "Waiver of Tort". Lexis Nexis. Some authority suggests that it was necessary that judgment had been entered for the alternative relief before an election would be deemed to have been made, but it is unnecessary to consider that further.

[7] *Halsbury's Laws of Australia*, "Restitution/ Claims based on Wrong Committed", [370-3750], [370-3755], [370-3760] Lexis Nexis

7 In his submission Mr Kun, as Pleader representing both defendants, took a threshold objection to the plaintiffs' claim for restitution. He submitted that the doctrine of unjust enrichment formed no part of English law, and therefore was not the law in Nauru. He cited the fifth edition of Osborn's Concise Law Dictionary and *Nelson v Larhart (sic)*[8] for that conclusion. That contention is without merit. It is true that doubt had been expressed about the application of that principle in English law, but such doubts were removed by the House of Lords in 1991 in *Lipkin Gorman (a firm) v Karpnale Ltd*[9].

8 The plaintiffs have apparently abandoned a claim in restitution as against Ronphos, which Mr Aingimea had opened, based on unjust enrichment, but the plaintiffs have pursued a claim for restitution against Asia Energy, which had also been opened by Mr Aingimea. Although restitution claims were made in Mr Aingimea's opening submissions as against both defendants, the plaintiffs' statement of claim did not in fact seek that relief, but instead sought compensatory damages. Mr Kun made no complaint about any deficiency in the pleadings but the compensation claims were not dealt with in any depth during the hearing, attention being focussed on the claims to restitution.

9 The claims for compensatory damages, as pleaded, were, first, for the cost of replacing the old tank with a new one (which would have cost in the order of a million dollars), secondly, damages in the sum of $50,000 for cleaning the waste rubbish and other items left on the land after the tank was demolished, and thirdly, damages for "loss of future income". The first and third claim for compensatory damages could not succeed, having regard to my findings of fact in the liability judgment. In his final written submissions as to damages, Mr Aingimea did pursue the second basis for compensatory damages that was identified in the prayer for relief, namely, the cost of cleaning up after Asia Energy had concluded its work.

---

[8] The citation given by Mr Kun for the case was [1951] A.C. at 513-4. That citation is incomplete, and the case name is incorrect. The intended reference was to *Reading v Attorney General* [1951] AC 507, at 513-4, per Lord Porter. I presume that the mistake was made in *Osborn. Nelson v Larholt* (not Larhart) [1948] 1 KB 339 was an earlier decision of Denning J, as he then was, concerning restitution.

[9] [1991] 2 AC 548. See *Halsbury's Laws of England*, "Restitution" (Vol 40(1)), (2007 Reissue), p.1 Introduction, Lexis Nexis.

10 In my judgment on the question of liability I expressed the tentative view that the defendants could be held liable, at worst, to pay only nominal damages by way of compensation. I invited submissions as to the appropriateness of that tentative conclusion, but the plaintiffs' submissions do not address the question whether a mere nominal award of compensatory damages would be appropriate against either defendant. The plaintiffs' submissions on damages largely concentrated on the assertion that Asia Energy gained unjust enrichment.

11 There is a paucity of evidence as to whether the second defendant, Asia Energy, made a profit from its contact to demolish the tank and export the scrap metal. In his written submission, Mr Aingimea sought to adduce evidence as to the likely cost to the second defendant and its likely profit from the demolition exercise. He asserts, first, that the tank was cut down in a week (which he concedes was not the subject of evidence led before me), secondly that "there would have been at least 50m/Tonnes of black steel in the tank" and, thirdly, that "the current market price for scrap iron is around USD $275 per m/tonne". Taking those propositions together, Mr Aingimea concludes that the second defendant, Asia Energy, would have achieved an unjust enrichment "of at least $10,000".

12 Mr Kun's submission, in response, also seeks to adduce evidence, relating to the likely price obtained for the scrap metal. Mr Kun annexed documents which, so it is said, show that the actual price received on the Asia market for the scrap metal was $100 per m/t. He also referred to documents which purported to show the total expenses incurred by both defendants, demonstrating, he submitted, that there was a net loss for the second defendant of $127,159, and a loss of $165,778 for the first defendant (These costs relate to the demolition of all tanks, not just the one on the plaintiff's land). Mr Kun submits that there is no evidence that a profit was gained by either defendant by virtue of the trespass on the plaintiff's land.

13 The onus is on the plaintiff's to make out their case for damages. As against Asia Energy they have chosen to do so primarily by arguing a claim based on restitution.

14 As I have said, there are two ways in which unjust enrichment may arise. First, the defendants may have gained a benefit at the expense of the plaintiff. Here, it is argued by Mr Aingimea that the plaintiffs could themselves have undertaken the task of demolition and exporting the scrap metal, thereby gaining the profit that fell to Asia Energy. In my opinion, however, had the plaintiffs taken that role, rather than Asia Energy, they would have had to meet the substantial expenses incurred by Asia Energy, particularly for scaffolding, that I discussed in my judgment on liability.

15 Whilst it may be thought improbable that Asia Energy would have gained no benefit at all from the removal of the tank on the plaintiffs' land, the plaintiff's contentions amount to speculation. I am simply unable to calculate the extent of the benefit, if any, Asia Energy achieved. Thus, as to the first basis on which unjust enrichment might be made out, I am not satisfied on the evidence that the second defendant was unjustly enriched at the expense of the plaintiffs.

16 The second basis for restitution, seeks to deny Asia Energy the profit which it gained by virtue of its trespass, even if it was not gained from or at the expense of the plaintiffs. Once again, there is a paucity of evidence as to whether any and how much profit was made by the second defendant from its demolition and removal of the scrap metal on the plaintiffs' land.

17 In my opinion, the plaintiffs have failed to establish on any basis that either defendant was enriched by virtue of the demolition and removal of the tank on the plaintiffs' land. I turn then to the question whether alternative relief by way of compensatory damages should be ordered.

18 There has been a trespass, albeit innocently committed by both defendants. Ronphos acted in what it considered was the best interests of the plaintiffs when it ordered the removal of the tank, and apart from leaving some rusted scrap metal, the concrete base and other waste, it did not damage the land, even arguably enhanced it. In those circumstances nominal damages had seemed to me to be adequate for its

trespass. On reflection, however, that might wrongly suggest that a mere trifling sum in damages would be appropriate.

19 In any event, "Nominal" damages does not mean "small" damages[10]. In *Baume v Commonwealth*[11], a case of trespass to goods, Griffith, C.J. held:

> "Assuming, however, that the plaintiff is entitled to damages for detention of the books after the time when the Customs had done with them, for which I think an action would lie against the Commonwealth, it was contended for the Commonwealth that these damages would be nominal only. I think not. The distinction between nominal and real damages was pointed out very clearly by Lord *Halsbury* L.C. in the "*The Mediana*" *v.* "*The Comet*": "*The Mediana*"[12] cited by Mr. Knox. He said:—"I wish, with reference to what has been suggested at the bar, to remark upon the difference between damages and nominal damages. "Nominal damages" is a technical phrase which means that you have negatived anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term "nominal damages" does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages." Then he referred to various cases one of which was the taking away of a chair for which the damages would be small. So here I think the plaintiff is entitled to damages, not nominal."

20 Although Ronphos' motives and behaviour were not such as to justify punitive damages (and exemplary damages were not sought[13]), its failure to consult the plaintiffs meant that the corporation entirely ignored the right of the owners of the land to decide for themselves whether and in what manner the demolition of the tank should occur. That behaviour undoubtedly upset the plaintiffs. The principle that trespass to land is actionable per se, acknowledges that the law regards trespass as a serious wrong, which if not addressed could lead to breaches of the peace[14].

---

[10] "Nominal damages is an expression used in contradistinction to substantial damages, and does not mean Small": per Encyclopaedic Australian Dictionary, Lexis Nexis.

[11] (1906) CLR 97 at 116.

[12] (1900) AC 113 at 116.

[13] Exemplary damages are awarded only where there has been conscious wrongdoing in contumelious disregard for the owner's rights: *Whitfield v De Lauret and Co Ltd* (1920) 29 CLR 71 at 77.

[14] See the discussion by Santow, J.A. in *Port Stephens Shire Council v Tellamist Pty Ltd* [2004] NSWCA 353 at [189]-[190].

This was not a case of there being nothing more than a mere trespass to the land; it was prolonged, and accompanied by significant activity by a number of workers on site, after which remained the large and unusable base where the tank had stood, plus a degree of litter.

21 The emphasis on restitution in the plaintiffs' written submissions might suggest that the plaintiffs had abandoned a claim for compensatory damages against the second defendant, Asia Energy. The plaintiffs have not yet applied for judgment, however, and they cannot be taken to have elected to abandon the claim for compensatory damages as against Asia Energy, any more than they did so with respect to Ronphos.

22 Having concluded that the claim for relief against both defendants by way of restitution cannot succeed, I will assume that the plaintiffs would want me to assess compensatory damages, the alternative basis for relief, as sought in the pleadings.

23 Having regard to the findings of fact I made in the primary judgment as to the benefit gained by the plaintiffs by virtue of the removal of the unusable tank, but also having regard to my findings in this judgment that this was not a case of mere trespass, I conclude that, having regard to the denial of the plaintiff's rights that the trespass constituted, it is appropriate that the plaintiffs be awarded something more than a negligible sum, by way of "nominal damages", but should not be awarded substantial damages. I assess damages for the act of trespass, as against the two defendants jointly, at $500.00

24 In addition, however, there is another head of compensatory damages that has been made out. In the prayer for relief in the statement of claim the plaintiffs sought damages with respect to cleaning up the waste rubbish and other objects left on the land after the demolition. That claim was pursued in Mr Aingimea's submission on damages. He contended that the clean up would cost $4500.00, being 3 days work at $1500.00 per day. That sum includes the expense of hiring a bulldozer or other heavy machinery and a truck, but no evidence has been led as to those costs. In reply, Mr Kun submitted that Ronphos could clean up the land at much less cost,

and in much shorter time (a matter of hours) and he advised that Ronphos was willing to conduct the clean up at its own cost.

25 The plaintiffs have a duty to mitigate their loss, but it would not be unreasonable for the plaintiffs to want to be in control of the remaining cleaning-up process. What might be achieved by Ronphos in a few hours cleaning-up might be unacceptable to the plaintiffs, perhaps reasonably so. It is appropriate, therefore, that some certainty be achieved. The plaintiffs are content to themselves engage persons to perform the clean-up work, but require compensation for that task. Although the submissions lack precision, I consider it appropriate that I take a global approach, and award the plaintiffs sum of $2000.00 under this head of damages, jointly as against both defendants.

26 The plaintiffs' claim was defended jointly by the two defendants. They had the same counsel and advanced the same defences. There are no contribution proceedings. I see no basis for distinguishing between them or for making different individual damages awards[15]. They will be jointly and severally liable for the total damages that I have assessed.

27 I therefore assess damages in the sum of $2500.00, and, subject to any submissions by Mr Kun, will, on application, enter judgment in that sum jointly against both defendants.

---

[15] As to entering separate judgments for different amounts against joint tortfeasors, See *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 57 ALR 639.

28 The parties may make submissions as to appropriate orders, including costs, in the event that agreement cannot be reached as to those matters. Failing agreement, I direct that written submissions on costs and other orders be filed and exchanged within 14 days of publication of this judgment, with a further seven days thereafter for the filing and exchange of submissions in reply.

Dated this 26th day of May 2011
Geoffrey M Eames AM QC,
Chief Justice.