IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO. 19/2010

IN THE MATTER	of the Declaratory Judgments Act 1994 and Section 129 of the Property Law Act 1952
BETWEEN	**NGATERE SAMUEL and LYNNETTE MARGARET SAMUEL** **Plaintiffs**
A N D	**TANGI CHUNG CHING MATAROA** **First Defendant**
A N D	The **MINISTRY OF INFRASTRUCTURE AND PLANNING, SURVEY OF LAND MANAGEMENT DIVISION** **Second Defendant**
A N D	**MARIANA MONA MARAMA and SHAUN PETER MICHAEL GALLAGHER** **Third Defendants**

Hearing: 7 April 2011

Counsel: Ms S Inder for Plaintiffs
First Defendant (present in Court but not represented)
Solicitor-General, Mr T Elikana, for Second Defendant
Mr C Petero for Third Defendants

Judgment: 30 June 2011

FIRST JUDGMENT OF HUGH WILLIAMS J

A. The application by Mr and Mrs Samuel for orders vesting in them be 204 m^2 of Lot 19 Arorangi previously leased by Ms Mataroa to Ms Marama and Mr Gallagher is adjourned part-heard for the parties to consider their positions in light of the comments in paras [24] to [33] of this Judgment.

B. All issues of costs are reserved but subject to the comments in paras [34] to [43] of this judgment

Introductory

[1] In this application the plaintiffs, Mr and Mrs Samuel,[1] seek a declaration that the first defendant, Ms Mataroa,[2] and the second defendant ("the Survey Department") acted unlawfully in relation to Mr and Mrs Samuel's lease of 796 m^2 of "Onemaru, Section 83E1B2, Lots 18, 19 and 20, Arorangi", and a further declaration validating or varying that lease.

[2] Put shortly, Mr and Mrs Samuel allege Ms Mataroa was the owner of Sections 18, 19 and 20, each of 796 m^2, leased 1,000 m^2 being part of that land to the third defendants, Ms Marama and Mr Gallagher, on 17 December 2002, but then leased 796 m^2, a portion of which was part of the land leased to Ms Marama and Mr Gallagher, to the plaintiffs in December 2006. They accordingly assert Ms Mataroa sold part of her land twice, has been paid twice for it, and that Mr and Mrs Samuel are therefore entitled to a declaration theirs is a valid lease plus an adjustment of their lease boundary.

Facts

[3] Resolution of the facts was assisted by the parties having sensibly agreed on the following salient points (though, as will be seen, they may have been rather too economical with some facts). With additional detail drawn from the evidence, the factual situation appears to be that:

(a) Ms Mataroa is the sole owner of Sections 18, 19 and 20, each of 796 m^2 under Plan SO913 deposited in the Office of the Chief Surveyor.

(b) Ms Marama and Mr Gallagher entered into a lease with Ms Mataroa on 17 December 2002 of 1,000 m^2 being part of "Onemaru Section 83E1B2, Lots 18, 19 and 20" with the certified plan for that

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[1] The parties are described in the lease and the Register of Titles as Tangi Chung Ching Mataroa and Mr and Mrs Samuela.
[2] The parties are described in the lease to Ms Marama and Mr Gallagher as Tangi Chang Timi.

land, L2352, showing the area leased at 1,000 m^2 being approved by the Chief Surveyor on 17 December 2002, and being confirmed on 24 January 2003. The certificate of confirmation was sealed on 3 February that year, but for some unexplained reason was not registered on the Register of Titles until 4 March 2010.

(c) Mr and Mrs Samuel leased 796 m^2, being part of "Sections 18, 19 and 20" from Ms Mataroa in December 2006, with the certified survey plan for that area being approved by the Chief Surveyor on 6 December 2006. It was confirmed on 27 July 2007, the certificate of confirmation was sealed by the Court on 24 August 2007, and the lease duly recorded on the Register of Titles. The plaintiffs built a house on what they thought was the land they leased between June-October 2008. According to Mrs Samuel's affidavit and a plan the parties put in evidence (but did not refer to), it encroaches on the land leased to Ms Marama and Mr Gallagher at least to the extent of the plaintiffs' deck encroaching by 1.7 metres[3] uniformly along about half the boundary of the land leased

(d) It is of some importance to note the plan attached to the lease to Mr and Mrs Samuel twice describes the land as "Pt 83E1B2 and Lot 19" and gives the land area as 796 m^2. The plan is "certified correct and conforms to SO913" by the Chief Surveyor. The dimensions are 21.87m road frontage, 22.07m for the opposite and parallel frontage with the side frontages, also parallel with each other, shown at 37.70m and 38.35m respectively.

(e) The plan attached to the lease between Ms Mataroa and Ms Marama and Mr Gallagher shows the leased area as 1,000 m^2 and twice describes the land as "Pt A3E1B2", with the plan being "certified correct and conforms to L2352". The plan contains no lot numbers. The road frontage and the opposite parallel frontage are shown at

[3] The encroachment may also involve a driveway.

27.11m and 27.30m respectively with the side, parallel frontages at 38.21m and 38.99m.

(f) Ms Mataroa was present at the hearing but not represented by counsel. However, she gave evidence in which she admitted that when she leased part of her land to Mr and Mrs Samuel in 2006 she was aware she had earlier entered into a lease with Ms Marama and Mr Gallagher for a larger area but was unaware the lease to the latter couple was not registered until 2010.

(g) Ms Mataroa said Mr and Mrs Samuel did all the work concerning the leasing of part of her land to them, but did not think she told them the lease to Ms Marama and Mr Gallagher was for 1,000 m^2 because she believed "It had already been recorded on the survey diagram that they picked up from there [the Survey Department] but it wasn't".She left it to the lawyer to do all the paper work for the lease to Ms Marama and Mr Gallagher.

(h) The land descriptions are wrong in both leases. Both say the land is part of Lot 20 when Lot 20 is not part of either. The land leased to Mr and Mrs Samuel also says it includes part of Lot 18 when it does not. However, since it seems only the plans, not the leases, go to the Survey Department, the Department cannot have been mislead by those errors.

[4] Mr Charlie, the Chief Surveyor, described how matters of this type are processed by the Survey Department.

[5] The process begins with the landowner instructing a private surveyor with the latter depositing all survey plans with the Survey Department for thorough investigation and checking, including looking for any encroachments and to ensure the proposed plan conforms. The surveyor effects any amendments required following which the plan is finalised and the surveyor appends it to a lease or a lease plan which is uplifted either by the landowner or their surveyor. They then bring it

to the Court for confirmation but, of some importance, it does not return to the Survey Department. If the plan is altered during the confirmation process, a further plan is prepared and the process repeated.

[6] Cross-examined by Ms Inder for Mr and Mrs Samuel, Mr Charlie acknowledged the Survey Department's website described its responsibilities. They include:

> Administration, plan preparation and examination services of all Cadastral surveys which the Cook Islands system of Land Tenure relies on;
>
> Maintenance of the Register of Survey Plans for lands in the Cook Islands;
>
> Custodian of all land survey plans and documents;
>
> ...

He acknowledged the Department has no Cook Islands governing legislation or regulations. It works under the New Zealand equivalents.

[7] Mr Charlie said the survey plan for the lease to Ms Marama and Mr Gallagher was No. L2352, the diagram on which shows the 1,000 m^2 was all of Lot 18 and a section of the adjacent Lot 19, a detail which does not appear on the plan attached to the lease, though the latter's dimensions repeat those shown on L2352 and the lease plan is endorsed by one of Mr Charlie's staff as "Certified correct and conforms to L2352." That certificate, he said, would not have been endorsed without reference to the underlying plan SO913.

[8] However, the plan attached to Mr and Mrs Samuel's lease both bore the notation that it was of Lot 19 and the endorsement "Certified correct and conforms to SO913", which is certainly correct, at least as regards the dimensions recorded on SO913. The absence of reference to SO913 on the lease plan for Ms Marama and Mr Gallagher was, Mr Charlie said, in accordance with long historical practice. Its absence, he suggested, was sanctioned by precedent and would have been a matter for Ms Mataroa or her surveyor. The explanation, Mr Charlie said, was:

> ... the person that produced the Samuel is the same guy that draw the plan from Landmark, its Ata Hosking. He was questioned by my staff that was he aware that there was already 1,000 m^2 before. He was questioned. You

know questions will be asked, but according to him never went through. His customer requested him to produce this plan, this one 796[m^2]. There wasn't any mention about it. I have spoken to my staff about this. They questioned the people that produced this plan – that brought in this diagram – about were they aware of the 1,000 m^2 and it is encroaching – they were aware of it.

[9] He then said:

The [L]2352 reference is that one - on the lease land 2352. The SO913 is only put on the original plan of the 2352, that is a survey plan showing details. Once we produce the lease plan those reference plans on the original will be shown – only the plan number, that plan is produced.

So was there a lease plan done for the Samuels one - equivalent to the L2352?..... Like I said, if the landowners comes in and request. If the landowner want a plan to be produced then they have to request. Like for instance, I heard the landowner saying before that she was aware that 1,000 m^2 was leased to the Gallaghers. The next step for her to come in to request for the balance of that two lands she owns. That is, a new plan will have to be produced with the balance of the land 592 m^2.

...

Was it [SO913] updated when the survey plan for the 1,000 m^2 was done – was that plan changed to show that that is no longer 796?..... Like I said, once the plan is produced and approved there's no more updating of that plan. We don't update. We have another system that is on a block sheet. That is another Cadastral map. That's where we make the updates. We enter a whole new land that has been surveyed.

And that system is cross-referenced with the other system?..... Exactly, yes.

...

... the beauty of the Occupation Right is the Court grants and confirms that before going out to the landowners, and for that we receive Court orders and Court orders and instructions are given to the surveyor, and everything is done as per instructions by the Court. Whereas for the lease - I think this is the grey area that ... this is the grey area that us at the Survey Department don't really know what I happening. We produce thousands of these diagrams every year. They are there and we don't know where it ended up, whether it has been confirmed in Court or not. And landowners are coming left, right and centre to my office requesting for the same piece of land and we never have any idea whether it has been through the Court or it has actually been approved. This case, this is the first time that a land has been leased to two unfortunate buyers, and there is an encroachment into this land. To me, really, it is the landowner who should know and understand why ... and she should be the only one knows that one has gone through and then the other one has not gone through, and both has gone through with that encroachment. This is the first time in the surveying history in the Cook Islands.

Submissions

[10] Ms Inder made the point that Mr and Mrs Samuel sought a declaration and relief under s 129 of the Property Law Act 1952 to have their lease declared valid and the lease to Ms Marama and Mr Gallagher varied by being reduced to 796 m^2, the area of Lot 18. She made the important point, confirmed by Mr Petero for Ms Marama and Mr Gallagher, that they had no objection to their lease being varied to encompass only 796 m^2 provided they were compensated by Ms Mataroa for the loss of land.

[11] Ms Inder relied on the fact that Ms Mataroa did not deny having sold the 204 m^2 difference twice and been paid for it twice.

[12] The real nub of the case, Ms Inder submitted, was whether Mr and Mrs Samuel could prove the Survey Department failed to exercise the required standard of care in approving the survey plans for the leases – plus the issue of costs.

[13] She pointed to the fact that the Cook Islands Act 1915 requires confirmation by the Land Court for alienations to have force or effect,[4] while s 480 provides:

> If confirmation is granted of two or more inconsistent instruments of alienation of the same land, the priority of those instruments as against each other shall depend upon the respective dates of confirmation, and not upon the dates of the execution of the instruments.

but she submitted Cook Islands law does not require alienations to be registered on the Register of Titles.

[14] Ms Inder's submissions noted that, pursuant to s 129 of the Property Law Act 1952, the Court has power to make orders in the case of encroachment of buildings on adjoining land and, under subsection (2), on being satisfied the encroachment is unintentional and did not arise from gross negligence or where the building was not erected by the encroaching owner, the Court has power to grant relief to the encroaching owner if just and equitable. Orders may be made without

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[4] Section 477.

ordering the encroaching owner to give up possession of the land encroached upon or pay damages, and the Court has a discretion to make orders "vesting in the encroaching owner ... any estate or interest in the piece of land encroached upon" or creating easements or dealing with possession of the land encroached upon.

[15] Ms Inder submitted the plaintiffs' encroachment in this case was unintentional and did not arise through gross negligence because they relied on the lease entered into with Ms Mataroa for 796 m^2, and the confirmation of that alienation by the Land Court. She stressed that Mr and Mrs Samuels' checking of the Register of Titles did not disclose the lease to Ms Marama and Mr Gallagher as it was not then registered: it achieved priority over the Samuel's lease by dint of being confirmed earlier.

[16] She submitted the Survey Department cross-referenced survey plans and therefore, when Mr and Mrs Samuels' plan came in, knew or should have known the lease of the 1,000 m^2 to Ms Marama and Mr Gallagher of part of the same land had already occurred.

[17] She stressed the plaintiffs were seeking neither compensation nor damages but validation of their lease of 796 m^2 and costs.

[18] The Solicitor-General made the point that it is landowners who know how much of their land has been leased, with the Survey Department's role on production of a survey plan being to check it accords with, in this case, SO913. It has no involvement in the process of subsequent confirmation.

[19] For Ms Marama and Mr Gallagher, Mr Petero noted his clients had purchased the lease of 1,000 m^2, the whole of Lot 18 and 204 m^2 of Lot 19 in 2002 for $30,000, but Ms Mataroa had had, in 2006, purported to sell the whole of Lot 19 to Mr and Mrs Samuel for $40,000.

[20] Ms Marama and Mr Gallagher had acknowledged the correct position as soon as the plaintiffs started building their house on Lot 19 and had, after discussions, entered into a settlement with Ms Mataroa whereby she agreed to compensate

Ms Marama and Mr Gallagher in the sum of $15,000 in respect of the 204 m^2 on the basis they relinquish that part of Lot 19, 204 m^2, she had leased to them.

Discussion and decision

[21] The various agreements reached by the parties have made the task of deciding this aspect of the case easier – but there still appears to be an abiding difficulty arising out of the way the plaintiffs' case is pleaded, and the evidence the parties chose to put before the Court resulted, as will be seen,in gaps in the record which mean this matter cannot be finally determined at this stage.

[22] In their first cause of action, in addition to seeking a declaration that Ms Mataroa and the Survey Department acted unlawfully, Mr and Mrs Samuel seek a further declaration that their lease of 796 m^2 is a valid lease. In their second cause of action they seek an order under s 129(3) of the Property Law Act 1952 varying the lease between Ms Mataroa and Ms Marama and Mr Gallagher, presumably by restoring the 204 m^2 difference in the lease to Mr and Mrs Samuel.

[23] The difficulty that appears to arise in relation to the relief sought in the plaintiffs' first cause of action is that, while there can be no doubt as to the validity of the lease from Ms Mataroa to Mr and Mrs Samuel – it was validly executed, validly approved and validly confirmed - a declaration to that effect would not appear to have the result of the restoration to Mr and Mrs Samuel of the 204 m^2 Ms Mataroa had previously leased to Ms Marama and Mr Gallagher. The disconnect may be between the contract pursuant to which Mr and Mrs Samuel agreed to lease an area of her land from Ms Mataroa and the lease itself, but the parties did not put the contract in evidence. If the amount of land leased was less than the amount contracted for, there seems no reason why Ms Marama and Mr Gallagher did not simply sue Ms Mataroa for breach of contract or for specific performance whereby they would have succeeded in recovering the 204 m^2 of their lease they currently lack. If, however, there was no preceding contract, either Mr and Mrs Samuel may have received what they contracted for or, if some other means of delineating the leased land they were purchasing was undertaken, evidence needed to be given of that fact. So, to sum up that cause of action, the lease to Mr and Mrs Samuel would

appear to be valid but if it was not for the area in the preceding contract, the evidence does not disclose the position.

[24] Then what Mr and Mrs Samuel seek in their second cause of action is an adjustment of the area of land leased by them to, as it were, restore the 204 m^2 they thought they had leased – the whole of that part of Lot 19 shown on Survey Plan L2352 as being leased to Ms Marama and Mr Gallagher and incorporated in the 1,000 m^2 leased to them by Ms Mataroa according to the confirmed lease dated 17 December 2002. There is no objection to that course by Ms Mataroa or by Ms Marama and Mr Gallagher, provided the latter are compensated in accordance with the acknowledgement of debt Ms Mataroa signed.

[25] There is no dispute on the part of any person involved that the encroachment by Mr and Mrs Samuel's house on that part of Lot 19 leased to Ms Marama and Mr Gallagher was unintentional and did not arise from gross negligence, and it is accordingly just and equitable that relief should be granted to Mr and Mrs Samuel.

[26] The difficulties which appear to arise, however, are, first, as to whether the encroachment is of a "building" and, secondly, that s 129(2) only gives the Court power to make a vesting order in favour of the encroaching owner in relation to the "piece of land encroached upon".

[27] The parties put an outline diagram in the agreed booklet but made no submissions on it, and there were no photographs so the only evidence on the topic was Mrs Samuel's affidavit saying that Ms Marama and Mr Gallagher applied for an injunction when the Samuels' house was completed "claiming that our veranda/deck encroached on their section by 1.7 metres", but there "was no mention of the driveway encroaching on their section" as is claimed in the defence filed by Ms Marama and Mr Gallagher. That pleaded – though there was no evidence to support the allegation – that Mr and Mrs Samuel "build a concrete driveway that encroached a further three metres into the third defendants' lease." The driveway was not mentioned in the statement of agreed facts.

[28] Several issues appear to arise from that scant evidence.

[29] The first is that there is no evidence as to whether the "veranda/deck" is on or affixed to the soil above which it has been erected, though it can be accepted – subject to the question of encroachment – that the maxim *cuius est solus, eius est ad inferos et ad coelis* applies. Secondly, though not appearing to be in contention, the parties appear to agree that, whatever the factual position, the "veranda/deck" is a "building" which occupies part of the land leased by Ms Marama and Mr Gallagher. Thirdly, if the driveway encroaches, there would appear to be no basis for suggesting a driveway might be a "building". Fourthly, as Hardie Boys J observed in *Blackburn v. Gemmell,*[5] "The Court must limit the exercise of its powers under s 129 to the minimum intervention necessary in order to secure proper relief for the encroaching owner."

[30] Having regard to that it would appear to be the case that, even if the "veranda/deck" is accepted as being a "building", the Court's powers under s 129(2) would appear to be restricted to vesting in Mr and Mrs Samuel, that part of Lot 19 actually encroached upon by their "building", not the whole of the 204 m^2.In practical terms the Court's powers appear to be limited to the narrow oblong of land shown on the diagram as the encroachment.

[31] If that be correct, the Court lacks the power to fully effect the agreement between the parties and the only means by which Mr and Mrs Samuel can have the entire 204 m^2 added to their lease under s 129 would be by the Mataroa to Marama and Gallagher lease being varied by the appropriate adjustment to the plan in terms of the lease to remove the 204 m^2 and the Mataroa to Samuel lease being similarly adjusted to include the 204 m^2 or by new leases being entered into to bring about the same result.

[32] The appropriate course, therefore, is to adjourn that aspect of the claim for the parties to consider their positions and, if they conclude the Court's observations are correct, take the appropriate remedial action.

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[5] *Blackburn v. Gemmell* (1981) 1 NZCPR 389 at 393.

[33] Leave is, however, reserved to the parties to revert to the Court if they consider the Court has power to effect the agreement between them or can assist in any way.

Costs

[34] By agreement between the parties determination of the impact of any costs orders was agreed to be delayed until after delivery of the substantive judgment in this matter. Accordingly what follows records the attitude of the parties and the Court's tentative views, both of which may change after further submissions.

[35] For Mr and Mrs Samuel, Ms Inder, sought indemnity costs on a solicitor/client basis against all defendants. While Ms Mataroa, not having delivered to Mr and Mrs Samuel the area of land which they presumably contracted to lease from her, should be liable to them for the survey and other fees incurred in correcting the matter, it may be something quite different for her to be liable for Mr and Mrs Samuel's costs other than on a party/party basis. Indemnity costs are the exception rather than the rule and usually require demonstration of exceptional circumstances before they will be awarded.

[36] The court is unaware at what point the parties agreed on what should be done to correct the position between them – the Acknowledgement of Debt is undated though the Statement of Agreed Facts is dated 31 March 2011 - but, if agreement occurred at an early date, that may impact on costs.

[37] As far as Ms Marama and Mr Gallagher are concerned, it seems they alerted Mr and Mrs Samuel to the problem as soon as it became apparent the Samuels' house (or part of it) was encroaching on the land leased to Ms Marama and Mr Gallagher and, on the evidence to date, did what they could from that point onwards to have the situation corrected. In those circumstances, it may be difficult for Mr and Mrs Samuel to obtain any order for costs against Ms Marama and Mr Gallagher – and vice versa.

[38] As far as the costs claim against the Survey Department is concerned, it might be thought to be a deficiency in the Cook Islands land tenure system that, after checking survey plans against plans such as SO913 and certifying their correctness on lease plans, the Survey Department has no further involvement in the matter unless plan alterations during the confirmation process necessitate further involvement. But, as Mr Charlie said, the present system is one which has served the Cook Islands well for many years with no problems – or at least no litigation – arising until this case.

[39] The most that might be said in Mr and Mrs Samuel's favour as the evidence now stands is that the lease plan attached to Ms Marama and Mr Gallagher's lease was for 1,000 m^2 of land, with the plan certified as conforming to Survey Plan L2352 – all of which is correct – but lacks express reference to Lot numbers while the plan attached to Mr and Mrs Samuel's lease is for 796 m^2 with the certification it conforms to SO913 and is Lot 19 – all of which is also correct. In checking the plan on the lease to Ms Marama and Mr Gallagher against survey plan L2352 officers of the Survey Department would have noted that the more particularised plan on L2352 clearly indicated the land being leased was the whole lot of 18 and part of lot 19. The dimensions on the plan leased to Ms Marama and Mr Gallagher and on L2352 are those earlier recounted. Mr Charlie said officers of the Survey Department, in confirming the plan attached to the lease to Ms Marama and Mr Gallagher, would have checked it both against Survey Plan L 2352 and against SO 913, but both would have tallied, as would the boundaries and the lease – had they had it.

[40] Then, when the Survey Department officers came to check the plan attached to the lease to Mr and Mrs Samuel they would, had they remembered the lease to Ms Marama and Mr Gallagher of four years earlier, perhaps have noted that the plan on Mr and Mrs Samuel's lease was expressed to be "lot 19" and "796 m^2" and in checking, as their certificate says they did, the dimensions of lot 19 on SO913, would have noted they were identical.

[41] On that analysis, the nub of the question would appear to be whether, in checking SO913 against the plan to be attached to Mr and Mrs Samuel's lease in 2006, officers of the Survey Department could be expected to remember the plan

attached in 2002 in the lease to Ms Marama and Mr Gallagher or were under a duty in 2006 to check L2352 as well as SO913. Then, if they were, would they have noticed the overlap in the road and opposite frontages.

[42] All of that said, it appears from Mr Charlie's evidence that the present system of land tenure in the Cook Islands has served the country well for decades without, he suggests, ending in litigation.

[43] For the present, however, all those are issues which will need to be addressed when costs come to be considered.

Result

[44] In the result the Court's orders are:

(a) The application by Mr and Mrs Samuel for orders vesting in them be 204 m^2 of Lot 19 Arorangi previously leased by Ms Mataroa to Ms Marama and Mr Gallagher is adjourned part-heard for the parties to consider their positions in light of the comments in paras [21] to [33] of this Judgment.

(b) All issues of costs are reserved but subject to the comments in paras [34] to [43]of this Judgment.

Hugh Williams J