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: [Matter dealt with on the Papers]

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

Judgment: 20th February 2012

SECOND JUDGMENT OF HUGH WILLIAMS J

A. **There will be a declaration under the Declaratory Judgments Act 1994 that the lease between the first defendant as lessor and the plaintiffs as lessee of 796m^2, being part of the land in Onemaru Section 83E1B2 is a valid lease as between those parties.**

B. **Pursuant to s 129 of the Property Law Act 1952 there will be an order vesting in the plaintiffs that part of the 204m^2 purportedly leased to the**

plaintiffs by the first defendant but already leased by the first defendant to the third defendants on or over which the plaintiffs' house encroaches.

C. The plaintiffs' application for costs against the second defendant is dismissed.

D. The plaintiffs are entitled to costs on an indemnity basis against the first defendant which are fixed in the sum of $7,000 including VAT and disbursements.

Introductory

[1] In what is described as the "First Judgment" in this matter delivered on 30 June 2011, the Court made certain findings relating to the dispute between these parties, but adjourned the matter part-heard to enable the parties to consider their positions in light of the comments in that Judgment and reserved the question of costs.

[2] This Judgment deals with the remaining issues arising from the dispute.

Summary of factual position and legal findings to date

[3] Though the detail of the facts giving rise to this dispute appears in the First Judgment – and reference should be made to that Judgment to explain what follows – it is convenient to summarise the principal facts and earlier findings to provide background for the matters dealt with in this Judgment.

[4] The brief facts are:

(a) Ms Mataroa, the first defendant, is the sole owner of Sections 18, 19 and 20 of Onemaru Section 83E1B2, each of 796 m^2 under Plan SO913 deposited in the Office of the Chief Surveyor.

(b) Ms Marama and Mr Gallagher, the third defendants, 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 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, the plaintiffs, 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, 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.[1]

(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.

(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.

(f) Ms Mataroa gave evidence at the hearing on 7 April 2011 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) 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.

(h) Ms Marama and Mr Gallagher 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

[1] The encroachment may also involve a driveway.

Ms Mataroa, in 2006, purported to sell the whole of Lot 19 to Mr and Mrs Samuel for $40,000.

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

[5] Then, after discussing the evidence and submissions the Court observed, in paras [23],[24],[26],[27] and [29]-[31]:

"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.

"Then what Mr and Mrs Samuel seek in their second cause of action is an adjustment of the 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.

"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".

"The parties put no photographs ... in evidence 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." That assertion was not mentioned in the statement of agreed facts.

"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*,[2] "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."

"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.

"If that be correct, the Court lacks the power to 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/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/Samuel lease being similarly adjusted to include the 204 m^2 or by new leases being entered into to bring about the same result.

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

[6] The Court then made some tentative observations concerning costs and adjourned the claim for the parties to consider their positions.

Submissions on relief sought

[7] In submissions dated 29 August 2011, Ms Inder, counsel for the plaintiffs, submitted the declaration sought by her clients against the first and second defendants went only to costs and further submitted by reference to various documents in the case, including the contract between Ms Mataroa and Mr and Mrs Samuel – to which was attached a draft of the lease between them – that the plaintiffs' lease could be validated without variation provided the agreement between Ms Mataroa and the third defendants to vary the lease was implemented.

[8] In response to the Court's comments concerning the powers conferred on it by s 129 of the Property Law Act 1952, Ms Inder submitted that if the plaintiffs' lease was declared valid there was no need to vary the lease as it was for 796m^2 being the whole of Lot 19.

Discussion and decision on relief sought

[9] As previously observed, there can be no doubt the lease between Ms Mataroa as lessor and Mr and Mrs Samuel as lessees is a valid lease as between the parties. The reasons for that conclusion are fully set out in the First Judgment.

[10] And there can be no doubt Ms Mataroa acted "unlawfully" – without holding that to be the appropriate term – in contracting to lease 204m^2 of her land to Mr and Mrs Samuel when she had already leased that part of her land to Ms Marama and Mr Gallagher and that lease remained in force.

[11] But, as Ms Inder submitted, the declaration of unlawful conduct sought by Mr and Mrs Samuel related only to the question of costs, not to the declaration of validity the plaintiffs sought in relation to their lease.

[12] As earlier noted, the Court's powers under s 129 of the Property Law Act 1952 are limited to making a vesting order in favour of an encroaching owner

only in relation to the "piece of land encroached upon", and the authorities cited in the First Judgment identified the limitation that vesting orders under s 129 can only be for the "minimum intervention necessary".

[13] It must follow that, setting the issue of costs aside, the Court's powers in relation to the plaintiffs' two causes of action are limited to declaring that the lease between Ms Mataroa as lessor and Mr and Mrs Samuel as lessee is a lease valid in its terms – namely a lease of 796m^2 – as between those parties. 204m^2 of that 796m^2 was, at the date of the Mataroa-Samuel lease, already leased as part of the Mataroa-Marama and Gallagher lease, but only part of that 204m^2, that part described in paras [27] and [30] of the First Judgment, is encroached on by the Samuels' veranda/deck".[3]

[14] On that basis, under s 129 of the Property Law Act 1952 the Court can only make an order vesting in Mr and Mrs Samuel that part of the land leased to Ms Marama and Mr Gallagher on or over which Mr and Mrs Samuel have erected their "veranda/deck". The Court has no power under s 129 to vest any greater portion of the 204m^2 in the plaintiffs because that is the "minimum intervention necessary". That means the plaintiffs cannot succeed in their second cause of action to any greater extent than just described, and it was with those difficulties in mind that the Court, in para [31] of the First Judgment, indicated to all parties other than the second defendant the practical steps they should take to rectify the unfortunate legal position in which they find themselves.

[15] That may be thought by the parties to be an unfortunate outcome of the litigation, but it is the outcome which the Court suggested in para [31] of the First Judgment they should then have set in train themselves to avoid the ongoing costs of the Court proceedings. What it now appears will need to happen is that the arrangement between Ms Mataroa and Ms Marama and Mr Gallagher set out in the Acknowledgement of Debt will need to be implemented so the third defendants finish up as lessees of 796m^2. That would leave the lease of 796m^2 which Ms Mataroa contracted to lease to Mr and Mrs Samuel to be implemented and the

[3] Thesuggested driveway passes from contention as it is not a "building".

contract perfected and both correct transactions registered on the Register of Titles. By that means both lessees will finish up with leases of the areas for which they contracted – although it means the Court's order under s 129 will thereby be rendered largely ineffectual, or at least overtaken by events.

Costs

[16] Given Ms Mataroa's acknowledgement that she knew, when contracting to lease part of her land to Mr and Mrs Samuel, that she had earlier contracted to lease part of the same piece of land to Ms Marama and Mr Gallagher, there can be little resistance on the first defendant's part to the application for costs against her. The real nub of that aspect of the matter is whether Ms Mataroa should pay Mr and Mrs Samuels' costs on a party -and -party or indemnity basis.

[17] As far as the second defendant is concerned, the plaintiffs seek indemnity costs against it on the basis, in Ms Inder's submissions, that the second defendant "failed to exercise the proper standard of care as the responsible public body in certifying the lease plan as correct and conforming to SO913".

[18] Then, as regards the third defendants, the Court tentatively opined in the First Judgment the reasons why it might be difficult for the plaintiffs to get an order for costs against the third defendants and vice versa. In any event, that issue passes from consideration as the plaintiffs are not seeking costs against the third defendants and, having regard to their lack of further involvement in the litigation since the hearing on 7 April 2011, it seems the third defendants are not seeking costs against the plaintiffs.

[19] At this point, some divergence from what are strictly costs issues is necessary to outline what has happened in relation to this file since delivery of the First Judgment on 30 June 2011.

[20] After a period for reconsideration by the parties, on 29 August 2011, Ms Inder filed a memorandum relating to costs and other issues to supplement that

which she had earlier filed dated 6 April 2011. The later memorandum dealt with the relief sought and costs issues.

[21] No further action having eventuated on the part of any of the defendants, at Ms Inder's request the matter was referred to Hugh Williams J who on 2 September 2011 - New Zealand time – made timetable orders directing any parties who wished to participate further in the case to file and serve memoranda on the topics raised by Ms Inder by 16 September 2011 (Cook Islands time). That memorandum was coupled with a direction that the Registrar refer the entire file to Hugh Williams J after 16 September 2011.

[22] By memorandum dated 16 September 2011, Ms Inder updated her application for costs to reflect additional costs incurred since 7 April 2011, but the only response received from any defendant was a memorandum dated 19 September 2011 filed by the then Solicitor-General submitting that, in the circumstances of this litigation, any order for costs in the plaintiffs' favour should be wholly borne by Ms Mataroa.

[23] Unfortunately, due to an administrative oversight, the file was not referred to Hugh Williams J until 17 February 2012, and then only on prompting by Ms Inder.

[24] The plaintiffs' application for costs against the second defendant can be dealt with shortly.

[25] In the First Judgment, the evidence given by the Surveyor General concerning the land tenure system in the Cook Islands was comprehensively reviewed. There is no need to repeat those passages.

[26] Ms Inder submitted the second defendant ought to have known that part of the land included in the plaintiffs' plan had already been leased to the third defendants when the second defendant's staff cross-referenced the plaintiffs' lease plan.To the contrary, the then Solicitor-General submitted that because the second defendant was not party to the lease confirmation proceedings concerning the Mataroa/Marama and Gallagher lease, it could not have had knowledge of the Court's orders, particularly the area of land leased.

[27] In the Court's view, whilst it may have been technically possible for officials in the Survey Department to have noticed the overlap between the land leased to the third defendants and that proposed to be leased to the plaintiffs, there was a significant time difference between the two transactions and it could not be said the officials acted, in terms of the pleadings, "unlawfully by certifying the lease plan of the plaintiffs knowing or having ought to have known that part of the land ... had already been alienated ... to the third defendants", particularly when the Survey Department receives no information following confirmation of transactions. The varying descriptions of the land leased rehearsed in para [4] above - coupled with the lack of full detail in the annexed diagrams - is likely to have contributed to any oversight in that regard.

[28] In those circumstances, the Court's view is that in the factual circumstances the plaintiffs have failed to show the second defendant's actions were "unlawful" and that, if this case suggests a deficiency in the Cook Islands land tenure system, that is not a matter which can be laid at the door of the Survey Department.

[29] The plaintiffs' application for costs – on any basis – against the second defendant is dismissed.

[30] As far as the level of the plaintiffs' entitlement to an order for costs against Ms Mataroa is concerned, the Court's view is that the criteria for assessing applications for indemnity costs in the Cook Islands can be regarded as conveniently summarised by Rule 14.6 of the New Zealand High Court Rules as that rule is based on authorities recognised as applicable, at least by analogy, in this jurisdiction

[31] Rule 14.6 reads:

> **14.6 Increased costs and indemnity costs**
>
> (1) Despite rules 14.2 to 14.5, the court may make an order—
>
> (a) increasing costs otherwise payable under those rules (increased costs); or
>
> (b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (indemnity costs).
>
> (2) The court may make the order at any stage of a proceeding and in relation to any step in it.
>
> (3) The court may order a party to pay increased costs if—

(a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or

(b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—

(i) failing to comply with these rules or with a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

(c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or

(d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

(4) The court may order a party to pay indemnity costs if—

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or

(c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

(d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it; or

(e) the party claiming costs is entitled to indemnity costs under a contract or deed; or

(f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious

[32] Applying that compendium to the facts of this case, there can be no doubt Ms Mataroa contributed unnecessarily to the situation in which the parties found themselves. Even if she may have been able to justify in her mind the double-leasing of part of her land to the third defendants and then to the

plaintiffs, so far as the evidence goes, she delayed for a lengthy period in taking practical steps to rectify the problem she had created. To safeguard and correct their position the plaintiffs therefore had no option but to issue this claim. They then pursued it vigorously in the run-up to the hearing on 7 April 2011. Further, in the run-up to the hearing, it was only on 31 March 2011 that Ms Mataroa settled, and then only with the third defendants. Since the hearing, she has done nothing and, in particular, taken no step to rectify the situation as suggested by the Court.

[33] As far as the criteria appearing in r 14.6(3)(b)(4) are concerned, the plaintiffs had to take a number of procedural steps – including a Notice to Admit Facts – and an application for particulars of her defence before the claim could come on for hearing.

[34] In those circumstances, the Court concludes the plaintiffs are entitled to an order for indemnity costs of this proceeding against the first defendant plus disbursements.

[35] As at 16 September 2011, the plaintiffs had been billed the sum of $6, 679.85 including VAT and disbursements by their solicitors. Further costs will have been incurred since that time and in order to avoid the necessity for the filing of further memoranda, the Court quantifies the order for indemnity costs against the first defendant and in favour of the plaintiffs in the sum of $7,000 including VAT (if any) and disbursements.

Summary

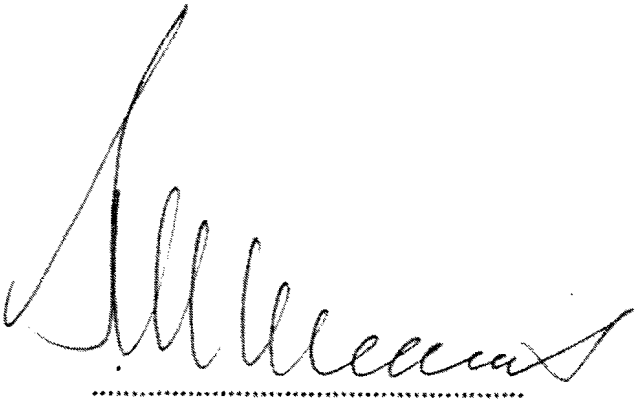
[36] In light of the foregoing the Court makes the following orders:

(a) There will be a declaration under the Declaratory Judgments Act 1994 that the lease between the first defendant as lessor and the plaintiffs as lessee of 796m^2, being part of the land in Onemaru Section 83E1B2 is a valid lease as between those parties.

(b) Pursuant to s 129 of the Property Law Act 1952 there will be an order vesting in the plaintiffs that part of the 204m^2 purportedly leased to the plaintiffs by the first defendant but already leased by the first defendant to the third defendants on or over which the plaintiffs' house encroaches.

(c) The plaintiffs' application for costs against the second defendant is dismissed.

(d) The plaintiffs are entitled to costs on an indemnity basis against the first defendant which are fixed in the sum of $7,000 including any VAT and disbursements.



Hugh Williams J