

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

**OA NO. 7/2017**

IN THE MATTER of the Declaratory Judgments Act  
1994

AND  
IN THE MATTER of an Application pursuant to  
sections 357 and 359 of the Cook  
Islands Act 1915

AND  
IN THE MATTER of the proposed Crown taking by  
consent of 9394m<sup>2</sup> of land in  
Avarua, part Ngatairi Sections 46  
and 46A

BETWEEN **ATTORNEY GENERAL**

Applicant

AND **NUKUTERE HOLDINGS  
INCORPORATED and THE  
ADMINISTRATOR OF THE  
CATHOLIC DIOCESE OF THE  
COOK ISLANDS**

First Respondents

AND **THE PROPRIETORS OF  
SAVAGE LANDS  
INCORPORATION**

Second Respondent

**Date of Hearing:** 29 May 2018

**Appearances:** Mr D James, Solicitor-General for Applicant  
Mr T Arnold for First Respondents (on all occasions other than 29 May  
2018 when Sister Elizabeth appeared for the First Respondents)  
Mr B Mason for Second Respondents (with, on 29 May 2018,  
representatives of the Management Committee of the Second  
Respondents in attendance)

**Judgment:** 15 June 2018

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**JUDGMENT (NO.1) OF HUGH WILLIAMS, CJ**

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[WILL0426.dss]

## Introduction

[1] This Judgment deals with an application by the Attorney-General for the assessment and award by this Court of compensation for the taking by the Crown of 9394m<sup>2</sup> of land situated in Rarotonga owned by the Second Respondent, the proprietors of Savage Lands Incorporation (“Savage”). The land is formally described as being part of Ngatairi Sections 46 and 46A, Avarua, and part of the land contained in a partition order made on 2 March 1917 with the land being delineated and described in the diagram deposited in the Chief Surveyor’s Office under D.3759.

[2] Sections 357 and 359 relevantly read:

**357. Taking of land for public purposes** - The High Commissioner may, by warrant, take any land in the Cook Islands for any public purpose specified in the warrant, and it shall thereupon become absolutely vested in Her Majesty as from the date of the warrant, or from any later date specified therein in that behalf, free from all estates, rights, and interests of any other person therein, save so far as any such estates, rights, or interests are expressly saved by the warrant.

This section was substituted for the original s. 357 (as amended by s. 3 (1) of the Cook Islands Amendment Act 1965) by s. 2 (1) of the Cook Islands Amendment Act 1966.

**359. Compensation for land taken** - (1) When any land has been so taken for a public purpose all persons having in respect of that land any right, title, estate, or interest which is extinguished or divested by the taking of the land shall be entitled to compensation therefor from the Crown.

(2) Such compensation shall be assessed and awarded by the High Court either on the application of any Minister or of any person claiming the compensation or any share therein.

(3) The compensation so awarded to any person shall constitute a debt due to him by the Crown, and shall be payable out of the Cook Islands Government Account.

...

(5) In awarding any such compensation the High Court may direct that the compensation, or any part of it, be paid into the Land Court for distribution to the persons entitled thereto.

(6) The receipt of the Registrar of the Land Court shall be a sufficient discharge for any money so paid in the same manner as if that money had been then paid to the persons entitled thereto.

[3] Strictly, the Court's jurisdiction being restricted by s 359(2) to the assessment and award of compensation to the landowners whose land has been compulsorily acquired by the Crown, the Court's consideration of the issues should be confined to that topic but, as appears from the Minutes preceding this Judgment and the Judgment itself, this matter has some unusual aspects and it is accordingly pertinent to discuss those as an adjunct to the assessment and award process.

### **Historical background**

[4] As recounted in the Court's first Minute of 7 February 2018<sup>1</sup>, the Solicitor-General on 5 December 2017 filed:

- a) An originating Notice of Application for Declaratory Orders by consent;
- b) A supporting affidavit sworn by Mr T Tutangata, Chief Executive Officer of the Cook Islands Investment Corporation ("CIIC") including a number of exhibits; and
- c) A memorandum of the applicant in support of the proposed consent order.

[5] Apart from some procedural issues – since resolved – the Minute recounted:

[7] Until its expiry on 30 November 2014 the land was subject to a 99 year lease granted to the Catholic Church as lessee and Nukutere College was erected on the land. However, in October 2013 the recently rebuilt main building at the school was destroyed by fire, possibly as a result of arson. According to page 5 of a valuation of the subject land by Curnow Tizard Limited dated 29 May 2017<sup>2</sup> "prior to the lease terminating the lessee [was] obliged to replace that building which would then revert to the ownership of the landowners...."

[8] The building has not been rebuilt in the period since the fire and it is the wish of all those involved in this matter to have reconstruction commence and be completed so that the school can continue operating at its full capacity. That situation lead to the present application.

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<sup>1</sup> At [1] of the Minute, the distribution of which was administratively delayed from about a month earlier

<sup>2</sup> Exhibit F to Mr Tutangata's affidavit

[9] Initially the matter before the Court involved 1.1837 hectares of land owned by Savage but, in the interval between 2014 and now, a portion of the land has been excluded from the proposal and the area now under consideration is the balance, 9394m<sup>2</sup>.

[10] Broadly put, it appears that the current proposal concerning Nukutere College is that the Crown compulsorily acquires the 9394m<sup>2</sup> from Savage, leases the land to what may be generally described at this point as the Roman Catholic Church; and the parties contribute varying sums of money to provide funds for the reconstruction of the damaged buildings<sup>3</sup>.

[6] The papers filed in the case included a draft Warrant whereby the Queen's Representative will take the 9394m<sup>2</sup> for "public purposes, namely Church education and public education purposes with a non-exclusive emphasis on child care, and trade or technical or academic teaching". The first Minute commented:

[14] Clearly enough the draft warrant complies with the s 357 requirement for land only to be taken for public purposes and the concluding section of the warrant is presumably intended to preserve "such estates, rights, or interest [as] are expressly saved by the warrant".

[7] After commenting on the form of the order sought in the application, the first Minute concluded:

[22] It seems clear from the subsection that compensation must be "awarded by the High Court" so, from that and the papers, it would appear appropriate that any order made in this matter be an award by this Court to Savage of an amount of compensation (whether agreed or otherwise), the sum awarded being justified by the valuation evidence.

[23] For this Court simply to make a consent Order awarding an, or the agreed, amount as compensation to be paid by the Crown to Savage would appear to simplify the matter and avoid the complexities arising from the wording of the alternative orders proposed by the Solicitor-General.

[24] Alternatively, this Court's award of compensation could include an order whereby Savage abandons any rights to further compensation other than that awarded. Litigants or potential litigants are always entitled to abandon their litigious rights by compromise or in settlement of Court cases.

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<sup>3</sup> Plus, as now made clear, construction of new buildings as well

[8] As a result of the way in which the matter has been conducted, the parties now agree that the appropriate order would be the one set out in para [23] of the first Minute and that, to further reduce the potential complexities of the matter, such an order would simplify the question of VAT.

### **Valuation evidence**

[9] As earlier noted, the valuation evidence consists of:

- a) A valuation by New Zealand registered valuers, Curnow Tizard, dated 18 November 2014 addressed to the CIIC which valued the market and capital value of the leased property at \$1.4M plus VAT. That, however, was a valuation of the 1.1837ha area originally proposed to be compulsorily taken and was only disclosed to other parties at a meeting on 20 July 2017.
- b) A valuation obtained by the Catholic Church from Mr Clark of Seager Partners as at 27 January 2016 at \$696,000 for the land and improvements.
- c) As a result of negotiations between the parties<sup>4</sup>, the valuation of the property was reconsidered by Curnow Tizard on 29 May 2017 and set at \$1.758M for the existing buildings and improvements, the replacement cost of the destroyed classroom block and the land. Later the parties agreed that the replacement cost of the destroyed classroom block was equivalent to its value.

[10] Given that Savage had agreed to the taking its land for \$1.7M, the first Minute<sup>5</sup> queried the basis on which the Court should be asked to “sanction the abandonment of the additional \$58,000”.

[11] That query was met by the filing of an affidavit by Mr Mason – who is both counsel for Savage and chairs its Committee of Management – dated 6 April 2018 advising that, after the Crown indicated an intention to take the land by Warrant, the

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<sup>4</sup> And the expiration of the 99 year lease dated 8 September 1915

<sup>5</sup> At [39]

Committee of Management sought to negotiate the best terms it could for the members of the incorporation.

[12] The Committee was hampered in those negotiations by not having all the valuations which were available to CIIC but, once it had received all the documents, lengthy negotiations resulted in agreement on the valuation at \$1.7M, that figure being regarded as generous in the light of the earlier assessments.

[13] The amount of compensation was then submitted to a meeting of Savage's landowners in Auckland, New Zealand on 8 July 2017 and, based on the valuations then presented, the figure was endorsed.

[14] However, on a meeting on 20 July 2017 of all the parties to this application and others representing agencies of Government, the valuation of \$1.75M was disclosed. It was felt that the valuers' varying assessments were unlikely to be reconciled but Savage took into account that the Catholic Church had assumed an obligation to pay the Crown \$1.7M as the price for obtaining the proposed lease in perpetuity<sup>6</sup> and, further, was a fund which had only been raised by the Church following substantial efforts. In addition, some of the Savage landowners were Church members and to them and others it was important that Nukutere College remained open and that its development programme be undertaken. Generally, the landowners did not want the Committee of Management to be overly aggressive in its further negotiations. Accordingly, Savage considered the \$1.7M figure remained a fair settlement and the second respondent answered the Court's query<sup>7</sup> by saying:

“Because when taking the Clark valuation (which was not brought to the Court's attention) into account, the likelihood that the midpoint between the second Tizard valuation and an updated valuation by Clark would still be less than \$1.7M (inclusive of classroom rebuild costs) and taking account of this the compensation agreed is a fair and reasonable one for [Savage]”.

[15] Having regard to all those factors, while it might perhaps have been considered the case that, in a normal commercial lease valuation unaffected by the factors discussed in the Minutes and earlier in this Judgment, a figure slightly higher than \$1.7M might have

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<sup>6</sup> Strictly, a lease for 60 years with perpetual rights of renewal

<sup>7</sup> At [12] above

been arrived at for compensation, the potential extra amount was likely to have been eaten up in costs and delays in having this matter concluded. Additionally, the \$1.7M figure has been agreed by all parties following extensive negotiations against the complex background arrangements elsewhere discussed and all of that, plus the fact that the views of as many members of Savage as possible have been ascertained and they support acceptance of the \$1.7M, indicates that sum to be the appropriate figure for the s 359(2) compensation.

[16] Formally, the Court is therefore prepared to indicate that once the 9394m<sup>2</sup> of Savage's land has been taken by Warrant – that being a statutory prerequisite under s 359(1) – the Court is prepared to assess the appropriate compensation to be paid by the Crown to the Savage Lands Incorporation at \$1.7M and would be prepared, by way of a second judgment, to award that sum to the Second Respondent as that compensation.

### **Balance of the arrangement**

[17] As it finally appeared following the exchange of papers and submissions at the hearing of this matter, the arrangement between all parties which lies behind the Warrant is that:

- a) The Crown is prepared to pay the compensation of \$1.7M to Savage on the basis that that sum is the consideration payable to it for granting, as the new owner of the land, the perpetual<sup>8</sup> lease of the land outlined in the Court's previous minutes.
- b) As large as that sum may appear to be as the price for obtaining a lease, it is founded on the Crown's wish to see Nukutere College continue on its present site and undergo development as part of the Crown's educational obligations to the people of the Cook Islands and as the price the Catholic Church is prepared to pay to obtain not just the usual 60 year lease but a lease in perpetuity<sup>9</sup>.

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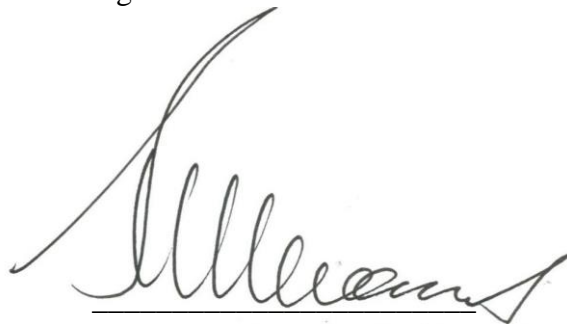
<sup>8</sup> But see fn [6] above

<sup>9</sup> Again, see fn [6] above

- c) The \$1.7M has been raised by the Catholic Church with considerable difficulty. The sum includes approximately \$675,000 paid by the Church's insurers, but the evidence suggests that further fundraising efforts by the Church are likely to be only marginally productive.
- d) As part of its educational obligations just mentioned, the Crown is prepared to pay the Catholic Church sums totalling up to \$500,000 when the value of developments by the Church on the land justifies whatever is the payment sought within that cap. The Crown was not prepared to pay anything further.

[18] The matter needs to be seen as two separate but interlinked transactions<sup>10</sup>; the payment of the \$1.7M by the Crown to Savage in discharge of its assessed obligation as far as compensation is concerned for the taking of Savage's land under s 357 and a separate, second, transaction whereby the Catholic Church will pay the Crown \$1.7M as the consideration for the grant to it of the lease of the land for educational purposes, the lease having the terms discussed in the papers including the Court's minutes. As the Court understood the proposal, the Church's payment of the \$1.7M to the Crown is net of VAT, if any.

[19] Once the \$1.7M is paid by the Crown to Savage in satisfaction of the assessed compensation for the taking of Savage's land, the funds will be paid to the proprietors of the lands as disclosed in Savage's register of landowners. Those payments will be proportionate to their interest in the land and for those whom the Committee of Management has not yet contacted, the funds payable to them will be put on term deposit – perhaps utilising s 359(5)? – pending their whereabouts being discovered.



**Hugh Williams, CJ**

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<sup>10</sup> Or, if the \$500,000 is taken into account, three such transactions