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

OA 2/01
NO. 190/2001

IN THE MATTER of the Declaratory Judgment Act 1998

AND

IN THE MATTER of the land known as ARETUNA SECTION 94A2B LOT 1 ARORANGI

AND

IN THE MATTER of an Application for a Declaratory Order

BETWEEN ATIROA O KEU MATAROA AND KOPU RAERA PUPA
Applicants

AND DENNIS HOGAN AND PATTI HOGAN
Respondents

Mr M C Mitchell for Applicants
Mrs T Browne for Respondents
Date of hearing: 1 May 2001
Date of Judgment: 8 May 2001

JUDGMENT OF GREIG, CJ

This is an application for a declaratory order as to the meaning and effect of a lease of the land known as Aretuna Section 94A2B Lot 1 Arorangi. The applicants are two of the owners of the land, the respondents are the occupiers under a lease and sublease. The real purpose of the application however is to prevent the respondents from continuing the construction of a building and other facilities which they wish to do for commercial purposes. The essence of the applicant's claim is that the land is a burial ground and that it should remain undeveloped without buildings being erected on it.

The land in question is an area of some 798 square metres with a frontage to the main road at Arorangi. It is part of the land known as Aretuna Section 94A2 which was comprised in a Partition Order made by the Native Land Court on 30 May 1912. Part of that land comprising then 2 acres 2 roods and 34 perches was leased by the landowners on 11 June 1970 to one Tangata Tutaka. The term of that lease was 60 years from that date. The only terms in the lease which limited the use of the land by the lessee were the following:

> "5. The lessee of the said land shall keep the land clean of all noxious weeds and growth and shall comply with the laws for the time being in force in the said Island relating thereto.
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> 8. The lessors shall during the said term be entitled to enter into that part of the demised premises which has (4) been used as a burial ground for the sole purpose of attending to, cleaning and maintaining the graves monuments, and tombstones therein erected.
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> 9. The lessee shall pay to the lessors reasonable compensation for any coconut trees growing on the said demised premises at the beginning of this lease in the event of a lessee removing any of said coconut trees from the said demised premises."

By 1975 that lease which has been described as the Head Lease in these proceedings had been assigned to one Ronald Charles Dowsett. It seems that Mr Dowsett arranged for a sub-division of this land or part of it comprised in the Head Lease to enable him to develop and to sublease parts of it. There was produced in the hearing a sub-divisional plan prepared by Mr W Brockway registered surveyor and dated 3 June 1975. That was a sub-division into four lots. Lot 1 was a narrow strip across the frontage on to the main road. It included the land in question in this hearing but it comprised also a further 319 square metres continuing in a northward direction along the frontage. The remaining three lots were to the rear of the land in question. They were served by a right of way passing across Lot 1 which was displayed and created on the plan of sub-division. It is relevant to note that the right of way instead of going

straight in a generally eastward direction to the main road, took a turn diagonally across the Lot 1 of the frontage.

Mr Gordon Sawtell took a lease of Lot 2 for his house site in 1975. The access to the main road from that Lot 2 was by way of the right of way but continuous to Lot 2 and between it and the main road was the land in question. The whole of the land is generally flat so that physical access could be obtained to the main road and directly along any part of the frontage comprising Lot 1. Mr Sawtell who gave evidence before me deposed that when he obtained his house site he refused an offer of a lease over the land in question because it was graveyard which was, as he described, a veritable forest of trees, shrubs and weeds. Mr Dowsett however renewed his offer of a lease or a sublease and in 1976 Mr Sawtell agreed to take a sublease of the land in question on a payment of $100 and an annual rental of $10 per annum. The sublease of that piece of land comprising 798 square metres was executed on 1 March 1976. It was for a term of the remainder of 60 years computed from 1 June 1970.

The sub-lease to Mr Sawtell contained a number of provisions which limited his use and occupation of the land. These included an obligation on him to keep the land free of noxious weeds and growths, not to cause a sub-division of the land by assignment, sub-lease or any other form of parting with possession of any divisible part of the land and not to assign or sublet or otherwise part with the whole of the land without the consent of the sub-lessor. There is an obligation on the part of the sub-lessee to erect fences and establish hedges to a good reasonable and neat standard on all the boundaries of the land within 2 years and to maintain the grass verges on the right of way and on the main road. The sub-lessee was not permitted to keep any animals, poultry or birds other than domestic pets on the land without the written consent of the sub-lessor.

Finally there was this clause:

> " 10. Notwithstanding any other provisions herein the sub-lessee shall permit the sub-lessor and the lessors under the said Head Lease and their successors and permitted assigns to have access

to the graves on the land hereby subleased in a reasonable manner and at reasonable times."

That last clause reflected the provisions of Clause 8 in the Head Lease which I have quoted. But there are as is plain some differences in the wording.

At some stage the part of Lot 1 of the divisional plan comprising 319 square metres became and remains occupied in part at least by an electric sub-station. Immediately behind that there was another sub-division and what has been called the Westpac house was built on what is described as Lot 9. That has a frontage to the main road. The Lot 9 runs partly along the northern side of the right of way opposite Mr Sawtell's house.

Mr Sawtell over the next few years from 1976 cleared the land and the tombstones and monuments of the noxious weeds and growth converting the whole to what the photographs produced to me indicate was a pleasant addition to his house site. Something like 19 gravestones, graves or monuments can be identified and are visible above ground. It is Mr Sawtell's evidence that there are number of other graves or burial places underground which are undated but which appear to be of some considerable age. They maybe unmarked or marked only by cornerstones. He believes that there is something like 25 to 30 graves or burial places on the land in question and the burial graves and burial sites have spread beyond the land in question into the remaining paRts of Lot 1 on this provisional plan on the other side of the right of way in what is the Westpac site. Mr Sawtell said that when he came to build his own house on Lot 2, he came on a grave site, when excavating a footing. He undertook an appropriate ceremony and covered over the remains.

The sub-lease to Mr Sawtell provided for rental reviews every 5 years from 1 June 1980. No rent reviews were concluded but in or about December 1994 the sub-lessor then Strickland Tourism Development Ltd then began steps to have the question of the rent review from 1980 brought to a conclusion. Mr Sawtell was not willing to accept a proposal for a rent of some $300 per annum for his front section on the land in question. There was some discussion with the sub-lessor or its representatives Mr

Mellor which included a suggestion that if the consent of the landowners were obtained the lessor might be willing to accept a much smaller rent. At some time during 1995 Mr Sawtell obtained the signature to a document which acknowledged that Mr Sawtell had kept the property in a reasonable and tidy condition, that the then owners had not intended to charge a ground rental for the cemetery area and were happy to continue the arrangement, repeating again that the lessors have access to the graves on the land at all reasonable times. Such a document could have no binding legal effect between the sublessor and sublessee though it did and does confirm the landowners view of the status of the land.

There were a number of further transactions in relation to this matter but in the end by a decision made on 8 June 1998 the Court fixed a rental for the land in question for the various quinquennial periods. In the course of the decision on fixing the rental, Dillon J observed

> "Mr Sawtell claims that Lot 1 is a cemetery and that such a restriction should exempt him from the normal provisions applied by this Court on rent reviews. The photographs produced by Mrs Browne do not support that claim by Mr Sawtell. He is making extensive use of Lot 1 as of course he is entitled to as sublessee."

The rental was fixed on a basis proportionate to the comparative areas of the land in question and the Westpac land on which the rent had been established earlier. Mr Sawtell was unhappy with the rent so assessed and refused to pay it. At or about this time the respondents became the sub-lessor by assignment to them of the Head Lease of June 1970. On 11 November 1998 the applicants re-entered the land in question. They have commenced the construction of a building which is intended to be a tea room with premises for a sewing business. The precise dimensions of the building are not before me but the evidence from Mr Hogan's builder was that there were some 37 footings between 80cms and 60cms deep to support the building and the decks and veranda. Further a trench has been dug and a septic tank has been installed in an excavation about 1 metre deep.

The essential factual dispute in this case was as to the status and identification of the land in question as a cemetery or burial ground and the extent of it.

The evidence of Mr Sawtell as I have already indicated was that, in his clearing of the site and his work on it from 1976 onwards, there was a number of burial sites. Some of which were marked by tombstones or other monuments on or above the ground but that there were others which were buried and not visible above ground. Some of these he had discovered but he was not asserting that these were the only sites on the land. Evidence was given in support of the applicant's claim by Poko Tutaka, the original Head Lease lessee, Taarouru Apera, Kapu Raera Rangatira who were landowners or associated with the landowners and asserted, to their knowledge, the existing status of the land as a cemetery. It was Mr Sawtell's evidence that during the work in relation to the septic tank a grave site was uncovered and some human bones were disturbed. Mr Hogan's builder in evidence did not accept that, stating that he had not himself seen or heard anything about it. But neither he nor Mr Hogan or any other witness was able to say with any certainty whether or where any burial site may be other than those that were visible and identifiable on the surface. It is clear that this site is no longer used as a burial ground. It seems that the last burial that took place on the site was in or about 1946. In the time since Mr Sawtell was in occupation, there have been some occasional visits by the descendants of those buried in the land. From the evidence before me this has been an infrequent event.

Mr Hogan's assertion is that although there have been burials and that there are burial plots on this land in the parts where he is developing his building and installing the septic tank there are no burial sites. The builder found no evidence of any burial sites in the footings, these are relatively shallow but from what Mr Sawtell has said in description of the more ancient burial sites I would have expected that with so many footings at least 60 cms or 600mm deep that anything of a burial site beneath those points would have been discovered. Indeed as Mr Sawtell has described these ancient sites there would not be a sure foundation or footing on top of them but it would be necessary to go to the floor of the burial sites to obtain a proper foundation. As far as the septic tank is concerned, there was the unusual fact that it is not buried in the

ground but just above it and Mr Hogan's builder somewhat reluctantly accepted that this was unusual and that this was one of the very few in Rarotonga which were at that height above the ground. He conceded that the possible presence of graves on that spot was part of the reason for not excavating further and deeper. In the support of the respondents Mr Tamataia Pera gave evidence as the husband of one of the landowners who had lived all his life at Arorangi and was familiar with the site. He asserted that before the right of way was created in 1975 the access was through and over the track which went across the area above where the building is being erected.

What I think is at least curious is that the right of way did not follow the direct route to the main road but deviated relatively sharply. That it seems it must have been to avoid constructing the right of way across any burial sites. There are in fact two marked sites with graves or gravestones above ground on either side of the right of way close to the main road boundary but equally the right of way might have deviated in effect across part of the area on which the building is to be sited as a more direct route to the main road.

It is noted further the other point about the 1975 sub-divisional plan is that whereas Lots 2,3 and 4 are some 23 to 24 metres deep, Lot 1 is only 14 metres deep. There is at least an implication that this narrow lot was created particularly to encompass the burial sites along the length of that frontage and that the right of way was especially delineated to avoid burial sites. That is of course confirmed by the provisions in both the Head lease and sub-lease for the reservation of access to the gravesites, tombstones and monuments. That reservation is still in force and binding on the applicants as Mr Hogan accepted.

My finding and conclusion on this aspect of the case is that the whole of the land in question, the area of 798 square metres, the subject matter of the sub-lease is cemetery or burial ground. Although it is no longer used for interments it remains the cemetery or burial ground. It is not necessary to qualify land as a cemetery that it should be in a present use for further burials or interments. The identification of any particular burial sites other than those which are visible above ground is not possible to state without some more evidence of archaeological investigation or other formal survey.

From what I have been told however and I accept it is equally impossible to say with certainty that there is no burial site at any point on the land without appropriate excavation. It seems more probable than not that there is no burial site in the area of the proposed building itself but the same cannot be said about the site on which the septic tank has been constructed.

In their statement of claim the applicants claim a declaratory order that the construction of the building is contrary:

1. to the provisions of Clause 8 of the Head Lease and
2. to the intention of the original parties to the Head Lease.

There is no statutory provision which affects the decision on this matter. Mr Mitchell did not rely on any statute or statutory provision to support his claim. There is no statute in the Cook Islands which relates to cemeteries or to burial grounds which are ancient or historic value. The provisions of the Land Dealings Act 1969 under which zoning orders might be made has no relevance or effect in this case. I was referred to the provisions of Sections 487 to 490 of the Cook Islands Act 1915 which provide for the establishment of native reservations including those burial grounds. No such reservation has been made in this case. Other circumstances relating to other pieces of land under which the use and status of a burial ground has been in issue were referred to me. Such cases depend on their own different facts and I do not find any assistance there.

I accept and acknowledge that to the landowners and their families the existence of the cemetery and the graves of their forebears are of special and indeed sacred significance. That alone without some law or custom having the force of law cannot rule this matter. I must begin with the fact that the landowners in 1970 granted a lease of which the respondents now have the benefit for a term of 60 years without any restriction as to the use they might put the land other than the reservation of the right of access. The essence of a lease is that the lessee has full free right of possession and use of the land though that can be limited as it often is, by the term of the lease. There is nothing in this lease which has been inserted to control or limit the use of the land

and in particular any building that might be put on it. The proposed construction is not in itself contrary to the provisions of Clause 8 of the lease and there is no evidence that there is a gravesite and there is certainly no monument or tombstone on the area on which the construction of the building is to take place. Of course if it was shown that there was a grave there then the landowners and their families would be entitled to come there to tend to it.

The intention of the lessors, the landowners must be gathered from the terms of the documents. It is the clear law that when a contract is made by way of a document such as a lease like this, the intention of the parties are to be drawn out of the document itself. Then there has to be a very clear implication from the words themselves what is being intended. If there is silence in the words that is to say, no words which can provide a proper implication then the intention cannot be drawn. Even if the landowner in 1970 were to come before the Court and say what they intended, that would not be evidence of the intention of document which as I say would be drawn from the document itself. I am entitled to take into account the relevant circumstances but these as at 1970 do not in my mind create any evidence of intention to prohibit or to limit the building on the site proposed.

There is however a distinction to be made about the site of the septic tank. Although the lease does not prevent building on all parts of this land or parts which are not the subject of graves, tombstones and monuments, to make the reservation effective it could not be permissible for the lessee to remove or destroy or cover up a grave or burial site which would then prevent the lessors from entering upon the burial ground and exercising their rights. To make the reservation work, the lessors and their successors must be entitled to come to the actual site and still with the tombstone or grave and not merely to the area in which it once existed. It will be noted that the terms of Clause 8 apply to the lessors and their successors. It is not therefore permissible under the lease for the lessor to remove any tombstones or gravesites and to build over them in the septic tank area. I have found that it is more probable than not that there is a grave there.

I am also of the view that it refers to three specific subjects, namely graves, monuments, and tombstones. In the lease itself there is no comma between graves and monuments but I do not think and it was not argued that that is intended to be read as if graves was merely adjectival. It is in my view a separate subject, separate from both and each of monuments and tombstones.

As a result then in my view and in my judgment there cannot be declaratory order as proposed or moved by the applicants. I am prepared to make a declaratory order to the effect that the lessee is not entitled to make any construction excavation or other activity which would remove destroy or cover over any grave, monument or tombstone on the land in question. I would like counsel, if they can agree, to submit a draft order which would interpret the declaration and any necessary and appropriate further order by way of injunction mandatory or otherwise in relation to the septic tank in particular. In the meantime I will continue the interim injunction.

I reserve the question of costs, and counsel may make submissions on that if required.

CHIEF JUSTICE