

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA

OA 7/03,8/03
CR 175/03,176/03,177/03,178/03

07/03 ERUERA NIA
INTERIM INJUNCTION

**08/03 MATA MAKARA (for Avarua
Cook Islands Christian
Church)**
DECLARATORY ORDERS

175/03 ERUERA NIA
V
KURA STRICKLAND

176/03 ERUERA NIA
V
REVEREND MATA MAKARA

177/03 ERUERA NIA
V
TUPOU FAIREKA

178/03 ERUERA NIA
V
ELIABA BENIONI

Mr George for Eruera Nia

Mr I Short for Avarua Cook Islands Christian Church and their representatives
in applications CR 175/03,176/03,177/03,178/03.

Date of hearing: 19 June 2003

Date of decision: 19 June 2003

DECISION OF SMITH J

I am going to deal first with the Informations. The Informations have been framed according to Sections 41(b) and 36(1) and it says that "on the 31st day of March 2003, 1st and 2nd of April 2003 and the 17th of May 2003 at Avarua all four of the people appearing today willfully destroys damages or modifies or causes

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to be destroyed damaged or modified any archaeological site namely the Avarua Churchyard cemetery or burial ground."

Now the very essential part of s. 36 which has been omitted and I refer you to s. 36 in the Act which says "it shall not be lawful for any person to destroy damage or modify, or cause to be destroyed damaged or modified the whole or part of any archaeological site (which you've got in the Information) the words you have omitted are "knowing or having reasonable cause to suspect that it is an archaeological site whether or not such site was registered." Now I've heard nothing today which leads me to believe that these people here would know or ought to have known that the Avarua Church was an archaeological site.

Any archaeological site, that's what you are talking about. My concern here is that s. 36 says that it is not lawful for any person to damage or destroy any archaeological site whether registered or not. It also says knowing that it is an archaeological site. S 42 does not have the element of knowledge nor does it recite to the fact that it is registered or not but it does refer to s. 28. I am going back to s. 28, it refers there to "Work contrary to Protection Notice is prohibited after any Protection Notice is issued pursuant to s. 26 then work is prohibited." Now has there been a Protection Notice issued in respect of this proposed archaeological site. At the time of the offence the answer must be no. So therefore s. 42 can be distinguished from s. 36 insofar as it must apply only to archaeological site which are registered in respect of which Protection Notice had been issued. So from that point of view I find first of all that under s. 36 there is no evidence to justify this Court in believing that the parties charged had knowledge of the fact that it was or may have been an archaeological site and in the second part if I allow s. 42 and I've got no problem in doing so, then because it was not registered as I believe would be really the only way in case

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which s. 42 can be interpreted then that section does not apply, therefore I must dismiss the prosecutions in each case.

I'm going now to deal with the application you put in for declaratory judgment this answers most of the matters you addressed but one of the most important matters which I think should be taken into account and you have adverted to part of it during the course of your evidence and of course your submissions and that is that the land was vested in the Incorporation of the Cook Islands Christian Church. Now I am looking at that Act and it does have attached to it an Incorporation and Section 7 of that Incorporation says "In an island where there is more than one local church there shall be an island church council representing all the local churches. The council shall meet at least twice a year, the council shall consist of the pastor of each church, the deacons and one church member from each church elected by the church meeting and retired pastors and officers of the Assembly and members of the Executive and Standing Committee residing on that island. The work of the council is to encourage and plan ways in which the church of the island can work together for the deepening of the spiritual life and the preaching of the gospel. No problem. Now the council may not discuss the affairs of one individual church unless that church brings the matter forward." I read that to mean that each individual church is a master of its own future, other than in those matters relating to training, placement and control of the pastors or the deacons within the church. So in this instance the control of the work that's being done in the graveyard is under the hand of the Avarua Christian Church.

I have gone through all the matters which you have sought declaration on and the only one in which I could make a declaration is to the effect that the land was vested in the Incorporation. In all other respects I do not believe I would make the declaration which you seek I would decline it. So if you wish I can

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make the declaration that the land is vested in the Incorporation but that's common knowledge and we have it on record.

I am looking at the application which has been brought by Mr Short. This was an application which he brought to declare that the classification by the Cultural and Historic Places Trust was ultra vires and invalid. I have had the opportunity of reading the letter from the Chairman of the Cultural and Historic Places Trust which he wrote on the 12th of June and he accompanied that with the minutes of a special meeting held on the 29th of May at 1.15pm at which the Cultural and Historic Places Trust Board were present or trustees were present with an apology from Noopii Tearea and Tutuina Matapakia but there were also a number of concerned citizens present at that meeting, I'm not going to read them out but it's available if anyone wants to see it. Those concerned citizens put their problems before the Trust Board. The Trust Chairman is recorded as saying "the Board of Trustees can assist to have the place declared as a historic site and the process is:

- a. The group needs to lodge an application immediately;
- b. This will then be sent to the Minister for approval;
- c. The Minister will forward it to the House of Ariki and Koutu Nui for support.

2. Having received this support the Board of Trustees can then publicly declare the site as a historic place which also includes traditional archeological site.

Now appended to that is an application made by Ngamau Munokoa and it reads;
"I hereby apply to the Cultural and Historic Places Board of Trustees and this is in respect of land Pouvaru, Avarua. I apply to the Cultural and Historic Places

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Board of Trustees to have declared within the meaning of historic place and traditional site as defined in s. 2 of the Act as a traditional site the following area:

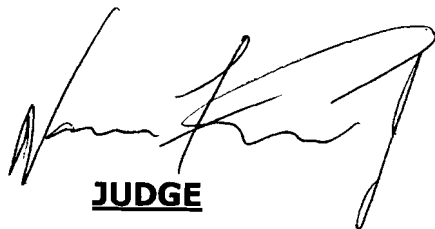
Avarua Cook Islands Christian Church graveyard including all those outside the traditional wall next to the Sinai on the main road." (See attached map) but we don't have an attached map.

So that was an application dated the 29th of May, the date of the meeting seeking to have this area which is rather vaguely defined as a traditional site. Now it's interesting to note that subsequent to the Chairman directing the Interested Concerned Citizens Group as to what they are required to do, there's a note to say "the Board of Trustees continued its meeting, classification of the Avarua CICC church graveyard. The Chairman suggested that the Board of Trustees declare the Avarua CICC churchyard and compound as an historic site. He further suggested this be followed by public notice in the daily newspaper. The Chairman to draft a formal classification notice to be signed by two members of the Board, the Chairman Tere Mataio and Sonny Williams were authorized to execute the formal deed of designation. A resolution was passed by the Board. Resolution – formal designation of the Avarua CICC church surrounding area and graveyard site to be designated as an historic site. Appended to that I have "Notice of Classification as a historic place. After careful consideration of all relevant information and being satisfied the place should be classified as a historic place the Cultural and Historic Places Board of Trustees in the exercise of powers under s. 40 of the Act pursuant to a formal resolution passed at its meeting held on the 29th of May do hereby classify as a historic place all that portion of land comprising the Avarua CICC building and surrounding graveyard and being part of the land known as Pouvaru s. 43 Avarua district, Rarotonga, dated the 30th of May." Now as Mr Short correctly referred to the Court

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previously in the case s. 8 (4) provides "The Board of Trustees in the exercise of functions and powers shall where such exercises in relation to any island or Vaka refers such matter to the committee for that island or Vaka and shall give the committee the opportunity to consider the matter and convey its recommendations to the Board." The Chairman was aware of that, that's what he told the people who were present at the meeting. But for some reason rather shortly after they concluded that meeting he resiled from that and they proceeded without referring the application to anybody to make the classification as sought. That classification does not comply with the procedures required under the Cultural and Historic Places Act and therefore I am making a declaration under the Act declaring that that declaration is invalid.

Now in doing this, this Court does not in any way condone the actions of the people who have been involved in the work of the church. It is clear that there is a lot of feeling, I'm not concerned about the fact that the media have tried to make capital out of it but it is clear from what this Court has heard today that there is a lot of feeling amongst the families who have been split over this matter. I made an interim injunction to prevent any further work being done until this case was heard. I am directing that that injunction shall continue until such time as I receive a joint memorandum, from the church or those authorized in the church to make such memorandum and the Trustees of the Cultural and Historical Places Trust, that they will make all endeavors to effect settlement of this matter and conduct the beautification, whatever that may mean, of the Avarua graveyard in a proper manner.



JUDGE