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

APPLICATION NO: 486/2019

UNDER	Section 409(c) of the Cook Islands Act 1915
IN THE MATTER	PUNAMAIA SECTION 190E2B3C, AVARUA
BETWEEN	GRAHAM SIMPSON **Applicant**
AND	WILKIE RASMUSSEN **Respondent**

Hearing date: 4 July 2022

Appearances: Mr Moore for Applicant

Decision: 31 May 2023

JUDGMENT OF JUSTICE C T COXHEAD

Introduction

[1] The current application for damages has arisen as a result of a number of other applications between Graham Simpson (the Applicant) and Mr Rasmussen (the Respondent).

[2] Since 2018 there have been several applications involving these parties and this land block. There is a tumultuous legal history between the Applicant and Respondent which has clearly contributed to the nature of the damages being sought.

[3] Here, the Applicant seeks orders for damages against the Respondent in respect of the holding over of a lease on Punamaia Section 190E2B3C (the land block). The Applicant seeks an award of general, special and exemplary damages.

[4] It must be presumed that the Applicant brings this claim on his behalf as a potential owner and on behalf of all owners, as he is not currently an owner who appears on the title for this land block. While currently not an owner, Mr Simpson has a recommendation before the King's Representative to have him included as an owner based on a recommendation I made to the Chief Justice, and the Chief Justice's subsequent decision.[1] This application falls in the unusual situation where the Court must consider the title and ownership as it currently is – although the Court has recommended changes to the title which will result in changes in the ownership list, if it is accepted by the King's Representative.

[5] I have therefore proceeded on the basis that this claim is for all the owners of Punamaia Section 190E2B3C, which does not include the Applicant, Mr Simpson, either at the time the Respondent occupied the land or currently.

[6] Despite notice of the hearing being given, the Respondent did not appear at the hearing on 4 July 2022.

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[1] *Simpson v Parson – Punamaia Section 190E2B3C Avarua,* CKLD, App. 390A 2/2018 "Oral Decision of Justice CT Coxhead" (11 July 2019); *Simpson v Parson – Punamaia Section 190E2B3C Avarua* (Judgment No. 1) CKLD, App. 2/2018 (9 August 2019); *Simpson v Parson – Punamaia Section 190E2B3C Avarua,* CKLD, App. 2/2018, "Report to the Chief Justice" (31 May 2022); *Simpson v Parson – Punamaia Section 190E2B3C Avarua* (Judgment No. 2 - provisional) CKLD, App. 2/2018 (7 November 2022); *Simpson v Parson – Punamaia Section 190E2B3C Avarua,* CKLD, App. 390A 2/2028 "Memorandum of the Chief Justice seeking consent of the King's Representative under s 390A(8) of the Cook Islands Act 1915" (8 November 2022).

Background

Punamaia Section 190E2B3C

[7] Punamaia Section 190E2B3C is 1009m^2. In 1977 there were eight original owners of the block, and as of 2023 there are 15 owners of the land block.

[8] In 1968 a 40-year lease was granted to James Woonton. He assigned it to the Respondent, Mr Rasmussen, on 24 November 2004, with four years left to run on the lease. The lease expired on 31 October 2008.

[9] The Respondent attempted to renew the lease over the land in the years following its expiry but failed to identify and locate the current owners of the land to obtain consent.

[10] The Respondent and his family moved off the land in 2007 but continued to use the property and dwelling for storage, as well as maintaining and renovating the property and dwelling.

[11] On 18 January 2018 the Respondent entered into a lease agreement with Werner MecKlenberg, a German national. The agreement was that MecKlenberg could live on the land, renovating the house in lieu of rent. This was short-lived, as the Respondent terminated the lease on 25 April 2018, and sought Mr MecKlenberg's deportation from the Cook Islands.

[12] In May 2018, amidst the Respondent's arrangement with Mr MecKlenberg, the Applicant sought vacancy of the dwelling. The Applicant sought injunctive relief against the Respondent, which was granted on 17 July 2018. The Applicant re-entered and occupied the property to ensure the Respondent's vacancy in 2018.

Application History

[13] As noted above, since 2019 there have been a number of applications involving these parties and this land block which has lead to the nature of the damages being sought. A brief summary of these different interactions are set out in the succeeding paragraphs.

[14] On 11 July 2019 the Applicant was seeking to correct the title of the land block pursuant to s 390A application. The Respondent appeared as opposing counsel for Ms Iva Parsons (his aunt) against the Applicant. The Respondent argued that the land was intended to be partitioned in 1977 and the Court should confirm the 1977 orders. I was the Judge in this 390A matter and made a recommendation to the Chief Justice that orders should be made correcting the title of ownership to include the Applicant. The Chief Justice agreed with my recommendation and sought draft orders from the parties. When the parties were not able to agree on draft orders the Chief Justice directed the matter back to me for a further report as to what orders he should grant. I heard from the parties and provided a decision to the Chief Justice on 31 May 2022, recommending orders should be granted.[2]

[15] On 17 July 2018 I issued a permanent injunction against Mr Rasmussen, prohibiting him from going onto the land block.

[16] On 19 July 2019 the Respondent applied for recall of the 17 July 2018 injunctive orders so he could access the chattels on the property. I dismissed the application the same day. The Respondent stated that there was an urgent need to enter the land to collect his chattels, so Mr Moore, as agent for the Applicant, emailed the Respondent offering to arrange a time for the Respondent to visit the property, but did not receive a reply save for the Respondent saying, "I will email in two days".

[17] On 29 August 2019 Mr Moore submitted an application for damages to the Court. The Respondent issued his notice of intent to defend the application on 2 October 2019.

[18] On 9 October 2019 Judge Savage held the first hearing as to damages. The matter was adjourned until the next Land Court sitting, as Judge Savage held that the matter was not in a position to move to considering quantum due to the Respondent's stated interest in filing a s 390A application in relation to the land, and due to the lack of evidence as to market rentals on the island with which to calculate mesne profits. It is clear that Judge Savage did not make any orders with regard to damages, as further evidence was required.

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2 *Simpson v Parson - Punamaia Section 190E2B3C Avarua*, CKLD, App. 2/2018 (31 May 2022).

[19] The Respondent did not submit any evidence or memoranda in respect of the damages application. On 26 May 2020 the Respondent filed a memorandum seeking leave to appeal the Applicant's entitlement to the land under s 390A and asking for this matter to be heard before the damages application was determined.

[20] The damages application did not progress until 21 October 2021 when Mr Moore filed a memorandum with the Court to begin hearing the application.

[21] On 25 October 2021 the Applicant also applied for a new timetable for the filing of evidence considering the Respondent's late filing of notice to defend, the fluctuating counsel situation of the Respondent, and the difficulties presented by COVID-19.

[22] I held a hearing via Zoom on 3 November 2021 to consider a new timetable. The Respondent once again raised his intention to file a 390A application in relation to the land, which he was granted leave to do. I directed that the Applicant file their evidence as to mesne profits by 24 January 2022, and the Respondent to submit their evidence in response by 21 February 2022.

[23] The Applicant submitted evidence as to market rentals for mesne profits being sought on 26 January 2022.

[24] On 1 April 2022, Ms Tangimama, as counsel for the Respondent, applied to the Court explaining her absence, and requesting for directions for a new timetable. This request to amend the filing timetable was granted, however the Respondent did not submit any evidence in response in accordance with the amended timetable.

[25] On 20 May 2022 Mr Moore applied to the Court for an order for interim costs, in light of the prolonged omission by the Respondent to file.

[26] On 1 June 2022 I gave the Respondent until 15 June 2022 to file evidence with regard to the damages application and confirmed that the hearing would be held in July 2022. I also gave leave for Ms Tangimama to withdraw as counsel for the Respondent, who would now be representing himself.

[27] On 15 June the Respondent filed a memorandum with the Court. It outlined the "exceptional circumstances" which led to the delay in his submissions. He reiterated his intention to file a 390A application with the Court. The memorandum omitted to include evidence in defence of the damages application, or a 390A application.

[28] I held the damages hearing on 4 July 2022. The Respondent did not appear. I reserved my decision as to damages, directing the Applicant to submit more evidence as to market rental prices in Avarua.

[29] On 7 July 2022 the Applicant submitted further evidence as to the quantum of mesne profits sought.

Notice to the Respondent

[30] Mr Moore in his memorandum to the Court disclosed an email exchange between himself and the Respondent. Mr Moore attached the memoranda he submitted to the Court on 22 June 2022, which included the 4 July 2022 hearing date. The Respondent only replied with "I will respond accordingly in two days."

[31] On 30 June 2022 Mr Moore sent the Respondent a memorandum that Moore had filed with the Court that day. That memorandum included the hearing date. The Respondent did not reply, so Mr Moore resent the email to the Respondent on 3 July 2022 asking for acknowledgement of service. The Respondent again did not reply.

[32] The hearing of the application was notified in the normal way being advertised in the Cook Islands newspaper. Notice was also displayed on the Ministry of Justice Notice Board.

Law

[33] The Applicant applies under s 409(c) of the Cook Islands Act 1915 for an order as to costs of general, special and exemplary damages in respect of the holding over of the property by the Respondent, and the lengthy legal proceedings.

[34] Section 409(c) of the Cook Islands Act 1915 sets out the ability for the Court to make a finding as to damages:

> **409. Miscellaneous jurisdiction of Land Court**
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> In addition to the jurisdiction elsewhere conferred upon [the Land Court] by this Act, that Court shall have jurisdiction-
>
> …
>
> (c) To hear and determine as between Natives [or the descendants of Natives] any claim to recover damages for trespass or any other injury to Native freehold land.

Special Damages - Mesne profits

[35] As I have noted above, I am considering this matter on the basis of the current list of owners. I note that I have recommended to the Chief Justice and he has recommended to the King's Representative that changes be made to the ownership list. I cannot make decisions based on a potential future scenario. I must deal with the information before me now, being the current title.

[36] The Applicant seeks special damages in the form of mesne profits for the period between the expiry of the lease on 31 October 2008 until the Respondent was given notice to vacate and was served with an injunction in May 2018. The Applicant seeks an amount of $74,453 in mesne profits.

[37] The Applicant applies for mesne profits based on eligibility derived from:[3]

a) The Respondent's continued occupation of the land after the lease's expiry on 1 November 2008 until 17 July 2017;

b) The Respondent's entering of a tenancy agreement with the German national where he purported to be landlord and sought to derive profit.

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[3] "Submissions of Applicant in Support": evidenced by the Respondent's own submissions (29 August 2019); "Order for Recall of Injunction Order" (July 2019); and "Section 390A Application" (21 December 2018).

[38] This Land Division of the High Court has not previously considered or awarded mesne profits damages. In such situations it is common for this Court to look to New Zealand precedent.

[39] Mr Moore referenced Todd's *Law of Torts in New Zealand,* to give the Court a "brief description of each category" of damages: special, general and exemplary. I find the below example of assistance in defining special damages in the form of mesne profits:[4]

> Where the defendant wrongfully makes use of the plaintiff's land, the plaintiff is entitled to recover by way of damages (generally called "mesne profits") a reasonable rate of remuneration for the full period of unlawful use, regardless of any actual loss suffered by the plaintiff or any actual benefit derived from the trespasser. This strict "user principle" is justified by the need to remove any financial incentive to interfere with the possessory rights of others.

[40] Despite the Respondent's failed attempt to renew a lease for the land block, he continued to occupy the land block for the period after the lease expired on 1 November 2008, to 17 July 2018, when an injunction was granted. During that time he had no legal authority or right to occupy the land. Further, not only did he occupy the land without authority, he then sub-leased the land.

[41] The Respondent knew he did not have authority to be on the land – why else would he have looked to renew the lease? When he was unable to find the owners of the land block to obtain a new lease, he must have been aware that he had no right to remain on the property and certainly no right to lease the land to someone else. While the Respondent had not been told to vacate the property, he knew the lease was at an end. However, the Respondent chose to remain on the land.

[42] As a result, it is clear that the Respondent should be held liable to the owners of the land during the time period he used the land without authority. Therefore, the Respondent should be held liable for mesne profits and obliged to pay a reasonable rent for the land for the use which he has enjoyed - to those who were owners at that time he used the land. In this situation a grant of mesne profits is justified.

Quantum of mesne profits

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4 Stephen Todd and others *The Law of Torts in New Zealand* (8th ed, Thomas Reuters, Wellington, 2019) at 520.

[43] In cases where mesne profits have been awarded the Court has had the benefit of expert evidence. In the case of a lease, evidence of market rentals and other factors which affect the overall value are relevant.[5] The evidence appears to have been submitted automatically by the parties, and there is no discussion on the level of sufficient evidence required. Mr Moore, in his submissions, referred to *Harvey v Beveridge* as an authority that expert evidence in the calculation of mesne profits was not required.

[44] When calculating mesne profits, the reasonability of the amount being sought is based on submitted evidence for the Court. For leases, it is the comparability of market rentals.

[45] In *Queenstown Central Ltd v March Construction Ltd*, expert evidence was available to the Court, which held:[6]

> The quantum of mesne profits is thus in the Court's principled discretion and involves a mix of considerations. The authorities indicate a choice as to the approach but I think they must here be considered together. The use must be understood for the benefit it provides to the user. The rent available in the market is another consideration. These considerations will be reflected in the price that a reasonable person would pay to purchase a right to do that which would otherwise constitute trespass.

[46] In *Harvey v Beveridge*, Gendall J in the High Court of Aotearoa New Zealand had the quantum of mesne profits referred back to him when the Court of Appeal found the plaintiff's claim for mesne profits could succeed. The Court of Appeal held that expert evidence was not necessary to confirm the reasonability of the quantum of mesne profits sought.[7]

[47] Mr Moore on 26 January 2022 submitted that the affidavits he provided based on market value of long-term rentals on the island are sufficient evidence for the calculation of mesne profits. In support of this he referred to the 2013 Practice Note (the Note) issued by Justice Isaac and Justice Savage regarding the determination of rental for commercial leases.[8]

[48] The Note addressed the lack of expert evidence filed in support of applications for determination of rentals for commercial leases. The Justices indicated that if the necessary

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5 *Matchitt v Whangara B20 Inc* (2009) 191 Tairawhiti MB 249 (191 TRW 249); *Roberts v Rodney District Council (No 2)* [2001] 2 NZLR 402; *Nicholls v Nicholls – Koromatua 3A* (2017) 154 Waikato-Maniapoto MB 128 (154 WWN 128); *Trustees of Motiti North E9 v Aukaha* (1997) 59 Tauranga MB 2 (59 T 2); *Re Omahu 2M3* (2000) 161 Napier MB 109 (161 NA 109).

6 *Queenstown Central Ltd v March Construction Ltd* [2016] NZHC 1884 at [256].

7 *Harvey v Beveridge* [2014] NZHC 947 at [11].

8 Cook Islands Court Rules, *Practice Note regarding determination of rental for commercial leases* (2013).

evidence is not submitted, the applications are to be adjourned until the necessary evidence is filed.

[49] The Note addresses a specific concern of the Court, being the lack of sufficient evidence to make an informed determination. The crux of the Note is to allay the concern of Judges when they make a determination without the necessary evidence to corroborate their recommendation. However, I record that this Note is concerned with commercial leases, not calculating mesne profits.

[50] There is no expert valuation evidence before the Court in this case. Mr Moore submits that any evidence provided by the two expert valuers on the island, Mr Tizzard and Mr Eggelton, would not be relevant as they have only ever given evidence on rent reviews and capital value reviews and not long-term rentals as is at issue here. The Applicant's evidence includes affidavits by Ngaoa Ranginui, who owned different sized properties on Avarua, and listed rental amounts submitted with itemised leases and contracts. There was no response or evidence filed by the Respondent or his former counsel Ms Tangimama.

[51] The first property provided as evidence by Ms Ranginui was a 3-bedroom dwelling containing approximately 140m^2 of living space, which was tenanted from 7 May 2019 to 30 April 2020 at a rent of $200 per week. The second property was on Eangaanga and Tutakimoa Section 50 Avarua, the same village as the subject dwelling, with 100m^2 of living space, was rented at $500 per week. The third property was a 75m^2 duplex on Taratui Section 93B2 Avarua, in the same village as the subject dwelling, at $300 per week. The fourth property is a 40m^2 one-bedroom dwelling on Tikioki Section 46C2 Takitimu, on the south side of Rarotonga, which is rented out for $150 per week (discounted from $250 for the tenant). And the fifth example provided was a two-bedroom dwelling on Avarua with a rent of $200 per week, which is inclusive of yard maintenance.

[52] On 7 July 2022 the Applicant submitted further evidence as to the quantum of mesne profits sought. Mr Moore filed a schedule of annual rentals from 2020 beginning with weekly rent of $200 and thereafter reduced at 4.5% per annum. The calculation for mesne profits were based on the period between 2008 and 2018. The total quantum of mesne profits sought based on this schedule was $74,453.

[53] The quantum of mesne profits is in the Court's principled discretion and involves a mix of considerations. A quantum is determined from considering a range of factors.

[54] In this situation I have considered the possible rent available in the market and the price that a reasonable person would pay to purchase a right to do that which would otherwise constitute trespass. While the Court does not have expert valuation evidence it does have the amounts put forward by Mr Moore.

[55] The potential rent that the Respondent should have paid during his wrongfully use of the property to the owners is judged irrespective of whether or not the owners could show that they would have let the property to anybody else or used the property themselves.

[56] I also consider whether the Applicant might not have suffered any actual loss by being deprived of the use of the property. I note that the Applicant is not yet an owner. The owners are uncontactable and there has been difficulty in finding any of them. However, I also apply the same assessment regarding actual loss to the owners.

[57] The Rarotonga context must also be taken into account and in particular the issue of absentee landowners. It is unclear as to how many similar situations there are in Rarotonga where people are unable to contact owners – although anecdotally contacting land owners is a common problem. The difficulty of contacting owners and absentee owners potentially contributed to the Respondent not being able to enter into a lease. Despite best efforts to try and locate owners or an owner – he was unable to. I am not sure if the Applicant has had any more success than the Respondent had in locating owners.

[58] There is also the issue of the Respondent improving the property and taking care of the property during the time he occupied the land. This has not been quantified but clearly the house was maintained to some extent over the ten year period from 1 November 2008, when the lease expired, to 17 July 2018. We know that some improvements were made to the house, albeit by MecKlenberg, whom the Respondent sub-leased the property to at no cost.

[59] Taking all these matters into account I am of the view a minimum amount should be imposed to recognise that the Respondent did use and enjoy the property for a ten year period, but also recognising the other factors I have mentioned. That amount will be $26,000.00.

[60] I emphasise again the unusual situation we find ourselves in. The Court must consider the title and ownership list as it currently is, even though it has recommended changes to the title which will result in changes in the ownership list, if it is accepted by the King's Representative. As noted, I must deal with the title as it currently is – not as it might be.

[61] Therefore, this amount is to be paid into the Court and the Court will on application distribute the amount equally to those persons who were listed as owners during the 10 year time period that the Respondent did use and enjoy the property without authority. Descendants of those owners, once those descendants have succeeded and been listed as owners will also be eligible to apply for those funds. The point being that those people who were listed as owners of the land while the Respondent used and enjoyed the property are the owners who are entitled to damages.

General Damages

[62] The Applicant seeks general damages for the "significant legal expense" and "to the anxiety and distress" the Respondent has caused in respect of the land and the drawn-out application, to the value of $5,000.

[63] Todd's *Law of Torts in New Zealand* sets out a definition of general damages:[9]

> *General Damages*
>
> Intangible harm such as pain and suffering, distress and anxiety falling short of recognisable psychiatric illness, embarrassment and humiliation, annoyance and inconvenience, is not in itself sufficient to ground a free-standing claim in a tort such as trespass that is complete without proof of damage, intangible harm can then be taken into account in assessing the total extent of the loss for which compensation is payable. Since intangible losses of this sort are not capable of objective quantification in monetary terms, their compensation is achieved by making a lump sum award known as "general damages". Both the availability and quantum of awards tend to depend on the nature of

9 Todd, above n 4, at 1320-1.

> the claim. In some cases an award of general damages may be made for loss of use of property, or loss of amenity.

[64] Mr Moore's claim on behalf of his client lacks detail other than a general submission that the Respondent should receive general damages for anxiety and distress.

[65] Clearly, any general damages to be awarded must be in relation to the land.

[66] The difficulty here for the Applicant is that the Applicant can only claim general damages in relation to the land as an owner. The Applicant is yet to be confirmed as an owner, albeit the recommendation before the King's Representative.

[67] As noted above, I have presumed that the Applicant takes this application on behalf of himself as a potential owner, and all of the current owners. None of the current owners have participated in the hearings and provided evidence of the general damages being claimed.

[68] This part of the claim is dismissed.

Aggravated and Exemplary Damages

[69] The Applicant seeks aggravated and/or exemplary damages for the "high-handed manner" the Respondent has behaved in throughout this application, in the sum of $10,000. The Applicant has not stated what award of aggravated damages are sought.

[70] The high-handed manner of the Respondent is, as submitted by the Applicant, is what qualifies an award of aggravated and exemplary damages.[10]

[71] In *TCN Channel 9 PTY Limited v Apping* exemplary or aggravated damages are available in cases of trespass in the right circumstances.[11] Where the Respondent is guilty of deliberate trespass and arrogant disregard, aggravated damages may be awarded to compensate for additional injury to the Applicant's feelings dignity or reputation. A further

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10 *Submissions of Applicant in Support* (29 August 2019).

11 *TCN Channel 9 PTY Limited v Apping* (2002) 54 NSW LR 333, cited in *Matchitt v Whangara B20 Inc* (2009) 191 Tairawhiti MB 249 (191 TRW 249) at [62].

sum may be awarded by way of exemplary damages solely to punish a defendant and to deter others.

[72] Mr Moore provided the Court with a definition of aggravated damages from the case of *Tuake v Toeta*. His submission is that the Respondent's behaviour is equivalent to telling the Applicant to "take him to Court", like in *Tuake*: [12]

> [50] As stated by Mr Moore for the Applicant, aggravated damages are paid as compensation for a wrong, for mental distress or injury to feelings and where the injury has been aggravated by the respondent's conduct.
>
> [51] The evidence has demonstrated that the Respondent has behaved in a high-handed manner with little or no regards for the property rights of the owners of this land and when questioned by the Applicant regarding the rock removal he told her, it was none of her business and she should take him to Court.
>
> (emphasis added)

[73] I would agree with Mr Moore if the Applicant was a current owner. He is still a potential owner. Although there is a high possibility from my view that he will be an owner, that has not yet occurred.

[74] As noted I have presumed that the Applicant takes this application on behalf of himself and all owners.

[75] None of the current owners have participated in the hearings and provided evidence to justify an award of aggravated and exemplary damages.

[76] This part of the claim is dismissed.

Decision

[77] This application was for three types of damages, under s 409(c) of the Cook Islands Act 1915. In regard to these damages sought, I have made the following decisions:

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[12] *Tuake v Toeta – Akaoa 65, Arorangi*, CKLD, App. 213/2013 (31 October 2013) at [50]-[51].

a) Special damages for mesne profits granted. The Respondent is ordered to pay $26,000.00 into the Court. The Court will on application distribute the amount equally to those persons who were listed as owners during the 10 year time period that the Respondent did use and enjoy the property without authority.

b) General damages for legal expenses and "anxiety and distress" caused by the Respondent dismissed.

c) Aggravated and/or exemplary damages for the Respondent's "high-handed manner" in dealing with the Applicant dismissed.

Dated at 1:00pm in Rotorua, Aotearoa New Zealand, on the 31st day of May 2023.

C T Coxhead
JUSTICE