IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA: 9/2015

Application No: 594/14

IN THE MATTER	**THE GREEN ROOM LIMITED**
	Appellant
AND	**THE LANDOWNERS OF NUKUPURE SECTION 3D1 NGATANGIIA**
	First Respondents
AND	**THE LANDOWNERS OF NUKUPURE SECTION 3D3 NGATANGIIA**
	Second Respondents

Hearing: 13 June 2016

Court: Sir Ian Barker JA (Presiding)
Paterson JA
White JA

Counsel: Mrs T Browne for Appellant
Mr D James, Solicitor-General and
Ms T Koteka, as amici curiae
No appearance for Respondents

Judgment: 16 June 2016

JUDGMENT OF THE COURT

A. The questions of law raised in this appeal are answered as follows:

1. The High Court did not misinterpret the rights of the parties under the Section 3D1 lease (the Restaurant lease) and the Section 3D3 lease (the Carpark lease);

2. The High Court did not address in detail s.106A of the Property Law Act 1952 (as inserted by the Property Law Amendment Act 1995-96) but it was unnecessary for him to do so.

3. The High Court did not take into account irrelevant factors, or fail to take into account relevant factors, in exercising its discretion under s.3 of the Declaratory Judgments Act 1994.

B. The appeal is dismissed.

C. There is no order for costs.

Introduction

[1] This appeal relates to the rights of the respective parties under two 60 year leases of land in Ngatangiia and the decision of Savage J in the High Court declining to grant declarations under the Declaratory Judgments Act 1994 that the lessor landowners were unreasonably withholding their consents to assignments of the leases.[1] Savage J did not give reasons for his decision given in Court on 16 October 2014 but supplied them on 17 December 2015 following a request from this Court.

[2] The parties resolved their dispute after the decision of Savage J in 2014, but the lessees sought and were granted special leave by this Court to appeal on the ground that the questions of law gave rise to matters of significant importance for similar Cook Islands' leases and business dealings.[2]

[3] The Solicitor-General was appointed as *amicus curiae* to present the contrary arguments and we are grateful for his assistance in providing both written and oral submissions.[3] The written submissions included references to evidence obtained by the Solicitor-General from Mr Trevor Clarke relating to his extensive business experience with leasehold transactions in the Cook Islands. Strictly speaking, this

[1] The Green Room v The Landowners of Nukupure Sections 3D1 & 3D3 Ngatangiia CIHC Application No 594/14, 17 December 2015.

[2] Court of Appeal Minute of 22 March 2016.

[3] Court of Appeal Minute of 21 April 2016.

evidence should have been provided to the Court by way of affidavit and an application for leave to adduce it, but as in the end Mrs Browne accepted it was consistent with her own experience, we have not been required to determine its admissibility.

[4] While the Respondents were not represented, we did receive a memorandum dated 8 June 2016 from Uraatua Willis, one of the owners of Section 3D3, seeking leave to make submissions. We have read the memorandum which is consistent with the decisions we have reached on the three questions of law.

[5] The three questions of law for determination are:

a) Whether the High Court misinterpreted the rights of the parties under the Section 3D1 lease (the Restaurant Lease) and the Section 3D3 lease (the Carpark lease);

b) Whether the High Court failed to address the application of s.106A of the Property Law Act 1952 (as inserted by the Property Law Amendment Act 1995-96); and

c) Whether the High Court took into account irrelevant factors, and failed to take into account relevant factors, in exercising its discretion under s.3 of the Declaratory Judgments Act 1994.

[6] Before addressing these questions we summarise the factual background, Savage J's decision and a number of undisputed matters of law.

Factual Background

[7] The two 60 years leases relate to two adjoining blocks of land which are owned by two different groups of Native Cook Island landowners. Both leases contained provisions permitting the lessees to assign their interests under their leases but subject to:

6.1. obtaining the written consent of the landowners (or a majority residing in Rarotonga); and

6.2. giving the landowners a right of first refusal to take the assignment of the land on the same terms and conditions.

[8] The first lease (conveniently called "The Restaurant Lease") executed on 22 March 1985 in favour of Rarotonga Marine 2000 Ltd commenced from 1 August 1994. It was subsequently assigned, apparently without landowner objection, in 1987 and 1994, until it was held by Flame Tree Pty Ltd.

[9] The second lease (conveniently called "the Carpark lease") executed on 24 September 1985 in favour of Tamati More Amoa commenced from 1 March 1985. It was subsequently assigned, also apparently without landowner objection, in 1985, 1987 and 1995 until it too was held by Flame Tree Pty Ltd.

[10] Flame Tree Pty Ltd, which held both leases, assigned them in November 2000 to Flame Tree Restaurant Ltd which subsequently assigned them to The Green Room Ltd (Green Room), again without landowner objection and with Court approval.[4]

[11] On 8 August 2014 Green Room entered into a agreement for sale and purchase with Michael Vinning and Cindy Adams - Vinning (the Vinnings) for the proposed assignment of their leasehold interests in the two leases. The proposed sale price was $300,000.00, $70,000.00 in cash and the balance by the transfer of a yacht owned by the Vinnings valued at $230,000.00. The agreement was conditional on the consent of the majority of the two sets of landowners of the two separate blocks of land in the two leases.

[12] Notices requesting the landowners' consents to the assignments of the two leases and waivers of the exercise of their rights of first refusal were delivered to the landowners or their representatives on or before 28 August 2014. Public Notices of the proposed assignments were also placed in the Cook Islands News in September and October 2014.

[13] The notices to the landowners stated that they had the right to purchase the properties for the same price and on the same terms and conditions as had been agreed with the "purchaser" (the Vinnings). In other words, the landowners of each block were required to buy both blocks for $300,000.00. The notices did not refer expressly to the yacht.

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[4] The Green Room, above n1 at [41].

[14] At the time of the hearing before Savage J in the High Court in October 2014 none of the landowners had given notice that they wished to exercise their rights of first refusal. Nor, however, had any of them given their consent to the assignments. Indeed there were indications that at the least some of them were withholding their consents.

[15] Green Room then filed an ex-parte application seeking declaratory orders that both groups of landowners were unreasonably withholding their consents to the assignments of the two leases, and the Vinning's were entitled to the assignments.

[16] At the High Court hearing the owners of the land the subject of the Carpark lease were represented by counsel.

The High Court decision

[17] After setting out the submissions of counsel for Green Room and the Carpark lease landowners and the relevant provisions of the Declaratory Judgments Act 1994 and the two leases, Savage J gave the following reasons for declining to make the declarations sought by Green Room:

a) The requirements of the two leases that the right of first refusal had to be exercised by the two groups of landowners on the "same terms and conditions" as any proposed assignments did not allow Green Room to include the lease of additional property as part of the those terms and conditions. The two leases were separate transactions, executed at different times, in relation to different blocks of land, and with different owners. The right of first refusal in each lease applied only to the specific land in each lease.[5]

b) The fact that the two leases had been assigned in one transaction previously and with the approval of the Court did not mean that on a subsequent assignment some landowners were not entitled to exercise their right of first refusal in respect of their particular lease.[6]

[5] At [40].

[6] At [41].

c) Green Room had made the right of first refusal "absolutely illusory" by requiring the landowners to pay $300,000.00 in part by transfer of title to the Vinning's yacht which was an impossibility.[7]

d) The owners of the land the subject of the Carpark lease were not entitled to withhold their consent because they sought a payment or allowance of transfer consideration in their favour when such a payment was not required by the lease and was forbidden by the Property Law Act 1952 (s.109).[8]

e) But a reasonable lessor in the position of the owners of the land the subject of the Carpark lease would not have consented to purchasing an additional lease as a condition to exercising their right of first refusal.[9] Savage J said:

> *They have a legitimate right to purchase their lease and not have it bundled up into a larger transaction. I do not also consider it reasonable that they have to become involved with consideration in the form of a particular item of personal property.*

Undisputed matters of law

[18] Counsel on appeal were in agreement on a number of matters of law.

[19] First, Savage J was right to consider the High Court had jurisdiction under the Declaratory Judgments Act 1994 to hear Green Room's application for declaratory orders relating to the interpretation of the two leases in this case. [10]

[20] Second, this Court has jurisdiction to determine the three questions of law notwithstanding the fact that the parties have resolved their dispute.[11]

[21] Third, Savage J correctly summarised the law relating to whether a lessor's consent to an assignment is "unreasonably" withheld when he said at [44]:

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[7] At [42].

[8] At [45].

[9] At [46].

[10] Mandic v Cornwall Park Trust Board [2011] NZSC 135, [2012] 2 NZLR 194 at [5] – [9] and [82].

[11] R v Gordon-Smith [2008] NZSC 56, [2009] 1 NZLR 721 at [3].

[44] "*The House of Lords and the New Zealand courts have indicated that the correct approach to what constitutes "unreasonably" is an objective one, based on what a reasonable lessor would do when asked to consent in the particular circumstances. The burden of showing that the refusal is unreasonable is on the lessee or assignee, but the parties cannot define what is reasonable and what is unreasonable. That is an objective question of fact for the Court to be decided in the circumstances as they exist. [Footnotes omitted] "*

[22] Fourth, statutory interpretation involves considering the text and purpose of the relevant provisions, taking into account the scheme of the particular legislation, the wider legislative landscape and the social and economic context. Furthermore, without usurping the policy-making functions of Parliament, Courts should interpret statutory provisions in order to make them work in a practical and commonsense fashion.[12]

Issue Number 1

[23] The first issue is whether Savage J misinterpreted the rights of the parties under the Section 3D1 lease and the Section 3D3 lease.

[24] While the relevant provisions in the two leases are in different terms the differences are not material for the purposes of this judgment. They both require the consent of the Lessor for a transfer of the lease. Under the terms of 3D3 (the Carpark lease) such consent cannot be arbitrarily or unreasonably withheld. While there is no similar qualification in the lease of 3D1 (the Restaurant lease), such a qualification is implied by section 110 of the Property Law Act 1952 (the 1952 Act).

[25] Under both leases the landowners as Lessor have a right of first refusal in the event of the Lessee wishing to assign its interest in the lease. The Carpark lease provides that the notice to the landowners is to specify "the terms and conditions including consideration upon which the Lessee desires to assign." If the landowners do not exercise their pre-emptive right the Lessee may assign their interest to any other person "upon the terms and conditions specified in the notice." They are not entitled to assign their interest in the lease to any other person "on any conditions other than

[12] Northern Milk Vendors Association Inc v Northern Milk Ltd [1988] 1 NZLR 530 (CA) at 537 – 538, and Teddy v New Zealand Police [2014] NZCA 422, (2014) 27 CRNZ 1, [2015] NZAR 80 at [30] and [44] (leave to appeal declined:[2015] NZSC 6).

those specified" in the notice without giving a further notice specifying the new conditions.

[26] The right of first refusal in the Carpark lease is to be upon the same terms and conditions as the Lessee is able to assign to any other person.

[27] The legal position is that under the terms of the two leases each set of landowners has a first right of refusal if the Lessee wishes to assign the leasehold interest but may waive that right. If the right is waived the consent of the landowners, which may not be arbitrarily or unreasonably withheld, is required to an assignment of the leasehold interest.

[28] In this case the Lessee sent similar notices to the two sets of landowners headed "Notice to Landowners – Proposed Assignment of Lease." In all material respects the notices were in identical terms. They advised the landowners how to exercise their first right of refusal and gave them the option of consenting to the sale and waiving their first right of refusal.

[29] The notices of the first right of refusal in this case advised the landowners:

> *"You have the right to purchase the property for the same price and on the same terms and conditions as have been agreed with the Purchaser"*

[30] The terms and conditions of the sale, as included in the notice in respect of the Restaurant land read:

> *"The Agreement for Sale and Purchase is for <u>all</u> the property currently used by the Flame Tree Restaurant. In addition to the Lease, which relates to the restaurant area, it also includes a further lease over the Carpark area which is part Nukupure section 3D3.*
>
> *The purchase price is $300,000 plus VAT"*

A similar provision substituting the Carpark area for the Restaurant area and vice versa appeared on the Carpark land notice.

[31] Three observations can be made on the form of the notices to the landowners:

a) The notices did not explicitly state that each sale of the leasehold interest to the prospective purchaser was conditional upon the sale of the other leasehold interest proceeding. However, this fact was obviously known to the landowners and is arguably implicit from the notices;

b) The terms stated in the notices were not the same terms and conditions as in the Agreement for Sale and Purchase. The price in the agreement was $300,000. However, $230,000 of the price was to be satisfied by transfer of the Vinning's yacht to the vendor Lessee. The notices suggested that the payment of $300,000 was to be in cash. There was no explanation before the Court as to how the yacht was to be converted to cash if the prospective rights had been exercised;

c) Both notices stated that consent to the sale proceeding was required from "the majority of landowners residing in Rarotonga." The consent under the Restaurant lease was required from the majority of the Lessors residing in Rarotonga but under the Carpark lease the consent was required from the Lessors, with the notices "to be delivered or posted to the Lessors at their last known address in Rarotonga."

[32] The form of the notices was not addressed before us and we therefore make no finding on the validity of them. It is not necessary to do so in view of the decision to which we have come.

[33] Mrs Browne made detailed submissions in support of the Appellant Lessee and her underlying submission was that the Lessee was selling the leasehold interest in each piece of land and a term or condition of the sale was that the both leasehold interests were acquired. In other words in the Agreement for Sale, it was a condition that the purchaser acquire both the Restaurant lease and the Carpark lease and this condition was thus one of the conditions upon which the Lessee desired to assign the lease. The Lessee as the proposed Assignor of the lease was entitled to include this condition in the notice when "specifying the terms and conditions including consideration upon which the Lessee desires to assign."

[34] Another submission made on behalf of the Appellant Lessee was that the right of first refusal is in two parts. The first part which refers to the Lessee's desire to assign the leasehold interest is what "triggers" the first right of refusal. The reference to "land" in

that provision is limited to the triggering of the right. It does not limit what may be included as the "terms and conditions" when the offer of the right is made to the landowners. To restrict the "terms and conditions" to those which apply to that piece of land only is a limitation on the Lessee's inherent right to sell.

[35] If the submissions made on behalf of the Appellant are correct, there could be undesirable consequences. An owner wishing to exercise the right of first refusal could be burdened with a major financial outlay by having to acquire a leasehold interest it does not want in order to secure the Lessee's interest in its own land. There is a further practical problem in the present case if both Lessors wished to exercise their pre-emptive right.

[36] The right of first refusal under either lease is in respect of the parcel of land in that lease. The purpose of such a right is to enable the owner of the right to acquire the interest on the same terms and conditions as a purchaser is prepared to acquire that expression interest. In the Court's view the expression "terms and conditions" cannot have the extended general meaning contended for on behalf of the Appellant. If it had such a broad meaning the exercise of a first right of refusal could impose on a landowner obligations that do not fall within the general purpose of such a right. As an example, on the sale of a business which includes the assignment of a lease containing a first right of refusal, the vendor Lessee could require the landowner, if it wishes to exercise its pre-emptive right, to take over liabilities of the business which the vendor may be imposing on the purchaser. In this Court's view, the position contended for on behalf of the Appellant does not make commercial sense and cannot be correct.

[37] The purpose of a pre-emptive provision, at the beginning of the term of a lease, is to allow the lessor to take over the lease if the lessee wishes to dispose of its interest. A lessee is entitled to receive from the lessor, if the right is exercised, the consideration it would receive, if it disposed of the leasehold interest. Normally that consideration would include the price and when and how the price is paid. It may also include other benefits arising directly from the use of the land itself. An example would be providing access to the property over adjoining property. It is the Court's view that the terms and conditions must relate directly to the property leased.

[38] Without defining the limits of what are terms and conditions which relate specifically and directly to the leased land, a term requiring a landowner to acquire an adjoining

price of land cannot in our view be a term and condition which a lessee can impose when issuing a pre-emptive notice. Thus it follows that the notices given in this case were not given in accordance with the first right of refusal provisions in the two leases.

[39] Savage J was also correct in respect of the consent issue. The landowners were entitled to decline consent to the assignments provided they did not act arbitrarily and unreasonably. As noted in the judgment of Savage J,[13] the approach as to what constitutes "unreasonably" in an objective one based on what a reasonable lessor would do when asked to consent in the particular circumstances. The Court does not accept the submission on behalf of the Lessee, namely that the requirement to purchase another lease was not an unreasonable request.

[40] The giving of a first right of refusal in accordance with the terms of the lease was a pre-requisite to the consideration of consent. Until the first right of refusal procedure had run its course, and the right had not been exercised a binding consent could not be given.

[41] In this case valid notices setting out the terms of the first right of refusal had not been given. It was inappropriate to give consent in the circumstances.

[42] This was a case where the sale was conditional upon both leases being assigned to it with the Lessors' consents. In these circumstances it was very unlikely that either set of owners was going to buy its own leasehold interest. If one had done so the sale by the Lessee to the third party would not have proceeded. While the result may have been the same the circumstances indicate that the appropriate course for the Lessee to have taken was to have advised the landowners of the terms of the sale, including that is could not proceed unless the purchaser acquired both properties.

[43] The advice would then request that the owners both waive their pre-emptive rights and consent to the sale. Giving them an opportunity to exercise their rights of first refusal, was not going to achieve a result.

[44] For the above reasons alone, Savage J was correct in declining to make the declaratory orders sought by the Appellant.

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[13] The Green Room (above n.1) at [44] which is set out in this judgment at [21] above.

Issue Number 2

[45] The second issue is whether Savage J failed to address s.106A of the 1952 Act.

[46] Section 106A was enacted by the Property Law Amendment Act 1995 – 96 and came into force on 1 January 1997. It provides:

> *106A. Further covenants included or implied in leases – (1) in every lease of Native freehold land for the permitted use of a commercial or industrial business or enterprise there shall be included, and if not included, implied, the following covenants by the lessee, for himself, his executors, administrators and assigns –*
>
> *a) that where commercially appropriate the lessee will pay to the lessor a goodwill payment at the commencement of the term of the lease;*
>
> *b) that the lessee will pay to the lessor the greater of:*
>
> *(i) a fair and reasonable ground rent; and*
>
> *(ii) a percentage of the annual gross turnover of all or part the land activities of the business or enterprise for which the land is being utilised, such percentage to be negotiated between the parties;*
>
> *c) that the ground rent payable by the lessee pursuant to the lease shall be reviewed at intervals of not more than five years, with the ground rent following review to be as agreed between the parties or failing agreement as determined by an independent arbitrator or by the High Court;*
>
> *d) that the lessee will give to the lessor reasonable opportunity to participate as shareholder on usual commercial terms in the business or enterprise for which the land is being utilised;*
>
> *e) that in the event of the sale or proposed sale of the business or enterprise for which the land is being utilised (including any sale or disposition of any shares in a company operating such business or enterprise which would alter the effective control of that company) –*
>
> *(i) the lessee will give to the lessor the right of first refusal to take the assignment of the lessee's interest pursuant to the lease, or the transfer of the shares, on the terms of the proposed sale, and any such sale, and any such sale shall be deemed to be conditional on the non-exercise of the right of first refusal;*
>
> *(ii) following settlement of the sale the lessee will pay to the lessor a percentage of the net sale proceeds of that enterprise or business and the lessor's entitlement pursuant to this subclause shall rank subsequent to any secured creditors and in priority to any unsecured creditors of the lessee.*
>
> *(2) This section applies:*
>
> *a) to leases for a term commencing on or after the 1st day of January 1997; and*

b) to leases renewed or extended, pursuant to subsections 469(3) and 469(4) of the Cook Islands Act 1915 and its amendments, for a term commencing on or after the 1st day of January 1997; and

c) with effect from 1 January 2007, to leases for a term commencing prior to 1 January 1997, which leases shall be varied to incorporate the covenants listed in subsection (1) of this section.

[47] This section may impact on the appeal before this Court although it was mentioned only in passing by Savage J in his reasons for judgment.[14]

[48] The aim of the section is to make it more possible for owners of land leased for business purposes to obtain benefit from their ownership of their land which in many cases has been leased for up to 60 years at very modest rentals. For example, the initial rental under the Carpark lease in this case was only $1.00 per annum.

[49] Grice J considered the section in some detail in *Lineen v MacQuarie & anor*[15] where she stated:[16]

> *"The amendment ... appears to be seeking to provide benefits to Native landowners (who have leased their land) in the future development of the land by allowing them the opportunity to participate and receive income from the land."*

[50] That learned Judge considered excerpts from the Hansard debate on the section when it was before Parliament. Whilst able to discern the clear intention of the legislation, she found the debate difficult to follow in parts. She did not to gain much assistance from a perusal of the Parliamentary debates and found difficulty in interpreting the section. We have perused the relevant Hansard excerpts and agree with her assessment of the debate.

[51] Like Grice J, this Court has found difficulty in interpreting the section. Whilst the clear intention is there, the section was inserted into the Act without much if any guide as to how it was to be implemented and with an overhang of vagueness which is not practicable in a statutory provision affecting many usual commercial transactions.

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[14] The Green Room, above n1 at [13](c).

[15] Lineen v MacQuarie & anor CIHC OA 3/2008. 26 September 2008.

[16] At [30].

[52] The uncertainty caused by the section is challenging for the legal and commercial communities in Rarotonga and is a reason behind the appellant proceeding with the appeal despite having settled with the Respondents. No doubt the willingness of the Solicitor-General to be *amicus* reflects the importance of there being an authorative guide from this Court on the section – albeit some of that guide being obiter.

[53] As explained by Grice J in *Lineen*[17], Parliament by enacting section 106A has affirmed the importance of preserving the rights of native landowners by giving native landowners the opportunity to share in the benefits of commercial developments on the land which they have leased.

[54] However the following procedural and implementational difficulties are apparent from a study of the provisions of the section.

(i) How is the goodwill payment at the commencement of the term of the lease to be assessed? What is the meaning of "where commercially appropriate"? Who decides if any payment is to be made at all? No guidance is provided (see s.106A(1)(a).)

(ii) What is meant by "annual gross turnover of all or part of the activities of the business or enterprise"? If there are several activities, which one or ones are to be the subject of the percentage of gross turnover impost? What is the difference between a business and an enterprise? What is to happen if the parties will not negotiate or if negotiation fails (See s.106A(1)(a).)

(iii) How practicable is it for the lessee to give the lessor "reasonable opportunity to participate as a shareholder on usual commercial terms in the business or enterprise" when the "lessor" is usually a large group of people some of whom do not live in the Cook Islands? What if some, but not all of the owners wanted to be shareholders? If so, what numbers of shares would be taken by them? Would they be minority shareholders with all the disadvantages of that status? What if the business or enterprise is a partnership or a joint venture? What are "usual commercial terms"? Who decides on all of the above in the case of failure of the parties to agree? (s.106A(1)(a)) The Court notes that this

[17] At [34] to [37]

notice requirement is greater than that in the leases under review because all owners have to be notified not just those living in Rarotonga or who have a contact address there.

(iv) How is the right of first refusal to be communicated to multiple lessors and how is their response to be considered? How can this possibly lengthy process be achieved in the context of the sale of a business as a going concern being conducted on the demised land? (s.106A(1)(e))

(v) Who determines the "percentage of net sale proceeds" of that enterprise or business? What is meant by net sale proceeds? Does that term mean what is left after payment of the vendors debts? (s.106A(1)(e)(i))

(vi) What is the effect of the section on leases (such as those in the present case) which commenced prior to 1 January 1997 and which are still in force at 1 January 2007? What is the meaning of 'shall be varied' in relation to those leases? (s.106A(2)(c))

(vii) What is the effect on s.106A of sections 68 (implied convents may be negatived) and s.109(1) (no fine for licence to assign) of the 1952 Act?

[55] The Legislature, when enacting s.106A in this form, must have had in mind some existing mechanisms in the law which would assist in the practical implementation of the new provisions being introduced otherwise the section under be largely unworkable.

[56] The Leases Restrictions Act 1976 ("the 1976 Act") and the Leases Restrictions Regulations 1977 ("the Regulations") provide for a Leases Approval Tribunal which has the power inter alia, of considering applications for the approval of leases, assignments of leases and subleases and may grant approval if the criteria set out in Regulation have been 'satisfied or met'. All these transactions are 'alienations' under the 1976 Act and Regulations and the Cook Islands Act 1915 ('the 1915 Act'). We believe that this Act may provide the solution to the lack of any dispute resolution mechanism in the section.

[57] Regulations promulgated in 2006 are fairly detailed and, in summary, cover the following topics; inter alia:

(i) Approval may be granted to named categories of persons – with a preference in favour of Cook Islands citizens but with the right to approve a non-Cook Islander party to an alienation if the High Court or this Court so orders. (Reg.19(d).

(ii) Approval may be granted to foreign enterprises regulated in the Cook Islands on certain terms (Reg.19(f)).

(iii) The Tribunal shall not approve any alienation unless it is satisfied that there has been a meeting of the relevant assembled owners resident on the relevant island and that the assembled owners have 'by consensus' consented to the transaction (Reg 21). This applies where the 'lessor' under the Section is a number of different persons.

(iv) The Tribunal must be satisfied that the alienation is not contrary to equity and good faith or to the interests of the persons alienating or to the public interest (Reg 23(b)) and section 482 of the Cook Islands Act 1915 Act

(v) Regulations 24 and 25 deal with two topics covered by Section 106A and provide as follows:

24. <u>Monetary consideration, annual rental -</u> The Tribunal shall not approval any lease, sublease or assignment of lease or assignment of sublease unless the Tribunal is satisfied upon the provision by direction or otherwise of such relevant information as may assist the Tribunal, that –

a) Any monetary consideration paid and annual rental payable to the owners in the land are adequate fair and reasonable and comply with section 482 of the Cook Islands Act 1915;
or
b) In the case of an enterprise or foreign enterprise the monetary consideration paid and annual rental payable to the owners in the land complies with section 106A of the Property Law Act 1952 as it applies in the Cook Islands.

25. <u>Owners or Cook Islanders to be given first right of refusal in lease</u> – The Tribunal shall not approve any sublease or assignment of lease or assignment of sublease unless the deed for the transaction expressly provides for –

a) the owners in the deed residing on the island on which the land is situated to be given first notice of any intended assignment or subletting and first option to purchase or refuse to purchase such assignment or subletting and the Tribunal is satisfied that such provision is reasonable; or
b) a Cook Islander residing in the Cook Islands to be given first right of refusal where there are no owners in the land residing on the island on which the land is situated willing to purchase such assignment or subletting and the Tribunal is satisfied that the lessee has made

reasonable attempts to give notice of the intended assignment or subletting and the Tribunal is satisfied that such provision is reasonable.

(vi) The Tribunal may not approve any assignment of lease unless the "original and final deed or document for the transaction" has been duly signed and /or executed by one of the parties and produced to the Tribunal (Reg.30)

(vii) Confirmation of the alienation must be given by the High Court (Land Division) pursuant to Section 477 of the 1915 Act and the alienation has no force or effect until such confirmation has been given. (Reg 31)

(viii) The Tribunal should not normally approve an assignment of lease or a sub-lease before the expiry of 10 years from the date of commencement of the lease. Approvals to assignments occuring within that period can be given in stated situations (Reg 34).

(ix) The Tribunal may require the production of further information from an applicant (Reg 35)

[58] The provisions of the 1976 Act and Regulations supply the key to answering many of the problems caused by the lack of specific implementation provisions in section 106A as detailed above. The requirement for alienation terms to be approved by the Tribunal and the Court will effectively compel the parties to a lease assignment to negotiate and reach agreement. The Tribunal and/or the Court would no doubt use their best endeavours to resolve any differences. But if both parties want the alienation to happen and are prepared to go through the many hoops involved, then commonsense indicates that resolution will occur. Although there is the requirement for a final version of the relevant agreement signed by the parties, the extensive powers of the Tribunal (and subsequently the Court) could easily be used to insert different terms in the document ultimately achieved.

[59] In this way, all the rather vague expressions in section106A such as 'usual commercial terms', 'annual gross turnover', 'where commercially appropriate', 'reasonable opportunity to participate as a shareholders' will be pragmatically considered either by the parties to a successful negotiation or by the Tribunal and/or the Court.

[60] The above resolution of the interpretation problem is not ideal. The Legislature should have included some mechanism for resolving any disputes to which the section would inevitably give rise. A simple reference of any dispute over any provision in the Section to the Tribunal or the Court or even to arbitration was all that would have been required.

[61] As already noted, processes outlined above will inevitably take a period of time which might be inimical to a speedy sale of a business as a going concern. A quicker process for dispute resolution could be more ideal. However the Court can only deal with the legislation as it is.

[62] As already noted, s.106A of the 1952 Act, which came into force on 1 January 1997, provides in subs (2) that it applies:

> *a) to leases for a term commencing on or after the 1st day of January 1997; and*
> *b) –*
> *c) with effect from 1 January 2007, to leases for a term commencing prior to the 1 January 1997, which leases shall be varied to incorporate the covenants listed in subsection (1) of this section."*

[63] For Green Room, Mrs Browne submitted that the reference in s.106A (2) (c) to the variation of pre- January 1997 leases required the parties to such leases to agree to a variation to incorporate the covenants in their leases. If the parties were unable to reach an agreement of this nature, their lease would not include those covenants.

[64] Mrs Browne acknowledged that her interpretation of s.106A (2) (c) required the Court to read in the words "by agreement between the parties to the lease" so that it read:

> " .... shall be varied by agreement between the parties to the lease to incorporate the covenants..."

[65] Mrs Browne submitted that the expression "shall be varied" was directory rather than mandatory. In support of her submission she relied on the decision of Grice J in Lineen[18] where the Judge said, in relation to a pre-January 1997 lease, that the covenants in s.106A (i) were not automatically implied into the lease, but rather the lease had to be varied to include them.

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[18] Lineen above n.15 at [40]

[66] For the following reasons, we do not accept Mrs Browne's submissions relating to the interpretation of s.106A(2)(a).

[67] First, as already noted, the purpose of the 1996 enactment of s.106A was to benefit Cook Islands native landowners by including or implying covenants in their leases designed to increase their potential returns from long-term leases of their land. This purpose was implemented by s.106A (I) which expressly requires leases of Native freehold land, used for commercial or industrial purposes, to have the prescribed covenants included or implied in them.

[68] Second, s.106A recognised the need to distinguish between existing leases (pre-January 1997 leases) and new leases (pose-January 1997 leases).

[69] The prescribed covenants would apply straightaway to new leases, but there would be a ten year lead in period before existing leases were varied. There was no reason why the prescribed covenants should not be included or implied in new leases from the outset. This is the effect of s.106A(2)(a). Parties to new leases would be aware of the new prescribed covenants and would be able to agree to their exclusion under s. 68 of the Property Law Act if the wished.

[70] Existing leases, however, were in a separate category and their parties were therefore, understandably, to be given time (ten years) before their leases were to "be varied to incorporate the covenants" with effect from 1 January 2007 in accordance with s.106A (2) (c). The parties to existing leases would have time to consider the implications of the prescribed covenants and agree to include them or exclude them under s.68 or vary them and obtain any Tribunal or Court approval required during the ten year period. In the absence of any agreement to the contrary, pre-January 1997 leases would be varied by the operation of s.106A(2)(c) as from 1 January 2007.

[71] Third, the mandatory effect of s.106A(2)(c) on existing leases after the elapse of the ten year period should not be described as unlawful retrospective legislation when the purpose of the provision was clearly to benefit Cook Islands Native Landowners. The ten year period provided lessees under existing leases with the opportunity to adjust their businesses and enterprises to meet the new potential obligations under the prescribed covenants.

[72] Fourth, as the Solicitor-General pointed out, the decision of Grice J in Lineen does not support a different interpretation. There is no suggestion in Lineen that s.106(2)(c) required existing leases to be varied by agreement between the parties. Lineen involved an application under the Declaratory Judgments Act 1994 for Court orders varying an existing pre-January 1997 lease in respect of the covenants in s.106A(1)(b) and (c). For reasons particular to that case, Grice J made the following order:[19]

> *" Declaring that the provisions of s.106A(2)(c) Property Law Act 1952 apply to the Deed of Lease... to require the Lease to be varied only to the extent necessary to include the covenants set out in s.106A(1)(b) and (c) of the Property Law Act 1952 but amended to:*
>
> *(i) Substitute the word "and" between s.106A(1)(b) (i) and (ii) with the word "or"; and*
>
> *(ii) Delete the words "or the High Court" in s.106A(1)(c)."*

[73] As the terms of this declaratory order correctly recognise, the existing pre-January 1997 lease would have been varied by the incorporation of the prescribed covenants in accordance with the operation of s.106A(2)(c) but for the terms of the Court's order.

[74] We do record, however, that we do not agree with the view of Grice J that it was not open to the parties to an existing lease to reach agreement on the exclusion (or variation) of any of the prescribed covenants.[20] In our view parties to an existing lease are entitled by s.68 of the 1952 Act to agree to exclude from their lease any covenants, including the covenants prescribed by s.106A(1). In the absence of any agreement under s.68, however, the prescribed covenants would be incorporated by the variation required and effected by s.106A(2)(c).

[75] For these reasons it was therefore unnecessary for Savage J to address s.106A in any detail his decision.

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[19] Lineen at [19].

[20] Lineen at [41].

Issue Number 3

[76] The third issue is whether Savage J took into account irrelevant factors and failed to take into account relevant factors in exercising the Court's discretion under s.3 of the Declaratory Judgments Act 1994.

[77] For the reasons given in our answers to issues 1 and 2, the answer to issue 3 is "No".

Costs

[78] As the appeal involved questions of public importance for Cook Island landowners and their lessees, we have decided that costs should lie where they fall and no order should be made.

Result

[79] Accordingly, the questions of law raised in this appeal are answered as follows:

a) The High Court did not misinterpret the rights of the parties under the Section 3D1 lease (the Restaurant lease) and the Section 3D3 lease (the Carpark lease);

b) The High Court did not address in detail s.106A of the Property Law Act 1952 (as inserted by the Property Law Amendment Act 1995-96) but it was unnecessary to do so.

c) The High Court did not take into account irrelevant factors, or fail to take into account relevant factors, in exercising its discretion under s.3 of the Declaratory Judgments Act 1994.

A. The appeal is dismissed and there is no order for costs.

Sir Ian Barker JA
(Presiding)

Paterson JA

White JA

Solicitors:

Browne Harvey and Associates PC, Avarua for Appellant.

Crown Law office, Avarua, for amicus curiae.