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

CA No 4/2019
Application No 10/2015

BETWEEN	**ANI PIRI**
	Appellant
AND	**ANNA NICHOLAS**
	Respondent

Coram:	White P Williams JA Asher JA
Hearing:	9 and 10 November 2020
Further submissions:	23 November 2020 and 29 January 2021 (Appellant). 26 November 2020 and 18 January 2021 (Respondent), 3 December 2020 and 9 February 2021 (amicus curiae)
Appearances:	Mr Andrew Irwin, Mrs Tina Browne and Ms Hinano Ellingham for the Appellant Mr Benjamin Marshall for the Respondent Mr Brian Mason as amicus curiae
Judgment:	24 March 2021 (NZ Time)

JUDGMENT OF THE COURT OF APPEAL

A **The appeal under s 390A(2) of the Cook Islands Act 1915 is dismissed.**

B **Subject to the Chief Justice obtaining the consent of the Queen's Representative under s 390A(8) of the Cook Islands Act 1915,**

the order made by Mrs David JP on 28 August 2007 confirming the alienation by way of lease between the landowners as lessor and the appellant as lessee for an area of 680 sqm is to be set aside and a rehearing of the appellant's application is to be ordered.

C **The respondent has been successful. If costs are sought, the respondent should file submission within 14 days and the appellant should respond within a further 14 days, with any reply by the respondent within a further 7 days. The submissions should address quantum, and the basis on which the quantum is arrived at. Mr Mason's costs are being met, and the submissions are not expected to deal with his position. No submission is sought from him on costs. Each submission should be no more than five pages, and the respondent's reply three pages.**

REASONS

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Introduction

[1] In this appeal by Mrs Piri against a decision of Williams CJ in the Land Division of the High Court (the Land Division) delivered on 5 September 2019 adopting a report by Savage J under s 390A(3) of the Cook Islands Act 1915 (the CI Act) dated 31 January 2019.[1] In his report Savage J recommended that a decision of the Land Division by Mrs David JP made on 28 August 2007 which had confirmed an application by Mrs Piri under the Land (Facilitation of Dealings) Act 1970 (the LFDA) in respect of a leasehold alienation should be overturned and reheard.[2] The lease was for 60 years and related to a valuable piece of land of 680 sqm close to the beach at Muri Lagoon, Rarotonga. The alienation had been approved by a prior resolution of a majority of the landowners at a meeting held on 21 March 2007.

[2] The background to the case is both factually and procedurally complicated and involves a range of statutory provisions which need to be reconciled. The complications have not been assisted by various delays which have occurred or by the fact that not all the relevant evidence was before Savage J and the Chief Justice. In particular, the Land Division file for the hearing before Mrs David JP does not appear to have been provided to Savage J or the Chief Justice. As will be explained, the information on this file, which was provided to us in a Supplementary Case on Appeal dated 3 April 2020, has altered the focus of the appeal.

[3] On the first day of the hearing of the appeal we also received an application by Mr Irwin, counsel for Mrs Piri, for leave to adduce in evidence a copy of the minutes of a family meeting held on 29 August 2006. The application was opposed on the grounds of late notice and prejudice. We admitted the document in evidence as it appeared relevant, but reserved the question of the weight to be given to it.

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1 *Nia v Piri – Te Reva Section 2C Ngatangiia* High Court (Land Division) App No 10/2015, 5 September 2019 (Williams CJ) [Chief Justice's decision]; and Report to the Chief Justice dated 31 January 2019 in *Nia v Piri – Te Reva Section 2C Ngatangiia* High Court (Land Division) App No 10/2015 [Savage J's report].

2 Savage J's report, above n 1, at [57]-[58].

[4] During the hearing of the appeal further legal issues were also identified by the Court which have been addressed in further written submissions by counsel.

[5] The submissions for the parties at the hearing of the appeal and subsequently have given rise to a number of factual issues and important issues of principle concerning the duties of disclosure owed by participants at landowners' meetings and the role of the Land Division in relation to the confirmation of landowner resolutions under the provisions of the LFDA and the CI Act. In view of the nature of these issues of principle relation to Cook Islands land law and procedure, the Court arranged for counsel to be appointed to assist as amicus curiae. We are grateful to Mr Mason for accepting this appointment and for the assistance he has provided to the Court. We are also grateful to the Solicitor-General for agreeing to meet the costs of Mr Mason.

[6] This appeal was heard during the COVID-19 crisis when the Judges were unable to travel to the Cook Islands and return to New Zealand without having to meet New Zealand's quarantine requirements. As permitted by rule 40 of the Court of Appeal Rules 2012 and with the co-operation of counsel, the appeal was heard by video link, with the Judges in Auckland, Mr Irwin in Wellington and other counsel in Rarotonga. We express our gratitude to counsel and the Court staff for their co-operation and support.

Factual background

The land the subject of the lease

[7] The land the subject of the lease is part of a large block of land with a total area of 25,000 sqm owned by descendants of Uirangi and her children. The descendants include Mrs Piri and other members of her family and also the late Mr Nia and his family. Two members of Mrs Piri's family already held leases of 1,172 sqm and 1,122 sqm of the land.

[8] The area of 680 sqm the subject of Mrs Piri's lease had been occupied by Mrs Piri and her family for some 50 years and is next to the Pacific Resort Hotel at Muri. Mrs Piri's father had built his family house on the land, but had also made it available for commercial tourism accommodation by renting it out to the Pacific Resort Hotel.

[9] Mrs Piri's sister, Cecilia Short, who leased adjacent land, had an existing business relationship with the Pacific Resort Hotel.

Mrs Piri's proposal

[10] Mrs Piri, who already had a home on Rarotonga, gave evidence that she sought a lease of the 680 sqm because it was her father's land. She sought a leasehold interest rather than an occupation right because a leasehold interest could be used as security for a bank loan. She was adamant in her evidence that in 2007 she had no commercial intentions for the land. Her evidence was that her commercial intentions did not develop until 2012 when she began negotiations with Pacific Lagoon Ltd, the owner of the Pacific Resort, for a commercial tourism joint venture.

[11] A draft 60 year lease between the landowners and Mrs Piri for the 680 sqm piece of land was prepared in 2007. The annual rental was to be $1.00 per annum. Clause 4 provided that Mrs Piri would not transfer, assign, sublet or otherwise part with the possession of the land without the consent of the majority of the landowners residing in Rarotonga. Clause 6 provided that Mrs Piri could use the land for "residential and/or purposes ancillary thereto".

Approval from other family member landowners under the LFDA

[12] Proceeding under the LFDA, Mrs Piri sought approval for her draft lease from the other family member landowners at a meeting held on 21 March 2007. The formal minutes of the meeting required by the LFDA recorded that there were some

35 people present or represented at the meeting, including Mrs Piri and Mr Eruera [Ted] Nia who was representing his father, Pouariki Akania.

[13] The minutes record that the following resolution was considered:

> THAT a lease be granted to ANI PIRI of an area of SIX HUNDRED AND EIGHTY SQUARE METRES (680m2) for a term of SIXTY (60) YEARS as from 1st day of March 2007 at an annual rental of ONE DOLLAR ($1.00) per annum reviewable five (5) yearly and subject to the terms and conditions contained in the draft lease attached to the application and to be explained during the meeting.

[14] The minutes also record that Mr Nia stated he and his father were not objecting to Mrs Piri succeeding to her father's interest, but were objecting to the lease. The text of the minutes reads:

> I object to this lease because a lease was granted on this land and a hotel was built on it. My dad is worried. He agrees to Ani succeeding to her father's Occupation Right but not the lease.

It is accepted that Mr Nia was referring to the lease to Mrs Piri's sister, Cecelia Short, and the tourist accommodation built on her land.

[15] The minutes then record that the resolution was passed "by majority".

[16] There is a passing reference in the minutes to an earlier family meeting which might have been a meeting apparently held on 29 August 2006 and the subject of the minutes in respect of which Mr Irwin sought leave to adduce in evidence before us. In our view whether there was an earlier meeting and, if so, what transpired at the meeting are not matters of significance for the appeal and we therefore do not need to determine whether any weight needs to be given to the document.

Mr Nia's letter of objection to the Registrar of the High Court dated 21 March 2007

[17] On 21 March 2007 Mr Eruera Nia wrote to the Registrar of the High Court in the following terms:

> In the matter of a proposed lease to Ani Piri on the land Te Reva Section 2.
>
> Dear Sir,
>
> My Father Pouariki Akania, Land owner, was not invited nor was he informed of the Family Meeting that was called on this matter even though he was present on The island and could have considered the Proposal.
>
> My father believes that if Ani wishes to succeed the interests of his brother, Kaveariki, in this particular section, solely. Then he will agree, subject to the Agreement of her brothers and sisters. That is, the succession of Kaveariki's Occupation right on this beach front land.
>
> My father does not agree to the lease proposal before the court, and cannot do so, until a proper Family meeting is called that he is informed of and may attend. To give his consideration.
>
> He is not aware that the children of his brother have succeeded their interest in the land yet.
>
> I am yours
>
> Eruera Nia, the son and acting as proxy for Pouariki AkaNia.

[18] Mrs Piri accepts that this letter constituted a memorial of dissent by Mr Nia to her proposed lease and that it was on the Land Division Court file when Mrs David JP came to consider her application for confirmation on 28 August 2007.

[19] The letter was not, however, part of the evidence before Savage J or the Chief Justice. Its existence was not drawn to their attention. It was, however, included in the Supplementary Case on Appeal filed for this appeal.

Approval of Leases Approval Tribunal

[20] It appears that Mrs Piri obtained the approval of the Leases Approval Tribunal to the draft lease under the Leases Restrictions Act 1976 (as amended) and the Leases Restrictions Regulations 1977 (as amended), but a copy of the approval was not in evidence.

Mrs Piri's application to the Land Division of the High Court for confirmation of the resolution for her lease under the LFDA

[21] Mrs Piri's application to the Land Division for confirmation of the landowners' resolution is dated 23 July 2007. It is a one page document which states simply that application is made for confirmation of the resolution by the landowners passed at the meeting on 21 March 2007 and then sets out the resolution in the same form as it appears in the record of the landowners' meeting. In other words, the application sought confirmation of the resolution in respect of the draft lease attached to the application which had been explained at the meeting.

No valuation

[22] Mrs Piri did not obtain or provide a valuation of the land the subject of the lease in support of her application. Nor did she obtain an exemption from the requirement to provide a valuation under s 53(1) of the LFDA.

Public notice of the hearing of Mrs Piri's application

[23] Public notice of the Land Division hearing of Mrs Piri's application was given in the Cook Islands News on 13 August 2007. It appeared along with some 65 other applications in the *panui* for hearing on 27 and 28 August 2007. The reference to Mrs Piri's application read simply:

> 581/07 – Ani Piri – Te Reva 2C Ngatangiia – Confirmation of Resolution of Assembled Owners – Kia akamanaia tetai uipaanga kopu tangata.

[24] The public notice also stated:

> Any person who disputes any of the above applications should file a Notice Disputing Claim to the Registrar of the High Court and a copy to be served onto the applicant 7 days before Monday 27th August 2007.

[25] The public notice did not state that a person who objected to the application should also appear at the hearing. Mr Nia gave evidence that he did not see the public notice.

[26] Like Mr Nia's letter of objection, this public notice does not appear to have been part of the evidence before Savage J or the Chief Justice. It was provided to us in the Supplementary Case on Appeal.

The Land Division file in August 2007

[27] It appears from the Supplementary Case on Appeal that the Land Division file in August 2007 contained the following documents required under the LFDA:

(a) Report of Recording Officer at Meeting of Assembled Owners held on 21 March 2007 and 22 March 2007 with Statement of Proceedings and Resolution of Assembled Owners.

(b) Minutes of Meeting of Assembled Owners held on 21 March 2007.

(c) Letter of objection from Mr Nia to Registrar dated 21 March 2007.

(d) Notice of Meeting to be held on 21 March 2007.

(e) Proxy Form to be used at meeting.

(f) Draft deed of lease from Landowners to Mrs Piri.

(g) Mrs Piri's application for confirmation of resolution of assembled owners dated 23 July 2007.

(h) Public Notice in Cook Islands News of 13 August 2007.

The hearing on 28 August 2007 before Mrs David JP

[28] The confirmation hearing before Mrs David JP under the LFDA took place in the Land Division on 28 August 2007 and proceeded as follows:

> **Registrar:** Application 581/07, Ani Piri, Application for confirmation of resolution on Te Reva 2C, Ngatangiia.
>
> **Court:** Good morning.
>
> **Mrs Piri:** Good morning your Worship.
>
> **Court:** The documents are in order. Is this just for confirmation?
>
> **Mrs Piri:** Yes your Honour.
>
> **Court:** Any objections?
>
> **Registrar:** No objections your Worship.
>
> **Court:** There's no objections, resolutions confirmed.

[29] It also appears that Mrs David JP wrote on the backing sheet of Mrs Piri's application – "No objections. Resolution confirmed. David JP."

[30] Mr Nia was not present at the hearing.

[31] We shall return to the implications of the statement that there were "No objections" later.

The execution in 2012 of a lese to Mrs Piri by the Registrar of the High Court

[32] A lease to Mrs Piri was executed by the Registrar of the High Court on behalf of the landowners on 5 April 2012, but it was **not** a lease in the same form as the

2007 draft lease approved by the landowners in the resolution at their meeting on 21 March 2007 and confirmed by Mrs David JP on 28 August 2007. Clause 6 of the lease as executed by the Registrar had been altered to provide that Mrs Piri could use the land "for residential and commercial purposes and/or purposes ancillary thereto".

[33] There was no evidence of any application by Mrs Piri to the Land Division for a variation of clause 6 of the 2007 draft lease to permit her to use the land for commercial purposes.

[34] No explanation has been provided for the alteration to clause 6 in the lease or for the delay between the approval of the draft lease to Mrs Piri in 2007 and the execution of the lease in 2012. There is no evidence that the approval of the Leases Approval Tribunal was sought or obtained for the form of the lease as executed in 2012.

[35] No proceedings have been taken yet in respect of the validity of the lease as executed in 2012.

The joint venture agreement between Mrs Piri and Pacific Lagoon Ltd

[36] In 2014 Mrs Piri entered into a joint venture with Pacific Lagoon Ltd, the operator of the Pacific Resort Hotel, for the construction of new hotel accommodation on the land which she had leased from her family. The unchallenged affidavit evidence from Mr Greg Stanaway for Pacific Lagoon Ltd was that Mrs Piri would receive some $80,000 per annum under the arrangement.

[37] In an affidavit of documents filed by Mrs Piri shortly before the Land Division hearing before Savage J, she deposed to the existence of a Joint Venture Agreement with Pacific Lagoon Ltd, but objected to its production on grounds of relevance. She was cross-examined about her refusal to produce the Agreement, but no application was made for an order for its production and it was not produced.

Proceedings by Mr Nia

[38] In 2015 Mr Nia became aware of the arrangements between Mrs Piri and Pacific Lagoon Ltd. He applied to the Land Division under s 390A of the Cook Islands Act 1915 for an order for a rehearing of the August 2007 decision by Mrs David JP confirming the resolution of the landowners approving the lease of the land to Mrs Piri.

[39] Mr Nia also applied for an injunction to prevent any construction work or preparatory work from being carried out on the land until further order of the Court.

[40] Acting under s 390A(3) of the Cook Islands Act, Weston CJ directed by minute dated 31 July 2015 that the application be referred to the Land Division for inquiry and report.

[41] The injunction was granted by Savage J on 20/21 August 2015 and remains in force.[3]

[42] Mr Nia's application for a rehearing of the August 2007 decision confirming the resolution approving the lease was also heard in the first instance by Savage J on 20 and 21 August 2015. The parties and other witnesses had filed affidavits and oral evidence was given at the hearing by the parties who were cross-examined.

Written submissions from the parties were requested and provided during 2015 and 2016.

[43] Mr Nia gave evidence that he represented some ten other landowners of the property, only one of whom appears to have attended the March 2007 landowners meeting.

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3 Savage J's report, above n 1, at [9]; and Chief Justice's decision, above n 1, at [45].

[44] Sadly Mr Nia died between the hearing before Savage J and the delivery of his report to the Chief Justice. Savage J decided, however, that he should still complete his report.[4]

[45] Mr Nia has subsequently been replaced as respondent in this appeal by Mrs Dorothy Anna Nicholas (Uirangi Mataiapo). She is the tribal chief and has been substituted for Mr Nia on the basis that the interests of the other landowners should continue to be represented.

Report to Savage J

[46] Savage J's report to the Chief Justice is dated 31 January 2019. This was some two years after the receipt of the final submissions for the parties in December 2016. In the absence of any explanation for this delay, we can do little more than note our concern about the time taken for the completion of the report.

[47] Savage J's report sets out the factual background as it appeared to him, the submissions for the parties, the relevant law, his discussion of the issues and his recommendation to the Chief Justice.

[48] It appears from his report that Savage J proceeded on the assumption that the 2012 lease as executed with its reference to "commercial purposes" was the lease which had been approved by the landowners in their resolution which in turn had been approved by Mrs David JP in 2007.[5] He was not made aware of the 2007 draft lease which did not include the reference to "commercial purposes". This misunderstanding of the position has then led the Judge to conclude that Mrs Piri had

4 Savage J's report, above n 1, at [3].
5 At [6] and [54].

plans to develop the land commercially from the outset which she had failed to disclose to the meeting of landowners and the Court.[6]

[49] Savage J also considered that there was a real issue in the case in relation to the over-occupation of the land by Mrs Piri and her family which should have been disclosed as well.[7]

[50] In the Judge's view the relevant statutory provisions and authorities required the Land Division in exercising its discretions under s 54(1) of the LFDA and s 482(1) of the CI Act to confirm a leasehold alienation of land to proceed in an inquisitorial manner making "all such enquiries" as would enable it to be satisfied that the conditions of alienation had been met and this only faintly resembled a proceeding *inter partes*.[8] Indeed it had "a strong flavour of the *ex parte* process".[9] This approach meant that an applicant for confirmation was under a legal obligation to disclose all relevant circumstances to the Court, including matters adverse to their case.[10]

[51] In support of this view the Judge said:[11]

> You should note that no notice of Court hearings is given to those who object at the meeting of owners and, accordingly, objectors are often unaware that a confirmation hearing will be held on a particular date. Certainly, this applicant was not given notice of this confirmation hearing.

[52] While it is possible that the Judge might have been referring to the absence of any express requirement to give notice specifically to an objector, there is a requirement in rule 332(3)(a) of the Code of Civil Procedure 1981 for public notice of the hearing of an application which, as we have already noted, was observed in

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6 At [23], [53] and [57(c)].
7 At [50], [51] and [57(d)].
8 At [38].
9 At [48].
10 At [48] and [57(b)].
11 At [49].

this case. There is no requirement for service of documents on interested parties. An argument to the contrary was rejected by the Privy Council in *Browne v Munokoa*.[12] We return later to this error in the Judge's report.

[53] On the basis of his approach, however, Savage J considered that Mrs Piri had failed to comply with her legal obligation of disclosure which in turn meant that Mrs David JP could not have been satisfied of the conditions of alienation under s 482(2) of the CI Act.[13] Savage J noted that all Mrs David JP had in this case at the hearing were "the jurisdictional precursors and silence" and that:[14]

> The confirmation hearing was brief and appears to have proceeded on the basis that, if there is no objection, there is no need for the Court to inquire further.

[54] Savage J then said:[15]

> I know from experience that these matters tend to be dealt with quite quickly and the lack of opposition is relevant, but the simple question to be asked of the applicant could be: "Is there anything that I should know about this application?" A response that there is not would probably satisfy.

[55] Accordingly, the Judge recommended to the Chief Justice that the application for a rehearing be granted and the confirmation of the leasehold alienation be set aside. His principal reasons for his recommendations were that Mrs Piri had failed to disclose "she had an important commercial transaction to follow" and the true position regarding the overall occupation of the total land by various family members.[16]

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12 *Browne v Munokoa* [2018] UKPC 18, at [47].
13 Savage J's report, above n 1, at [57(f)].
14 At [46].
15 At [47].
16 At [57].

[56] In making this recommendation Savage J noted that the issue of Mr Nia's delay of "some nine years" between the confirmation process in 2007 and the rehearing application in 2015 was not as potent as might have been first thought because Mr Nia gave evidence that he had not been given notice of the confirmation hearing or its result and only became aware of the proposed commercial development of the land in March 2015, the lease was not signed until 2012 and Mrs Piri had not altered her position in reliance on the validity of the lease.[17]

Decision of the Chief Justice

[57] Following receipt of Savage J's report, Williams CJ, acting under s 390A(3) of the CI Act and without holding a further hearing, issued his judgment on 5 September 2019. In his decision the Chief Justice referred to the background factual and legal issues and concluded that it was appropriate to follow Savage J's "persuasive" recommendations.[18] In particular, the Chief Justice agreed with Savage J that Mrs Piri had failed in her duty to advise the confirmation hearing of "the very lucrative commercial deal which sat behind the proposed lease" and "her family's existing occupation of a significant area of the beachfront, an occupation which would be exacerbated by confirming the lease".[19] The Chief Justice overturned the August 2007 order confirming the alienation by way of lease and ordered a rehearing.

[58] In reaching his decision the Chief Justice said:[20]

> Given the dates of the lease, the confirmation hearing and the s 390A application, s 390A(8) is not triggered.

[59] Section 390A(8) provides:

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17 At [55]-[56].
18 Chief Justice's decision, above n 1, at [38] and [45].
19 At [40]-[41].
20 At [47].

> This section shall extend and apply (with the exception hereinafter mentioned) to orders, whether made before or after the commencement of this section, save that in all cases where an order is dated more than 5 years previously to the receipt of the application under this section the [Chief Justice] shall first obtain the consent of [the Queen's Representative] before making any order hereunder …

[60] In the present case it appears that s 390A(8) would in fact be triggered because the confirmation order was made in the Land Division in August 2007 and the s 390A application was received in July 2015. The fact that the lease was not executed by the Registrar until April 2012 does not seem to be relevant. The consequences of the application of s 390A(8) in this case are addressed later.

Issues on appeal

[61] At the hearing of this appeal Mrs Piri challenged the report of Savage J and the decision of the Chief Justice on the grounds that there was no duty of disclosure, especially when the approval of the Leases Approval Tribunal had already been obtained, and, if there were such a duty, she was not in breach of it because the commercial deal with Pacific Lagoon Ltd did not exist in 2007 and disclosure of her family's existing occupation of the land and its location "should not have altered the Court's decision". She also disputed that failure to provide a valuation of the land with the application in 2007 was fatal to the order being made. Finally, she submitted that the late Mr Nia's decision not to raise his concerns at the confirmation hearing disentitle him (or his successor) to a rehearing of the confirmation application.

[62] During the hearing Mr Irwin, counsel for Mrs Piri, raised a further issue about the relevance of s 58(2) of the LFDA and in written submissions provided after the hearing he argued for the first time that s 482 of the CI Act did not apply to applications for confirmation of resolutions for alienation under the LFDA. In his submission it was unnecessary for the Land Division to consider the matters specified in s 482(2) of the CI Act and both Savage J and Williams CJ were wrong to do so.

[63] Mrs Nicholas sought to uphold the report of Savage J and the decision of the Chief Justice. In the course of her comprehensive submissions, however, she accepted that Mrs Piri's evidence at the 2015 hearing was that the commercial venture with Pacific Lagoon Ltd was not conceived of until 2012. At the same time, she did not accept that this evidence was correct. Instead she submitted that Savage J and the Chief Justice were entitled to draw an inference from other evidence that Mrs Piri failed to disclose to the landowners and the Court "her commercial intentions" for the land at the time she sought the leasehold interest in the land. In particular, Mrs Nicholas relied on the failure of Mrs Piri to produce her Joint Venture Agreement with Pacific Lagoon Ltd. She also supported the decision under appeal on the further ground that Mrs Piri's failure to provide a valuation of the land in support of her 2007 application was fatal.

[64] In his written submissions provided after the hearing, Mr Marshall for Mrs Nicholas disputed the new argument raised by Mr Irwin that s 482 of the CI Act did not apply.

[65] In the course of the development of these arguments during the hearing of the appeal and subsequently, it has become apparent that the focus of the case has shifted significantly because:

(a) Savage J and the Chief Justice were not aware of the terms of the 2007 draft lease, the fact that Mr Nia had given notice of objection to the Land Division or that public notification of the 2007 Land Division hearing had been required and was given.

(b) For the reasons below we have decided that applicants for confirmation do not owe any obligation of disclosure. Instead we consider it is necessary to focus on the role of the Court and the nature of the hearing before Mrs David JP in this case; and

(c) The new post-hearing argument for Mrs Piri has required further consideration of the interrelationship between the relevant provisions of the CI Act and the LFDA.

[66] These developments and our relevant factual findings have meant that it has become unnecessary for us to consider aspects of the submissions relating to the allegations of non-disclosure by Mrs Piri. In particular, we do not need to resolve the factual issue of her non-disclosure of her commercial intentions for the land based on her 2014 Joint Venture Agreement with Pacific Lagoon Ltd and the non-production of the agreement itself.

Relevant statutory provisions

[67] Before referring to the specific statutory provisions themselves, it is important to recognise the special character and importance of ancestral property to the indigenous people of the Cook Islands and the general approach to the interpretation of statutory provisions relating to land in the Cook Islands as mandated by decisions of the Privy Council.

[68] As the Privy Council has said,[21] the special character and importance of ancestral property to the indigenous people of the Cook Islands "transcends any commercial significance". The land law system of the Cook Islands makes freehold native land generally inalienable (either *inter vivos* or by will).[22] And the alienation of lesser interests is restricted and strictly controlled.

[69] In this context, the CI Act is of particular significance. As noted by the Privy Council in *Tumu v Tumu*, it is "a monumental enactment, running to 660 sections,

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21 *Descendants of Utanga and Arerangi Tumu v Descendants of Iopu Tumu* [2012] UKPC 34 [*Tumu v Tumu*] at [2]; *Baudinet v Tavioni* [2012] UKPC 35, at [61]; and *Browne v Munokoa*, above n 12, at [5].

22 *Tumu v Tumu*, above n 21, at [60]-[61].

providing for all aspects of the government of the Cook Islands".[23] The Privy Council pointed out that one of its principal legislative purposes was:[24]

> … to protect the indigenous people of the Cook Islands against exploitation, either by their own tribal chiefs or by people of European origin. Freehold native land was in general to be inalienable. Any permitted alienation was to be in writing. Partitions and exchanges were to be subject to the supervision of the Land Court to ensure fairness. These provisions, whether or not they may today seem paternalistic, have always been an essential part of the land law system in the Cook Islands, and in a system of that sort consent, even if assumed to have been freely given, is not sufficient to override its operation.

[70] Implementing this principal legislative purpose, s 477 of the CI Act provides:

> **477. Confirmation necessary** – No alienation of Native land by a Native [or descendant of a Native] shall have any force or effect until and unless it has been confirmed by [the Land Division of the High Court].

[71] And reinforcing this prohibition, s 482(1) and (2) provide:

> **482. Conditions of confirmation** – Subject to the provisions of this section, the confirmation of an alienation shall be in the discretion of the Court.
>
> (2) No alienation shall be confirmed unless the Court is satisfied as to the following matters:
>
> (a) That the mode of execution of the instrument of alienation is in conformity with this Act;
>
> (b) That the alienation is not contrary to equity or good faith or to the interests of the persons alienating or to the public interest; and
>
> (c) That the consideration (if any) for the alienation is adequate.

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23 At [14].

24 At [60].

[72] While s 479(3) of the CI Act and s 54(3) of the LFDA provide that there is no appeal from any order of the Court confirming an alienation, s 390A(1) to (3) of the CI Act provide:

> **390A. Amendment of orders after title ascertained** – (1) Where through any mistake, error, or omission whether of fact or of law however arising, and whether of the party applying to amend or not, [the Land Division of the High Court] or [the Court of Appeal] by its order has in effect done or left undone something which it did not actually intend to do or leave undone, or something which it would not but for that mistake, error, omission have done or left undone, or where [the Land Division of the High Court] or [the Court of Appeal] has decided any point of law erroneously, the [Chief Justice] may, upon the application in writing of any person alleging that he is affected by the mistake, error, omission, or erroneous decision in point of law, make such order in the matter for the purpose of remedying the same or the effect of the same respectively as the nature of the case may require; and for any such purpose may, if he deems it necessary or expedient, amend, vary, or cancel any order made by [the Land Division of the High Court] or [the Court of Appeal], or revoke any decision or intended decision of either of those Courts.
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> (2) Any order made by the [Chief Justice] upon any such proceedings amending, varying, or cancelling any prior order shall be subject to appeal in the same manner as any final order of [the Land Division of the High Court] but there shall be no appeal against the refusal to make any such order.
>
> (3) The [Chief Justice] may refer any such application to [the Land Division of the High Court] for inquiry and report, and he may act upon that report or otherwise deal with the application without holding formal sittings or hearing the parties in open Court.

[73] Mrs Piri does not dispute that s 390A was available in this case and, notwithstanding the absence of any right of appeal against the confirmation decision of Mrs David JP, provided the Chief Justice with the necessary jurisdiction to determine Mr Nia's application for a rehearing. Mrs Piri does of course challenge by way of this appeal under s 390A(2) the Chief Justice's decision to exercise his discretion under s 390A(1) to grant the rehearing.

[74] We now turn to the LFDA which was enacted in 1970 "to facilitate dealings in land by providing for incorporation of owners of Native land and powers of assembled owners".[25]

[75] It was accepted by counsel for the parties that the enactment of the LFDA recognised the need for a new process to facilitate land dealings following practical difficulties arising from the growing numbers of landowners and the diaspora of the people of the Cook Islands after the Second World War, especially to New Zealand. The Act was designed to permit the incorporation of landowners and the alienation of interests in native land by majority decisions of landowners provided prescribed processes were followed and confirmation for resolutions of alienation was obtained from the Land Division.

[76] The powers of assembled owners are addressed in Part II of the LFDA which contains a series of provisions prescribing a process by which owners of native land may meet to make decisions concerning their land. As there is no dispute that the prescribed process leading to the meeting of the landowners in March 2007 was followed in this case, it is unnecessary to refer to these provisions in further detail.

[77] Nor is there any dispute in this case that the alienation resolution for the 60 year lease of the land passed by the majority of the landowners assembled at the meeting was permitted by s 51(1)(c) of the LFDA and that by virtue of s 51(2) the resolution had no force or effect unless it was confirmed by the Land Division of the High Court.

[78] The remainder of Part II of the LFDA contains provisions prescribing how a resolution, including a land alienation resolution, is to be confirmed by the Land Division. For present purposes, ss 53, 54 and 58 are of importance.

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25 Land (Facilitation of Dealings) Act 1970, long title.

[79] Section 53 provides:

> **53. Resolutions for alienation of land** – (1) Except as may be otherwise provided by Rules of the Court or unless exemption from the requirements of this subsection is granted by the Court, every application for the confirmation of a resolution for the alienation of land to any person other than the Crown shall be supported by a valuation of the land to which the resolution relates.
>
> (2) In determining the adequacy of the consideration the Court shall have regard to the valuation as aforesaid but shall not be bound to determine the adequacy of the consideration in conformity with that valuation.

[80] Section 54(1) provides:

> **54. Court may confirm, modify or disallow resolutions** – (1) On application for the confirmation of any resolution the Court subject to the provisions of this Act may –
>
> (a) Confirm the resolution either absolutely or subject to any conditions that it is authorised to impose; or
>
> (b) Disallow the resolution.

[81] Section 58 provides:

> **58. On confirmation of resolution for alienation the Registrar to become agent of owners to execute instruments, etc.** – (1) On the confirmation of a resolution for the alienation of any land to the Crown or to any other persons or for the variation of the terms and conditions of any lease the Registrar shall become the statutory agent of the owners to execute all instruments and to do on their behalf all such things as may be necessary to give effect to the resolution.
>
> (2) Every instrument of alienation executed by the Registrar as agent of the owners shall without confirmation under Part XVI of the Cook Islands Act 1915 have the same force and effect as if it had been lawfully executed by all of the owners or their trustees and as if those owners or trustees had been fully competent in that behalf.
>
> (3) …
>
> (4) Except as against a person guilty of fraud no instrument of alienation executed by the Registrar as agent of the owners under this section shall be invalidated by any breach or non-observance of the provisions of this Part of this Act prior to the confirmation of the

> resolution of by any repugnancy between the terms of the resolution and the terms of the instrument of alienation executed in pursuance thereof.

[82] The issue of the interrelationship between the LFDA and the CI Act is addressed in s 3 of the LFDA which provides:

> **3. Relationship of this Act to Cook Islands Act 1915** – Except so far as a contrary intention appears the provisions of this Act shall apply notwithstanding anything contained in the Cook Islands Act 1915.

[83] This provision reflects the well-established rule of statutory interpretation that in order to avoid conflict a specific provision in one statute will usually prevail over a general provision in another statute.[26] In the present context, unless a contrary intention appears, the specific provisions of the LFDA will prevail over the general provisions of the CI Act.

[84] At the same time, however, in the absence of any conflict or contrary intention, the general provisions of the CI Act will continue to apply. For instance, there is no dispute that s 469 of the CI Act, which limits the term of any alienation of native land to a period, including rights of renewal, to 60 years, applies to leases under the LFDA. The continued application of the CI Act to leases under the LFDA is also confirmed by s 58(2) of the LFDA which refers to alienations in instruments executed by the Registrar as having the same force and effect "as if" they had been confirmed under the CI Act.

[85] The interpretation and application of s 3 of the LFDA lie behind the new argument for Mrs Piri that her application to the Land Division for confirmation of the majority alienation resolution of March 2007 should have been dealt with exclusively under the LFDA and not the CI Act.

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[26] Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 478; and *Baudinet v Tavioni*, above n 21, at [19].

[86] Mrs Piri also relies on the Leases Restrictions Act 1976 (as amended in 2002) and the Leases Restrictions Regulations 1977 (as amended in 2006). Section 3(1) and (4) of the Act provide that:

> **3. Approval of Leases Approval Tribunal required** – (1) Notwithstanding any other provision in any Act, no lease, assignment of lease, or sublease executed after the coming into force of this Act shall be valid and of any effect unless the approval of the Tribunal has been obtained to that lease, assignment of lease, or sublease, as the case may be.
>
> …
>
> (4) Notwithstanding any provision in the Land (Facilitation of Dealings) Act 1970, no resolution of any meeting of assembled owners to lease any land shall be confirmed by [the Land Division of the High Court] unless the approval of the Tribunal has been first obtained.

[87] Regulations 23 and 24 provide that:

> **23. Alienation complies with Cook Islands Act 1915** – The Tribunal shall not approve 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) The mode of execution of the instrument of alienation is in conformity with the Cook Islands Act 1915; and
> >
> > (b) The alienation is not contrary to equity or good faith or to the interests of the persons alienating or to the public interest.
>
> **24. Monetary consideration, annual rental** – The Tribunal shall not approve 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.

[88] In response Mrs Nicholas relies on regulation 30 which provides:

> **30. Approval may be refused unless final document executed [by] Parties** – The Tribunal may not approve any lease or sublease or assignment of lease or assignment of sublease unless the original and final deed or document for the transaction has been duly signed and/or executed by one of the parties thereto and produced to the Tribunal.

[89] As amicus Mr Mason pointed out:

(a) Appointees to the Tribunal are not required to have, and currently do not have, any judicial training; and

(b) Applications before the Tribunal are not publicly notified.

[90] Finally, reference should be made to the Code of Civil Procedure 1981 and the rules relating to the notification by the Registrar of the High Court of applications, including applications for confirmation. Under rule 332(3) the Registrar is responsible for public notification of applications by notices published in a daily newspaper, posted in each village and broadcast over a radio station operating in the Cook Islands.

Does s 482(2) of the Cook Islands Act 1915 apply to the Land Division of the High Court when determining whether to confirm a resolution for alienation under s 54(1) of the Land (Facilitation of Dealings) Act 1970?

[91] Mrs Piri initially agreed with Savage J and Mrs Nicholas that the requirements of s 482(2) of the CI Act, which are set out in [71] of the judgment, applied to the Land Division when determining whether to confirm a resolution for alienation under s 54(1) of the LFDA, but her counsel Mr Irwin has now submitted that the Land Division's discretions under s 482 of the CI Act and s 54(1) of the LFDA are separate and discrete and that the requirements of s 482(2) do not apply to applications for confirmation of resolutions for alienation under the LFDA.

[92] In his post hearing submissions Mr Irwin has argued that the two discretions are separate and discrete because the CI Act relates to confirmation of instruments of alienation which have already been executed, while the LFDA relates to confirmation of resolutions alienation which precede execution of any instrument of alienation. He submitted that the separate and discrete nature of the two sets of statutory regimes is reinforced by the provisions of s 58(2) and (4) of the LFDA:

(a) The former making it clear that the instrument of alienation executed by the Registrar had the same force and effect "as if the alienation had been confirmed by the Land Division pursuant to Part XVI of the Cook Islands Act 1915"; and

(b) The latter protecting the validity of the executed lease in the absence of fraud.

[93] In particular, Mr Irwin submitted that the three matters specified in s 482(2) of the CI Act did not apply to the decision-making function of the Land Division under s 54 of the LFDA because:

(a) The matter in subpara (a) ("that the mode of execution of the instrument of alienation is in conformity with this Act") has no relevance because there will be no executed instrument for the Land Division to consider.

(b) The matter in subpara (b) ("that the alienation is not contrary to equity or good faith or the interests of persons alienating or to the public interest") does not apply because of the clear implication of s 58(2) of the LFDA as amended. The Leases Approval Tribunal will also have been satisfied of these considerations before the Land Division confirms the alienation.

(c) The matter in subpara (c) ("that the consideration (if any) for the alienation is adequate") does not apply because the Land Division must consider the adequacy of the consideration under s 53(2) of the LFDA in any event.

[94] Mr Irwin has also submitted in response to submissions by Mr Mason as amicus that there is a notified process under the LFDA where any owner, whether or not he or she attended the meeting of assembled owners, may appear and have his or her objection heard by the Land Division.

[95] Finally Mr Irwin submitted in response that in terms of s 3 of the LFDA, s 58(2) of the LFDA (as amended in 1973) does evince a "contrary intention" such that the considerations in subpara (b) do not apply.

[96] We agree with Mr Irwin that in this context the CI Act and the LFDA do contain separate statutory regimes insofar as the former addresses the role of the Land Division when confirmation of an executed instrument is sought and the latter when confirmation of a landowners' resolution for alienation is sought. But we do not agree that the fact of these two statutory regimes means that the matters specified in s 482(2) of the CI Act are not relevant when the Land Division is exercising its discretion to confirm a resolution for alienation of land under s 54(1) of the LFDA. Our reasons reflect in large part submissions by Mr Marshall for Mrs Nicholas and by Mr Mason as amicus.

[97] First, the requirement for the Court to be satisfied as to the "mode of execution" of the instrument of alienation will still arise under the LFDA if there has been compliance with the requirements of the Leases Restrictions Act 1976 and the Leases Approval Tribunal has given its prior approval (s 3(1) and (4)) and there is a lease signed or executed by one of the parties as required by regulation 30 of the Leases Restrictions Regulations 1977. The Land Division will still be responsible for ensuring that the "mode of execution" is in order before exercising its discretion to confirm a landowners' resolution for alienation.

[98] Second, the requirement for the Land Division to be satisfied that the alienation is "not contrary to equity or good faith or to the interests of the persons alienating or the public interest" is of paramount significance. Each of these considerations reflects the protective role of the Court, especially the Land Division, when considering confirmation of alienations of native land in the Cook Islands. As the Privy Council pointed out in *Tumu v Tumu*[27], this was one of the principal purposes of the CI Act and even the consent of all the landowners to an alienation will not override the operation of the land law system of the Cook Islands. The considerations in s 482(2)(b) reinforce the responsibility of the Court to ensure fairness between all landowners and to take into account the wider "public interest" ramifications of the proposed alienation.

[99] As a matter of principle, these considerations are relevant whenever the Court is evaluating an alienation of native land whether in the context of confirming an instrument under the CI Act or a landowners' resolution under the LFDA. Indeed these considerations are likely to be particularly important when the Court is evaluating a majority resolution of landowners because the interests of the minority may require special protection. As Savage J recognised in his report, the Land Division is not obliged to confirm resolution with majority support from landowners.[28]

[100] It is therefore not surprising that s 54(1) of the LFDA contains no suggestion that these considerations are irrelevant and should be disregarded by the Land Division when exercising its discretion to confirm a landowners' resolution of alienation. In the absence of any provision expressly or by necessary implication fettering the exercise of the Land Division's discretion, it is reasonable to conclude that these considerations are relevant and should be taken into account. In terms of s

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27 *Tumu v Tumu*, above n 21, at [60].

28 Savage J's report, above n 1, at [15].

3 of the LFDA, no contrary intention appears in either s 482 of the CI Act or in s 54(1) of the LFDA to suggest otherwise.

[101] Under the CI Act, when the Land Division is asked to confirm an alienation known and subscribed to by all the landowners, it must ensure the alienation is "not contrary … to the interests of the persons alienating". As Mr Mason pointed out, it would be odd if under another Act, the LFDA, where the Court has the power to confirm a resolution which will then lead to an alienation that the landowners themselves will not be a party to, and which many of them may not have consented to or even know about, the Land Division is not required to consider whether the alienation is "not contrary to the interests of the persons alienating". Indeed, he submits an obvious purpose of requiring confirmation of resolutions is because they can impact upon the rights of persons who have no knowledge of them.

[102] We agree with Mr Mason. It would be odd if the Land Division's discretion under s 482 of the CI Act to decline confirmation of an alienation could be exercised in the public interest even when all the landowners consented to the alienation but the Land Division's discretion under s 54(1) of the LFDA to decline confirmation of an alienation could not be exercised to ensure fairness between landowners or in the public interest when the landowners' resolution had been adopted by a majority only.

[103] This approach to the interpretation and application of the discretion under s 54(1) of the LFDA also reflects the rule of statutory interpretation that statutes addressing the same or similar subject-matter should be read together to enable them to work in practice.[29] Different provisions should be reconciled and inconsistencies avoided.

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[29] Ross Carter *Burrow and Carter Statute Law in New Zealand*, above n 26, at 267 and 467.

[104] The complementary nature of s 482(2)(b) of the CI Act and s 54(1) of the LFDA has been recognised by experienced Land Division Judges.[30]

[105] Contrary to the submissions for Mrs Piri, we do not read s 58(2) and (4) of the LFDA as leading to a different conclusion in this case. The provisions of s 58 do not apply to the exercise of the Court's discretion under s 54(1) of the LFDA. They apply only **after** the Court has exercised its discretion and confirmed a landowners' resolution for alienation and the Registrar has executed the instrument of alienation giving effect to that resolution.

[106] The short answer in this case is that the Registrar did not execute the lease in the form in which it was confirmed by Mrs David JP in August 2007. Instead the Registrar executed the 2012 lease which contained the amended clause 6 permitting Mrs Piri to use the land for commercial purposes. As the lease in its 2012 form was not the subject of the landowners' resolution in March 2007 and has not been confirmed by the Court, we do not see how the provisions of s 58(2) or (4) could apply in this case because they only apply when the Registrar has executed an instrument of alienation "to give effect to the resolution" and "in pursuance of" the terms and of the resolution. The amendment to the lease meant that what was purportedly executed by the Registrar had not been the subject of the landowners' resolution or confirmation by the Land Division. In these circumstances neither provision can preclude the Court from determining the application by Mr Nia under s 390A of the CI Act challenging the validity of Mrs David JP's decision.

[107] Nor do we see the prior approval of the Leases Approval Tribunal as altering our conclusion. The statutory obligations on the Court under s 482 of the CI Act and s 54(1) of the LFDA involve the exercise of judicial discretions requiring separate evaluation and, in the absence of any express statutory provision to the contrary, could not be discharged simply by relying on the decision of an administrative

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30 *Terai Ama nee Joseph - Ekeua Section 25 Vaipae Aitutaki* High Court (Land Division) App No 382/2005, 23 July 2007 at [15]-[16]. See Savage J's report, above n 1, at [36]-[37] and [57(f)].

tribunal. In this case Mrs Piri also faces the further difficulties that there is no evidence that the lease in its 2007 form was executed by anyone before it was produced to the Tribunal as required by regulation 30 or that the lease in its 2012 form was ever produced to the Tribunal.

[108] Equally, we do not agree with Mr Irwin that the existence of the notified process under the LFDA whereby any landowner may appear and have his or her objection heard before the Land Division means that the considerations in s 482(2)(b) do not apply under s 54(1) of the LFDA. On the contrary, the existence of this process reinforces the right of an objector to raise and the obligation of the Court to evaluate any relevant aspect of those considerations.

[109] In addition, the express requirement for the Court to be satisfied that "the consideration (if any) for the alienation is adequate" under s 482(2)(c) of the CI Act has no counterpart provision in the LFDA. Instead s 53(2) of the LFDA provides that "[in] determining the adequacy of the consideration" the Court shall have regard to the valuation of the land provided, in the absence of any exemption under s 53(1). In other words, s 53(2) is based on the existence of the express obligation on the Court under s 482(2)(c) to determine the adequacy of the consideration. This is another example of a provision in the CI Act continuing to apply to the Court when exercising its discretion under s 54(1). Again, in terms of s 3 of the LFDA, there is no contrary intention to displace the application of s 482(2)(c).

[110] For these reasons we have concluded that the matters specified in s 482(2) of the CI Act do apply to the Land Division when determining whether to confirm a resolution for alienation under s 54(1) of the LFDA. Before turning to the facts of this case again, however, we deal next with the submissions relating to the inquisitorial role of the Land Division and the issue whether there is a duty of disclosure on applicants for confirmation as held by Savage J and Williams CJ.

Does the Land Division of the High Court have an inquisitorial role?

[111] In view of the conclusion reached in the preceding section of this judgment, we are able to address the issue of the inquisitorial role of the Land Division relatively briefly.

[112] The starting point is that the Land Division must be "satisfied" of the matters specified in s 482(2) of the CI Act before exercising its discretion to confirm the alienation. As Savage J noted in his report for the Chief Justice, the word "satisfied" has been judicially interpreted on many occasions.[31] In the context of this legislation we consider that "satisfied" should be interpreted to mean that the Land Division has reached a clear conclusion after considering each of the specified matters.[32]

[113] As the Privy Council has held in *Tumu v Tumu*,[33] when considering s 416 of the CI Act which requires the Court to be satisfied in the matter of "equity and good conscience" as a precondition for the exercise of the power conferred by that provision, there must be "sufficient material" on which the Court "could be satisfied". In our view a similar approach should be adopted to the interpretation of s 482(2). We do not agree with Mr Irwin that the decision in *Tumu v Tumu* should be distinguished because under s 416 the Court has a positive duty to be satisfied of these matters whereas under s 482(2) the obligation is expressed in the negative. We do not see this distinction as warranting a different approach to the need under both provisions for the Court to have "sufficient material" to enable it to be "satisfied" its discretion should be exercised one way or the other.

[114] To enable the Land Division to reach a clear conclusion after considering the specified matters, it will therefore need to have sufficient material before it

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31 Savage J's report, above n 1, at [46].

32 Matthew Smith *The New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [9.1.18].

33 *Tumu v Tumu*, above n 21, at [63].

relating to the mode of execution of the instrument, any matters of equity and good faith, the interests of the persons alienating, the public interest and the adequacy of the consideration (if any). Such material will need to be provided to the Land Division by the applicant for confirmation and any objector or obtained by the Land Division following inquiry.

[115] As we have already noted, the fact that a majority of the landowners support the application for alienation will not be determinative. As Savage J pointed out,[34] the Land Division is not obliged to confirm resolutions with majority support from landowners, but must look to all relevant factors and the overall equity of the matter to determine whether confirmation should be granted. A similar approach was adopted by the Privy Council in *Tumu v Tumu*.[35]

[116] Aspects of the necessary material required by the Land Division to be satisfied of the specified matters will normally be provided by an applicant in the documents provided to the Land Division in support of the application. For instance, in the present case some relevant material was contained in the draft 2007 lease, the minutes of the meeting of the alienating landowners and Mrs Piri's application itself.

[117] Material about the adequacy of the consideration will be apparent from the valuation of the land which an applicant is required to provide under s 53(1) of the LFDA unless an exemption has been obtained.

[118] Other relevant material may be provided to the Land Division by any objectors in their statements at the meeting of the alienating landowners, their notices of objection or at the Land Division hearing if they appear. For instance, in this case it was apparent from the minutes of the meeting of the alienating landowners that Mr Nia was concerned about the proposed lease of the land to Mrs

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34 Savage J's report, above n 1, at [15].

35 *Tumu v Tumu*, above n 21, at [60].

Piri because the lease to her sister had resulted in a commercial arrangement with the neighbouring Pacific Resort.

[119] But it is possible that not all the material the Land Division needs in order to be able to reach a clear conclusion about each of the specified matters will be provided by the applicant or any objectors. Substantive issues relating to equity, good faith, the interests of the alienating landowners and, significantly, the public interest, may well require the Land Division to make further inquiries of its own volition or initiative before it is in a position to have "sufficient material" to be "satisfied" that it should exercise its discretion in the circumstances of a particular case. In particular, the unrepresented interests of landowners who were not present at the meeting where the resolution to approve the alienation was adopted and the wider public interest may well require further inquiries. In some cases the Land Division may need to consider appointing counsel to represent these interests.

[120] It is for this reason that we agree with Savage J and the authorities he relied on that the Land Division has an inquisitorial role in this context.[36] In particular, we refer to the decision of the New Zealand Court of Appeal in *Wilson v Herries* which concerned the interpretation of s 220 of the Native Land Act 1909, an alienation confirmation provision requiring the Māori Land Board or the Native Land Court to be "satisfied" of matters similar to those specified in s 482(2) of the CI Act.[37] In the judgment of the Court comprising Williams, Edwards and Cooper JJ delivered by Edwards J it is stated:[38]

> The inquiry which has to be made by a Maori Land Board or the Native Land Court under section 220 is of an inquisitorial character, and only faintly resembles a proceeding *inter partes*.

[121] Mr Irwin for Mrs Piri submitted that we should not follow early 20th century New Zealand decisions under the Native Land Act 1909 because that Act has been

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36 Savage J's report, above n 1, at [38].
37 *Wilson v Herries* (1913) 33 NZLR 417, at 423-424.
38 At 423.

repealed and the law in New Zealand and the Cook Islands is different in the 21st century. He also pointed out, correctly, that none of the New Zealand decisions relied on by Savage J supported the proposition that an applicant for confirmation was under a duty of disclosure. We shall return to that aspect of Mr Irwin's submission. At this stage, however, we are concerned with the "inquisitorial character" of the Land Division's role under s 482(2) of the CI Act. In our view the decision in *Wilson v Herries* does still provide support for our interpretation of that aspect of the provision.

[122] The view that the Land Division has an inquisitorial character was also supported by Mr Mason, amicus curiae in this case. He pointed out that there were a number of good reasons why the Land Division should be required to make its own inquiries in order to be satisfied of the specified matters:

(a) The Cook Islands diaspora meant that many landowners were overseas; and

(b) The interests of other landowners might emerge only after an inquiry of a general nature.

[123] We have therefore concluded that under s 54(1) of the LFDA and s 482(2) of the CI Act the Land Division does have an inquisitorial role. In order to be able to reach a clear conclusion that the specified matters are met in the circumstances of a particular case it may well need to make inquiries of its own volition or initiative to obtain "sufficient material" for the exercise of the statutory fettered discretion under s 54(1) of the LFDA. At the same time, however, we recognise that the inquisitorial process needs to be as speedy and as cost effective as possible and a full court hearing is not required. An examination of the relevant material on the Land Division file should indicate whether there is an objection, whether any issues arise in terms of the matters specified in s 482(2) and whether any further information is

required. Once all the relevant material has been obtained a considered decision should be able to be made as to whether confirmation is appropriate.

[124] The next question is whether, as Savage J and the Chief Justice held,[39] an applicant for confirmation is under a duty to disclose all relevant circumstances, including matter adverse to the application.

Is there a duty of disclosure on applicant for confirmation?

[125] Savage J held that there was a duty on an applicant to disclose matters which might be adverse to their case because a hearing for confirmation of alienation only faintly resembles a hearing *inter partes* and has "a strong flavour of the *ex parte* process".[40] He supported his decision on this point by reference to his view that no notice of Court hearings was given to those who objected at the meeting of owners.[41] The Chief Justice accepted this approach.[42]

[126] For the following reasons, we do not agree with Savage J and the Chief Justice on this issue.

[127] First, as we have already noted, public notice of Land Division hearings is required to be given and objectors are entitled to be heard both at meetings of landowners and at Land Division confirmation hearings. Landowners receive notice of two separate processes where they have the opportunity to make their views known. It is therefore not correct to describe confirmation hearings as having a "strong flavour of the *ex parte* process". Indeed the notice requirements and the provision for a meeting and hearing process which provide the opportunities for the

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39 Savage J's report, above n 1, at [48] and [57(b)]; and Chief Justice's decision, above n 1, at [39].

40 Savage J's report, above n 1, at [48].

41 At [49].

42 Chief Justice's decision, above n 1, at [34] and [39].

expression of views stand in stark contrast to without notice hearings which do not have such features and which therefore give rise to a duty of disclosure.

[128] Second, while applicants must comply with all the requirements for material in respect of their applications and would also be advised to provide the Land Division with material to assist the Land Division when considering matters specified in s 482(2) of the CI Act, there is no obligation on applicants to go any further in the context of processes under the LFDA.

[129] Third, applicants are entitled to rely on the fact that it is the responsibility of the Land Division to have "sufficient material" in order to be satisfied that the requirements are met. Once it is accepted the Land Division has an inquisitorial role, the need for a separate extended duty of disclosure on an applicant is not warranted.

[130] Fourth, the Land Division, exercising its inquisitorial role, will be able to seek and obtain from applicants and objectors any further material it might require to be "satisfied" of the specified matters.

[131] Fifth, none of the authorities cited by Savage J in support of the Land Division having an inquisitorial role goes so far as to decide that there is a separate duty of disclosure on applicants.

[132] Finally, we note that Mr Mason agreed that the confirmation process is on notice and therefore not *ex parte* so there is no separate duty of disclosure on applicants beyond the requirements of the legislation.

[133] Having decided that as a matter of law there is no separate duty of disclosure on applicants for confirmation, we are able to conclude that Mrs Piri was not in breach of any such duty and it is unnecessary for us to consider the submissions of the parties relating to the question whether she was in fact in breach of any such duty. In particular, we do not need to consider the difficulties Mrs Nicholas faced in respect of this question flowing from the absence of any express adverse credibility

findings by Savage J relating to the evidence of Mrs Piri or any express adverse inferences drawn by Savage J or the Chief Justice. We note, however, that aspects of those submissions remain relevant to the next issue relating to the August 2007 confirmation hearing before Mrs David JP.

The hearing of the application and the objection in this case

[134] We have already set out the documents on the Land Division file at the time of the hearing of Mrs Piri's application for confirmation and the transcript of the hearing of the application by Mrs David JP on 28 August 2007.[43]

[135] There is no doubt that a copy of Mr Nia's letter of objection dated 21 March 2007 was on the Land Division file. It is accepted that the letter was a memorial of dissent by Mr Nia.

[136] There is also no doubt that the minutes of the meeting of landowners held on 21 March 2007 were on the Land Division file and recorded Mr Nia's objection based on his concern about a lease leading to a commercial arrangement.

[137] Notwithstanding these documents on the Land Division file, especially Mr Nia's memorial of dissent, it appears from the transcript of the hearing that in response to Mrs David JP's question "Any objections?" she was advised by the Registrar that there were "No objections".

[138] Mr Irwin for Mrs Piri submits that the Registrar's answer meant that there were "no objectors" appearing at the hearing. In his submission, Mrs David JP would have been aware of the documents on the Land Division file and Mr Nia's memorial of dissent. In Mr Irwin's submission the existence of a single objection

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43 This judgment at [27]-[28].

was not material and would not in any event have been a barrier to success for Mrs Piri.

[139] We are not able to accept these submissions.

[140] First and foremost, there is simply no indication in the record before this Court that before exercising the discretion under s 54(1) of the LFDA Mrs David JP followed the necessary inquisitorial process and gave any consideration to the matters specified in s 482(2) of the CI Act. In particular, there is no indication that she considered whether she had "sufficient material" before her to be satisfied of the specified matters. The process she adopted at the hearing of Mrs Piri's application and the decision she gave did not meet the statutory requirements. The fact that the majority of landowners at the March 2007 meeting may have approved the resolution was not determinative.

[141] Second, there was an objection by Mr Nia on the Land Division file which the Land Division ought to have considered. The requirements of the public notice to file an objection were met. The public notice did not refer to any requirement for an appearance as well. Mr Nia was entitled to expect his objection to be considered by the Land Division at the hearing whether or not he appeared in support of it.

[142] Third, it would be surprising if the Registrar had meant "no objectors present" rather than "no objections" as recorded in the transcript. The Registrar was responding to Mrs David JP's question which related to "objections", not "objectors". If there had been any objectors present, they would have been obvious to both Mrs David JP and the Registrar. The question and answer only make sense if they refer to "objections". Thus the record shows a failure to consider an objection that should have been considered.

[143] Fourth, Mrs David JP may or may not have been aware of the documents on the Land Division file. We rather think she may not have been because of the number of cases she had to deal with and because she asked the question. We are

therefore inclined to think she relied on the Registrar to draw any objections to her attention. The alternatives would be that she had read the Land Division file, but overlooked the objection or omitted to take into account at the hearing. In this respect we agree with the submissions of Mr Mason as amicus that it cannot be presumed that a Justice of the Peace as experienced as Mrs David would have ignored or disregarded the objection if she had been aware of it. It is more likely that she overlooked the objection. As Mr Mason submitted:

> The number of matters on the *panui* for that day together with the perfunctory manner in which the application was dealt with suggest the written objection may have been overlooked. In the normal course if there is an objection on the file the Justice of the Peace or the Judge will make specific reference to the objection in terms such as, "I see there's an objection from a Mr Erenua Nia on behalf of his father. Is Mr Nia in Court today?" "Are there any other objectors?" This did not occur.

[144] The result is that at the hearing before Mrs David JP Mr Nia's objection was not considered. In our view this was also a fatal flaw in the Land Division's process. It is a fundamental proposition that a person who has a right to be heard by a Court should be heard. Here Mr Nia had a right to have his objection to the confirmation of the alienation taken into account. Mrs David JP's failure to consider Mr Nia's objection at all meant that he was denied his right to be heard.

[145] We do not accept Mr Irwin's submission that consideration of Mr Nia's objection would (or should) have made no difference to the outcome. Not only is this speculation but it also overlooks the further material that the Land Division might well have been given on inquiry, including material about:

(a) Mrs Piri's intentions in respect of the land the subject of the draft 2007 lease: did she have the same commercial intentions as her sister?

(b) The extent of any over-occupation by Mrs Piri's family which might have been exacerbated by the 60 year lease.

(c) The location of the land close to the beachfront on the Muri lagoon.

(d) The valuation of the land, including for commercial purposes. There is little doubt that the 60 year leasehold interest in the land was of considerable value, especially if there were to be any commercial use of the land similar to the adjacent land the subject of the lease to Mrs Piri's sister.

(e) The adequacy of the consideration for the alienation in light of the valuation. The Land Division might well have seen from the valuation that the $1 per annum consideration was inadequate in the circumstances of this case. While $1 per annum might be perfectly acceptable for a purely residential transaction, it would patently not be so for a commercial transaction.

(f) Other material relevant to the Land Division's consideration of equity, good faith and the public interest.

[146] For these reasons we conclude that the failures of Mrs David JP to consider the matters specified in s 482(2), to recognise the existence of Mr Nia's objection, to give the objection any consideration at the August 2007 confirmation hearing and to make any further inquiries about the objection or the matters that concerned Mr Nia meant that she was not in a position to be "satisfied" that the matters specified in s 482(2) of the CI Act were met in the circumstances of this case. In our view these failures were fundamental and lead to the question whether the relief granted by the Chief Justice was warranted in terms of s 390A of the CI Act. But before turning to that question we consider whether the failure of Mrs Piri to provide a valuation in support of her application was also a fatal error on its own.

The absence of a valuation

[147] This issue, which was mentioned by Savage J during the argument before him but is not addressed in his report or by the Chief Justice in his decision, has been raised by Mrs Nicholas as a further ground for supporting the judgment under appeal.

[148] The short argument for Mrs Nicholas is that s 53(1) of the LFDA contains a mandatory requirement for every confirmation application to be supported by a valuation of the land unless the Land Division grants an exemption. In the absence of an exemption in this case, Mrs Piri was therefore under an obligation to provide a valuation of the land in support of her 2007 application to the Land Division. The failure of Mrs Piri to comply with this obligation was fatal to her application because it meant the Land Division had no jurisdiction to confirm the landowners' resolution under s 54(1) of the LFDA. The Land Division was simply unable to determine the adequacy of the consideration as required by s 53(2) of the LFDA and s 482(2)(c) of the CI Act.

[149] In response Mrs Piri acknowledged that no valuation was provided, but submitted this was not fatal to her application because s 58(4) of the LFDA provides a complete answer. Alternatively, she submitted that the purpose of a valuation is to provide the Land Division with a basis for determining under s 53(2) of the LFDA the adequacy of the consideration paid and here:

(a) The amount of the consideration was "nil".

(b) The annual rental for the lease was $1, reviewable every five years.

(c) The annual rental was clearly not proportional to the value of the land. It was the normal landowner rental that has existed in the Cook Islands for generations.

(d) The Leases Approval Tribunal had already approved the rental as being adequate, fair and reasonable.

[150] We have already addressed Mr Irwin's submissions based on s 58(4) of the LFDA and the approval of the Leases Approval Tribunal in the context of our discussion of the relevance of the matters specified in s 482(2) of the CI Act and have concluded they do not apply.[44]

[151] Turning to Mrs Piri's alternative submission, we agree with her that the purpose of the requirement for the provision of a valuation is to enable the Land Division to determine whether the consideration paid for the lease is adequate. This is clear not only from s 53(2) but also from s 482(2)(c) of the CI Act. The information in a valuation may also be relevant to the Land Division's determination of the other issues under s 482(2)(b).

[152] But we do not agree with Mrs Piri that the other factors she has mentioned provide an answer. The decision by the Land Division as to whether the consideration was adequate required an evaluation of all the relevant circumstances in the case in light of the valuation. In the absence of a valuation it was simply not possible for the Land Division to conduct the requisite evaluation in this case. As Mrs Nicholas points out, had the Land Division been provided with a valuation it would have been likely to have been alerted to vital material relating to the location of the property, its real value and the inadequacy of the return to the other landowners, particularly in light of its potential commercial use. As it was, there was no valuation to provide a benchmark for evaluating the adequacy of the consideration.

[153] We therefore conclude that the failure of Mrs Piri to provide the Land Division with a valuation in support of her application for confirmation of the resolution for alienation was fatal because it meant that the Land Division was not in

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44 This judgment at [105]-[107].

a position to determine the adequacy of the consideration as required by s 53(2) of the LFDA and s 482(2)(c) of the CI Act.

The relief to be granted

[154] This issue requires consideration of the exercise by the Chief Justice of the discretion conferred on him by s 390A(1) of the CI Act to make any order remedying any mistake, error, or omission whether of fact or law by the Land Division. The Chief Justice may also amend, vary or cancel any order made by the Land Division.

[155] The principles of law relating to the interpretation and application of s 390A(1) are set out by Savage J in his report and by the Chief Justice.[45] As they are not in dispute, we summarise them briefly:

(a) The burden of proof is on the applicant and is not easily satisfied.

(b) The Chief Justice needs to review the evidence given at the original hearing and weigh it against the evidence produced by the applicant (and any evidence in opposition).

(c) The principle of *omnia praesumuntur rite esse acta* (everything is presumed to have been done lawfully unless there is evidence to the contrary) applies. Therefore, in the absence of a patent defect in the order, there is a presumption that the order made was correct.

(d) Evidence given at the time the order was made, by persons more closely related to the subject matter in both time and knowledge, is deemed to have been correct.

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[45] Savage J's report, above n 1, at [39]-[42]; and Chief Justice's decision, above n 1, at [23]--[24]. See also *Teariki v Sanderson* CA 1/11, 19 October 2011 at [31].

(e) The burden of proof is on the applicant to rebut these two presumptions.

(f) As certainty of outcomes, especially long-standing ones, is important, applications under s 390A will only be successful in "exceptional circumstances" where the applicant has shown a "clear mistake or error in the original order which [is deemed] necessary or expedient to remedy".

[156] Mrs Piri submitted the Chief Justice should not have granted relief under s 390A because:

(a) Mr Nia had the opportunity to raise his concerns at the publicly notified confirmation hearing before the Land Division in August 2007, but chose not to do so.

(b) The effect of the Chief Justice's decision is to give Mr Nia (now Mrs Nicholas) a second opportunity to litigate issues not raised at the 2007 hearing.

(c) That is inconsistent with the principle of certainty and finality of decisions.

(d) There was no exceptional reason justifying the orders made.

[157] There are a number of difficulties with this submission:

(a) At the Land Division hearing in August 2007 Mrs David JP failed to follow the inquisitorial process and consider the matters specified in s 482(2) of the CI Act. She did not have "sufficient material" before her to be satisfied these requirements were met.

(b) We now know that Mr Nia did complete a memorial of dissent which appears to have been overlooked by Mrs David JP at the August 2007 confirmation hearing. His opposition to the proposed lease was therefore not taken into account.

(c) We also know that there was no adequate inquiry by the Land Division about the matters specified in s 482(2) of the CI Act.

(d) Mrs Piri did not comply with her obligation to provide the Land Division with a valuation of the property in support of her application.

(e) The Land Division was therefore not in a position to exercise its discretion under s 54(1) of the LFDA. The Land Division's August 2007 decision was therefore made in error, both procedurally and substantively.

(f) It is not a decision which should be upheld on grounds of certainty or finality because the Land Division was in breach of its fundamental duties to consider the matters specified in s 482(2), to recognise Mr Nia's objection, to hear from him and to inquire into the specified matters.

(g) The elapse of time between the confirmation decision in August 2007 and Mr Nia's application for a rehearing in 2015 is not a reason for declining relief. As the Privy Council recognised in *Tumu v Tumu*,[46] lapse of time is a less significant factor under the Cook Islands land law system.

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46 *Tumu v Tumu*, above n 21, at [61].

(h) Mrs Piri did not act on the confirmation decision until after the lease was varied to permit her to use the land for commercial purposes and was executed in 2012, and she entered into the Joint Venture Agreement with Pacific Lagoon Ltd in 2014. Mr Nia did not become aware of the proposed commercial development until 2015 and he then applied for a rehearing and an interim injunction. The interim injunction was granted and remains in force.

(i) In these circumstances Mrs Nicholas should be given a first opportunity to litigate the relevant issues.

(j) In this case there are therefore "exceptional circumstances" justifying the orders made. The validity of the lease as executed in 2012 also remains in issue.

[158] For these reasons we have therefore concluded that the Chief Justice's decision was correct and the appeal under s 390A(2) of the CI Act should be dismissed. We have also decided that, subject to the Chief Justice obtaining the consent of the Queen's Representative under s 390A(8) of the CI Act, the August 2007 order of the Land Division should be overturned and a rehearing ordered. It is necessary for our judgment to be provisional in this respect because, as we have noted,[47] s 390A(8) is triggered in this case, and it is well established that the powers under s 390A(1), (3), (4), (8) and (9) of the CI Act are conferred solely on the Chief Justice.[48] We note that in the meantime the injunction granted by Savage J on 20/21 August 2015 remains in force.[49]

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47 This judgment at [60].

48 *Tavioni v Baudinet* CA 1--3/09, 10 July 2009 at [24]; *Baudinet v Tavioni*, above n 21, at [19]; and *Hosking v Marearai* High Court (Land Division) App No 390A 7/16, 8 July 2020 at [16]-[26].

49 This judgment at [41].

The result

(1) The appeal under s 390A(2) of the Cook Islands Act 1915 is dismissed.

(2) Subject to the Chief Justice obtaining the consent of the Queen's Representative under s 390A(8) of the Cook Islands Act 1915, the order made by Mrs David JP on 28 August 2007 confirming the alienation by way of lease between the landowners as lessor and the appellant as lessee for an area of 680 sqm is to be set aside and a rehearing of the appellant's application is to be ordered.

(3) The respondent has been successful. If costs are sought, the respondent should file a submission within 14 days and the appellant should respond within a further 14 days, with any reply by the respondent within a further 7 days. The submissions should address quantum, and the basis on which quantum is arrived at. Mr Mason's costs are being met, and the submissions are not expected to deal with his position. No submission is sought from him on costs. Each submission should be no more than five pages, and the respondent's reply three pages.

Douglas White. | | RJ Asher

White P | Williams JA | Asher JA