

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

APPLICATION: 889/2022

UNDER Section 3 of the Declaratory Judgments Act 1994

IN THE MATTER of the land known as TE VAIMAPIA SECTION
19, TAKITUMU

AND

IN THE MATTER of a certain Deed of Lease dated 6 April 2016
between THE PROPRIETORS OF TAERO
LANDS INCORPORATION as lessor and THE
PLANTATION VILLAGE LIMITED, as lessee
(the “Lease”)

BY THE PLANTATION VILLAGE LIMITED a
duly incorporated company having its registered
office at Global House, Avarua, Rarotonga,
Cook Islands
Applicant

Date: 22 September 2022 (NZT)

JUDGMENT OF ARMSTRONG J

Introduction

[1] Plantation Village Limited has filed an ex-parte application seeking a declaration per s 3 of the Declaratory Judgments Act 1994 waiving the requirement to obtain consent from all landowners to a sublease of land at Te Vaimapia Section 19, Takitumu. This decision determines whether a declaration should be made.

Background

[2] On 6 April 2016, the Proprietors of Taero Lands Incorporation granted a lease over 4,000 square meters of the land to Plantation Village. On 8 January 2019, Savage J granted an order winding up the Incorporation. As a result, the landowners became the lessor under

the lease. On 21 April 2022, Plantation Village entered into an agreement to sublease 1,156 square metres of the land to Donald and Diane Cleverley.

[3] Clause 4 of the lease provides that Plantation Village cannot sublease the land without first obtaining consent from the lessor. Clause 5 provides that where Plantation Village seeks to sublease the land it must offer the right of first refusal to the lessor.

[4] Plantation Village has taken various steps to notify the owners of the proposed sublease, to seek their consent, and to notify them of their right of first refusal. Some owners have consented to the sublease. The majority have not responded. Plantation Village now seek a declaration:

- (a) Dispensing with the requirement to obtain consent from the remaining landowners to the sublease; and
- (b) Confirming it can grant the sublease to Mr and Mrs Cleverley.

What legal principles apply?

[5] The terms of the lease are absolute. Plantation Village cannot sublease this land without first obtaining consent from the lessor. As the Incorporation has been wound up, it must obtain consent from all owners to comply with the terms of the lease.

[6] The Court can make a declaration waiving compliance with such a term where:¹

- (a) The applicant has taken all reasonable steps to obtain consent from the owners; and
- (b) The owners are unreasonably or arbitrarily withholding their consent; or
- (c) The owners who have responded consent. The remaining owners have not responded and it is impractical to obtain their consent.

¹ ANZ – *Kainganui and Te Utu Section 92E, Arorangi* 18 December 2014, App 696/2014, Isaac J; ANZ – *Te Aurere Section 14B, Matavera* 16 February 2015, Isaac J, ANZ – *Akooa Section 69J2, Arorangi* 18 March 2016, Isaac J.

Has Plantation Village Limited taken all reasonable steps to notify the owners?

[7] When the application was filed, Grice J directed Plantation Village to provide:

- (a) A list of the landowners, their present circumstances, their whereabouts, the steps taken to serve them and the date of service; and
- (b) Evidence as to service on each landowner.

[8] In response, Ms Ellingham, for Plantation Village, filed a memorandum dated 30 August 2022 which lists the landowners for this block, his or her present circumstances, the steps taken to serve that landowner, the date of service, and whether the landowner consents to the sublease.

[9] Affidavits from Valentino Wichman and Brian Mason have also been filed. Mr Wichman is a solicitor and is the son of Puai Wichman, a director of Plantation Village. Mr Wichman undertook to contact landowners on behalf of his father. He is familiar with the owners who are his relations. Mr Mason is a solicitor who practices in the Cook Islands. Mr Mason has acted for various landowners in this block over the past 7 years. Mr Mason assisted contacting the owners at Ms Ellingham's request.

[10] There are 14 owners. Mr Wichman met with two of the owners, who live in Rarotonga. The rest live overseas. The two resident owners signed consent forms. A further owner also signed a consent form. For the remaining owners Mr Wichman and Mr Mason sent them notice by email. That notice:

- (a) Set out the main terms of the lease and the sublease;
- (b) Provided information on the proposed sublessees Mr and Mrs Cleverly;
- (c) Advised that the owners must consent to the sublease;
- (d) Set out the right of first refusal in favour of the owners; and

- (e) Had a section for the owner to complete to indicate whether he or she consent to the sublease, oppose the sublease, or wish to exercise the right of first refusal.

[11] Those emails were delivered and did not return to the sender. Other than the three written consents obtained, the other owners did not respond. No one sought to exercise the right of first refusal and the time to do so has now expired.

Should I make the declaration?

[12] I am satisfied that Plantation Village has taken all reasonable steps to notify the owners. Three have signed consent forms. For the remaining owners, they were sent notice that informed them of the proposed sublease, and provided an opportunity for them to consent, oppose, or exercise the right of first refusal. Despite that notice, they have not responded. It is impractical to obtain their consent given they live overseas and have not engaged in this matter.

[13] I note that in other cases where such a declaration is sought, the applicant has placed public notice in Cook Island, Australian and New Zealand newspapers, and has held publicly advertised meetings of owners.² Such public notice is necessary where the contact details for all owners is not held. In this case, contact details were obtained for all owners, and those owners were notified directly, or through his or her recognised contact. Such direct notice is better than public newspaper notice.

[14] It is also apparent that when the lease was granted the land was administered by the Incorporation. If the Incorporation was still operating, Plantation Village could have engaged directly with the Committee of Management. As the Incorporation was wound up, it must now deal with multiple owners, the majority of whom do not reside in the Cook Islands and (at least in this matter) have not engaged.

² Ibid.

Decision

[15] For these reasons, I grant an order declaring that:

- (a) Plantation Village Limited does not have to obtain any further consents from the landowners to sublease part of this land to Mr and Mrs Cleverley; and
- (b) Plantation Village Limited are entitled to grant the sublease to Mr and Mrs Cleverley.

[16] A copy of this decision is to go to all parties.

Dated at Whangārei, Aotearoa/New Zealand on this 22nd day of September 2022.

M P Armstrong
JUSTICE