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

APPLICATION NO. 944/2023

IN THE MATTER	of the Landlord and Tenant Act 1730 & the Declaratory Judgments Act 1994
AND IN THE MATTER	of the land named **VAI I NANU SECTION 53, AVARUA, RAROTONGA** (the Land)
AND IN THE MATTER	of an Deed of Lease dated 10 March 1969 (the [forfeit] Lease) now vested in Kiikii Motel Limited (the [ejected] lessee)
AND IN THE MATTER	of an application for recovery in ejectment and or for a declaration that the Lease is at an end
BETWEEN	**GEORGINA SAVAGE**, landowner Applicant
AND	**KIIKII MOTEL LIMITED**, a company having its registered office on Rarotonga Respondent

Hearing date: On the papers

Appearances: Mr T Moore for Applicant
Ms C Evans for Respondent

Decision: 21 July 2023

DECISION OF COXHEAD, J

Introduction and issue

[1] The application before the Court is for recovery in ejection and/or a declaratory order that a lease is at an end.

[2] Before I can progress to the substantive matter, I must determine the preliminary issue of whether the Court has jurisdiction in terms of the Landlord and Tenant Act 1730 (LT Act).

Applicant's submissions

[3] Mr Moore has filed an application relying on the LT Act and the Declaratory Judgments Act 1994.

[4] He submits that the LT Act was an act of the Parliament of Great Britain that was law in New Zealand in 1840. Therefore, pursuant to s 615 of the Cook Islands Act 1915 (CI Act 1915), it is in force in the Cook Islands.

[5] As I read the application, it relies on s 2 of the LT Act. Section 2 states in part:

> **2 On half a year's rent in arrear, landlord may re-enter serving a declaration of ejectment. When lessor in ejectment may recover judgment, etc. Not to bar the right of any mortgagee**
>
> And whereas great inconveniencies do frequently happen to lessors and landlords, in cases of re-entry for non-payment of rent, by reason of the many niceties that attend the re-entries at Common Law; and forasmuch as when a legal re-entry is made, the landlord or lessor must be at the expense, charge, and delay, of recovering in ejectment, before he can obtain the actual possession of the demised premises …
> …

[6] Mr Moore in reply submissions submitted:

(a) The consolidation of Acts in the *Laws of the Cook Islands 1994* green statue books (the green books) do not include all Acts applicable to the Cook Islands.

(b) Section 615 of the CI Act 1915 does not apply to alienation of land, and so is irrelevant.

(c) Section 649 of the CI Act 1915, the Property Law Act provides for distress, but this is simply read out of that Act. It does not cause the whole Act to fail.

[7] In essence, the application seeks ejection of the respondent from the land pursuant to the LT Act.

Respondent's submissions

[8] Ms Evans, as counsel for the respondent, objects to the application. She notes that the application for recovery in ejectment seeks to use a novel path.

[9] Ms Evans argues that the application should be dismissed for the following reasons:

(a) The usual course in such proceedings is forfeiture pursuant to the Property Law Act 1952.

(b) The LT Act is absent from the list of Imperial Acts contained in the green books.

(c) The combined effect of s 615 of the CI Act 1915 and art 77 of the Constitution of the Cook Islands is to keep the law of England, as existing on 14 January 1840, in force in the Cook Islands, with the following exceptions:

(i) Where such English law is inconsistent with the Cook Islands Act 1915;

(ii) Where such law is inapplicable to the circumstances of the Cook Islands;

(iii) Where such law was not in force in New Zealand at the commencement of the Cook Islands Act 1915; or

(i) Where such law is inconsistent with the Constitution of the Cook Islands.

[10] The respondent argues that the LT Act fails the s 615 CI Act test because:

(a) It is inapplicable to the circumstances of the Cook Islands when viewed in relation to the protective regime established to protect Native Rights;

(b) It is inconsistent with the Cook Islands Act 1915, specifically in relation to s 649 abolishing distress for rent.

[11] Therefore, Ms Evans submits that the application pursuant to the LT Act be dismissed as inapplicable in the Cook Islands.

Decision

[12] When the Cook Islands attained self-governance on 4 August 1965, a Constitution was enacted by the New Zealand Parliament which authorised the Cook Islands Legislative Assembly to enact laws for the Cook Islands. The laws in existence in the country were continued except so far as inconsistent with the Constitution, under art 77 of the Constitution.

[13] After 1981 the power of the New Zealand Parliament to legislate for Cook Islands was abolished by a Constitutional amendment.[1] The Cook Islands Parliament ceased to enact laws to adopt New Zealand laws.

[14] Acts of the British Parliament which were in force in New Zealand on 1 April 1916**,** except so far as inconsistent with Cook Islands Act 1915 or inapplicable to the circumstances of the country, and until repealed by Parliament, continue to be in force.[2]

[15] Clearly, the right of distress for rent allowing landlords to seize a tenant's goods to secure payment of rent arrears has been abolished. Section 649 of the CI Act 1915 specifically abolishes distress for rent in any Act.

[16] Therefore, if the LT Act provides for distress for rent, the Act is no longer applicable in the Cook Islands, because it is incompatible with Cook Islands Legislation.

[17] The LT Act does provide distress for rent. Section 2 of the LT Act sets out:

> … it shall be made appear to the Court where the said suit is depending, by affidavit, or be proved upon the trial, in case the defendant appears, **that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises**, countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter; then and in every such case the lessor or lessors in ejectment shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; …
> [Emphasis added]

[18] This section demonstrates that ejection pursuant to s 2 of the LT Act is dependent on "distress" not being available. Further, distress also appears as a component of the LT Act in ss 5 and 6. There are only six sections in the LT Act.

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1 Constitution Amendment (No 10) Act 1981-82, s 7. Added art 39(5) to the Constitution.
2 Cook Islands Act 1915, s 615.

[19] It has been noted that in Aotearoa/New Zealand:[3]

> The Property Law Act 2007 replaces the Property Law Act 1952, the Contracts Enforcement Act 1956 and replaces, in whole or in part, various other UK Acts which were previously on the statute book as Imperial Acts, such as the Partition Acts of 1539 and 1540, and in abolishing distress for rent, the statutes which governed that remedy such as the Landlord and Tenant Act 1730, the Distress Act 1689 and the Distress and Replevin Act 1908.

[20] The same must apply in the Cook Islands, with the specific adoption of the Property Law Act 1952 into Cook Islands law therefore replacing the LT Act with the abolishment of distress for rent.

[21] The abolishment of distress pursuant to s 649 of the CI Act 1915 therefore results in the LT Act no longer being applicable in the Cook Islands given it is inconsistent with the CI Act 1915.

[22] Further, it is difficult to see how parts of ss 2, 5 and 6 of the LT Act could operate when the distress for rent parts of those sections is deleted. The Act as a whole becomes inoperative.

[23] The Property Law Act 1952 is in force in the Cook Islands by virtue of s 637 of the CI Act 1915. In contrast, the LT Act was not specifically adopted in the Cook Islands like the Property Law Act 1952. I suspect there was good reason in adopting the Property Law Act as the prevailing legislation to provide guidance in situations similar to the matters in dispute in this case and given the abolishment of distress for rent.

[24] I have not been able to find any Cook Islands cases that refer to the LT Act. It appears that while in force in the Cooks Islands, the LT Act has probably seldom or never been relied upon.

[25] The fact that the LT Act does not appear in the green books is not fatal to its application in the Cook Islands. It is noted that the purpose of publishing the list of statues in its present form is to draw attention to some Imperial and English laws. Therefore the list is not conclusive. The fact the LT Act is not included in the list of statues is an indication of it not being considered to be one of the primary pieces of legislation applicable in the Cook Islands.

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3 *Land Law – Estates and Interests in Land* (online ed, Thomson Reuters) at [PL8.0].

[26] Given the above considerations the LT Act is inconsistent with the CI Act 1915 which abolished distress for rent. Furthermore, the LT Act is no longer applicable to the circumstances of the Cook Islands, given the Property Law Act 1952 has been specifically adopted in the Cook Islands and that Act has provision for situations when a tenant or lessee has not paid rent.

[27] For these reasons, I find that the Court does not have jurisdiction in terms of the LT Act.

[28] Therefore, the part of the application which relies on the LT Act is dismissed.

Coxhead, J