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

IN THE MATTER of **VAIKANOA SECTION 89H, ARORANGI**

A N D

IN THE MATTER of a certain Deed of Lease dated 15 June 1988 to **PACIFIC GROUP CONSULTANTS LIMITED** and assigned to **MANUIA BEACH HOTEL LIMITED** (in receivership) pursuant to a Deed of Assignment of Lease dated 14 January 1994

A N D

IN THE MATTER of an Application by **MANUIA BEACH HOTEL LIMITED** (in Receivership) to Dispense with the consent of the Landowner

Mrs Browne and Miss Harvey for the Receiver
Mr Manarangi for the Landowners
Mr Mitchell for the Purchasers

Date of Hearing: 5 & 6 September 1997
Date of Original Decision: 6 September 1997
Date of Judgment: 10 September 1997

JUDGMENT OF DILLON

This is an application for the Court to dispense with the formal consent of the owners of the above block to an assignment of their lease and to grant this Court's consent in accordance with the provisions of Clause 3 of a Deed of Lease dated 15 June 1988 which states as follows

> "The Lessor(s) shall not transfer assign sub-let or otherwise part with the possession of the land hereby leased or any part thereof without the written consent of the majority

of the lessors ordinarily residing in Rarotonga firsthand and obtained OR the prior approval of the High Court of the Cook Islands at Rarotonga ..."

Lengthy international conference calls were held on Friday 5 September 1997 and Saturday 6 September 1997 (New Zealand time) when argument by Counsel was presented; evidence of the receiver was recorded; and submissions by Counsel were subsequently faxed to me in New Zealand.

The Court was informed that the urgency of the application was because the agreement with the proposed assignees was due to become unconditional the following day, namely 6 September 1997 (Cook Island time), and failure by the Receiver to obtain the necessary consent from the Court could mean an abandonment by the assignees of the proposed sale.

The following decision was recorded and faxed to the Court in Rarotonga.

IN THE MATTER of **VAIKANOA S.89H**

A N D

IN THE MATTER of **MANUIA BEACH HOTEL LIMITED**

Applicant

Mrs Browne and Miss Harvey for the Receiver
Mr Manarangi for the Landowners

Date of Hearing: 5 & 6 September 1997
Date of Decision: 6 September 1997

DECISION OF DILLON J.

This is an application for the Court to dispense with the formal consent of the owners of the above Block and to grant consent in accordance with the provisions of Clause 3 of the Deed of Lease dated 15 June 1988.

Mr Manarangi agrees that the two issues for the Court to determine are -

(a) the legal interpretation of the Lease document;
(b) the interests of the majority of the landowners;

as to (a) above the law on the rights of a Lessee to assign is well established. If lessors refuse consent then Lessees can seek the assistance of the Court,

as to (b) above the Lease requires the Court to consider the interests "... of the majority of the Lessor/s ordinarily residing in Rarotonga ....". At the meeting relied on by Mr Manarangi only 15 owners out of a total of 142 were present, and one whole family of Kapi's were excluded.

For reasons which I shall set out in full in due course, the Court dispenses with the consent of the Landowners and grants approval to the assignment of the Lease as applied for.

Dillon J."

BACKGROUND

Manuia Beach Hotel Limited is a company in receivership and, as its name suggests, operated a hotel on Vaikanoa Section 89H. The administration and accounting records were destroyed by a fire which affected part of the hotel buildings and which fire occurred in November 1996. KPMG Accountancy Firm were appointed Receiver by the Bank and Mr Carr, the Resident Director of that organisation, has been undertaking the work of completing the receivership. Tenders have been called and various other steps implemented whereby a purchaser has now been secured to take over the fire damaged hotel for a price of $855,000.00. There has been no objection by the Receiver or the Landowners to the proposed Purchasers in their personal capacity or in the operations which they intend to undertake in order to restore the hotel to its previous operational capacity.

THE LANDOWNERS' STATUS

Mr Carr arranged, through his solicitors, for notices to be sent out to all the owners in Rarotonga seeking their consent to the proposed assignment of the lease. There are 142 owners to this property, but not all of course are resident on Rarotonga. There are in effect

four family groups. For one reason or another, which was not disclosed in the course of the hearings, the Kapi family have been excluded from meetings and discussions with the other three families. Mr Manarangi, for the Landowners, referred to an important meeting held on 19 August 1997 and he attached to a Memorandum the actual minutes taken at that meeting. I have assumed that the reference to 19th is a typographical error, because the minutes attached to Mr Manarangi's submissions refer to a date of 29 August 1997. Those minutes I do not believe assist these Landowners in the representations that they have made through their Counsel. It is clear from the minutes that the owners present, 14 in all, discussed in a very preliminary way the possibility of taking over the property and running it themselves. I say in a very preliminary way because as at 29 August 1997 Mrs Hogan is recorded as saying "we don't have money but we have land - that's ours." There are no other references in the minutes which would assist the Court in deciding whether or not the owners have the capacity or the ability to undertake a hotel operation, even if it was possible for them to take over the land from the Receiver. Certainly only a week before the conference calls the minutes record that they don't have any money, but only the land.

Because of the difficulty of ascertaining just who was present at these owners' discussions, the Court asked the Deputy Registrar to identify owners present at the family meeting as late as 4 September 1997, just days before the conference calls. The following is the Deputy Registrar's report.

> "Owners present at family meeting last night 4 September 1997.
>
> MATAROA FAMILY
>
> | | | |
> |---|---|---|
> | 1. | Potiki Mataroa | m.a. |
> | 2. | Tere Mataroa | m.a. - Rep by his son Teariki Mataroa |
>
> (Total in this family group 5)
>
> NANUA FAMILY
>
> | | | |
> |---|---|---|
> | 1 | Miimetua Pupa | f.a. - Rep by her P/A Teremoana Pera |
> | 2. | Pati Pupa (Hogan) | f.a. |
> | 3. | Matarii Vaineritua | f.a. - P/A for Matamanea Timoteo Pupa |
> | 4 | Upokoputa Poti | f.a. - Rep by her P/A Teremoana Rongokea |
>
> (Total in this family group 28)

No. 4 in Nanua family asks that she be accepted as representing four (4) other family members without any proper Power of Attorney but I have not accepted that because one of family member from this branch said he is the Power of Attorney of one of the owners named.

KAPI FAMILY

None present as they were not invited.
(Total in this family group 20)

NOA FAMILY

1	Tokerau Dean	f.a.
2.	Alfred Dean	m.a.
3	Aporo Dean	m.a.) Not present but rep by No. 2 with
4.	Tuiate Dean	m.a.) no proper P/A
5.	Tamariki Tamaiva	m.a.
6.	Enua Mataroa	m.a.
7.	Teariki Mataroa	m.a.
8.	Alexander Puriiti	m.a.
9	Marion Puri	f.a. - Rep by her P/A Emily Puri

(Total from this family group 89)

No. 2 in the Noa family said that he represents his sick brother and another brother who is at present in New Zealand.

The total numbers of each family group adds up to 142 in the list of owners sent to you."

THE LANDOWNERS' OBJECTIONS

Basically the objections of the Landowners represented by Mr Manarangi is that they wanted to purchase the balance of the lease and that they were never given this opportunity. Accordingly they sought an adjournment of the proceedings for a period of three weeks. As evidence of their good faith, Mr Manarangi indicated that he had $50,000.00 in cash. He did not, however, provide any details of who supplied that money or whether there were any conditions attached.

In the course of the conference call the figure of $855,000.00 was referred to as the tender price offered by the purchasers who now seek consent of the assignment of the lease to them. The Court was also told that it was estimated that a further $500,000.00 - $600,000.00 would

be required to repair the fire-damaged buildings; that is a total outlay of some $1.3 - $1.4 million. These were the figures upon which the owners wished to borrow finance. Mr Manarangi conceded that the owners have not approached any bank or any financial institution. He did claim, however, that such finance would fit the criteria of the Cook Island Development Bank. The Court observed, in reply to that submission, that it had always believed that housing finance was the Cook Island Development Bank priority, but Mr Manarangi assured the Court that this was not so.

While Mr Manarangi mentioned during the conference call of 5 September 1997 (New Zealand time) that he had a deposit of $50,000.00 in cash, in the course of the conference call the following day he mentioned that he had a deposit of $100,000.00 and promises of $300,000.00 - $350,000.00. However no details of the deposit or of these promises were made available to the Court. Rather, the Court was left to assume it was from the 15 members of the three out of the four families that own this property who had made these financial commitments. Given that the owners were legally represented and so were well aware of the Court's concern about their ability to finance a $1 million plus transaction, it was unfortunate that even elementary information as to the source of those alleged funds was not made available for the Court's consideration.

Against that background this Court had to consider whether the application for an adjournment for 21 days was reasonable and should have been granted. Added to that consideration the Receiver had been in touch with the proposed Purchasers who have sold their house in New Zealand and who were prepared to complete the settlement and to conclude the contractual arrangements unconditionally on 6 September 1997 (Cook Island time). If consent was not granted the Purchasers intended to withdraw from the conditional contract and travel to Australia to undertake alternative business opportunities there.

The Landowners' position can be summarised as follows

1. A very small minority claiming to represent 142 landowners.

2. A venture involving the owners in $1.3 - $1.4 million with no information whatsoever as to where such a large amount of finance can be secured.

THE RECEIVER'S APPLICATION

The Receiver has for some months worked his way through the legal processes of calling tenders, negotiating the best sale of the leasehold premises at a price of $855,000.00, when apparently the previous Lessee now in receivership had paid $2.4 million; advising all the owners by separate notices to each one personally (as declared by Mrs Hogan, one of the owners now objecting to the assignment); obtaining all necessary consents including the Development Investment Board; obtaining confirmation from the Court that the ground rent has been paid up to date and giving an undertaking that the 1.5% of gross revenue outstanding would be paid from the sale proceeds. It is the formal consent to the assignment that is the only issue outstanding.

I have already referred to the Landowners' representation relative to the total ownership of this land. Mrs Browne for the Receiver referred to 47 responses from Owners on Rarotonga, that is to the notices sent out to them - of these she says 11 have consented; 12 neither consent nor object, 22 refuse consent but give no reasons; one wishes to negotiate a new lease; and one wants to buy.

Finally, Mrs Browne referred to the expenses currently being incurred by the Receiver at the rate of $250.00 per day for interest to the bank, together with wages.

THE PURCHASERS' POSITION

Mr Mitchell acts for the proposed assignee of the lease. His clients' position is that they have sold their house in New Zealand; they are prepared to complete the purchase and travel to Rarotonga; but if the conditional agreement cannot be made unconditional by 6 September 1997 then they intend to abandon Rarotonga and travel to Australia

THE ISSUES

Mr Manarangi has conceded that the two issues for the Court to determine are:

(a) *The legal interpretation of the lease document:*

As stated in the Interim Decision, the law on the rights of a lessee to assign his lease is well established. It is unreasonable and unacceptable in law to refuse consent because the owners wish to obtain possession of the premises for themselves - re Smith's Lease, Smith v Richards (1951) 1 All ER 346. That is the position in this case when the Landowners refused to grant consent because they want possession for themselves, even though there is no breach of the terms of the lease other than the 1.5% of gross revenue which has been satisfactorily secured.

It is also relevant to the present circumstances that Mr Manarangi makes no objection whatsoever to the proposed assignment on personal or financial grounds. Nor is there any suggestion that the premises are to be used for any purposes other than what they have always been used for. Such conditions were examined in the case of Fairhall v Gillies 1948) NZLR 184 and were held to constitute an unreasonable refusal.

In law therefore, the Receiver is entitled to assign this lease and refusal by the Owners to consent because they want this land returned to themselves prior to the termination of the lease is an unreasonable refusal.

(b) *The interests of the majority of the Landowners:*

This lease in favour of Manuia Beach Hotel Limited was approved originally by the Owners and confirmed subsequently by the Court. Upon confirmation the Court was satisfied "that the alienation is not contrary to equity or good faith or to the interests of the persons alienating or to the public interest;" (Section 482(2)(b)). The landowners now suggest that their original approval be cancelled and the Court's confirmation be set aside for no other reason than they want to operate the hotel themselves, but as

already explained the law applying in the Cook Islands does not permit landowners to arbitrarily take back their land which they have previously agreed to lease for a period of years.

There are two other practical difficulties to the objections mounted by the landowners :

1 How many of the 142 landowners on the title to this land are in fact objecting - the calculation by the Deputy Registrar is 15; that by Mrs Browne is 24. There is certainly not a majority of the owners who object and clause 3 of the lease refers to a "... majority of the lessors ordinarily residing in Rarotonga ...". The objectors have presented no evidence of how many owners they claim to represent and who live on Rarotonga.

2. The Court has no satisfactory evidence of the Objectors' ability to finance the established $1.3 - $1.4 million required to operate this hotel. There have been no approaches made to lending institutions. Nor has there been any consideration given to a very few of the Owners intending, it would seem, to bind the great majority of the owners to a million plus dollars debt without that majority being consulted or having any say in such a speculative venture, given the experiences of the Rarotongan Hotel and Sheraton Hotel undertakings.

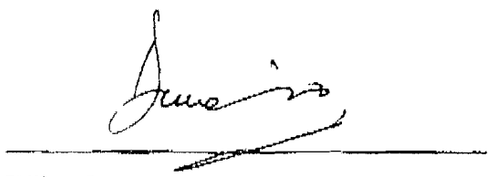
CONCLUSION

I believe this Court has a duty and a responsibility to ensure the protection of the majority of the owners who are not represented in these proceedings from the minority who are represented by Mr Manarangi. The majority of the owners are entitled to expect this Court to enforce the law as applying in the Cook Islands.

To accede to Mr Manarangi's request for an adjournment would be to ignore legal principles involved, place the majority of the owners at serious financial risk when they have not even been consulted by the minority group of owners; and delay further the payment of a

percentage of gross revenue of which the owners have been deprived for the last twelve months.

It is necessary therefore that this Court consider whether its consent to this assignment should be granted in terms of Clause 3 of the lease. For the reasons set out above, the consent of the landowners is hereby dispensed with and the Court consents to the assignment applied for.



Dillon J.