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

OA 3/2008

IN THE MATTER	of sections 2, 3 and/or section 9 of the Declaratory Judgments Act 1994
AND	
IN THE MATTER	of an Application for a Declaratory Order
BETWEEN	PAULA LINEEN Applicant
AND	MERE-MARAE VILMA MACQUARRIE First Respondent
AND	VAITAMANGA HOLDINGS LTD Second Respondent

Hearing date: 29 May 2008

Counsel: Mr Little for Applicant
Mrs Brown for First Respondent
No appearance for Second Respondent

Decision: 26 September 2008 (NZ time)

DECISION OF GRICE J

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Introduction

1. This is an application for a declaratory order. The applicant seeks orders pursuant to sections 2, 3 and/or 9 of the Declaratory Judgments Act 1994 declaring that the terms set out in s.106A(1)(b) and (c) of the Property Law Act 1952 (inserted by the Property Law Amendment Act (No.35) 1995-96) are implied in a Deed of Lease dated 5 July 1985 between Teremoana Tinirau (now deceased) and the First Respondent, and in all subsequent assignments of the Deed of Lease.

2. The application was amended by consent to exclude from its ambit applications relating to the determination of a rental sum in the event this Court made the above declaratory order.

Section 106A of the Property Law Act

Section 106A of the Property Law Act came into force on 1 January 1997. It provides:

> *"106A Further covenants included or implied in leases*
>
> *(1) In every lease of Native freehold land and for the permitted use of commercial or industrial business or enterprise there shall be included, and if not included, implied, the following covenants by the lessee, for himself, his executors, administrators and assigns –*
>
> *(a) that where commercially appropriate the lessee will pay to the lessor a goodwill payment at the commencement of the term of the lease;*
>
> *(b) that the lessee will pay to the lessor the greater of:*
>
> *i a fair and reasonable ground rent; and*
>
> *ii a percentage of the annual gross turnover of all or part of the activities of the business or enterprise for which the land is being utilised, such percentage to be negotiated between the parties;*
>
> *(c) that the ground rent payable by the lessee pursuant to the lease shall be reviewed at intervals of not more than five years, with the ground rent following review to be as agreed between the parties or failing agreement as determined by an independent arbitrator or by the High Court;*

(d) that the lessee will give to the lessor reasonable opportunity to participate as shareholder on usual commercial terms in the business or enterprise for which the land is being utilised;

(e) that in the event of the sale or proposed sale of the business or enterprise for which the land is being utilised (including any sale or disposition of any share in a company operating such business or enterprise which would alter the effective control of that company) –

i the lessee will give to the lessor the right of first refusal to take the assignment of the lessee's interest pursuant to the lease, or the transfer of the shares, on the terms of the proposed sale, and any such sale shall be deemed to be conditional on the non-exercise of the right of first refusal;

ii following settlement of the sale the lessee will pay to the lessor a percentage of the net sale proceeds of that enterprise or business and the lessor's entitlement pursuant to this subclause shall rank subsequent to any secured creditors and in priority to any unsecured creditors of the lessee.

(2) This section applies:

(a) to leases for a term commencing on or after the 1st day of January 1997; and

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

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

Background

3. The Applicant (Mrs Lineen) is the sister of the First Respondent (Mrs Macquarrie). Mrs Lineen lives in New Zealand. They are the daughters of Teremoana Tinirau and succeeded her as landowners of land including land known as Vaitamanga Section 88F1 Arorangi (the "Arorangi land"). This succession occurred on 9 March 1994. The Arorangi land was leased to Mrs Macquarrie pursuant to a Deed of Lease dated

5 July 1985 at a rental of $1.00 per annum for a term of 60 years ("the Lease"). On 8 July 1997 the lease as it related to part of the land (9949 m^2) ("the Beachfront") was assigned or subleased to the Second Respondent, Vaitamanga Holdings Ltd ("VHL") a company in which Mrs Macquarrie and her children have interests. In November 1997 VHL subleased the Beachfront to Crown Beach Executive Villas Ltd. That company went into receivership and the receivers sold the Beachfront lease, as part of the business of Crown Beach Executive Villas Ltd, to South Pacific Resorts Ltd ("South Pacific"). The Deed of Assignment dated 28 July 2000 of the Beachfront lease from Crown Beach Executive Villas Ltd (in receivership) to South Pacific was produced.

4. Copies of the following documents were produced:

- Deed of Lease dated 5 July 1985 between Teremoana Tinirau and Mrs Macquarrie (the Lease).
- Deed of Assignment of sublease dated 28 July 2000 between Crown Beach Executive Villas Ltd (in receivership) and South Pacific (the plan purporting to be annexed to this deed was not annexed to the copy produced).

5. Neither the Deed of Sublease dated 8 July 1997 from Mrs Macquarrie to VHL, nor the Deed of Sublease dated 4 November 1997 from VHL to Crown Beach Executive Villas Ltd (in receivership) was produced. The information as to the contents of those arrangements has been gleaned from the recitals in the Deed of Assignment of Sublease for Crown Beach Villas Ltd (in receivership) to South Pacific and evidence of the parties.

6. The Lease between Mrs Macquarrie as Lessee and her mother as Lessor includes, in addition to the Beachfront land, a further 1.1546ha of non-beachfront land on the other side of the road to the Beachfront land. Other terms of the Lease are:

Rental: For and during the first ten years an annual rental of $1.00.

Rent Reviews: Ten yearly. Annual rentals to be agreed but failing agreement to be fixed by arbitration in accordance with the Arbitration Act 1908 such rentals to be based upon then current market rentals for comparable land excluding all improvements effected to the land by the Lessee and the terms

conditions and provisions of the Lease but to be not less than the annual rental payable for the preceding ten years; "*provided however that such reviews shall take into account whether the Lessee is related to the landowner or is a landowner*".

Use of Land: The Lessee may use the land for residential purposes and/or commercial purposes and purposes ancillary thereto.

7. The Lease was confirmed by the High Court by Certificate of Confirmation dated 19 August 1985.

8. Mrs Macquarrie says that VHL subleased the Beachfront land to Crown Beach Executive Villas Ltd for a consideration of $250,000.00 plus VAT. The sublease included her house and flat valued at $180,000.00. Mrs Macquarrie then purchased a unit from Crown Beach Executive Villas Ltd for $150,000.00 plus VAT. She also deposes that she paid $30,000.00 to Mrs Lineen for the lease of the beach reserve and also paid to a Mr Stenson approximately $6,000.00. In addition she paid the legal costs on the transactions. Mrs Lineen's understanding of this transaction differs in relation to the details of the consideration for the unit. However nothing turns on that here.

9. It is common ground that a hotel and villa complex has been erected on the Beachfront land and is run as a business concern.

10. The Deed of Assignment dated 28 July 2000 of the Beachfront lease recites Crown Beach Executive Villas Ltd (in receivership) as assignor and South Pacific as assignee. It was approved by the Leases Approval Committee on 28 July 2000. The Deed records the transfer to South Pacific of the Beachfront lease plus 902m^2 of reserve land that is also recorded as having been leased by Mrs Macquarrie as landowner to VHL and thence from VHL to Crown Beach Executive Villas Ltd. The details recorded in the Certificate of Approval issued under the Leases Restriction Act 1976 are:

Land: Vaitamanga Sections 88F1 in the Tapere of Tokerau, Arorangi District, Rarotonga.

Annual Rental: The greater of $5,000.00 or one and a half percent of the gross income of the Lessee.
Consideration: $2,393,247.00.
Term of Alienation: 60 years computed from the 1st day of August 1985.

11. Mrs Macquarrie says she received nothing from this assignment of lease by Crown Beach Executive Villas Ltd (in receivership) to South Pacific.

12. VHL receives the rental paid pursuant to the sublease to South Pacific.

13. I note that the Deed of Assignment purports to assign to South Pacific the land for the unexpired term of the head leases. The Deed recital records however that the sublease to the assignor (Crown Beach Executive Villas Ltd (in receivership)) is only for the unexpired term less one day. VHL therefore apparently provided a sublease, rather than an assignment of the Lease to Crown Beach Executive Villas Ltd. In turn Crown Beach Executive Villas Ltd (in receivership) could provide an assignment only of that sublease to South Pacific.

14. In summary the chronology, relating to the transactions with the Lease is:

5 July 1985	Deed of Lease of the Arorangi land from Teremoana Tinirau (as Lessor) to Mrs Macquarrie (as Lessee) (the Lease). Native Freehold land lease for 60 years from 1 August 1985.
9 March 1994	Mrs Macquarrie and Mrs Lineen succeed their mother, Teremoana Tinirau, as Lessor under the Lease.
8 July 1997	Deed of Assignment of 9,709m^2 being the Beachfront land Mrs Macquarrie to VHL.
21 October 1997	Deed of Lease to VHL (as Sublessor) of 902m^2 of reserve land.
4 November 1997	Deed of Sublease by VHL to Crown Beach Executive Villas Ltd

of the reserve land and the Beachfront land for the remainder of the term of the head leases less one day.

15. The lease arrangement between Mrs Macquarrie and VHL is variously referred to as an assignment, in the recitals, and as a sublease by Mrs Macquarrie and her counsel. As the primary document has not been produced I am unable to reach a conclusion as to whether that arrangement is an assignment of the Lease or a sublease to VHL.

The Respondent's Case

16. Mrs Macquarrie says that Mrs Lineen also received property from their mother in 1983. A copy of the order granting the Right of Occupation for that property was produced by Mrs Macquarrie. It records:

> Date of order: 28 April 1983
>
> Land Description: Nikao Section 106A, Avarua
>
> Area: 1.4346ha
>
> Use: Dwelling house, commercial, agricultural and industrial activities.

(the "Nikao land").

17. Teremoana Tinirau subsequently also granted a lease over the Nikao land to her daughter, the Applicant, Mrs Lineen. The relevant Deed of Lease is dated 4 April 1993 and the Certificate of Approval was granted on 30 April 1993. It is for a term of 60 years from 1 April 1993 at an annual rental of $1.00 reviewable five yearly. It also records that the land may be used for residential, commercial or agricultural and ancillary purposes. The lease covers 1.2284ha comprising two parcels which are part of the Nikao land, but does not include a third parcel included in the Right of Occupation Order. The Certificate of Confirmation is dated 13 May 1993.

18. Mrs Macquarrie says that the leases to her and her sister, respectively, are on terms and conditions usual in leases to family members. She says it was never intended that Mrs Lineen would benefit from her Beachfront lease nor would Mrs McQuarrie benefit from her sister's Nikao land right or lease.

19. Mrs Brown, Counsel for the Respondent, makes four main submissions:

i. the Lease is a landowners lease. It should be treated differently from leases to non-landowners where goodwill is paid and a market rental is normally stipulated. She points to the annual rental of $1.00 and the stipulation that the rental review "*shall take into account whether the Lessee is related to the landowner or is the landowner*".

ii. that the Applicant is really seeking a share of the rental that VHL receives from South Pacific. As this rental is pursuant to a sublease it is not a lease of Native freehold land, therefore s.106A cannot apply to include the specified terms into the sublease.

iii. that because of the mother/daughter relationship the ground rental was fixed at $1.00 which in the circumstances is a fair and reasonable ground rental. The parties mother's wishes as to the distribution of her land between her daughters should be given weight. No goodwill was paid at the time the Lease was granted.

iv. that s.106A(1)(c) only requires the Deed to be varied to incorporate the covenants listed in s.106A(1). It does not give the Court power to determine the matters referred to in s.106A(1).

20. The points in submissions (iii) and (iv) are not now relevant to this case. At the outset of the hearing the Applicant amended the application, by consent, to limit it to a declaration that the terms set out in s.106A(1)(b) and (c) are implied in the Lease.

Declaratory Judgment

21. Section 3(1)(b) of the Declaratory Judgments Act 1994 allows an application for a declaratory judgment where any person:

"*(b) claims to have acquired any right under any such enactment, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof, such*

person may apply to the High Court by originating summons for a declaratory order determining any [enactment] ..., or of any part thereof".

22. Under s.4 any declaration has the same effect as a like declaration in a judgment and so binds the person making the application and all persons on whom the application has been served.

23. The jurisdiction to grant the declaration is discretionary. The Court may, on any grounds which it deems sufficient, refuse to give or make the order.

24. As a matter of general law, within the limits of their jurisdiction, and subject to any express statutory provision to the contrary the Courts have power to grant declarations upon any matter whatsoever. In Imperial Tobacco Ltd v Attorney-General (1981) A.C. 718 at 750, Lord Lane said:

> *"Anyone is on principle entitled to apply to the Court for a declaration as to their rights unless statutorily prohibited expressly or by necessary implication".*

25. The Court's power is subject to the general limits which exist on the Court's jurisdiction. It is not necessary for there to be a subsisting cause of action for the Court to have declaratory jurisdiction, but the jurisdiction is not an advisory jurisdiction. It is confined to declaring rights between the parties:

> *"... it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else"* Gouriet v Union of Post Office Workers (1978) A.C. 435 at 501 per Lord Diplock.

26. The present issue, relates to the construction of an enactment and in particular its effect on a specific lease between the parties. The issue is therefore appropriate for the declaratory procedure.

Interpretation

27. The move from a literal to a purposive approach in the interpretation of legislation over recent years is now well recognised. At times the Court has to look beyond the words of the statute. In the case of ambiguity the Court takes the meaning which best achieves the purpose of the legislation. Allowance can be made for imperfect drafting and inappropriate words can be given meaning to if the underlying intent is clear. This does not mean that the Court can attach to words meanings that they are incapable of bearing. That would be to rewrite the provision not to interpret it. Professor John Burrows QC in his recent New Zealand Law Society seminar booklet, "Interpretation of Statutes and Contracts" (NZLS, Wellington June 2008) puts it as follows:

> *"Once upon a time the courts applied a literal – indeed literalistic – interpretation to many kinds of statute. The concentration on the literal meaning of the words could mean that the purpose of the legislation was frustrated."* (at p 11 supra).

28. The Constitution allows for this approach in the interpretation of Cook Islands enactments. It provides at clause 65(2):

> *"Every enactment, and every provision thereof shall be deemed to be remedial, whether its immediate purpose is to direct the doing of anything that the enacting authority deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment [of the object] of the enactment or provision thereof according to its true intent, meaning and spirit".*

29. To assist in ascertaining the purpose of the legislation the Court may look for an understanding of the theme and context of the Act. It may be necessary to refer to extrinsic materials such as Hansard.

30. The amendment to s.106A of the Property Law Act appears to be seeking to provide benefits to Native landowners (who have leased their land) in the future development of the land by allowing them the opportunity to participate and receive income from the land.

31. By consent, excerpts from Hansard of speeches given in the second reading of the Bill which inserted s.106A into the Property Law Act, were provided to the Court. The Parliamentary debate indicates an intention to benefit Native landowners who were missing out on the income and proceeds from deals made using their land which had been leased for business purposes:

Hansard 912/12/1996 at p 2453. The record of the Hon T Matapo's speech states:
"So this is the whole idea behind this, as Government feels that people should benefit out of every deal made, regarding their lands. The Government of the time was also aware that there were some things that have already happened and cannot be helped, but in this particular case it happened during the time of this Government and we are looking at it very carefully. That is why Cabinet came up with the idea that they should look into the matter of these commercial visitors trying to exchange leases from one to the other."

Hansard 912/12/1996 at p 2454. The Hon Vaine Tairea states:
"Mr Speaker I rise to give my full support to the Amendment Bill presented to the House this afternoon. Today Rarotonga, Aitutaki, Mauke and Atiu will be affected by this Amendment. For example I have leased my land to someone through an agreement. My family gave me the land and then I leased it to someone else. Under the law this person will have to ask me before he sells my land, but what transpired until today was not like that. If the landowner goes to Court and says I do not want my land to be sold to the person, the Court will say the law says you cannot do anything about it. This is one of the sections that has got us into problems when the Committee went around the island.

Secondly, the misunderstanding of the law in operation in our country. The reason being, all our lands are fragmented – one piece here, one piece there, all over the place. I thought once the lease agreement was signed that was all there was to it, yet there were no other people involved. My appreciation in this regard Mr Speaker, that what has been written in the Amendment before us says, any agreement or any amount of money imposed has to be done by nobody else but the landowner and this is what I like about it.

Mr Speaker, it is not my standing up that I give my support and that's the end of it. That is not the end of it, but I like what is here in the House right now because the old one is here and the new one is over there and the benefit derived out of this, the processing of the lease agreements it is up to the landowner to decide how much money he is going to impose. As we go along the way there is room for improvement as we encounter various problems along the way.

That is why, Mr Speaker, I rise to give my support to the Motion moved by the Minister regarding this Amendment."

Then in Hansard (12/12/1996), Hon Mama Mau Munokoa states:
"I rise to give my support to this Property Law Amendment Bill before the House, Mr Speaker. This is a pre-warning to us for our land that we have given out. Some of our people they have their land given to them outright with no cost at all, but it is up to you to see how best you can develop and make some earnings from it. So as I said this Property Law Amendment Bill is to warn us and this law is to protect us so we don't go into anything without proper guidance."

Hansard 12/12/1996 at p2456. Dr R Woonton.
"Of course any business who is selling up will make a lot of money after the use of people's land. In our country we don't require people selling businesses to pay Capital Gains Tax, so why is it difficult to compensate the landowners with a small percentage of the sale value of that property? Like the Minister of Agriculture said, the only thing that he is not satisfied with the Amendment is the number. There is no number given as to what is the appropriate or the just figure that should be paid to the landowners."

32. The debate is difficult to follow in parts but in general terms it seems that s.106A was intended to give rights to the Native landowners to obtain a fair rental income and to share in the benefits of the development of their land. This case is however limited to the terms relating to the rental.

33. The difficulty with the covenants implied or to be included under s.106A is in their practical application. Professor Burrows referred to this type of problem when he commented:

> *"Some statutes ... are so amended in the years following their enactment that they lose coherence. In those cases the Courts may have to engage in creative interpretation. The purposive approach will often allow the Court to find that "the general intent comes through" the verbal thicket"* (at p.7 supra).

34. Other legislation, including the Cook Islands Constitution recognises the special relevance of provisions prohibiting or limiting the alienation of Native Land in the Cook Islands. A proviso to the anti-discrimination provisions of Clause 64(1)(c) of the Constitution provides:

"64(1) It is hereby recognised and declared that in the Cook Islands there exist, and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms -

...

(c) The right of the individual to own property and the right not to be deprived thereof except in accordance with law:

Provided that nothing in this paragraph or in Article 40 of this Constitution shall be construed as limiting the power of Parliament to prohibit or restrict by Act the alienation of Native land (as defined in s.2(1) of the Cook Islands Act 1915 of the Parliament of New Zealand);..."

35. In s.2(1) of the Cook Islands Act 1915 "Native" means a person belonging to any Polynesian race. "Native land" means land owned by a "Native". This Act and various other statutes place restrictions on dealing with Native land. For instance s.467 of the Act prohibits the alienation of customary land or any interest therein whether by will or otherwise and whether in favour of a Native or European or of the Crown. Similarly there are limitations on Natives (or their descendents) alienating Native freehold land in fee simple or any other freehold interest whether legal or equitable. Alienation by way of lease, is limited to 60 years (s.469 of the Cook Islands Act).

36. Section 422 of the Cook Islands Act 1915 (NZ) provides for land to be held in accordance with the customs, usages and traditions of the natives of the Cook Islands. There are prohibitions on alienation to non-indigenous people (s.467-9 of the Act).

37. In summary the importance of preservation of Native Land and land rights in the Cook Islands is recognised by various statutes in the Constitution. Parliament has sought, by providing terms and conditions to be inserted in commercial leases of Native freehold land, recognition of the rights of Native landowners by giving them the opportunity to negotiate for a share in the benefits of commercial developments on the land where appropriate.

Application of s.106A

38. Section 106A of the Act implies into every lease of Native freehold land for the permitted use of a commercial or industrial business or enterprise, various covenants in favour of the Lessor. By virtue of s.106A (2)(b) of the Property Law Act these covenants are to be included or implied in leases for a term commencing or reviewed or extended, pursuant to ss.469(3) and 469(4) of the Cook Islands Act, on or after 1 January 1997.

39. For leases for a term commencing prior to 1 January 1997, s.106A(2)(c) provides that, with effect from 1 January 2007 those leases:

> *"(c) ... shall be varied to incorporate the covenants listed in subsection (1) of this section".*
>
> (emphasis added)

40. The Lease commenced before 1 January 1997. Therefore if s.106A does apply to the Lease, the covenants in s.106A(1)(b) and (c) are not automatically implied into the Lease. Rather the Lease must be varied to include those covenants.

41. The Property Law Act allows an implied term to be excluded by agreement (s.68). Counsel advised the Court that it has now become the practice for commercial lease

documents to expressly exclude the terms and covenants to be included or implied under s.106A(2). In this case there could be no exclusion. The Lease was entered into over ten years before the s.106A amendment was enacted.

42. The prerequisites for the application of s.106A are:

i. that there is a lease; and

ii. it is of Native freehold land; and

iii. it is for the permitted use of a commercial or industrial business or enterprise.

43. This application related to a lease of Native freehold land. No issue was taken to the land being Native freehold land as it related to the initial lease from Teremoana Tinerau (succeeded by Mrs Lineen and Mrs Macquarrie) to Mrs Macquarrie. The Lease permits commercial purposes and ancillary purposes.

44. Section 106A provides that the covenants are by the Lessee "*his executors, administrators and assigns*". Section 64 of the Property Law Act 1952 (Cook Islands) also provides generally that an implied covenant relating to any land of a covenantor shall, unless a contrary intention is expressed, "*be deemed to be made on behalf of the covenantor and his successors in title*". (This provision was modified in the New Zealand Property Law Act 1952 by the insertion of s.64A in 1986, but this section has not been similarly amended in the Cook Islands Property Law Act). Section 2 of the Act defines "Land" as including all estates or interests whether freehold or chattel, in real property.

45. Assignees of the Lease are therefore bound by the covenants in the Lease to the same extent as the original lessee. Covenants for payment of rent run with the estate and so are enforceable by the original lessor against the assignee.

46. The covenants to be included or implied s.106A(1)(b) are that the lessee will pay to the lessor the greater of a "*fair and reasonable ground*" rent "*and*" (sic) a percentage of the annual gross turnover of the business or enterprise, "*such percentage to be negotiated between the parties*". Determining a fair and reasonable ground rental is unlikely to pose too much difficulty. It is a common formula for rental reviews in

leases. It would allow the taking into account of a wide range of factors, not limited to market rents, but also other provisions in the lease such as the fact it is a family lease and the surrounding circumstances. The "*and*" joining (i) and (ii) should read "*or*". The section requires the payment to be the greater of either the fair and reasonable ground rent or a negotiated percentage.

47. Under s.106A(2)(c) of the Act the covenants to be included by variation to the Lease should be limited to insert the clauses set out in s.106A(1)(b) and (c). Otherwise to the extent possible the terms of the lease should remain extant mutatis mutandi. The parties are entitled to have the provisions of the Lease they have negotiated varied only to the minimum extent possible. Therefore only where necessary should the original lease provisions be altered. The variation to be made to the Lease must be limited:

(a) To vary the rental review period from ten yearly to intervals of not less than five years.

(b) To insert a requirement that the payment will be the greater of:

i *a fair and reasonable ground rent; or*

ii *a percentage of the annual gross turnover of all or part of the activities of the business or enterprise for which the land is being utilised, such percentage to be negotiated between the parties;*

The "*and*" between the alternatives in s.106A(1)(b)(i) and (ii) appears to be a typographical error and it should read "*or*" as it refers to the greater of the alternatives.

48. In other respects the lease need not be altered. The factors which are set out in the lease for consideration when fixing the rental remain including the requirements in the lease that in fixing the rent in accordance with the Arbitration Act 1908

> "*... such rentals to be based upon then current market rentals for comparable land excluding all improvements effected to the land by the Lessee and the terms conditions and provisions of this Deed... provided however that such reviews shall take into account whether the Lessee is related to the landowner or is a landowner.*"

The lease requires the review to be determined by arbitration under the Arbitration Act 1908. This Arbitration is one of the processes referred to in s.106(1)(c).

49. Section 106A(1)(b)(ii) provides for an alternative method of rent fixing where it provides a greater payment. This alternative requires the parties to "*negotiate*" a percentage of the annual gross turnover of all or part of the activities of the business or enterprise for which the land is being utilised. The section is silent on what happens if the parties fail to reach agreement. Therefore unless agreement is reached the rental must be either negotiated or fixed at a rental review by the arbitrator under s.106(1)(c).

50. The rental reviews provided for under the Lease are every ten years. The Lease when varied will now require a review at intervals of not more than five years. Therefore unless the parties are able to negotiate a new rental payment, any review of rental cannot be determined by the arbitration procedure until five years after the last review under the Lease. There is a ratchet clause requiring that the rental not be less than the annual rental payable for the preceding ten years. This clause must necessarily be altered to read "*five*" years rather than "*ten*" years to make sense of the ratchet clause and the varied period of five years for rental reviews.

Family Arrangement

51. The first submission on behalf of Mrs Macquarrie, is that the Lease is a family lease, originally between mother and a daughter, and by virtue of succession, now between Mrs Macquarrie and Mrs Lineen (as Lessor) and Mrs Macquarrie (as Lessee). The lease records that rental is $1.00 per annum initially and subsequently the lease "*shall take into account whether the lessee is related to the landowner or is the landowner*". Closely related to this is the third submission on behalf of Mrs Macquarrie, that her mother should be entitled to decide which sister received what land. In this case Mrs Lineen received other land on which Mrs Macquarrie has made no claim. These submissions highlight an important issue. The thrust of the amendment is to protect the interests of Native landowners rather than interfere with customary arrangements. However it would do violence to the wording of the section

to exclude family leases totally from the coverage of s.106A. It would require a strained interpretation of that section and one which is not appropriate. However the express provision in the Lease that a review must take into account whether the Lessee is related to the Lessor together with the surrounding circumstances must properly be taken into account by an arbitrator when the amount of rental payable to the Lessor is determined.

Respondent's Submission on Application of s.106A to arrangement between VHL and South Pacific

52. As I noted earlier I am unable to determine whether the arrangement between Mrs Macquarrie and VHL is an assignment or a sublease. The variation of the lease to include the covenants in s.106A(1)(b) and (c) binds any assignee both by the express provisions of s.106A(1) and by the general application of the Property Law Act 1952. It does not however automatically bind a sublessee. The sublessee is bound to the extent set out in the sublease or any other contractual arrangement between the parties.

53. The second submission on behalf of Mrs Macquarrie is that Mrs Lineen is in reality seeking a share of the rental that VHL receives, but this rental is payable pursuant to a sublease and not a lease of Native freehold land.

54. The contractual relationship between Mrs Macquarrie as lessor and VHL as lessee is the primary contractual relationship. The copy of the Deed of Assignment of Sublease between Crown Beach Executive Villas Ltd (in receivership) and South Pacific was not executed by Mrs Macquarrie as head lessor. But even if there is no direct privity of contract between the lessor and a subsequent assignee from the lessee, nevertheless an assignee is bound by the terms of the original Lease. The original lessee remains bound unless otherwise discharged. The primary relationship of lessee and lessor under the head Lease remains in existence and it is the terms of that Lease which is to be varied under s.106A. In this case that relationship is between the Native freehold land lessor and Mrs Macquarrie as lessee.

55. I am not in a position to determine whether the Lease was properly assigned to VHL. In any event the interpretation of that arrangement was not specifically sought in the application for declaratory orders.

Covenants not Implied but Lease to be Varied

56. As the Lease predated 1 January 1997 the covenants are not implied but the Lease must be varied to incorporate them. The application relates solely to covenants under s.106A(1)(b) and (c) (ibid).

Declaratory Orders

This Court makes the following declaratory orders:

a. Declaring that the provisions of s.106A(2)(c) Property Law Act 1952 apply to the Deed of Lease dated 5 July 1985 between Teremoana Tinirau and Mere-Marae Vilma Macquarrie to require the Lease to be varied only to the extent necessary to include the covenants set out in s.106A(1)(b) and (c) of the Property Law Act 1952 but amended to:

   (i) Substitute the word "*and*" between s.106A(1)(b)(i) and (ii) with the word "*or*". and

   (ii) Delete the words "*or the High Court*" in s.106A(1)(c).

b. Costs are reserved. Counsel may make written submissions. Written submissions by the parties must be filed on or before 10 October 2008.

Grice J