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

OA 13/04,
Land 05/04

IN THE MATTER of The Declaratory Judgments Act 1994 and the Illegal Contracts Act 1987

BETWEEN **WILLIAM KEU** and **AMANDA KEU,** both of Rarotonga, lessees
Applicants

AND **THE LANDOWNERS** of Kaikaveka Section 103E No. 3 Avarua, lessors
Respondent

Mr McFadzien for Applicant
Mrs Browne for Respondent
Date of decision: 8 July 2004

DECISION OF GREIG, CJ

By a lease dated 21 October 1994 the landowners of Kaikaveka Section 103E No. 3 leased the land to Mr and Mrs Keu for a term of 60 years from 1 August 1994. The land had originally been leased to Mr Keu's mother. She had lived there for many years and was a close friend of Tinomana, one of the owners of the land. The arrangement was made in part because of the relationship, the friendly association between the original landowners it included a surrender of the lease to Mrs Keu Senior and this new lease to her son. Mr and Mrs Keu built a house on the land and have lived there since. They have paid the rent although there is some question of review of the rent which has not been attended to.

They have now come to an arrangement to sell the property to another party. The lease contains no restriction of any kind on assignment or transfer of the lease. As a matter of courtesy the proposal to sell was brought to the attention of Tinomana. I accept that for the first time she then realized the absence of any restriction and raised some objection to the matter. Mr and Mrs Keu have brought proceedings for a declaratory judgment to confirm or validate the lease and to seek relief under the Illegal Contracts Act. The landowners have commenced proceedings with an application under s. 390A of the Cook Islands Act 1915. Because of the pending sale I thought it was appropriate to try and deal with this matter urgently and I am glad and appreciate the assistance that I received at very short notice from both counsel in this matter. As a matter of convenience and by consent the two applications have been dealt with and heard as one but it was felt appropriate that the s. 390A application should as it were be given precedence as it affects the matter as a whole.

The lease was the subject matter of an assembled owners meeting called under the Land (Facilitation of Dealings) Act 1970 (the Act). The lessees, Mr and Mrs Keu were assisted by a solicitor who made the application to the Court on their behalf, that was accompanied by a draft lease and in due course a copy of Powers of Attorney of a number of landowners.

There was a meeting with Tinomana before the assembled owners meeting and there were discussions about amendments to the lease. Thereafter the solicitor wrote to the Court confirming that meeting and the request that the documents be amended, the amendments were threefold as follows:

1. 5 yearly reviews, the original drafted being 10 years;
2. Rental at $300, the original rent was $250 in the first draft lease;
3. A restriction on transfers or assignments.

It is the last which is the kernel of this case and this hearing. The solicitor concludes his letter by saying that he enclosed the amended documents obviously to take account of those three proposed amendments. The draft and the further amended lease did show 5 yearly review and a rental of $300. As to the restrictions the original draft lease, first put forward, contained as Clauses 4 and 5 a provision against transfer, assigning or sub-letting without the consent of the majority of the landowners residing in Rarotonga but with a proviso that such consent would not be arbitrarily or unreasonably withheld and the additional Clause 5 that if there was a desire to assign or sublease then the lessors would have the first right of refusal and could then consent to the assignment specifying terms or conditions of purchasing the land or the lease for a value to be agreed on between the lessors and the lessees. The amended lease contains precisely the same clauses.

In preparation for the meeting the solicitor had forwarded the amendment and copies of Powers of Attorney which had been given by some of the landowners. The meeting was held on the 15th July 1994.

The record of the meeting presided over by a court officer who is accepted as being of long experience shows a total of 7 persons present or represented at the meeting. Tinomana is one, Philip Tuoro is another and he is recorded as being present and with her Power of Attorney. Four others were also recorded as being present with three with a Power of Attorney to Mr Tuoro. The record indicates that there was another person present, Ioane, also known as John Ata.

The meeting then proceeded. It is recorded that the chairman authorized the above representation. That seems to be recorded as being in accordance with s. 45A of the Act. That point was not argued before me but this seems to be irrelevant in the event.

The resolution that was carried was then unanimously to accept the surrender of the existing lease, grant the new lease but with the amendment that Clauses 4 and 5, the provision against assignment and the first refusal provision be deleted from the deed of lease. In due course that resolution was confirmed by the Judge, the lease was approved by the Leases Approval Tribunal and was signed by the Court Registrar on behalf of the landowners and was in all respects then treated as valid.

It is accepted that it is unusual for a lease such as this not to have a provision against assignment and subletting and perhaps also a first refusal on assignment. That was recorded in the letter which notified Tinomana that the assignment was to take place. I accept that it is unusual that such a provision would not be present. The meeting records that it was deleted and that was what was agreed to.

Mrs Browne in her submissions hypothesized that the Chairman, believing that there were to be some further amendments or restriction on the assignment, as set out in the solicitor's letter, thinking to meet that by deleting the provisions in the deed, did just that but of course with an entirely opposite effect.

It is difficult of course without evidence to come to any conclusion about that and no evidence is actually available, assuming those who were present could remember at this stage. The reason is that Phillip Tuoro is no longer alive, Ioane lives in New Zealand and the Chairman now lives in Australia.

Apart from that, perhaps speculative submission, there is a submission which challenges the validity of the meeting. It is said first of all that there is no quorum. Section 45 (1) of the Act requires that a quorum be at least five individuals entitled to vote and present during the meeting. Section 45 (2) continues with provision about an owner attending and voting either personally

or by a proxy appointed in writing: Powers of Attorney are of course accepted in that way as proxies.

It is unusual for a provision for a quorum to specify individuals and I consider that that does mean actual persons present. The persons who attend by proxy or by Power of Attorney cannot be included in those individuals. They may attend but they are not present as individuals to form a quorum. On the evidence of the record, there were only two individuals present. Even that is challenged and there is evidence that Ioane was not present because, it is said, he has always lived in New Zealand and was not here at the time of the meeting. Moreover it is alleged that Phillip Tuoro did not have a Power of Attorney for Tinomana. The file does not include in the powers which the solicitor furnished for the purposes of the meeting a power from Tinomana.

Section 45 also requires as part of the qualification for the quorum that the five individuals should represent at least one quarter of the beneficial freehold interest in the land.

The file shows that there are some 21 members. Mrs Browne has put to me from her consideration and searches that there were four original title holders, all with equal shares. She has calculated that the 7 persons said to be represented, and that of course is challenged, constitute 1/42 of 1 share so that even those present by proxy or Power of Attorney did not constitute the ¼, let alone the individuals that were there.

Mr McFadizien has argued that s. 390A is not suitable, appropriate or created for the purpose of dealing with a matter such as this. In effect he submits that it is a slip provision for correcting errors. Correcting errors where the Judge has intended to do something but by a slip or some mistake has done the opposite or something else; for example where a line has been drawn in a plan in the wrong

place, where some mistake has been made in that form which can be easily identified and then corrected. It is his submission that this is not a provision for general re-hearing of matters which have happened 10 years ago, let alone matters which have happened a 100 years ago. The fact is that since 1950 when 390A was introduced in place of former 390, the Court has regularly dealt with matters in a full re-hearing and on some occasions has re-ordered the whole matter. I believe that I have expressed concern, as other Judges have, about the tendency for what seems to be a change of mind on the part of some involved to come along and seek under s. 390A a re-hearing to have a second chance at the matter in issue.

In this case however there is unfortunately a strong case to show that the meeting itself was not properly constituted and therefore there is a real question whether the decision of confirmation by the Court has any standing at all. I think that it almost goes without saying that if the Judge on the confirmation application had been appraised of the matters that are now being canvassed before me, he would not have given confirmation but would have required the matter to be resolved again in a further meeting.

Reference was made to sub section (5) of 390A which provides that in making any amendment or variation or cancellation of an order rights or interests acquired for value and in good faith under any instrument of alienation executed before the making of the amendment or variation should stand and that the rights thereunder should not be affected. That really is to protect mortgagees and other persons who have dealt with the land thereafter and obtained rights and interests without any knowledge of the defects or errors that might have occurred in the recent or distant past. I have some doubt as to whether that would apply to persons obtaining rights under the actual alienation which is in issue. In theory that comes before the order that I might make today but it seems to me that notwithstanding the value and the good faith which

nobody has challenged in this case that would be mean in the event and perhaps in many such cases as this that there would be no grounds or jurisdiction to make any amendment or variation at all.

In light of the original draft, the meeting with the solicitor and his letter reaffirming the restriction that it does seem unlikely that at this meeting of assembled owners the parties, if fully informed, would have deleted these two restrictions in their entirety or at all.

My conclusion is that there is a mistake, there is an error and that it is appropriate that something should be done to correct it. It was proposed by Mrs. Browne that the restriction which was to be included by way of amendment ought to have been a total prohibition of assignment. That is contrary to what the solicitor actually did and it would certainly provide a great difficulty to the lessees who as I say in good faith have proceeded to take the lease, live in the premises and build a house.

Clauses 4 and 5 as provided are in my view restrictions on the assignment of a lease. They are usual provisions and although there are some particular circumstances in this matter both for and against lesser restriction than total prohibition I believe that Clauses 4 and 5 if included in the lease would be appropriate and quite proper. It does mean some restriction on the right to sell but will I think meet the justice of the case and come to what would be a fair conclusion such as can be reached now.

Clearly the eggs cannot be put back into their shell. We cannot go back to the original meeting. Things have changed and times have passed and this I believe will provide a solution which I hope will be accepted. It is one that I will impose in any event on the parties.

I make an Order therefore amending the lease by inserting in it Clauses 4 and 5 as drafted by the solicitor with effect from 1994. I direct the Registrar to execute a variation of the lease accordingly including clauses 4 and 5 as previously drafted by the solicitor. In the circumstances, unless counsel want to make submission I feel that there should be no order as to costs. I formally reserve costs.

Hon Sir Gaven CJ

CHIEF JUSTICE

Addendum:

Since delivering this oral judgment it has been brought to my attention that the question of the quorum under s.45(1) of the Act has been subject of an earlier judgment of the Court. This was in an application re Part Pokonui Sec. 107D Avarua No.362/98 in which Smith J. held that persons present by proxy were individuals entitled to vote. The land alienation in question came before me in later proceedings but the question of the quorum was not canvassed at that stage. It is to be noted that Smith J. observed that the Act ought to be amended to provide for three persons personally present at land owners' meetings.

There are now conflicting decisions of the Court which can only be resolved by the Court of Appeal, in a case before it, or by the legislature.

Hon Sir Gaven CJ