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

APPLICATION NO: 454/2017

IN THE MATTER	of Section 3 of the Declaratory Judgments Act 1994 and Section 106A of the Property Law Act 1952 (as amended by the Property Law Amendment Act 1995-96)
AND IN THE MATTER	of the land known as **PUE SECTION 130 NO. 2, AVARUA**
AND IN THE MATTER	of a deed of lease dated 3 February 1975 between the landowners and The Union Steam Ship Company of New Zealand Limited now vested in The Colonial House Limited
AND IN THE MATTER	of an application for Declaratory Orders
BETWEEN	**THE COLONIAL HOUSE LTD** Applicant
AND	**THE VAKATINI LANDS INCORPORATED** Respondent

Hearings: 17 April 2018
(Heard at Rarotonga)

Counsel: Mr Scowcroft, for the applicant
Mr Mason, for the respondent

Decision: 1 June 2018

RESERVED JUDGMENT OF ISAAC J

Introduction

[1] This is an application for declaratory orders in relation to the rent review clause in a deed of lease dated 3 February 1975 over the land known as Pue Section 130 No. 2 in Avarua.

[2] The applicant seeks orders pursuant to section 3 of the Declaratory Judgments Act 1994 declaring that:

(i) Section 106A(1)(b)(i) of the Property Law Act 1952 applies to the deed of lease dated 3 February 1975 and requires that the lessee pay a fair and reasonable ground rent to the lessors;

(ii) If application of the rent review clause at 1(b) of the deed of lease as written produces a rent which is not fair and reasonable, then pursuant to section 106A(1)(b)(i) of the Property Law Act 1952, clause 1(b) of the lease does not apply, or it applies with necessary modification so that the rent payable by the lessee is fair and reasonable;

(iii) The application of the rent review clause at 1(b) of the deed of lease to the rent review due on 1 November 2014 produces a rent that is not fair and reasonable; and

(iv) A fair and reasonable ground rent could be produced if rent was calculated in accordance with the commonly-used comparative value clause using current rental values of comparable unimproved land, rather than the capital value clause in the deed of lease.

[3] The applicant has also filed a related application pursuant to s 409B of the Cook Islands Act 1915 seeking orders determining the capital value of the land as at 1 November 2014.[1]

[1] App 268/2017.

[4] It was agreed by the parties that I would firstly determine the application for declaratory orders before consideration of the application for determining capital value as at 1 November 2014.

Background

[5] The applicant, The Colonial House Limited, is a Cook Islands company owned by Suzanne Carruthers Brown, her husband Robert Brown and daughter Pasha Carruthers. The company currently leases the land known as Pue Section 130 No. 2, Avarua.

[6] The Deed of Lease in question was entered into on 3 February 1975 by the landowners of Pue Section 130 Number 2 in Avarua (who are now incorporated as The Proprietors of Vakatini Lands Incorporated) and The Union Steam Ship Company of New Zealand. The lease granted covers an area of 8249m², being part of Pue Section 130 Number 2 and is for a term of 60 years from 1 November 1974. The Union Steam Ship Company paid consideration of $15,000 for the lease and rent was set at $200.00 per annum for the first five years.

[7] Clause 1(b) provides the rent review formula for calculation of annual rent on the basis of capital value following a valuation every five years:

> …and paying therefor: -
>
> 1. (a) FOR and during the first five years of the said term the rental of TWO HUNDRED DOLLARS ($200.00) per annum.
>
> (b) FOR and during each succeeding period of five years of the said term an annual rental calculated on the basis of **Five Dollars per centum of the Capital Value** of the said parcel of land, after deducting therefrom the value of all improvements paid for or effected by the Lessee thereon, following valuations to be made as at the first day of November in the year immediately following the expiration of each period of five years of the term hereby granted but in no case shall the rental be less than TWO HUNDRED DOLLARS ($200.00) per annum.

[8] The applicant purchased the lease in 2003 and converted the property into a restaurant called Tamarind House. Mr and Mrs Brown also built their house on site and

some accommodation for restaurant staff. The applicant paid $500,000.00 in consideration for the lease, and rent at the time of purchase was set at $2,000 per annum.

[9] The Deed of Assignment dated 22 December 2003 provides in terms of rent payments that:

> …the Assignee will at all times hereafter pay the rent at the times and in the manner provided by the Lease…

[10] On 12 March 2011, the Court ordered that rent be set at $3,000 per annum for the five years beginning November 2009.

[11] A rent review is now due for the five year period beginning 1 November 2014.

Evidence provided by the Applicant

Valuations by Mr Eggelton

[12] Mr Eggleton of Frame Group provided evidence of valuations for the subject lease in the following manner.

Valuation 1: Land Rent Review

[13] This first valuation by Mr Eggelton calculated capital value of the land in order to determine rent on the basis of the current rent review clause in the lease in question.

[14] Of particular note in the valuation is the discussion of cyclone sea surge vulnerability, for which a 20% discount was applied. Mr Eggelton noted that the land is positioned within the "A" zone of Tower Insurance's "Cyclone Map for Rarotonga", denoting that it is a highly vulnerable area subjected to regular cyclone activity and severe sea surge during cyclones. This sea surge activity has caused major erosion of the land, causing a loss of 2549m² or 31% of the original section area. This can be seen on a recent survey undertaken by Landmark Services which shows a significant portion of the land which has reverted to beach condition. At present, the usable area of the block is now 5,700m².

[15] Mr Eggelton calculated capital value of the land using the capital value of similar sized and located properties and taking into account any increases or discounts for location,

vulnerability to cyclone sea surge, land block size (where negative adjustments are applied at the rate of 10% each time the land area is doubled) and time (so that a capital value is reached for the same year).

[16] The only two properties within the CBD of Avarua which have recent determinations of capital value determined by the Court are Island Merchants' property at Taputapuatea Sec 224 & 225 Avarua and Club Raro's property at Punamaia Sec 190E2A1. Both properties are smaller with main road and beach frontage. Mr Eggelton applied the following adjustments:

	Island Merchant: Taputapuatea Sec 224 & 225	**Club Raro: Punamaia Sec 190E2A1**
Capital value	Total value of $149,000 or $103.98 per square metre	Total value of $312,000 or $77.71 per square metre
Initial adjustments for comparable terms	Remove the discount of 10% applied by the Court for "considerable rock protection" which helps to prevent Cyclone sea surge (this resulted in a 10% decrease being applied for sea surge vulnerability rather than the usual 20%). This puts starting value at $114.38psm.	Remove the discount of 10% applied by the Court to account for improvements to the land by the lessees. This puts starting value at $85.48psm.
Adjustments: size	Area of 1433m² would be doubled twice to reach comparative size, so discounted by 20%. Takes value to $91.50psm.	Area of 4137m² adjusted by 5%. Takes value to $81.21psm.

Adjustments: location	No adjustment applied.	No adjustment applied.
Adjustments: cyclone vulnerability	20% discount applied for cyclone vulnerability.	20% discount applied for cyclone vulnerability.
Adjustments: time	Capital value determined in 2013, one year adjustment applied at 2.5% (due to low inflation and CPI).	Capital value determined in 2013, one year adjustment applied at 2.5% (due to low inflation and CPI).

[17] Mr Eggelton concluded on the above calculations that the land at Pue Section 130 No. 2 has a capital value of $403,600, or $70.81 per square metre as at 1 November 2014.

[18] This would put annual rent for the Pue Section 130 No. 2 at $20,150 as at 1 November 2014.

Valuation 2: Comparable Values

[19] The second valuation completed by Mr Eggelton highlights the same aspects as the first, but notes that he had been asked to offer suggested rentals based on the "more commonly accepted formula" of current market rentals. Accordingly, he provided a list of four comparable properties to act as a guide for fair market rental as at 2014. The properties and their comparable rents were as follows:

(i) Punakiore Pt Sec 16M: rent of $0.90 per square metre at 2011. Suggested to increase by 4% for 3 years, taking it to $1.01psm.

(ii) Ngongore Pt Sec 11J: rent of $1.09 per square metre at 2015. Suggested to decrease by 4% for one year, taking it to $1.05psm.

(iii) Te Araunga Pt Sec 7C: rent of $2.00 per square metre at 2014. Suggested to decrease by 35% to account for lower land value in

Punamaia than Muri, in accordance with Judge Isaac's decision in the *Club Raro* case.[2] This takes the comparable figure to $1.30psm.

(iv) Te Ruatupa Sec 39A & 39C: rent of $2.75 per square metre in 2016. Suggested to decrease by 35% for same reason as Te Araunga and a further 4% a year to reach a 2014 comparable value, taking it to $1.65psm.

[20] Taking into account the above figures, Mr Eggelton suggested a comparable rent of $1.25 per square metre, being the medium of the four comparable values given above.

[21] This would put annual rent for Pue Section 130 No. 2 at $7,125 as at 1 November 2014.

Affidavit of the applicant, Suzanne Carruthers Brown

[22] The applicant provided further figures from previous rent review periods:

Year	**Capital Value**	**Rent**
1982 (agreement reached for rent for the period 1979-1984)		$1,200
1984	$27,600	$1,380
1989	$30,000	$1,500

[23] The applicant notes that she is not clear how rent was determined for the years between 1994 to 1999 but that rent had reached $2,000 per annum by the time they purchased it in 2003.

[24] The applicant and her husband have invested a large amount of money in their business, including borrowed funds to help fund renovation of the heritage building and the kitchen equipment when they first opened. High expenses including food and beverage costs in Rarotonga as well as power bills and other running costs mean that the business does not make much profit and some years even operates at a loss.

[2] *Club Raro v Landowners – Punamaia Section 190E2A1* (2015) CKLC, App 73/1995, 21 April 2015.

[25] Increased competition from cheap eateries and food markets around Rarotonga have also put increased strain on the business, but the applicant had hoped that they would be able to make a profit at some point in the future with careful financial management after having reduced their debt over recent years.

[26] Tamarind House is regarded by many as one of the finest restaurants in Rarotonga, but it will not be feasible to continue running it if their rent is to rise to $20,000-$30,000 per year.

[27] It was reasonable for the applicant to assume when purchasing the lease that rent increases would continue proportionate to previous increases. This assumption was reinforced in 2009 when the applicant accepted a 50% increase from $2,000 to $3,000 despite considering it steep, and assumed that any future increases could not be larger than that 50% increase.

[28] The valuation completed by Mr Eggelton assesses what would constitute "fair and reasonable" rent as at November 2014 if rent was based on comparative market values. Mr Eggelton concluded that annual rent of $7,125 would be fair and reasonable as at 2014.

[29] The applicant would be happy to pay comparable market rent at the figure suggested by Mr Eggelton of $7,125. This would still be twice the rent calculated during the previous rent review in 2009.

Evidence provided by the Respondent

Valuation by Mr Tizard

[30] The landowners provided a valuation by Mr Tizard of Curnow Tizard Limited.

[31] The valuation notes that approximately 20% of the 8249m² section is beach area, but records that it is still usable for "commercial tourist orientated purposes".

[32] Mr Tizard used following properties for comparison:

(i) Ngatairi 25A, Avarua;

(ii) Island Merchants, Taputapuatea 224 & 225; and

(iii) Club Raro, Punamaia Section 190E2A1.

[33] Mr Tizard concluded that an over discount of 25% should be applied to the Island Merchants property, giving an area rate of $78 per square metre. This discount takes into account the fact that the Island Merchants land is significantly smaller than the land in question, the determination of capital value occurred one year earlier and the beach area is not of as good quality as at Tamarind House.

[34] In terms of the Club Raro land, Mr Tizard concluded that it should have "a positive adjustment to reflect location and beach quality".

[35] The overall assessment of capital value was set at $70 per square metre or $577,000 for the net site area of 6,600m² as at 1 November 2014, and $54 per square metre or $445,000 as at 1 November 2009.

[36] This would put annual rent for Pue Section 130 No. 2 at $28,950.

Submissions of Counsel for the Applicant

[37] Counsel for the applicant submits that the annual ground rent produced by application of the rent review clause in the rent review due on 1 November 2014 is not fair and reasonable.

[38] Section 106A provides that the lessee will pay a fair and reasonable rent to the landowners. Where a clause in a deed of lease is inconsistent with the covenants implied by s 106A, the lease is varied so that it is not inconsistent. Clause 1(b) of the lease in this case has therefore been replaced or modified by section 106A(1)(b)(i), so that the lessee is required to pay only a fair and reasonable ground rent to the landowners.

[39] Unless the parties to the lease expressly agree pursuant to s 68 of the Property Law Act 1952 that s 106A is to be excluded from their lease, s 106A applies so that if the application of the rent review clause in the deed of lease does not produce a rent amount that is fair and reasonable, the rent review clause as originally drafted must be modified to produce a fair and reasonable rent.

[40] The easiest way to remedy the rent review clause in the deed and achieve a 'fair and reasonable rent' is to use the alternative rent review clause commonly used in Rarotonga whereby rent is determined by reference to current market rent of comparable, unimproved

land of a similar value, and rent is not to be less than the rent payable for the preceding five-year period. This formula has been widely accepted in the Cook Islands.

[41] This alternative formula is what a reasonable and willing landlord and a reasonable and willing tenant would agree to. Use of this clause has become standard practice in Rarotonga and parties in this case would have no reason to depart from standard practice. This formula has also been reviewed by the High Court as recently as 2015 in the *Matarangi* decision, which also sets out the factors which are to be considered when choosing the properties to be used for comparison.[3]

[42] If the current rent review clause found in the deed is applied to the land as from November 2014, rent per annum will be set at between $20,180 and $28,950 for the five years from 2014. This constitutes an increase of between six and nine times the previous rent which was determined at 2009 to be $3,000.

[43] This unprecedented increase in rent is due to a change in methodology applied by the High Court to determine capital value, coupled with huge growth in the tourism industry in the Cook Islands, neither of which the applicant could have foreseen when taking on the lease.

[44] Prior to 2015, the High Court calculated capital value simply by multiplying rent by 20.[4] Since 2015, the Court has determined capital value by comparison to leases with between 45 and 60 years of the term remaining. This new method for determining capital value has resulted in a significant increase in rent of capital value leases. It was reasonable for the applicant to assume when taking on the lease that the Court would continue the same approach to rent determination. Furthermore, any lessee entering into a lease in 2003 would have reasonably assumed that a capital value rent review clause and a comparative market rent review clause would produce a similar rent.

[45] Any lessee would plan for future rent increases on the assumption that their rent review clause would not produce an increase any larger than double the previous rent. Even a lessee who sought professional valuations and legal advice about their likely future rent

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[3] *Tuake – Matarangi Section 83H1, Arorangi* (2015) CKLC, App 513/2014, 8 May 2015.
[4] *In re Deed of Lease to Cook Islands Telecommunication Assets Ltd - Puoromea Section 49D, Avarua* (2013) CKLC, App 300/2011, 30 August; *In re Deed of Lease to Island Hotels Ltd - Puatiki Section 84B, Arorangi* (2001) CKLC, App 62/99, 14 March 2001.

liability prior to 2015 would have been unable to predict such a dramatic increase in land value and commercial activity in the last few years.

[46] The applicant is prepared to pay an increase in rent and is able to cover those expenses if their rent is determined in accordance with comparative market rentals. The company may be forced to go out of business, however, if it is required to pay such a large increase in rent as is produced under the rent review clause, as the unexpected increase in expenses will cripple the small business which operates on a small profit margin. In addition, Mr and Mrs Brown may also lose their home.

[47] Ultimately, counsel for the applicant submitted that s 106A may provide a useful "safety mechanism" for those lessees who still hold capital value leases in the instance that they find themselves "suddenly (and through no fault of their own) burdened with unexpected large rent liabilities". Counsel noted that applicants would still need to prove that the rent produced by their rent review clause was not fair and reasonable, so the Court would still have oversight in determining in which instances such an argument would succeed.

Submissions of Counsel for the Respondent

[48] Counsel for the respondent provided the following summary of submissions:

(i) Section 106A applies to the deed of lease in question, but does not have the effect of altering the rent review clause as set out in the deed;

(ii) The formula set out in the rent review clause is "fair" as it was freely agreed to by two properly-advised parties;

(iii) Even if s 106A *did* replace the existing rent review clause, rent would be determined in the same way except that the landowners may receive less than 5% of capital value when interest rates are low and more than 5% when interest rates are higher, and a ratchet clause would be implied in the lease;

(iv) There has been no change in the Court's approach to determining capital value; and

(v) The applicant's circumstances and the use to which the land is put are not relevant in the determination of rent;

[49] The deed of lease represents an agreement entered into freely by two properly-informed parties who had received independent legal advice at the time of signing. The deed includes a certificate from a solicitor of the High Court of New Zealand testifying that the effect and content of the deed had been explained to the lessors, as required by section 475 of the Cook Islands Act 1915. The Court can also assume that the requirements of s 482 were similarly complied with as the deed was confirmed by the High Court.

[50] The Court is generally reluctant to interfere with contracts entered into freely by parties who have been properly advised. The Court of Appeal determined in *Apex Agencies Limited v Cook Islands Trading Corporation* that the correct approach in the interpretation of a contract or lease is to consider the intention of the parties from the words used.[5] Where the wording of a provision is clear and unambiguous, the Court must give effect to the ordinary meaning of their words as that is what the parties are taken to have agreed to.

[51] Justice Grice held in the *Lineen* case that "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".[6] Judge Savage similarly stated in *Are Tamanu Villas* that the Court should "tread carefully before interfering with the terms of what is a commercial lease... (and) should follow the terms of the lease between the parties unless there are exceptional circumstances to deviate from the terms of the lease contract".[7]

[52] The lease in question in this case is identical to the leases which the Court dealt with in *Club Raro* and *Are Tamanu Villas,* with the exception that those leases provided for ten-yearly rent reviews rather than five-yearly. In both cases, the Court refused to interfere with the terms of the leases freely entered into by the parties.

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[5] *Apex Agencies Limited v Cook Islands Trading Corporation* (2015) CKCA 1, App 8/2013, 20 March 2015.
[6] *Lineen v MacQuarrie – Vaitamanga Holdings Limited* (2008) CKLC 47, App 3/2008, 26 September 2008 at [47].
[7] *Are Tamanu Villas Limited v Landowners – Maungarua Section 41, Anaunga, Aitutaki* (2015) CKLC, App 285/2012, 24 April 2015 at [15].

[53] There is nothing unusual about the formula set out in this deed, and nothing inherently unfair about rent determined by reference to capital value. As pointed out by the applicant, the approach of taking five percent of the land valuation after deducting the value of any improvements made to the land is a commonly-used approach for leases in the Cook Islands.[8]

[54] The principles of statutory interpretation have been summarised in statements by Justice Grice of the High Court in *Lineen v McQuarrie – Vaitamanga Holdings Limited* and *Mervin Communications Limited v Telecom Cook Islands Limited*.[9] These statements confirm that a "purposive" approach must be taken to statutory interpretation. The *Lineen* case also provides that, in the case of s 106A, evidence from Hansard debates at the time of the passing of the amendment suggest that the intent of this section was to benefit native landowners. It would therefore be against the intent of the legislation to allow lessees to use s 106A to argue for a lesser annual rent.

[55] The applicant in this case is asking the Court to do the very opposite of what the Court has ascertained to be the intent of the legislation. The applicant seeks to reduce the amount of rent which the lessors would receive but for s 106A, but the intent of s 106A is to create a "minimum standard" to ensure that lessors get *no less than* a "fair and reasonable ground rent". The declaratory orders sought by the applicant are contrary to the underlying objective of the legislation and would seemingly ignore the lessor's interest.

[56] The applicant assumes that s 106A overrides the formula for rent review set out in the deed, and argues that a different formula must be used in order to achieve a 'fair and reasonable' rent as any rent based on capital value cannot produce a rental value which is 'fair and reasonable'. It is clear, however, that this is not how s 106A applies.

[57] Section 106A merely implies covenants which are to be read into the lease and interpreted alongside and in the context of the terms agreed to by the parties. In this case, the formula set out in the rent review clause is clear and unambiguous and must prevail. That formula must be applied in a 'fair and reasonable' manner to produce rent which is consistent with the bargain reached between the parties. The implied covenants set out in s

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[8] *Are Tamanu Villas Limited,* above n 7; *Club Raro Limited,* above n 2.
[9] *Lineen v MacQuarrie,* above n 6; *Mervin Communications Limited v Telecom Cook Islands Limited* (2008) CKHC 30, App 2/2008, 29 October 2008.

106A are not intended to create uniformity across contracts or inhibit the parties' ability to bargain, and will not override terms freely entered into by the parties.

[58] The applicant suggested that there was a change in methodology used by the Court in 2015 for capital value which has resulted in increased rental for lessees with capital value leases. An alternative view is that, following the issuing of a Practice Note dated 9 October 2013, the Court has required professional valuations or other expert evidence to be filed with all applications for rental determination on commercial properties. It is the consequent improvement in the quality of evidence of appropriate rent determinations through the use of professional valuations, alongside the increase in commercial activity on the island, which has made figures for the sale of leases (which are the best evidence of capital value) more widely available and able to be used in rental determinations.

[59] It is unlikely that such a large company as The Union Steam Ship Company would have misunderstood the rental formula set out in the rent review clause, but rather it simply would not have conceived how much Rarotonga would develop in the next forty years and how rapidly the value of land would increase. The applicant has benefitted from this economic growth through their business and should not now be able to deny the landowners their share of it.

[60] The proposed increase in rent as from 2014 simply suggests that the amount of rent the landowners have been receiving in the past few years has not been keeping up with the value of their land, and they should not now be deprived of future gain from their land simply because the applicants have previously been benefitting from a good deal. This would not be in the spirit of s 106A.

[61] The capital value for this section has not yet been determined for the five years beginning 1 November 2014, and yet the applicant is submitting that the rent produced by the rent review clause is not fair and reasonable. The applicant must therefore be arguing that it is impossible for a capital value rent review clause to produce a fair rental, even though this is a common formula present in many leases throughout the Cook Islands.

[62] Further, to follow the applicant's argument would be to open up every lease in the Cook Islands to ongoing review of its rental, which was not intended by s 106A. Rather s 106A is aimed at fairness in interpreting the bargain made between the parties in order to ensure that landowners receive fair gain from the use of their land.

[63] Counsel provided a copy of the lease held by Aquarius Pacific Hotels over the land known as Cemetary Reserve 206A1, Avarua, Rarotonga on which The Islander Hotel sits. The Islander is primarily a restaurant and bar with a few rooms of backpacker accommodation. Mr Mason noted that due to the ratchet clause in the lease, annual rent of the Aquarius land cannot be less than $40,000. This is significantly higher than either valuation of $20,150 or $28,950 in this case. Under Aquarius Hotels' lease, rent is based on current market rentals for comparative unimproved land, and this is the very formula the applicant considers to produce fairer rents.

[64] As was confirmed by Mr Tizard during cross-examination, the circumstances of the applicant are an irrelevant consideration when determining rent under a lease. Matters such as how the applicant uses the land, the applicant's financial situation, how they choose to run their business and what kind of profit margins result, are not matters to be taken into account when determining annual rent. It is not the Court's role to amend leases to prevent struggling businesses from 'falling off the economic ladder'.

[65] Counsel also referred to a New Zealand Supreme Court case *Mandic v The Cornwall Park Trust Board* with similar facts, where rent of a perpetual lease was to rise from $2,350 per annum to $40,000 per annum upon application of the rent review formula provided in the deed. In this case, Justice William Young stated:[10]

> We accept that where a rent-fixing proposition in a lease is in general terms (for instance providing a "fair rent"), the valuer must assess rent which reflects the terms of the lease... But the rent-fixing formula in this case is not of that character. It is intended to provide the lessor with an annual return based on the value of the land. The fairness of this return (five percent of the residual) in the context of the lease as a whole, including all restrictions imposed on the lessees, must be taken to have been settled when the leases were first taken up".

If this approach was to be applied to the lease in question in this case, it must be assumed that the "fairness" of the formula was settled when the deed was entered into and the formula set out in the deed must be applied.

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[10] *Mandic v The Cornwall Park Trust Board* [2011] NZSC 135 at [73].

Law

[66] Section 3 of the Declaratory Judgments Act 1994 allows for applications to the High Court for declaratory orders to determine any question of construction or validity of any enactment under which a person claims to have acquired a right or is otherwise interested in.

[67] Section 106A of the Property Law Act 1952 provides:

> **106A Further covenants included or implied in leases**
>
> (1) In every lease of Native freehold land 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) if 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 after-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 end in Priority to any unsecured creditors of the lessee.

(2) This section applies:

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

(g) 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

(h) 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.

[68] In *Lineen v MacQuarrie,* Justice Grice established a purposive approach to statutory interpretation of Cook Islands legislation:[11]

> 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… This does not mean that the Court can attach to the words meanings that they are in capable of bearing. That would be to rewrite the provision not to interpret it…
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> …
>
> The Constitution allows for this approach in the interpretation of Cook Islands enactments. It provides at clause 65(2):
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> > "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

[11] Above n 6 at [27],[28] and [30].

> attainment [of the object] of the enactment or provision thereof according to its true intent, meaning and spirit".

[69] Her Honour similarly stated in *Mervin Communications Limited v Telecom Cook Islands Limited:*[12]

> The modern trend in statutory interpretation of legislation is toward a "purposive" interpretation. The words are to be read in their context and with a view to giving effect to the purpose of the legislation. However the actual words remain the most important single factor in statutory interpretation. The most natural meaning of those words in their context taking into account their purpose should be sought.

[70] Justice Grice reviewed excerpts from the Hansard debates during the passage of s 106A in the *Lineen* case. The following statements made by Cook Islands Members of Parliament are relevant:[13]

> Hon T Matapo: *"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".*
>
> Hon Vaina Tairea: *"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.*

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[12] *Mervin Communications Limited v Telecom Cook Islands Limited,* above n 9 at [18].
[13] Hansard debate as quoted in *Lineen v MacQuarrie,* above n 6 at [31].

> *…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".*
>
> 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?"*

[71] On the basis of this debate, Justice Grice concluded that: [14]

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

[72] The Court of Appeal endorsed this approach in *The Green Room Limited v Landowners of Nukupure Section 3D1 Ngatangiia*:[15]

> First, as already noted, the purpose of the 1996 enactment of s. 106A was to benefit Cook Islands native landowners by including or implying covenants in their leases designed to increase their potential returns from long-term leases of their land. This purpose was implemented by s. 106A(1) which expressly requires leases of Native freehold land, used for commercial or industrial purposes, to have the prescribed covenants included or implied in them.

Discussion

[73] This is an application for declaratory orders. The question which I must determine is whether s 106A of the Property Law Act 1952 applies to the Deed of Lease in question,

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[14] Above n 6 at [30] and [32].
[15] *Green Room Ltd v Landowners of Nukupure Section 3D1 Ngatangiia* [2016] CKCA 1, App 9/2015, 16 June 2016 at [67].

and if so, what effect this has on the determination of rent under the rent review clause in the Deed of Lease.

[74] In relation to the first issue, it is not disputed that s 106A applies to the subject lease. Where the parties differ, however, is what effect s 106A has on the rent review clause and the determination of rent.

[75] The applicant purports that the application of the current rent review clause produces rent which is unfair and unreasonable, and s 106A therefore acts to modify that clause. The applicant further suggests that, in this case, the most appropriate modification is to determine rent in accordance with comparable market values, in effect replacing the capital value rent review clause with a comparative value clause.

[76] The applicant also submits that the practice note of this Court dated 9 October 2013 which required expert valuation evidence to be filed with applications for rental determination of commercial properties has led to an unprecedented increase in rental values.

[77] On the other hand, the respondent submits that s 106A acts as an implied covenant in the lease but does not override the terms and conditions negotiated in the lease. Section 106A was not intended to standardise contracts or remove the ability of properly-advised parties to negotiate. Rather, the respondent submits that s 106A is to be read alongside the capital value rent review clause in the lease to require the clause to be applied fairly and reasonably, but in accordance with the terms negotiated. The respondent also maintains that if the applicant's argument is accepted, it would open up every lease in the Cook Islands to ongoing review. This was not intended by s 106A, which was aimed at interpreting the bargain between the parties to ensure the landowners receive a fair gain for deals made in relation to their land.

[78] The respondent also considers that the practice note of 9 October 2013 has led to an improvement in the quality of the evidence before the Court for rental determinations through the use of professional valuations. This has made available figures for sales of leases, which is the best evidence of capital value.

[79] When considering the arguments before me, I am guided by decisions of the Cook Islands High Court and Court of Appeal.

[80] In *Lineen v MacQuarrie*, Justice Grice explains how s 106A is interpreted in accordance with the purposive approach:

> 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.[16]
>
> …
>
> 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.[17]

[81] The Hansard debate referred to by Justice Grice in the *Lineen* cases suggests that s 106A was intended to protect Cook Islands landowners who had previously been missing out on potential financial gains from on-sale of leases of their land. In particular, it appears that from the debate that the section was specifically aimed at financial gains from land which was leased for commercial purposes or which was commercially developed.

[82] As set out earlier, the Court of Appeal in the *Green Room* case endorsed this approach by specifically stating that s 106A was to benefit Cook Island native landowners to increase their potential return from long-term leases of their land.[18]

[83] Therefore, in my view, any application of s 106A must be approached with that intention in mind. That is, that s 106A was implemented to assist native landowners to increase the returns from long-term commercial leases of their land.

[84] I do not consider that s 106A can be used to create uniformity across all lease contracts in the Cook Islands, or to prevent parties freely negotiating the terms of their leases.

[85] The rent review clause in the subject lease is not unusual, and not inherently unfair. It is a standard rent review provision used in many leases in the Cook Islands.

[86] The Courts have been reluctant to interfere with such contracts. This is demonstrated in the *Ara Tamanu Villas* case where Judge Savage said that the Court should

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[16] Above n 6 at [31].
[17] Above n 6 at [37].
[18] Above n 15.

"tread carefully before interfering with the terms of what is a commercial lease… (and) should follow the terms of the lease between the parties unless there are exceptional circumstances to deviate from the terms of the lease contract".[19] I also stated this in the *Club Raro* case.[20]

[87] There is nothing exceptional about this case and the practice note of 9 October 2013 has not created a situation which is unfair to the parties. Rather, the availability of professional evidence now required in terms of the Court's practice note has allowed for the intent of s 106A, which was inserted for the landowners' benefit, to be correctly recognised.

[88] I therefore do not consider that Parliament's intent can be stretched to allow s 106A to be used by a lessee to override the rent clauses freely negotiated in a lease when it was clear that Parliament intended that s 106A would provide an increased benefit to Cook Islands landowners in the commercial leasing of their land and allow them to benefit from on-sale of leases.

Decision

[89] For the reasons set out above, the application for declaratory orders is dismissed.

[90] The application 268/2017 to determine the capital value can now be scheduled to be heard before Judge Coxhead in July at Rarotonga.

A copy of this decision is to go to all parties.

Dated at Gisborne, New Zealand this 1st day of June 2018.

W W Isaac
JUSTICE

[19] Above n 7 at [15].
[20] Above n 2 at [42]-[43].