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

**APPLICATION NO.: 27/2022**

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| UNDER | the Declaratory Judgments Act 1994 |
| AND<br>IN THE MATTER | of the land known as KAINGARA SECTION 10D1, NGATANGIIA |
| AND<br>IN THE MATTER | of an application for Declaration Order by PIERRE KAINUKU |
| BETWEEN | PIERRE KAINUKU<br>**Applicant** |
| AND | RORO DANIEL<br>**First Respondent** |
| AND | SONNY RORO JUNIOR DANIEL<br>**Second Respondent** |

Hearing dates: 5 and 6 July 2023
10 and 13 July 2023

Appearances: Mr T Moore for Applicant in 27/2022
Ms T Browne for Respondents in 27/2022
Ms T Browne and Ms H Ellingham for Applicant in 659/2022
Mr T Moore for Respondent in 659/2022

Decision: 8 May 2024 (NZT)

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**JUDGMENT OF THE JUSTICE C T COXHEAD**

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*Proceedings continued overleaf*

*Proceedings continued*

**APPLICATION NO.: 659/2022**

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| UNDER | the Property Law Act 1952 |
| AND<br>IN THE MATTER | of the land known as KAINGARA SECTION 10D1, NGATANGIIA |
| AND<br>IN THE MATTER | of an application for Relief against forfeiture by RORO MANA DANIEL and MAUI DANIEL |
| BETWEEN | RORO DANIEL<br>**First Applicant** |
| AND | SONNY RORO JUNIOR DANIEL<br>**Second Applicant** |
| AND | MAUI DANIEL<br>**Third Applicant** |
| AND | PIERRE KAINUKU<br>**Respondent** |

## Introduction

Pierre Kainuku has applied to the Court for declarations that two leases and an occupation right held over Kaingara Section 10D1 blocks by Roro Daniel and Sonny Roro Junior Daniel are at an end. The Daniels have opposed these declarations and filed an application for relief against forfeiture.

## Background

[1] As at 15 November 1994 there were two owners of the Kaingara Section 10D1 land: Tangaroa Te Amaru and Ngamata Te Amaru. They owned the land equally.

[2] Tangaroa is now deceased and has been succeeded to by the applicant, Pierre Kainuku, along with seven others. Mr Kainuku is the court-appointed co-trustee for Tangaroa, tasked with sorting out his landholdings on behalf of the co-successors.

[3] Ngamata presently resides in the Cook Islands. She has no issue.

[4] On 15 October 1998 a deed of lease ("the 1998 lease") was issued by the landowners to Roro Daniel and his wife Akaiti, over part of Kaingara Section 10D1, Ngatangiia, comprising an area of 2426m$^2$. The lease was for a term of 60 years, commencing on 1 October 1998.

[5] On 15 March 1999, another deed of lease ("the 1999 lease") was issued by the landowners to Roro Daniel and Akaiti, over an additional part of Kaingara Section 10D1, Ngatangiia, also comprising an area of 2426m$^2$. The land block adjoins the land leased under the 1998 lease. The lease was for a term of 60 years, and also commenced on 1 October 1998.

[6] Following Akaiti's passing in 2010, the deeds were assigned solely to Roro Daniel on 12 October 2012 (for the 1998 lease) and 14 December 2018 (for the 1999 lease).

[7] On 6 May 2015, Roro Daniel purported to execute a deed of surrender of the 1998 lease. An occupation right order was granted by the Court to Sonny Roro Junior Daniel, Roro Daniel's son, over the same parcel of land formerly covered by the 1998 lease.

[8] On 1 January 2016, Mr Kainuku put the lessees on notice following non-payment of rent.

[9] Sometime in 2020, Sonny Roro Junior Daniel commenced construction on the land over which he had an occupation right. However, only the foundation piles have been completed so far.

[10] The 1998 and 1999 leases were officially forfeited for non-payment of rent, with the posting on the land of the notices of forfeit on 24 June 2020.

[11] Sonny Roro Junior Daniel, Roro Daniel, and his daughter Maui Daniel have made their own application under s 118(2) of the Property Law Act 1952 for relief against forfeiture of the deeds of leases.

[12] On 5 and 6 July 2022, I heard this application in Court. Closing submissions were delivered on 13 July 2023.

[13] The transcript of the hearing was provided to me on 23 November 2023.

**Declarations sought**

[14] Mr Kainuku seeks the following declarations from the Court:

(a) That the 1998 lease remained afoot as at:

(i) 7 May 2015, being the date on which the purported occupation right order granted to Sonny Roro Junior Daniel order was made; and

(ii) 24 June 2020, being the date that the 1998 (and the 1999) lease was forfeit for non-payment of rent.

(b) In respect of the 1998 lease, that the covenants implied and included in s 106A of the Property Law Act 1952 (as amended by the Property Law Amendment Act 1995-96) are implied and included in the 1998 lease.

(c) In respect of the 1998 lease, that there are 5-yearly rental reviews currently outstanding as at 1 October 2003, 2008, 2013 and 2018.

(d) In respect of the 1998 lease, that the lease is at an end.

(e) In respect of the 1999 lease, that the covenants implied and included in s 106A of the Property Law Act 1952 (as amended by the Property Law Amendment Act 1995-96) are implied and included in the 1999 lease.

(f) In respect of the 1999 lease, that the lease is at an end.

(g) That the occupation right order granted to Sonny Roro Junior Daniel on 7 May 2015 is at an end.

[15] Sonny Roro Junior Daniel, Roro Daniel, and his daughter Maui Daniel seek orders:

(a) Dismissing the application as it relates to the occupation right order granted to Sonny Roro Junior Daniel.

(b) Dismissing the application as it concerns the rent arrears relating to the 1998 lease and the 1999 lease.

[16] Sonny Roro Junior Daniel, Roro Daniel, and Maui Daniel have made their own application under s 118(2) of the Property Law Act for relief against forfeiture of the deeds of leases.

[17] The issues I have to determine are:

(a) Have the leases been forfeited and therefore at an end?

(b) Is the occupation right at an end?

(c) Should relief against forfeiture be granted?

## The 1998 lease

[18] The 1998 lease was issued to Roro Daniel and Akaiti Daniel, over land purporting to be the sole entitlement of Ngamata Te Amaru.

[19] The purporting of sole entitlement is set out in cl 11 of the 1998 lease. It states:

> THE Lessors hereby agree that the said land is the entitlement of NGAMATA TE AMARU and accordingly the consideration of $12,000.00 and any rental paid pursuant to this Deed be paid to the said NGAMATA TE AMARU.

[20] In May 2015, Roro Daniel executed a deed of surrender in respect of the 1998 lease to surrender the lease back to the landowners. However, Ngamata Te Amaru was not involved in executing the deed of surrender. Sonny Roro Junior was granted an occupation right over the area of the 1998 lease.

[21] After the surrender, Sonny Roro Junior continued to make some annual payments of $200.00. However, he also stated that he considered the lease had been surrendered, and he was just paying out of courtesy and family values.

*Occupation right to Sonny Roro Junior Daniel*

[22] An occupation right was granted on 7 May 2015 (over the area of the 1998 lease), on the basis that the lease was surrendered.

[23] The conditions of the occupation right included:

> [3] THAT the construction upon the said land of the dwelling shall be commenced within 5 years and completed within 7 years from the date of this order: Provided however that this period may upon application being made to the Court be extended by [a] period not exceeding 3 years.
>
> [4] THAT the Order shall lapse automatically upon failure to comply with condition (3) above.

**The 1999 lease**

[24] The 1999 lease was issued to Roro Daniel and Akaiti Daniel, over land purporting to be the sole entitlement of Tangaroa Te Amaru.

[25] The purporting of sole entitlement is set out in cl 10 of the 1999 lease. It states:

> THE Lessors hereby agree that the said land is the entitlement of TANGAROA TE AMARU and accordingly the consideration of $10,000.00 and any rental paid pursuant to this Deed be paid to the said TANGAROA TE AMARU.

[26] For the 1999 lease, Roro Daniel stated that the payments were not rent, they were "gratitude".

[27] By deed dated 14 December 2018, part of the 1999 lease was assigned to Roro Daniel's daughter, Maui Daniel, comprising an area of 1141m$^2$. Roro Daniel retained the interest in the remaining area of land. No notice was given of this assignment. There has been no evidence presented by the respondents to show that the landowners consented to this assignment, as required by paragraph 4 of the lease.

*Forfeiture*

[28] The applicant states that as at 24 June 2020, the lease was forfeit for non-payment of rent.

[29] On 24 June 2020, two notices of forfeit (one for each lease) were posted by Travis Moore, agent for the landowners. Each notice of forfeit provided these grounds:

> The Lessee has failed to pay the rentals owing under the Lease as at:
>
> 1 October 1998 thru 1 October 2019 @ $200.00 per annum for a total sum due as of the date of this notice of: $4,200.00 (Four Thousand Two Hundred Dollars and no/cents)

**Submissions of Mr Kainuku**

[30] The applicant applies under s 3 of the Declaratory Judgments Act.

[31] The applicant submits that the 1998 lease, the 1999 lease and the occupation right are all at an end. The leases were forfeit for non-payment of rent as at 24 June 2020. Furthermore, the occupation right has automatically lapsed.

[32] Furthermore, the applicant submits that the provisions contained in s 106A of the Property Law Act 1952 apply to the leases. This argument is based on the fact that the clause excluding provisions of Property Law Act was struck out of the leases.

[33] This means that the Property Law Act is applicable to the leases. Of particular relevance is s 106A(1)(c), which requires that the amount of rent shall be reviewed at least every 5 years. Therefore, there are outstanding rental reviews from 2003, 2008, 2013 and 2018.

**Submissions of Roro Daniel and Sonny Roro Junior Daniel**

*1998 lease*

[34] The respondents argue that the applicant has no standing to challenge the 1998 lease. The area of the 1998 lease (and the occupation order), is the entitlement of Ngamata Te Amaru. The 1998 lease dictated that the area was the entitlement of Ngamata, and it is for her to dictate or to agree to the occupation right of that same land.

[35] They say that the applicant has no standing because he has no interest in the 1998 lease; he only has rights to Tangaroa Te Amaru's interests.

*Occupation right*

[36] Because the occupation right is over the same land as the 1998 lease, the respondents say that their argument about the applicant's lack of standing applies to the occupation right as well.

[37] Alternatively, the respondents submit that if the Court finds that the applicant does have standing, then it should be found that the Court lacks jurisdiction under the Declaratory Judgments Act 1994 to make the order sought in respect of the occupation right.

[38] Regarding the applicant's argument that the occupation right is automatically at an end because construction has not been completed within seven years, the respondents argue that the reason construction was halted was because of the proceedings brought by the applicant.

*1999 lease*

[39] The respondents accept that the provisions of s 106A of the Property Law Act 1952 apply to the 1999 lease.

[40] The respondents are willing and able to pay rental arrears on the 1999 lease, and have applied for relief against forfeiture.

**Discussion**

*Standing*

[41] The respondents argue that the applicant has no standing to challenge the 1998 lease and because the occupation right is over the same land as the 1998 lease, the respondents say that their argument about the applicant's lack of standing applies to the occupation right as well.

[42] Cook Islands legislation is silent on the issue of standing, but there has been some case law which has considered the issue.

[43] In *Re: Puia*, Isaac J stated the well-settled concept of standing in the law – that a party must have a sufficient interest in or be sufficiently affected by the proceedings in order to have a right to be heard in court.[1]

[44] In *Turepu - re Kaingavai Section 49C2B1*, it was argued that the objectors were not owners of the land, in that they are not named as individuals on the title, therefore they should not have standing to dispute decisions in relation to the land.[2] The objectors were Ngati Maoate Kopu, but the land was owned solely by the holder of mataiapo title for Ngati

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1 *Re: Puia* [2017] CKLC 4 App 588/2012 and 228/2016 (25 August 2017) at [23].
2 *Turepu - re Kaingavai Section 49C2B1* [2022] CKLC 4 App 353/2021 & 354/2021 (28 June 2022).

Maoate, Kiriau Turepu. However, the Court stated that "Given the collective nature of land ownership, the Land Division of the High Court has taken a flexible approach when considering matters of standing."[3] The objectors were found to have standing because the lands in contention are within the traditional Kopu area of Ngati Maoate and therefore Ngati Maoate Kopu will be materially affected by the outcome of this application.

[45] In *Manuela v Tini*, the applicants were found to not have standing because they were not owners of the land, they were just lessees.[4] Their lease did not include the area that was the subject of the contested deed of variation, therefore they did do not have a right or interest in the property that was the subject of the order and as such, had no standing to bring an application to annul that order. In comparison with the *Manuela v Tini* decision, the applicant in this case does have an ownership right. Even if the lease was not signed, *Manuela v Tini* demonstrate that it is not the lessee rights that determine standing.

[46] Both Ngamata Te Amaru and Tangaroa Te Amaru had entitlement to all of the profit of the land, even though they only had a 50 per cent interest in the land. The entitlement clause in the respective leases in favour of Ngamata or Tangaroa could not have had the effect of a de facto partition of the land for the 60-year term of the 1998 lease. Put another way, the entitlement clause, while providing that each of the respective owners would receive rent in terms of a certain area of the land, did not change how the land continued to be held by the two owners. The land was held by the owners equally, but their respective areas were undefined and therefore each owner had an interest in the whole area of the land, not just a specific part of it.

[47] As an owner the applicant retains an interest in the land and therefore still retains standing to bring the actions that the applicant has brought.

[48] This also extends to the applicant having standing regarding the occupation right.

*Jurisdiction to make declarations under the Declaratory Judgments Act 1994*

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3 *Turepu* at [31].

4 *Manuela v Tini* [2023] CKLC 4; Application 1139 of 2022 (3 October 2023).

[49] The respondents point to the case of *Ellena Tavioni and Others v The Cook Islands Christian Church Incorporated of Avarua (Tavioni)*, where the Court determined that it did not have jurisdiction to make declarations under the Declaratory Judgments Act 1994 regarding the validity of historic court orders.[5] In that case, Isaac J declared that the declaratory judgments jurisdiction cannot be exercised to resolve an issue that is partly related to fact and partly related to law.[6] The matters at issue must be strictly questions of legal interpretation to fall under the Declaratory Judgments Act jurisdiction.

[50] The applicable law to the declaration that the occupation order is at an end is s 3 of the Declaratory Judgments Act 1994. The relevant part of that section provides:

> **3. Declaratory orders on originating summons**
>
> (1) Where any person –
>
> (a) has done or desires to do any act, the validity, legality, or effect of which depends on the construction or validity of any enactment, or any deed, will, or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or
>
> (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 regulation, bylaw, deed, will, document of title, agreement, memorandum, articles of instrument, or of any part thereof.

[51] In *Tavioni*, Ms Tavioni filed an application pursuant to s 390A of the Cook Islands Act 1915, seeking an order cancelling the 1904 orders - the 1904 orders were an order confirming the alienation of Tepuka Section 106C, an order vesting title to various lands, including Tepuka, an order that Makea Ariki held a life interest in the land, and an order cancelling that life interest order:[7]

[52] Isaac J set out that s 3 of the Declaratory Judgments Act provides that a declaratory judgment can only be made in relation to the following instruments:[8]

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5 *Ellena Tavioni and Others v The Cook Islands Christian Church Incorporated of Avarua* (Application 196/14), 24 November 2016.

6 At [29].

7 *Tavioni v Cook Islands Christian Church Incorporated of Avarua* [2016] CKLC 2; (Application 196.2014), 24 November 2016.

8 *Tavioni* at [22].

> any enactment, or any deed, will or document of title or, any agreement made or evidenced in writing or any memorandum or articles or association of any company or body corporate or any instrument prescribing the powers of any company or body corporate.

[53] Isaac J found that a Court order did not fit any of these categories.

[54] In *Ariki*, Isaac J reaffirmed that a Court order is clearly not one of the categories set out in s 3(1) of the Declaratory Judgments Act and whether the purpose of the declaratory order is to invalidate the order or interpret it, the answer is the same. To decide otherwise would be to look past the meaning of the words in that section and the intention of Parliament in omitting orders from the list of matters subject to declaratory judgment.[9] Therefore, Isaac J held that his decision in *Tavioni* stands – a Court order is not subject to the Declaratory Judgments Act.

[55] The Court has previously, particularly where the parties' consent to the cancellation, granted orders declaring an occupation order to be at an end. In *Tuoro v Toeta*, the Court stated:[10]

> In my view there are terms and conditions within the Occupation Right which could depending on the facts lead the Court to make a Declaratory Order declaring that the Occupation Right was at an end.

[56] The Court of Appeal in *Nicholas v Nicholas* agreed that the Court does have the power to cancel an occupation right made under s 50:[11]

> We also consider that Coxhead J was right to assume the power to cancel an occupation right made under s 50 [of the Cook Islands Amendment Act 1946]. As noted above, the legislation suffers from some of the same criticisms as the Occupation Order 2001 itself in that it lacks many machinery terms. We agree with the approach taken by Coxhead J (at paragraphs [83] to [86]) and the authorities which His Honour cited.

[57] In *Turepu – re Kaingavai Section 49C2B1*, there was an application made under s 3 of the Declaratory Judgments Act 1994, seeking a declaration that an occupation order was at an end. The occupation right was granted to Barbara Chitty in 1985 on the condition she built a home on the land, which was duly built. Barbara passed away in 2018 and the

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9 *Ariki, In re* [2019] CKLC 11; Application 104 of 2018 (20 May 2019) at [26].
10 *Tuoro v Toeta* [2015] CKLC 2; Application 47.11, 391.11 (29 April 2015) at [19].
11 *Nicholas v Nicholas* [2019] CKCA 2; CA 8 of 2018 (7 July 2019) at [78].

occupation order did not extend the right to her successors. The Court therefore declared that the occupation order in favour of Barbara Chitty was at an end.[12]

[58] In *Nicholls v Karika*, the applicant sought a declaratory order cancelling occupation rights, pursuant to s 3 of the Declaratory Judgments Act 1994, on the basis that the orders have lapsed, as the occupants had not complied with the terms and conditions specified in the orders to build within five years.[13] There was no contention between the parties over the question of whether the two existing occupation rights over the land had lapsed. The Court therefore made orders cancelling the two occupation rights orders, declaring that the occupation rights had lapsed and were at an end.[14]

[59] While these later cases have not directly referred to *Tavioni*, they have established authority for the fact that occupation orders can be declared to be at an end by s 3 of the Declaratory Judgments Act. The Court clearly has the ability not necessarily to cancel orders which were still valid and in operation, but to declare that orders are at an end by virtue of their own terms.

[60] Therefore in situations where the occupation right has clearly lapsed as a matter of law given the conditions of the Court order have not been satisfied, the Court evidently has the ability to declare that the occupation right to be at an end by virtue of its own terms.

*The occupation right*

[61] In this situation, even if the 1998 lease was validly surrendered it is clear that the occupation right is at an end.

[62] Originally, the application was to declare the occupation right to be a nullity, because, it was argued, that the surrender of the 1998 lease was invalid.

[63] However, under its own terms, the occupation right has automatically lapsed. This is because Sonny Roro Junior Daniel has not completed construction of a dwelling within

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12 *Turepu - re Kaingavai Section 49C2B1* [2022] CKLC 4; Application 353/2021 & 354/2021 (28 June 2022).

13 *Nicholls v Karika* [2020] CKLC 8; Application 123 of 2019 (22 December 2020).

14 *Nicholls v Karika* at [57].

seven years of the date of commencement, as required by cl 3 of the conditions. Both Sonny and his father confirmed in the Court hearing that the construction of the dwelling has not been completed, and so far only the foundations have been partly finished.

[64] Clause 3 has not been complied with and therefore, the occupation right automatically lapsed on 7 May 2022.

*1988 lease*

[65] The first respondent accepts that the purported deed of surrender has no legal effect and, accordingly, the 1998 lease remained active until the date of forfeiture.

[66] A lessee cannot unilaterally surrender a leasehold estate. In this case, there is no evidence of either lessor executing the deed of surrender, even though ample opportunity has been provided for the respondents to produce this evidence. Therefore, the lease was not surrendered.

[67] On 24 June 2020 the 1998 was forfeit for non-payment of rent. Mr Daniel has failed to remedy the breach by paying the rents due.

*The 1999 lease*

[68] The purported part-assignment of the 1999 lease from Roro Daniel to his daughter Maui was carried out without the consent of the landowners and without offering the landowners the right of first refusal.

[69] No evidence has been presented by Roro Daniel to show that the landowners consented to the assignment as required by paragraph 4 of the 1999 lease.

[70] On 24 June 2020 the 1999 lease was forfeit for non-payment of rent. Mr Daniel has failed to remedy the breach by paying the rents due.

## Relief against forfeiture

[71] Roro Daniel and Maui Daniel have applied for relief against forfeiture and indicated their willingness to pay the rental arrears, if any, under the 1998 lease and the 1999 lease.

*Submissions of Roro Daniel and Maui Daniel (the relief applicants)*

[72] The relief applicants, Roro Daniel and Maui Daniel, submit that they are willing and able to pay the rent which is in arrears. They argue that it is accepted practice in relief against forfeiture law that if the lessee or tenant is willing and able to pay then normally relief will be granted.

[73] The relief applicants say that the amount owing should be less the annual $200 contributions they have already paid to the landowners. They have provided receipts as to those payments. Roro Daniel gave evidence that he was not able to find all of the receipts, as some documents had been lost or destroyed following his wife's death.

[74] The Daniels submit that their interests are adversely affected by the forfeiture.

## Decision on relief against forfeiture

[75] The general principle upon which the discretion to grant relief is exercised was described by Jenkins LJ in *Gill v Lewis*:[15]

> ...save in exceptional circumstances, the function of the Court in exercising this equitable jurisdiction is to grant relief when all that is due for rent and costs has been paid up, and (in general) to disregard any other causes of complaint that the landlord may have against the tenant. The question is whether, provided all is paid up, the landlord will not have been fully compensated; and the view taken by the Court is that if he gets the whole of his rent and costs, then he has got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant, and so forth, are, generally speaking, irrelevant.

[76] In *Studio X Ltd v Mobil Oil New Zealand Ltd*, Hammond J comprehensively considered the English and New Zealand cases on the discretion to grant relief against forfeiture:[16]

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15 *Gill v Lewis* [1956] 2 QB 1 at 13-14.

16 *Studio X Ltd v Mobil Oil New Zealand Ltd* HC Auckland CP381/95, 12 June 1996.

> A number of factors had to be considered in exercising the discretion to grant relief. These included: whether the breach had been deliberate; whether the breach had been beyond the tenant's control; whether the breach had involved an immoral or illegal use and whether the tenant had made or would make good the breach of the covenant or was able and willing to fulfil his obligations in the future; the conduct of the landlord; the personal qualifications and financial position of the tenant; sometimes the position of the third parties; the gravity of the breach; whether it had occasioned lasting damage to the landlord; and the proportionality of damage suffered by the landlord compared to the advantages if no relief was granted.

[77] In *Detour Clothing Ltd v Star Five Ltd*, the New Zealand High Court noted that while the factors set out in *Studio X* provide helpful guidance, they do not constitute a checklist that must be applied in every case.[17] Instead, the Court is required to isolate and weigh those factors that are relevant to the particular circumstances before it. However, the need for a proportionate response to any breach underpins the exercise of the Court's discretion. Ultimately, a balancing exercise is required to determine whether, and on what terms, relief should be granted.

[78] Mr Kainuku has agreed that if the respondents prove to this Court that all rental arrears have been paid, and if the relief applicants pay the legal costs of the forfeiture, he will withdraw the notice of forfeiture.

[79] However, the amount of rent in arrears is disputed.

[80] Mr Kainuku says the rental arrears under the 1998 lease and the 1999 lease include:

(a) Any additional sum that shall become due following outstanding rental reviews pursuant to s 106A(1)(c) of the Property Law Act 1952;

(b) Any additional sum that shall become due pursuant to s 106A(1)(b) of the Property Law Act 1952.

[81] Furthermore, Mr Kainuku does not accept the evidence of the "purported receipts". Firstly, he says that there are only twelve receipts, which does not account for two annual rental payments from 1998. They do not have the word receipt on them, but simply say "kaingara gratuity" (or gratitude), which he says indicates they are not intended as rent

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17 *Detour Clothing Ltd v Star Five Ltd* [2017] NZHC 1172.

payable under the leases. There are also different signatories on the receipts, and often the recipient has not signed at all.

[82] Even if the objector accepts the receipts as evidence, the amount paid as evidenced by these receipts is only $2400. There is still $8400 owing for the two leases.

[83] In assessing the breach it is clear that the relief applicants have failed to pay rent. This was a deliberate act. It was in their control to prevent that breach.

[84] Further, the relief applicants have not rectified the breaches. They have promised to make good, but there is no evidence of genuine good intent. They were first put on notice on 1 January 2016, more than 4 years before the leases were subject to forfeit. As at the date of the 2020 forfeiture notice, rent was still outstanding and overdue.

[85] In terms of the proportionality of damages suffered compared to the advantages of granting relief, based on the 22-year failure of the relief applicants to meet their obligations, inability to meet current or future rents, I assess that the landowners' damages will continue to mount if relief is granted.

[86] The application for relief from forfeiture is dismissed.

**Section 106A of the Property Law Act 1952**

[87] I have noted that the respondents accepted that the provisions of s 106A of the Property Law Act 1952 apply to the 1999 lease.

[88] Clause 10 excluding provisions of Property Law Act was crossed out of the 1998 lease. This has relevance given the applicant's claim for a declaration that in respect of the 1998 lease, there are 5-yearly rental reviews currently outstanding as at 1 October 2003, 2008, 2013 and 2018.

## Decision

[89] Having regard to the above I conclude:

(a) That the 1998 lease remained afoot as at:

(i) 7 May 2015, being the date on which the purported occupation right order granted to Sonny Roro Junior Daniel order was made; and

(ii) 24 June 2020, being the date that the 1998 (and the 1999) lease was forfeit for non-payment of rent.

(b) In respect of the 1998 lease, that the covenants implied and included in s 106A of the Property Law Act 1952 (as amended by the Property Law Amendment Act 1995-96) are implied and included in the 1998 lease.

(c) In respect of the 1998 lease, there are 5-yearly rental reviews currently outstanding as at 1 October 2003, 2008, 2013 and 2018.

(d) In respect of the 1998 lease, that the lease is at an end.

(e) In respect of the 1999 lease, that the covenants implied and included in s 106A of the Property Law Act 1952 (as amended by the Property Law Amendment Act 1995-96) are implied and included in the 1999 lease.

(f) In respect of the 1999 lease, that the lease is at an end.

(g) That the occupation right order granted to Sonny Roro Junior Daniel on 7 May 2015 is at an end.

(h) The application for relief against forfeiture is dismissed.

[90] A copy of this decision is to be sent to all parties.

Dated at Rotorua, Aotearoa/New Zealand this 8th day of May 2024.

**JUSTICE COXHEAD**