

IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND

CA 3/2000

IN THE MATTER of Article 60(3) of the Cook Islands Constitution Amendment Act (No. 9)
1980-81

AND

IN THE MATTER of CROWN BEACH EXECUTIVE VILLAS LIMITED (In Receivership)

BETWEEN VAITAMANGA HOLDINGS LIMITED

Appellant

AND

KERRY MARK DOWNEY and MICHAEL ROBERT CARR as
receivers of Crown Beach Executive Villas Limited (In Receivership)

Respondent

Hearing: 11, 12 July 2000

Coram: Speight JA
David Williams J
Carter J

Counsel: Mr J Katz QC and Mrs T P Browne for Appellant
Mr M C Mitchell for Respondent
Mr D C S Morris for South Pacific Resorts Limited

Judgment: 24 July 2000

JUDGMENT OF THE COURT

INTRODUCTION - NATURE OF APPEAL

[1] This is an appeal from the reserved judgment of Norman F Smith J given on 9 June 2000 granting applications by the respondent receivers for orders dispensing with the consent of

the appellant lessor ("Vaitamanga") to an assignment of a Deed of Sublease dated 4 November 1997 ("the Sublease"), the lessee (or more accurately the sublessee) being Crown Beach Executive Villas Limited ("Crown Beach"). The Sublease encompasses the land known as Vaitamanga Section 88F1 comprising 9709m² and also a further 902m² being Part of Vaitamanga and known as the reserve land. The land is leased for the maximum statutory period of 60 years.

- [2] The Crown Beach receivers wished to assign the Sublease to South Pacific Resorts Limited ("South Pacific"). Smith J held that the decision of Vaitamanga and Mrs MacQuarie to withhold consent to the assignment was unreasonable. (Mrs MacQuarie is the landowner of the land and also the lessee of the land. On 8 July 1987 she assigned part of her interest as lessee, namely 9709² to Vaitamanga. Mrs Macquarie is also a shareholder and director of Vaitamanga.)

- [3] Smith J accompanied his order dispensing with the consent with a direction that Vaitamanga and Mrs MacQuarie, "submit to counsel for the applicant, a statement of the amount claimed to be due and owing and the applicant is directed to settle all payments properly payable in terms of the Sublease upon settlement of the sale thereof."

- [4] The application was made in reliance on s 110 of the Property Law Act 1952 NZ which is in force in the Cook Islands by virtue of section 637 of the Cook Islands Act 1915. It provides that in all leases containing a covenant against assignment shall be deemed to be subject to a proviso to the effect that the licence or consent shall not to be unreasonably withheld. Section 110 reads as follows:

"110. Licence or consent not to be unreasonably withheld — (1) In all leases, whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against assigning, underletting, charging, or parting with the possession of demised premises or any part thereof without licence or consent, that covenant, condition, or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject to a proviso to the effect that the licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the landlord to require payment of

a reasonable sum in respect of any legal or other expenses incurred in connection with any such licence or consent.

[(1A) For the purposes of this section, a licence or consent shall be treated as unreasonably withheld if it is withheld by reason only of the colour, race, or ethnic or national origins of any person.]

(2) In this section the term "lease" has the same meaning as in section 117 of this Act."

- [5] The related section 109 prohibits the extraction of fines or sums in the nature of fines in respect of a consent to an assignment and provides:

"109. No fine for licence to assign — (1) In all leases containing a covenant, condition, or agreement that the lessee shall not, without the licence or consent of the lessor, assign, underlet, part with the possession, or dispose of the demised premises or any part thereof, that covenant, condition, or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of any such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or consent.

(2) Neither the assignment or underletting of any leasehold by the assignee of a bankrupt, or by the liquidator of a company, or by the Sheriff under an execution, nor the bequest of a leasehold, shall be deemed to be a breach of any such covenant, condition, or agreement, unless the contrary is expressly declared in the lease.

(3) For the purposes of this section, terms defined in section 117 of this Act have the meanings assigned to them by that section."

- [6] The judgment of Justice Smith also dealt with a similar application by the receivers in relation to adjoining land. This application was heard and determined at the same time and with the same outcome. There was no appeal from that part of the judgment.

THE ORIGINAL SUBLEASE

- [7] The stated purpose of the original Lease of 4 November 1997 was "for the establishment of a tourist resort facility constructed and furnished to the standard of an international resort": clause 9(a). Crown Beach operates a small tourist resort on the land comprising 12 villa style units, a swimming pool, bar, administration building and restaurant. Construction of the existing buildings, which represented Stage 1 of a proposed 50 unit complex, was completed in 1998. One unit is owned by Mrs MacQuarie and is operated by Crown Beach under a

Management Agreement. The resort's facilities are of a very high standard and the resort has been assessed as being of four star quality. All units contain airconditioning. The property has substantial further development potential.

- [8] On 15 November 1999, Mr K M Downey and Mr M R Carr of KPMG were appointed by Westpac Banking Corporation and others as joint and several receivers and managers of Crown Beach. The receivers subsequently determined that a sale of the business of Crown Beach as a going concern offered the best possible return for the Crown Beach business and assets. Pending this sale the resort has been traded under the control of the receivers.
- [9] After an international advertising programme and the consideration of various offers received, the receivers accepted the best offer being NZ\$2,783,003.00 for the business and assets of Crown Beach. The final sale agreement dated 4 April 2000 was entered into between the receivers as vendors and South Pacific as purchaser and Mr Rondo Perkins, Mosaic Travel & Tours Inc, Mr Don Morrison and Western Travel Group Limited as guarantors. The original settlement date for the agreement was 11 May 2000. True copies of the agreement were supplied to this Court by the receivers.

THE RELEVANT PROVISIONS OF THE SUBLEASE

- [10] The Sublease, which had been approved by the Leases Approval Committee on 27 August 1997, provided for an annual rental which should be the greater of \$5,000 per annum reviewable 5 yearly or 1.5% of the gross income of the Lessee. In order to enable the gross income to be established, clause 3(a) provided that:

"The Lessee shall keep full and complete records of all income arising from the use and enjoyment of the said land by the Relevant persons and shall on the 20th day of each month provide to the Lessor a true and accurate summary of Gross Income earned in the immediately preceding month. The Lessee shall further on request provide the Lessor with full and accurate data as to the true consideration of any sale or other transaction or activity earning Gross Income for any person to enable the true Gross Income to be verified."

[11] We were informed from the Bar that in recent times the 1.5 turnover percentage has resulted in a rental payment of about \$NZ30,000 per annum.

[12] Clause 5 imposed restrictions on disposition. Clause 5(d) provided that:

"If at any time during the term hereof any shareholder of the Lessee desires to effect a disposal of shares Mere-Marae Vilma MacQuarie and upon her death her successors in title shall have the right of first refusal to the disposition or to the disposal of shares as the case may be on certain specified conditions."

[13] As to assignment, clause 5(e) provided as follows:

"The Lessee will not during the continuance of the term of this Lease effect any disposition in respect of the said land or any part thereof or any estate or interest therein to any third person nor will it procure or allow the said land, any part thereof or any estate or interest therein, to be further disposed or (otherwise than as provided in Clause 4(c) above) by any such third person in favour of any other person without the prior consent in writing of the Lessor and subject to compliance with Clause 4(d) above such consent shall not be unreasonably withheld in the case of a disposition by the Lessee in any case where:

- (i) The proposed third person is a person or company of good financial standing with a potential to maintain the Gross Income at a level at least equal to that earned or proposed to be earned by the Lessee and conducting or proposing to conduct on and from the said land a business the same as that of the Lessee and having the financial ability to perform the obligations of the Lessee hereunder the onus of proving which facts to the reasonable satisfaction of the Lessor shall be upon the Lessee;
- (ii) The Lessee shall have procured the execution by the proposed third person (if an assignee) of an assignment of his lease (in a form to be approved by the Lessor) to which the Lessor shall be a party and (in every other case) the execution by the proposed third person of a Deed of Covenant (to be prepared and stamped by the Lessor's solicitors at the Lessee's expense) whereby the proposed third person covenants with the Lessor in the same terms as the Lessee is bound by clauses 3, 4, 6 and this clause 5;
- (iii) All rent and any other moneys then due and payable hereunder shall have been paid and there shall not be any subsisting breach by the Lessee of the covenants, conditions and agreements herein contained or implied PROVIDED THAT any breach which has been waived by the Lessor shall not be deemed to be an unremedied breach for the purpose of this paragraph;
- (iv) The Lessee shall have paid to the Lessor all proper costs, charges and expenses incurred by the Lessor or her advisors of and incidental to any enquiries which may be made by or on behalf of the Lessor as to the responsibility, solvency, fitness and suitability of any proposed third person and the costs of the Lessor and her

solicitors in connection with the consent by the Lessor required hereunder and the preparation and execution of the Deed of Covenant abovementioned;

PROVIDED ALWAYS that (notwithstanding the provisions of Section 109(1) of the Property Law Act 1952 (N.Z.) as applied in the Cook Islands) the Lessee shall pay to the Lessor in consideration of such consent a sum of ONE PER CENTUM (1.00%) of the Lessee's Transfer Consideration as that sum is more particularly calculated and defined in clause 6 below." (Underlining added.)

The critical clause for present purposes is Clause 5(e)(i). The waiver proviso under clause 5(e)(iii) is significant in relation to alleged unremedied breaches which were relied upon by the respondent.

THE REQUEST FOR CONSENT TO THE ASSIGNMENT AND THE SUBSEQUENT RESPONSES OF THE LESSOR

[14] In the written submissions of the appellant in relation to the substantive appeal it was strongly contended that the Court below, and this Court, in considering the question of the application for dispensation with consent, should place itself in the shoes of the reasonable Lessor and confine itself solely to those matters of fact which were before the Lessor when consent was refused. No other material was admissible. The written submissions put the matter as follows:

- "18. It is fundamental to the submissions of the appellant that in the context of an application for dispensation with consent to an assignment of the lease, the Court is placing itself in the shoes of the reasonable lessor faced with a request for consent to assignment. Thus, the Court must and indeed can only consider those matters of fact before the lessor and no other matters. Matters that have arisen since the request for consent and the refusal are not matters upon which the lessor has ever been asked to make a decision.
- 23. It is significant however that much of the financial information produced (especially that in the Record at pages 77-101) was produced in large part by the respondents. None of it appears to have been before the appellant lessor when she was requested to consent to the proposed assignment. She had before her only those documents given to her or her solicitors as at the date of the refusal to consent on 26 April 2000 and anything else she was asked to look at when reconsidering but affirming her refusal on 26 May 2000.

24. The refusal and whether or not it was reasonable is to be judged having regard to what was before the appellant prior to the Court hearing and not at the Court hearing. Subsequent material on which she has not been asked to comment cannot bear upon the reasonableness or otherwise of her refusal."

[15] There was considerable debate at the hearing about the soundness of these submissions. The appellant's contentions derive support from certain observations by Slade LJ in *Bromley Park Ltd v Moss* [1982] 2 All ER 890, 901 although Cumming-Bruce LJ found it unnecessary to decide the point and Dunn LJ did not address it. To the extent that David Williams J followed Slade LJ in *Car Warehouse Limited v Vehicle Direct Ltd* CP 1367/92, High Court, Auckland Registry, 22 October 1993, it is to be noted that he went on to consider the post-refusal evidence anyway. More importantly Somers J in *WE Wagener Ltd v Photo Engravers Ltd* [1984] 1 NZLR 412 (CA) said at 427 had expressed the position as follows:

"Parliament clearly intended the deemed proviso to be effective. So it is not competent for the parties to a lease to limit the operation of the proviso by attempting to define what is reasonable and what is unreasonable. That is an objective question of fact for the Court to be decided in the circumstances as they exist when the issue is before it. See *Creer* (1971) 125 CLR 84, at p 89 per Menzies J and p 91 per Windeyer J; and see Barwick CJ at p 87." (Underlining added.)

- [16] To paraphrase Cooke J in the same case at p 418, the parties cannot by relying on finely tuned evidentiary analysis abrogate the right and duty of the Court, in the event of a dispute as to the reasonableness of the withholding of consent, to decide by objective standard whether or not the refusal is unreasonable.
- [17] In any event this Court considers that even if the appellant's evidentiary submissions were sound in principle, they cannot be applied to the present case for a variety of reasons. At least up until the commencement of the High Court proceedings, the respondent never made an unqualified and final decision to refuse consent as opposed to withholding it pending receipt of further information and the satisfaction of certain collateral conditions which the respondent sought to impose. Moreover, to the extent that grounds for withholding consent were given in the lead up to this litigation, they never remained constant. As is demonstrated

by the factual summary which follows the respondent "shifted the goal posts" on several occasions.

- [18] The view of the Court is that it must consider all of the material placed before the Trial Judge especially since all appeals are by way of rehearing (s 55 Judicature Act 1980-81). As to any additional relevant material placed before this Court on appeal there is a discretion to receive it by leave under section 57. The role of this Court is therefore as stated by Lindley MR in *Coghlan v Cumberland* [1898] 1 Ch 704:

"Even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge, with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong."

- [19] The Court considers that it is most important in deciding whether the apparent refusal was unreasonable to consider carefully the narrative of events which unfolded in this case. We are indebted to both counsel for the helpful way in which they explained the chronology of events. We find that the facts may be summarised as follows.
- [20] On 30 November 1999 the solicitors for the receivers wrote to Mrs Browne of Clarkes PC who was acting for the landowners concerning various alleged breaches of the lease. They adverted to the question of consent and noted that the landowners were entitled, pursuant to clause 5(f)(i) of the Sublease, to refuse their consent to any sale whilst the company was in breach of its obligations pursuant to the Sublease. It was pointed out the receiver had requested advice as to an amount that the landowners would be prepared to accept as compensation for past or existing breaches in order to clear the way for the landowners' consent. The letter also referred to other alleged breaches.
- [21] Clarkes PC replied on 22 December 1999 stating that their instructions were that in consideration of the payment to Mrs MacQuarie of \$30,000 she would withdraw the default

notice with regard to the alleged failure to reveal all relevant facts when offering Mrs MacQuarie a right of first refusal under clause 5(d) of the Sublease in respect of certain share transactions which had occurred in September-October 1998. The letter went on to advise that Mrs MacQuarie would not forfeit the lease as a consequence of the appointment of the receiver.

- [22] On 23 December 1999 the solicitors for the appellant wrote to the receivers at some length providing a summary of the nature of the existing alleged breaches under the Sublease including the apparent omission to offer the right of first refusal. The letter concluded as follows:

"It is acknowledged by all parties that if a court was to hold that there had in fact been a breach in (or breaches) of the Sublease, the calculation of damages would be a very difficult one. It would involve lengthy legal proceedings and as the landowners wish the Resort to move forward they have agreed to waive their rights in respect of these breaches in consideration for the amount specified in our earlier letter." (ie \$30,000)

- [23] The actual application for consent to the proposed assignment was made by the receivers by their letter of 6 April 2000. The letter stated inter alia:

"The company seeks your consent on behalf of all lessors to an assignment of the lease for Lot and Lot 2 more particularly described below to South Pacific Resorts Limited as purchaser of the assets and business of the company...

In terms of the agreement for sale of business made by the receivers, the purchase price apportioned to Lots 1 & 2 including the chattels of the resort is \$2,466,250. Settlement of the sale is set down for 11 May 2000 or earlier if required consents are obtained.

Details of South Pacific Resorts Limited are attached.

We would be grateful if you would:

- provide your consent to an assignment of the sublease to South Pacific Resorts Limited
- let us know whether you wish to exercise your right of first refusal

We note that the head lessor has seven (7) days in which to exercise this right. Please note this period will expire on 14 April 2000 being 7 days after delivery of this letter.

We would appreciate your early consideration and response."

- [24] Attached to the letter was a memorandum on providing details of South Pacific Resorts Limited which stated as follows:

"South Pacific Resorts Limited is a company incorporated in the Cook Islands on 17 September 1999. Its original shareholder was Don Morrison. It has never traded. It is now owned as to 49% by Rondo Perkins, a rancher, of Idaho, USA and 51% by Mosaic Travel and Tours, a limited liability company incorporated in Alberta, Canada and which is publicly listed on the Alberta Stock Exchange.

Its directors are Mr Perkins and Mr Don Morrison, the President of Mosaic Travel and Tours.

It has Development Board Approval covering the acquisition and operation of the Crown Beach Resort.

It was originally established with \$100 paid up capital.

It has entered into a contract to purchase the assets of the Resort for some 2.71 million dollars.

This is to be funded by a loan from Westpac Bank, Rarotonga in the sum of 1.7 million dollars with the balance of 1 million plus being provided as shareholder equity or loans.

Any working capital required will be supplied as either shareholder loans or equity.

Mr Perkins is a man of substance and owns and successfully operates several ranch properties in the United States.

Mosaic Travel and Tours is a publicly listed corporation in Canada, which is currently expanding its operations.

Mosaic Travel and Tours is one of a group of companies which operate in the wholesale travel business. Of significance is that these companies all previously associated with Don Morrison have been selling in recent years significant numbers in to the Cook Islands from their Canadian Client base.

It is confidently expected that Mosaic Travel Group will now be able to place a large proportion of these clients into the Crown Beach property rather than any other Rarotongan property.

They will have confidence in doing so because they intend to appoint Jim and Clare Smith to manage the property to a higher professional standard than has been achieved in the past. Mr and Mrs Smith are themselves from Canada and have been selected by Don Morrison for this task. They have been on the island for some months awaiting the result of the tender process and are simply waiting to commence their new duties. This couple is experienced in the hospitality industry.

The net result of this is that South Pacific Resorts Limited will have a greater income than the previous operators who, of course went into receivership."

The final sentence was very pertinent because, as already noted, the first requirement of clause 5(e)(i) is that the proposed assignee is "a company of good financial standing with a potential to maintain the gross income at a level at least equal to that earned or proposed to be earned by the lessee".

- [25] The solicitors for the appellant replied on 11 April stating that their instructions were that Vaitamanga did not consent to the proposed assignment. They said that Mrs MacQuarie wished to reserve her position with regard to her right of first refusal to the said assignment until the question of consent had been dealt with. The letter concluded by asking for an extension of the 7 day period allowed under clause 5(d) of the Deed of Lease to 30 days from 6 April 2000 in respect of the right of first refusal.
- [26] On 13 April the receivers responded to the appellant's solicitors and agreed to the extension to 26 April 2000 "subject to your client within that extended period providing us in writing details of the reasons and basis on which consent to the proposed assignment is withheld". It was further stated that "the details provided must be complete and should include without limitation details of any concerns your clients have with regard to the proposed assignee, further information concerning the proposed assignee your clients require, details of any breaches which would have to be remedied and of any arrears which would have to be paid in order for the consent to be given." The receivers asked for a reply by 26 April 2000. This request was criticised by counsel for the appellant on the basis that the onus of satisfying Clause 5(e)(i) was placed by that clause squarely on the lessee. We do not agree with the criticism. The receivers were being asked to extend the 7 day right of refusal period. The lessor had refused to disclose its position on consent to the assignment. In return for this indulgence the receivers sought to clarify the basis on which consent was being withheld. There is nothing in the point.

[27] On 26 April the solicitors for the appellant advised by letter that their clients were unable to exercise the right of first refusal as they were unable to obtain the finance required. They went on to say that consent to the proposed assignment "was being withheld on the following grounds:

- "1. Alleged breaches of the terms and conditions of the Deed of Sublease with regard to the share transfers;
2. Mr Perkins failure in his capacity as major shareholder and director of the Company to do the following:-
 - (i) make payments in accordance with the management Agreement
 - (ii) pay ground rentals
 - (iii) provide our clients with the company's accounts to enable our clients to calculate their percentage of gross turnover despite frequent requests.
3. Mr Perkins intimidating and threatening attitude to our clients.

Essentially our client, based on past experience, has no reason to believe that the proposed purchaser will behave any differently to the company."

[28] Several points should be made about this withholding of consent. First, it is to be noted that the grounds did not include any concerns about the financial standing of South Pacific. Indeed all of the grounds related to past alleged breaches of the Deed of Sublease and Mr Perkins' alleged failure in his capacity of major shareholder of Crown Beach to undertake to carry out certain suggested obligations. Secondly, the management agreement was a separate matter not relevant to the assignment. (This was later conceded in the letter from the respondent's solicitors of 26 May 2000 discussed below.) Thirdly, the items referred to in paragraphs 2(ii) and 2(iii) were remedied before the matter came before Smith J. Fourthly, the conclusion that, based on past experience, the appellant had no reason to believe that the proposed purchaser would behave any differently to the company because of Mr Perkins continuing involvement, does not sit easily within the critical conditions for consent under the latter part of Clause 5(e)(i), at least so far as item 3 is concerned. The attitudinal or behavioural characteristics of the assignee are irrelevant if not related to the relationship of landlord and tenant: *International Drilling Fluids Ltd v Louisville Investments Ltd* [1986] 1 All ER 321, 325.

[29] The solicitors for the receivers, Stevenson Nelson & Mitchell, replied on 6 May and said:

"I note the grounds on which the consent is withheld. It is not clear to me whether your client claims there are payments due under the lease which should have been made, but have not. If so, it would be helpful if those could be quantified so that I can refer them to the receiver. In that connection I refer you to section 109(1) of the Property Law Act 1952 which provides for the recovery of certain identified costs.

Clearly, the receiver is unable to make any approach to your client in relation to any payment that may be due to her under the Management Agreement - which payment (if any) would now rank along with the other unsecured creditors.

You have explained to me that your client's main concern is that the sort of difficulties that she says she has encountered hitherto in obtaining financial information details, will not characterize any future dealings with a new company. I have been giving some consideration to that but from the point of view of the receiver, he will not be in a position to become involved in that aspect. Mr Manarangi may have some representations to make in that regard, and in respect of the Management Agreement, but as you know he has been involved for all of last week in his father's funeral arrangements.

Finally, I have no knowledge of the alleged intimidation and threats referred to in your letter, and therefore cannot comment. Once again, this is a matter beyond the scope of the receivership.

I look forward to hearing from you." (Underlining added.)

If the characterisation of the main concern is accurate the main concern had changed from that articulated in the letter of 26 April.

[30] The next development was a meeting between the solicitors for the parties on 16 May 2000. It appears that at that meeting the appellant for the first time claimed that South Pacific was not in good financial standing and did not have the potential to maintain the gross income of the resort at a level at least equal to that earned by Crown Beach. This inference may be drawn from the letter of 17 May from the receivers' solicitors to the appellant's solicitors. In that letter the question of a payment for past breaches of the lease was discussed as well as the appellant's legal and other costs to date. The letter concluded by advising that the receivers sought a swift response as they were anxious to have an application to dispense with consent heard in the current Court session should that become necessary. The receivers

also sought information as to the basis “on which the lessor claims that South Pacific is not of good financial standing with potential to maintain the gross income of the resort at a level at least equal to that earned by Crown Beach”.

- [31] The swift response sought by the solicitors for the receivers materialised in a letter of the same date from the appellant’s solicitors which stated as follows:

“Thank you for your facsimile of 17 May 2000. Whilst Mr Manarangi referred to the figure of \$30,000.00 in his letter to the writer of 27 January 2000 the amount in fact was agreed to at a meeting held on 25 January 2000. Our record shows that Mike Carr agreed to that figure and hence our letter to Karen Harvey dated 22 December 1999.

We have not been able to contact John Katz but have left a message for him to call the writer. We confirm however that previous discussions with him have indicated that his costs together with our costs would exceed \$45,000.00.

The Company failed to make payments due to Mrs MacQuarie under the Management Agreement last year. Mr Perkins at a meeting with our clients promised to pay that amount. That amount remains outstanding. As indicated at our meeting of 16 May 2000 we will take instructions from our client as to the information compiled by them relating to the financial standing of the purchaser.”

- [32] The reference in the last sentence was not responsive to the precise Clause 5(3)(i) issue raised at the end of the receivers’ letter. Be that as it may, the next development was a three page letter or notice from Vaitamanga Holdings direct to the receivers dated 22 May 2000, a letter which assumed some prominence in the arguments before us. Counsel for the respondent submitted that it was unfortunate the letter had been sent to the receivers and not to the receivers’ solicitors. His lack of knowledge of this letter had led him to write a letter of 24 May 2000 asking just what were the appellant’s objections to the granting of consent. (It should be interpolated here that the receivers filed their application to dispense with consent in the High Court at Rarotonga on 23 May 2000 and it was allocated a hearing date of 24 May doubtless on the grounds of urgency.)

- [33] Notable features of the letter written by Vaitamanga to the receivers on 22 May were a detailed request for financial statements concerning South Pacific and similar financial

statements concerning the principal shareholders of South Pacific, namely Rondo Perkins, 49% and Mosaic Travel and Tours, 51% together with evidence of any actual wholesale business contracts which Mosaic had entered in respect of bringing Canadian tourists to the Cook Islands. The letter also asked for payment of all proper costs incurred by the Lessor in respect of its inquiries as to the suitability of the proposed assignee and in this respect contended that the financial damage was occurring to the Lessee by way of unpaid solicitor's fees in respect of the consent. The letter stated:

"We therefore ask that this condition be remedied by way of a funds deposit to cover existing fees and expenses as well as those expenses that shall arise related to the completion of this request for consent."

The letter went on to point out that the default had been committed by the appointment of a receiver as provided by clause 13(a) and that such a default had to be remedied within 14 days. This statement was made notwithstanding that, as noted earlier, in December of the previous year the solicitors for the appellant had written advising that Mrs MacQuarie would not forfeit the Lease as a consequence of the appointment of a receiver. The notice concluded as follows:

"From the beginning of this **DEED OF SUBLEASE** between **VAITAMANGA HOLDINGS LIMITED** and **CROWN BEACH EXECUTIVE VILLAS LIMITED**, there have been consistent problems with the financial well being of the business being operated upon our land, this has resulted in very significant financial loss and mental duress upon the owners of **VAITAMANGA HOLDINGS LIMITED**, in the persons of Mere-Marae Vilma MacQuarie and her family.

Now comes again **CROWN BEACH EXECUTIVE VILLAS LIMITED**, (in receivership), asking us to approve the sale of our **DEED OF SUBLEASE** to another unknown business entity.

For the sake of preventing as much as possible any further financial loss and duress to the landowners, we are simply asking to be allowed to make our decision concerning the consent of the assignment of the lease, based upon sound and reasonable business practices.

Asking to be provided with the information detailed, (and required in the Lease document), in this letter, so that we as the Lessor's are able to make a sound decision based upon facts at hand, is in our opinion a reasonable and prudent action.

We look forward to hearing from you by 05 June 2000." (Underlining added.)

[34] The underlying passages show that not only was the appellant changing the grounds of its opposition and raising matters which had earlier been cleared away but was confirming that it had not made a final decision on the application for consent as of 22 May 2000. Moreover, the reference to "another unknown business entity" would not be literally true for the identity and essential details of South Pacific had been supplied in the receivers' letter of 6 April 2000.

[35] There was a preliminary hearing in the Court on 24 May before the Chief Justice after which the solicitors for the receivers wrote to the solicitors for the appellant stating inter alia:

"Following today's hearing I am writing to establish yet again (and I hope finally) just exactly what your client's objections are - and what the receivers have to clear out of the way in order to obtain the landowners consent.

You indicated in Court that the following matters were outstanding:

1. Evidence satisfactory to your clients had not been provided to establish that the purchasers had the financial ability to perform the obligations of the lessee and to achieve and maintain an income at a level that would enable that;
2. That the Deed of Covenant under paragraph (ii) was to be prepared to your clients satisfaction;
3. That the subsisting breaches as outlined in your letter of 23 December had to be resolved.

Later in the hearing you informed the judge that your client's two major problems were that she did not want to deal with Rondo Perkins, and, secondly, (and perhaps part of the first) he was the very same person who was in the earlier company, and he has demonstrated that, according to you, he could not prevent it going into receivership. The implication at least is that your client is not satisfied that he will not drive it into receivership again.

After the Court hearing the landowners daughter, Hinano, mentioned to Mike Carr that she had further doubts - namely that the presence in the Company of the wholesaler, Mr Morrison, would be counter-productive and would "drive away" other wholesalers; and accordingly the business would diminish.

Arising out of all of this, the receivers must have, and are entitled to, a clear statement of what it is they must deal with in order to bring this matter to a resolution. For example, can we take it that the first part of paragraph 5(e)(i) has now been dealt with - the question of good financial standing? Do you accept that it is for the lessor's solicitors to prepare the Deed of Covenant under sub-paragraph (ii)? Do they agree that all rent and other monies are up to date under sub-paragraph (iii)?

Once again I repeat the receivers willingness to pay "the lessor all proper costs, charges and expenses incurred by the lessor and her advisors of an incidental to any inquiries which may be made by or on behalf of the lessor as to responsibilities solvency fitness and suitability of any proposed third person and the costs of the lessor and her solicitors in connection with the consent by the lessor required hereunder ..." (clause (iv)). I should add however that I believe those costs must be reasonable and not costs relating to objections conjured to drag the matter on with the possible aim of seeing this offer collapse in the hope that the lessors may ultimately gain possession of the property. That last eventuality has also been mentioned in conversations by the daughter of the landowner. In indicating their willingness to consider such a payment, I emphasise that the receivers are not, in so doing, prepared to sign a "blank cheque" in order to meet costs that are not strictly in connection with the consent and solvency.

We will be urging the Court to obtain an early fixture and in the meantime I have asked the receivers to obtain such information as they can to meet your clients last minute point relating to the financial ability to perform. Just how that is to be established is not altogether clear to me - perhaps your clients have a clearer picture of what they need to be satisfied on that point.

If your client is to file an affidavit on some point then that should be done I suggest without delay. I was somewhat taken back when you stated in Court that you had not had time to prepare such an affidavit. This matter has been going on now since last November.

As to the judge's suggestion of funding a judge to come to Rarotonga - you indicated that your clients would not be interested in such a proposal. Could you raise with them the possibility of their travelling to Auckland if the receiver made a contribution to their travel costs. I have no clear instructions on that point but it might be worth pursuing as an alternative.

Please provide precise details of your client's objections before the end of this week."

- [36] The solicitors for the appellant replied by letter dated 26 May 2000. The following matters are worthy of note:

"Good financial standing and potential to maintain the gross income - It is a requirement under clause 5(e)(i) of the Deed of Sublease that our client be reasonably satisfied that the proposed purchaser is of good financial standing with a potential to maintain the gross income at a level at least equal to that earned or proposed to be earned by the Lessee and conducting or proposing to conduct on and from the said land a business the same as that of the Lessee and having the financial ability to perform the obligations of the Lessee contained in the Deed of Sublease. We have received from the Receiver documents which were given to Westpac Banking Corporation no doubt to support the financial arrangements with that Bank. Our client would like to have some time to consider these documents. Our client would like details of who the proposed managers are and what experience they have in the industry. We would require his/her/their CV and references.

Subsisting breaches - It is not necessary in our view for us to go through the details of the existing breaches as these have been referred to in our letters of 23 December 1999 and 26 April 2000. The subsisting breaches have also been discussed at various meetings held with

the solicitor for the purchaser and the Receiver. The bottom line is that our client company has no confidence in Mr Perkins. The Company's judgment is based on its experience with Crown Beach Villas Limited since Mr Perkins' involvement as a shareholder. Although we acknowledge that the arrears owing under the Management Agreement is not the concern of the Receiver nevertheless the non-payment of it demonstrates, in our client's view, the type of person Mr Perkins is particularly as had personally promised our client to pay... (sic)

...

... The payment under clause 5(e)(iv) should relate to all proper costs with regard to the question of solvency, fitness and suitability of the proposed purchaser and in connection with obtaining the consent of the Lessor. We will give you a note of our costs.

Don Morrison - We have in our possession information which, if true, casts some doubt on Mr Morrison's financial standing and ability to perform. That may have been what Hinano MacQuarie was conveying to Mr Carr. According to the information that we have, Don Morrison no longer has any interest in a travel wholesale company. He was once president of Skyhigh Holidays as well as Mosaic. Skyhigh Holidays owned Cook Islands Holidays which was the company that Mr Morrison tried to purchase but was sold to someone else. Perhaps you may be able to provide us with information to the contrary which might satisfy the concerns of our client.

Delaying proceedings - It is implied in your letter that we are engaging delay tactics. It seems that you expected to proceed on the application to dispense with consent even though a copy of the application was served on us on Monday 22 May and the affidavits on Tuesday 23 May. We are surprised that you expected our client, who has a genuine concern, to be ready to proceed on your application when the first notice that we had that you were applying to dispense with consent was only received by us late Friday 19 May 2000. It appears that it is your view that we should have prepared for a Court hearing prior to you filing your application.

It is quite clear from the correspondences that the parties since December 1999 have been trying to resolve outstanding issues not preparing for a Court action which may or may not happen.

We want to make it quite clear that we have no intention of delaying matters. As indicated we will be filing Mrs MacQuarie's affidavit as soon as that is completed. We confirm that it is not our client company's intention to drag matters on with the possible aim of seeing this offer collapse in the hope that the lessors ultimately gain possession of the property. You are aware that the appointment of a Receiver gives rise to a "default" under the Deed of Sublease and entitles the Lessor to forfeit the Sublease. The Lessor has chosen not to take that step. If her intention was to repossess the land surely she would have done so then.

Court hearing - You will recall that in response to the Judge's suggestion of funding a Judge to travel to Rarotonga the writer indicated that she would have to take instructions on that. The view that the writer expressed to the Court was her own. We have now had the opportunity to discuss the matter with our client and can confirm that they do not wish to contribute to the cost of bringing a Judge to Rarotonga. Before our clients decide on the question of travelling to New Zealand would you kindly indicate the size of the Receiver's contribution. Is the Receiver contributing to our travel and accommodation costs as well?

Rentals and other payments - We confirm that all rentals under the Deed of Sublease have been paid to date. A payment that was owing by the Company was subsequently paid by the Receiver. The percentage of transfer consideration on the share transfers is still outstanding." (Underlining added.)

It can be seen that the appellant was again now back to the original position of not forfeiting on account of the appointment of the receiver which had been asserted only a few days earlier in the letter/notice from Vaitamanga of 22 May. Moreover, the last paragraph confirmed that the ground rentals earlier claimed to be outstanding had been paid. On the critical Clause 5(e)(i) point time was sought to consider additional material supplied by the receivers and CVs of the proposed managers were requested.

The letter concluded by stating:

"We are instructed as follows:

Subject to satisfying the provisions of clause 5(e)(i) of the Deed of Sublease our client will be prepared to consent to the proposed assignment on the following conditions:

- (i) That the sum of \$16,766.00 owing under the Management Agreement to be paid together with interest for late payment.
- (ii) The sum of \$30,000.00 be paid with regard to the alleged breaches under clause 5(e)(iii).
- (iii) The sum of US\$564.53 being the difference of the percentage of the Transfer Consideration to be paid.
- (iv) A debenture be entered into to secure payment under the Management Agreement.
- (v) Provision be made that there be a penalty interest on any late payments under the Management Agreement.
- (vi) Payment of our proper costs under clause 5(e)(iv).

This offer will lapse on Wednesday 31 May 2000.

The above proposal is being suggested in order to enable the Resort to move forward. Our client has genuine grievances and, to date, Mr Perkins has not demonstrated good faith in his dealings with our client. His consent to providing the above will go some way to demonstrate an intention to act in good faith in future dealings with our client." (Underlining added.)

This passage demonstrates that lessor was seeking to acquire collateral benefits as a condition of granting consent because at the very least items (i), (iv) and (v) had nothing to do with the issues relevant to the granting of consent under Clause 5(e). The Management Agreement was a separate contractual matter governed by the separate Management Agreement between Mrs MacQuarie and Crown Beach. The letter acknowledged that this was nothing to do with the receivers. With respect to the \$30,000 in (ii), the reference there presumably related to the figure of \$30,000 first mentioned in the appellant's solicitors letter of 20 December 1999 and involving the alleged failure to comply with the right of first refusal in respect of share transactions in October 1998. It will be recalled that the appellant's solicitors had said in their letter of 23 December 1999 that the calculation of damages for this alleged breach would be a very difficult one. Finally, as to payment of proper costs, there had been no indication that the proper costs of the assignment to which the lessee was entitled under clause 5(e)(iv) would not be forthcoming. On the contrary, the respondent's solicitors had confirmed in their letter of 24 May that all proper costs would be paid.

- [37] The letter once more left the door open to the receivers and did not in terms signify an unflinching refusal to consent. As to the satisfaction of the provisions of clause 5(e)(i) that matter was now plainly on the table, although of course it had not been so when the letter of 26 April was written advising that consent was being withheld.

THE HEARING

- [38] The applications to dispense for the consent of the lessor to an assignment of various leases to South Pacific came on for hearing by way of a special fixture in the High Court of the Cook Islands on 6 June 2000. The Judge had been flown to the Cook Islands at the receivers' expense because of the urgency of the matter. We were told that Mr Nia the other landowner whose consent was being sought made submissions and then Mrs MacQuarie confirmed her evidence and was cross-examined. The hearing lasted for half a day. A

substantial body of evidence was placed before the Court including the following (the references are to the Case on Appeal):

- “(a) Affidavit of K M Downey in support sworn 7 April 2000 (Record page 64) although sworn in unrelated proceedings.
- (b) Affidavit of M R Carr in support sworn 22 May 2000 (Record page 74). Mr Carr confirmed that all unpaid rent had been paid.
- (c) Affidavit of Rondo Perkins in support sworn 1 June 2000 (Record page 61).
- (d) Affidavit in Opposition by Mere Macquarie sworn 6 June 2000 (Record page 102).
- (e) Certain documentary exhibits produced by the landowner Ted Nia and receivers (Record pages 77-101), such exhibits including an affidavit of Zandra Perkins sworn 5 June 2000 (Record page 92) and an affidavit of Eloise Hurley sworn 6 June 2000 (Record page 96).

[39] A significant additional amount of financial information concerning South Pacific was produced as Exhibits “A” - “G” by the receivers. In the Case on Appeal it runs from pages 77 to 101. It encompassed a history of Mosaic Travel & Tours Inc now known as BookForTravel.Com Inc and dealt with the involvement of Western Travel Group Ltd, Mr Don Morrison and Mr Malcolm Stone. There were CVs of Mr Morrison, Mr Stone and others as had been requested in the lessor’s 22 May letter/notice.

[40] The financial performance of BookForTravel was also canvassed in detail. Full details of the loan facilities from Westpac to South Pacific were provided. In addition there was further information from an Auckland Chartered Accountant, Mr P J Brannigan, concerning the financial structuring of South Pacific and a commentary provided on its recent financial performance. A letter placed before the Court from BookTravel.Com Inc pointed out that BookForTravel had strong support from the financial and brokerage community who were committed to supporting BookForTravel’s “Go Forward Growth Strategy”. BookForTravel was described as a vertically integrated travel business company which included retail travel agencies, wholesale tour operators, media division print magazine, internet website and resort properties. It suggested that BookForTravel was in a position to allow South Pacific

to immediately develop the next stage of Crown Beach Resort. The resort had to be fully developed to justify the infrastructure that is presently in place.

- [41] It was noted that Westpac had given a firm commitment to funding further development of the resort as soon as South Pacific had purchased the property from the receiver. The Westpac documentation confirmed that, subject to satisfying certain conditions, this was so. There was also detailed information concerning this Westpac funding which was to be guaranteed by Messrs Perkins and Morrison and BookForTravel Inc. The funding involved a term loan facility No 1 from \$1,355,000 and a term loan facility No 2 of \$1,020,000; the first being to assist with the acquisition of Crown Beach and the second to construct 12 additional accommodation units. There were various conditions and undertakings relating to the proposed funding.

- [42] The affidavit by Mr Rondo Perkins, after dealing with the troubled history of Crown Beach, concluded as follows:

"I am a minority share-holder in South Pacific Resorts and will not have any management responsibility. Mosaic Travel and Tours is involved in the wholesale travel business and have employed Jim and Claire Smith as resident managers of the resort in the future. This professional management, together with the business which Mosaic can direct to the resort should ensure that there are no further insolvency problems."

- [43] On the other side, Mr Nia produced affidavits from Zandra Perkins and Eloise Hurley which discussed their past role with Crown Beach and were critical of the reliability of Mr Rondo Perkins.

- [44] For the appellant a lengthy affidavit was filed by Mrs MacQuarie. In the affidavit it was stated:

"7. Vaitamanga has refused to provide its consent to a proposed sale of the resort previously operated by Crown beach and now operated by the Applicants on the basis:

- (i) That Vaitamanga is not satisfied as to the requirements of clause 5(e)(i) of the Sublease;
- (ii) That there are subsisting breaches of the Sublease as referred to in clause 5(e)(iii) of the sublease; and
- (iii) That it has no confidence in the abilities of Rondo Perkins, a shareholder and director in the proposed purchaser Company.

Existing Breaches

- 8. On 23 December 1999 my solicitor wrote to the Receiver of Crown Beach summarising the breaches of the Sublease. A copy of my solicitor's letter dated 23 December 1999 is attached and marked with the letter "A".

[45] In relation to the existing breaches the claim that the appointment of a receiver breached clause 13A was revived once again even though that had been earlier waived. In respect of the financial standing of the proposed assignee the concluding comment was that "the details of the proposed purchaser provided to me contained several inconsistencies which are of concern to me and need clarification before I can be comfortable with the financial standing and abilities of the proposed purchaser." These concerns had apparently arisen from assessments made by Vaitamanga's accountant, Trends Limited of information supplied by the receiver concerning South Pacific. This in turn had been responded to by BookForTravel in a letter to the receivers' solicitors dated 31 May.

[46] However, the most detailed section of the affidavit related to Mrs MacQuarie's views on Rondo Perkins which cover paragraphs 29 to 53. The affidavit concluded as follows:

- "51. We understand that Rondo Perkins has blamed all the problems to do with the Resort on the previous managers, Steve and Brenda Farnsworth, and on his sister Zandra Perkins who he appointed as manager of the Resort. As Mr Perkins however was the holder of the greatest number of shares and was a director of the Company, we do not accept that he should not take some responsibility for the previous failure of Crown Beach. Further I have been given an extract from Travel Week (October 1999 issue) which is attached and marked "O". The comments therein as to the management of Crown Beach is consistent with my understanding of the position.
- 52. Crown Beach has a history of litigation and Mr Perkins has personally been involved with litigation with Steve Farnsworth, ourselves and now with his sister Zandra Perkins and another shareholder of the Company Eloise Hurley. In our

experience, Mr Perkins appears to be very litigious, aggressive and unable to compromise.

53. We have been advised that Mr Perkins will not have any involvement in the management of the proposed purchaser company. However we note that he is a director of that company and therefore will presumably be involved in all decisions made by that company. Because of his past attitude towards us, which has been totally dismissive, the fact that he has never made any apology to us for the past breaches or made any attempt to remedy those breaches, we can have no confidence in his future abilities in relation to the Sublease Land.
54. I would ask the Court to protect our rights as native landowners and not dispense with the consent of the First Respondent. The difficulties experienced by Crown Beach since its inception have caused us immense stress and considerable worry. Myself and my husband are elderly and have real difficulty coping with what has been a series of legal battles. We do not wish these battles to continue but, with Mr Perkins involved, we have no confidence that that will not be the case."

[47] One can readily sympathise with these sentiments. It is plain that the Crown Beach project has caused considerable problems for Mrs MacQuarie and her husband. However, subject to the remedying of past breaches, the High Court was not empowered to address these issues. Its task was to confine itself to the question of whether the refusal of consent was unreasonable.

THE JUDGMENT

[48] In his judgment the Judge said he proposed to deal with the application to dispense with consent on behalf of the landowners of sections 88F2A and B who were represented by Mr Nia first, and then to deal with the application in respect of Vaitamanga Holdings Limited. The Judge dealt with the substance of the 88F2A and B owners' concerns as promoted by Mr Nia. Most of these are not relevant for present purposes. The Judge then turned to the concerns raised about the inclusion of Mr Rondo Perkins in the company proposing to take over the leases and said:

"It was made clear, that Mr Nia at least had no time for Mr Perkins. It has been shown to the satisfaction of the court, that the proposed purchaser, is South Pacific Resorts Limited a company in which Mr Perkins is but a shareholder and director. It is the ability of the Company to comply with the covenants, and satisfy the question of financial ability, not that of Mr Perkins, that is in question. In this regard, evidence has been shown that the company

has very strong backing from overseas interests, including travel interests, which must provide resources to foster growth in the type of business carried out on the land. Further, the Westpac Banking Group which has offered the purchaser a very substantial loan has demonstrated its faith in the ability of the Purchaser.

Having regard to the evidence given in respect to the bona fides of the purchasing company, the faith the Westpac Bank has demonstrated in the venture, this Court is satisfied that South Pacific Resorts Limited is a fit and proper entity to take over the leases, and has the finances and ability to comply with all of the covenants of the leases in respect to sections 88F2A and B.

The Court is equally satisfied that the lessee has complied with all of the requirements in the leases in respect to seeking the consent of the lessors, and that the reasons for withholding such consent are irrelevant and therefore unreasonable."

The Judge then made orders dispensing with the consent of the lessors of Parts Vaitamanga 88F2A and B to the assignment of the leases thereof to South Pacific Resorts Limited.

- [49] The Judge then turned to the refusal of Vaitamanga and Mrs MacQuarie, a shareholder and director of that company. The Judge began by noting that "the evidence here, was placed largely upon Mrs MacQuarie's strong aversion to Mr Rondo Perkins". In this respect it must be remembered that Mrs MacQuarie was cross-examined before the Judge and the inference may properly be drawn that in her oral evidence she focussed primarily, if not solely, on her aversion to Mr Perkins rather than any clause 5(e)(i) matters that had received attention in her affidavit. This seems to be confirmed by the passage we have underlined in the next section of the judgment.

"Mrs MacQuarie admitted that she had met him once only, and at that time he had been extremely rude to her. The Court has no reason to doubt Mrs MacQuarie's account of this meeting. In Mr Perkins' defence, it was pointed out that despite the injection of \$500,000 into the business being carried out on the land, it was clear that the business was on the verge of bankruptcy, a matter that could have coloured his judgment and demeanour at the time of his meeting with Mrs MacQuarie. Regardless of Mrs MacQuarie's personal feelings towards Mr Perkins however, the proposed assignee was not to be Mr Perkins, but South Pacific Resorts Limited, a company about which Mrs MacQuarie raised no concerns, other than the presence of Mr Perkins as a director and shareholder. This would not constitute a reasonable ground to withhold consent.

The reasons as to why the Lessor company would not consent to any assignment are set out at paragraph 7 of the affidavit of Mrs MacQuarie sworn on the 6th June 2000 and are as follows:

- [i] "That Vaitamanga is not satisfied as to the requirements of clause 4(e)(1) of the sublease.
- [ii] That there are subsisting breaches of the sublease as referred to in clause 5(e)(iii) of the sublease, and
- [iii] That it has no confidence in the abilities of Rondo Perkins, a shareholder and director in the proposed company.

It is stated that breaches continue including that, in terms of clause 5(1)(i), whereby the appointment of receivers for the lessee constitutes an assignment without consent. Counsel for the applicant referred the Court to a letter dated the 22nd December 1999 from Counsel for the lessor, stating, "Mrs MacQuarie will not forfeit the lease as a consequence of the appointment of a Receiver", Mrs MacQuarie has clearly waived the breach.

With regard to any other breaches, there have been discussions as to the quantum to be paid to alleviate any such breaches. Whilst the applicant is prepared to pay from the proceeds of the sale all monies properly payable, the applicant is responsible to the debenture holders, and cannot enter into any proposal contrary to their interests without their consent. The Court was advised that the rent has been paid, and upon determination of whatever monies are properly payable those debts too can be settled from the proceeds of the sale."

- [50] The Judges' waiver point was plainly correct and once again it was confirmed that all outstanding rent had been paid. There was an indication, which the Court apparently found satisfactory, that any other amounts owing would be paid from the proceeds of the sale.
- [51] The Judge went on to deal with the September/October 1998 sale and purchase agreement and said:

"One matter of concern, is a time share arrangement entered into by a former manager of the Resort, and a Mr McNamee. Little is known about the nature of the licence granted, but Counsel for the applicant admits that if the consideration can be established, Mrs MacQuarie is entitled to 1.5% thereof in accordance with clause 1(b) of the sublease.

The purported breach in transferring shares in the lessee company without first offering them to Mrs MacQuarie is rather dubious, since the shares because of the receivership, are worthless, and the amount of damages that would be assessed in respect of that breach would be infinitesimal."

That particular finding again appears soundly based and the Judge is merely repeating the comment of the respondent's solicitors in their letter of 23 December 1999 to the receivers about the difficulty of quantifying damages.

[52] The Judge then expressed his overall conclusion as follows:

"With the greatest of respect, the decision of the lessor company and Mrs MacQuarie to withhold consent to the assignment is unreasonable having regard to the nature of the grounds relied upon, and the offer of the applicant to settle all and any outstanding matters upon settlement of the sale.

It is hereby ordered that the consent of Mrs MacQuarie, and Vaitamanga Holdings Limited to the assignment of the sublease to South Pacific Resorts Limited is hereby dispensed with.

There is a direction that the lessor, Vaitamanga Holdings Limited, and Mrs MacQuarie submit to Counsel for the applicant, a statement of the amount claimed to be due and owing and the applicant is directed to settle all payments properly payable in terms of the sublease upon settlement of the sale thereof.

The question of costs is reserved, and Counsel are invited to file and exchange memoranda in respect thereto within one month of the date hereof should they so wish."

[53] Counsel for the appellant rightly accepted that the passages in the first part of the judgment dealing with the financial aspects of South Pacific were intended to apply equally to the second part of the application in respect of Vaitamanga.

LEAVE TO APPEAL

[54] On 12 June the appellant applied for leave to appeal asserting that it was entitled to appeal as of right pursuant to Article 60(2)(b) of the Cook Islands Constitution Act 1964. As to the grounds of appeal it was asserted that the trial Judge had erred in determining that:

- “(a) The appellant’s concerns at the presence of Mr Perkins as a director and shareholder of the purchaser company did not constitute a reasonable ground to withhold consent;
- (b) Mrs MacQuarie had clearly waived her right to forfeit the Deed of Sublease;
- (c) The purported breach in transferring shares in the Lessee company without first offering them to Mrs MacQuarie is rather dubious, since the shares because of the receivership are worthless, and the amount of damages that would be assessed in respect of that breach would be infinitely small.”

It may be noted in passing that none of these grounds directly addressed the financial standing of South Pacific or its potential or otherwise to maintain gross income at a level at least equal to that earned by the lessee.

- [55] A date of hearing was apparently allocated for the following day for 13 June at 10.45 am. On that day N Smith J granted leave to appeal and also a stay of execution pending determination of the appeal. At this point counsel for the respondent filed a memorandum advising that it wished to present submissions on the application for leave and pointing out that it had not had an opportunity to be heard on such matters.
- [56] On 14 March a rehearing was granted and after hearing argument leave to appeal was refused. Subsequently, an application for special leave to appeal was made to this Court. Counsel for the respondent conceded that there was a wide discretion in this Court to grant leave and correctly in our view did not strongly oppose the application. The Appellant contended that special leave ought to be granted reason of its general public importance, or alternatively the magnitude of the interests affected. It was said that the following issues of general public or importance in the case of assignments of leases in the Cook Islands and in the context of applications pursuant to s 110 of the Property Law Act arose.

- "(a) The circumstances in which a Court should override the decision of the native land owner or lessor to refuse consent.
- (b) The applicability of the rules established by the United Kingdom and New Zealand Courts to applications in the Cook Islands for orders dispensing with consent pursuant to section 100 Property Law Act 1952. It is understood there are no earlier decisions of the High Court of the Cook Islands in point.
- (c) Whether the Judge directed himself correctly in law in considering the application to dispense with consent and applied the right burden of proof.
- (d) The circumstances of a proposed assignee and in particular the financial soundness of the proposed assignee and the directors of a company to be formed where the proposed assignee is a company and whether such matters may properly impact upon the question of consent and if so how and to what extent.

- (e) Whether the proposed assignee must as a matter of law satisfy the lessor (or in a case of refusal, the Court) as to its own circumstances including its financial circumstances. If so, had the proposed assignee done so in this case."

[57] Whatever may have occurred as to leave in the High Court we are in no doubt that we have jurisdiction to grant leave and that leave is appropriate in this case. It is granted accordingly.

APPLICABLE LEGAL PRINCIPLES

[58] In *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 All ER 321 Balcombe LJ summarised the law as follows:

- "(1) The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee: ...
- (2) ... a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease: ...
- (3) The onus of proving that consent has been unreasonably withheld is on the tenant: ...
- (4) It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances: ...
- (5) It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease:
- (6) There is a divergence of authority on the question, in considering whether the landlord's refusal of consent is reasonable, whether it is permissible to have regard to the consequences to the tenant if consent to the proposed assignment is withheld. ... there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment that it is unreasonable for the landlord to refuse consent.
- (7) Subject to the propositions set out above, it is in each case a question of fact, depending upon all the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld:...

- [59] While the law has been modified by statute in the United Kingdom, the law of New Zealand and the Cook Islands is undoubtedly to the same general effect. Reference may be made to similar statements of principle in the judgment of Somers J in *Wagner Ltd v Photo Engravers* [1994] 1 NZLR 412 at 426, 427 and in Hinde McMorland and Sim, *Butterworths Land Law in New Zealand* (1st Ed 1997) at paras 5.099-5100, pp 507-508.
- [60] We would add one further proposition to the eight listed by Balcombe LJ. Section 110 does not expressly require a landlord to respond to a request for consent within a reasonable time. Hinde, McMorland & Sim, *Land Law in New Zealand* 1997, para 5.099, page 506 suggest that the landlord has such a duty. The learned authors express the view that failure to respond within a reasonable time may itself constitute an unreasonable withholding of consent. They refer to *Midland Bank plc v Chart Enterprises Inc* [1990] 2 EGLR 59 where a delay of 2½ months was considered unreasonable but note that that case may have been influenced by the Landlord and Tenant Act 1988 UK, section 1(3) which expressly requires landlords to respond within a reasonable time. We agree with the authors that failure to respond within a reasonable time may itself constitute an unreasonable refusal. What is a reasonable time will depend on the precise circumstances of each case.

SUBMISSIONS FOR APPELLANT

- [61] In the comprehensive written and oral submissions of counsel for the appellant in this Court, three main points were emphasised. First, as in the Court below, it was said that “at the heart of the objections raised by the landowners and lessor lies an objection to the personality of the proposed assignee, Rondo Perkins or any company in which Mr Perkins is involved”. Mr Perkins’ previous performance, or alleged lack of performance, as a director and shareholder in Crown Beach was stressed. Reference made to litigation involving Crown Beach which had caused substantial costs and other losses to the native landowners and lessors and which eventually culminated in orders which led to the control of Crown Beach passing into the hands of Mr Perkins. That notwithstanding the company nevertheless went

into receivership. It was emphasised that it was now the same Rondo Perkins, who sought to buy back the business under the guise of a new entity. Neither the appellant, nor Mrs MacQuarie wanted to have anything to do with Mr Perkins nor any company under his control. The appellant was unpersuaded by Mr Perkins' assertions that he was not directly responsible for the demise of Crown Beach.

- [62] Secondly, reliance was placed on alleged existing breaches of lease. This was in part an implicit response to the Judge's rulings on waiver. It was further submitted that the unremedied breaches would not be able to be remedied as the Judge had hoped since it was doubtful whether the receivers would be able to provide financial recompense that they had promised.
- [63] Finally, counsel engaged upon a detailed critique of the nature and structure of South Pacific, its directors and its financial resources. While this detailed written and oral analysis was based upon the same material as had been before the High Court it was acknowledged that this sophisticated analysis had not been presented to the Judge. Among the many points of criticism that were leveled at South Pacific was the fact that whatever the resources of its shareholders, South Pacific itself was only a \$100 company. In this respect strong reliance was placed on the judgment of the Court of Appeal in *Charins Investments Limited v Korochine 15 Limited* (Court of Appeal, Henry J, Thomas J and Temm J, CA 272/94, Judgment 22 April 1996). In that case Temm J at p 5 speaking for the Court referred to the finding of the Judge "that *Korochine* was a subsidiary of Equitable General Insurance Company Limited, that company being a substantial company in its own right and in turn a subsidiary of Equitable Holdings Limited". As to that, Temm J said that "the evidence was that *Korochine* was merely a subsidiary of the other companies mentioned. There was nothing to show what its financial strength amounted to, if anything. Even before us on the hearing of the appeal, it was not known what its capital was, whether it had any assets at all and whether or not the "substantial companies" named had any legal obligation to satisfy its debts". Temm J also mentioned the fact that *Korochine* was a new company and did not

have a balance sheet. The Court concluded that apart altogether from the failure to proffer a suitable guarantee, a reasonable lessor would require better evidence that Korochine had the financial resources to meet its commitments under the lease.

- [64] We do not consider that the holding in *Korochine* can be transformed into an immutable principle in all cases. Each case must depend on its own facts. Here, as we note later, while South Pacific may be only a \$100 company, there was more than adequate evidence before the Judge to demonstrate that, taking into account the resources of its shareholders and business associates, it was capable of meeting the standards required in the assignment clause.

SUBMISSIONS FOR THE RESPONDENT

- [65] In the respondent's submissions much was made of the vacillations of the appellant on the consent issue. To the extent that in the appellant's submissions it had been claimed that by letter of 26th April the appellants declined to give consent, it was significant that in that letter there was no mention of any challenge being made to the financial good standing of the proposed assignees. The first query regarding financial good standing was not presented to the respondents (or the proposed assignee) until the letter of 26th May following an indication by counsel for the appellants at a Court hearing the previous day.
- [66] Next it was suggested that the Judge's finding of waiver was amply justified. As long ago as the letter of 22nd December it had been said that "Mrs MacQuarie will not forfeit the lease as a consequence of the appointment of a receiver". The Judge was entitled to rely on that in determining that there had been a waiver.
- [67] In summary the respondent asserted that the refusal of the lessor was not bona fide. "It was all about a personal argument with Mr Rondo Perkins" and the Judge had been right to rule that this was not enough.

- [68] As to the financial ability of South Pacific it was said that in comparing the new and old lessees, consideration must be given to the fact that the assignee was not "just a \$100.00 company" - it was a company supported by substantial working capital from the bank, substantial input from Rondo Perkins, and the Canadian interests with travel and other experience. Strong reliance was placed on the apparent financial solidity of the shareholders in South Pacific. It was pointed out that the backers of South Pacific must be prepared to stand by their company because they had given personal guarantees to Westpac. It was noted that the lease did not provide for personal guarantees. It provided only for a covenant by the assignee. The lessor should not be allowed to rewrite the lease. The appellant was attempting to improve its position by "clogging the consent".

CONCLUSIONS AND DECISION

- [69] We have carefully considered the submissions for the appellant and we have steadily borne in mind that the onus of proof under the clause lay upon the respondent. In the end we have not been persuaded that the decision of the Judge below to dispense with the consent was in any way affected by errors of principle or approach or that it was not soundly based on the material before the Court. Indeed on our own review of such material which we have summarised above, we were left in no doubt that the Judge's findings and conclusions were correct. We need not traverse all of the issues again but would highlight the following points.
- [70] Clause 5(e) contains a number of provisions which need to be complied with when a lease is assigned but Clause 5(e)(i) is the only one which relates to the status of the assignee. Provided the assignee attains the requirements of s 5(e)(i) then, leaving aside the other machinery provisions including the question of past breaches, the lessor cannot withhold consent. Rejection of a proposed assignee solely through dislike of a shareholder (in this case, Mr Rondo Perkins), is not enough and the Judge was right to reject this central

complaint of the respondent. The situation might, of course, be different if the challenged shareholder not only has a bad business track record but is also to play a major part in the management of the assignee's business.

- [71] As to the alleged breaches of the Sublease which were set out in the letter dated 23 December 1999 from Clarkes to the Receivers, the only one which required detailed consideration by the Judge was that relating to the September/October 1998 share transaction. All others had been remedied or waived or involved payments yet to be quantified such as legal costs on the consent to the assignment.
- [72] As to the share transaction, some of the conditions of the share sales would appear to have been amended between the parties, namely the vendors and the purchasers under the share transfers, subsequent to notice of the sale being given to Mrs MacQuarie and she having waived her right of first refusal. She contended that because of the change of conditions she should have been given a further right of first refusal. The shares were to be sold at \$331,150.00 and even if one allows for \$41,902.00 to be subsequently deducted from the purchase price by virtue of the further arrangement, there would still be a consideration of just under \$290,000. However, Mrs MacQuarie's claim is that she was deprived of the right of purchase of those shares, albeit shares which are now virtually worthless. We agree with Smith J when he said it would be difficult to see, as the circumstances later developed, how a claim for loss could be sustained, even if there had been a default under the lease.
- [73] Thus the only remaining issue was the question of the financial standing of South Pacific and its potential to maintain the gross income at a level at least equal to that earned by Crown Beach. The presence of the word "potential" is significant. It requires a possibility or perhaps probability but not a certainty that the proposed assignee will at least produce financial results equal to that of its predecessor. The performance, or relative lack of it, by Crown Beach meant that in the circumstances this contractual standard was not a very high one. In our view the Judge was right to hold that the standard was reached.

- [74] The existing lessee had been in difficulties for some time. The previous share transfer which took place in October 1998 was originally welcomed by the lessors in the hope that the overall performance of Crown Beach would improve. Regrettably this did not eventuate. While South Pacific is a one hundred dollar company the evidence demonstrated that BookForTravel.Com is an experienced travel operator which would have a reasonable clientele. Mr Don Morrison, a director of that company, has reasonable knowledge of the travel and hospitality industry in Rarotonga. The principals of South Pacific are guaranteeing the Westpac bank loan. Given the amount of their investment and the undertakings they have given it is reasonable to infer that they will use their expertise to operate the business and achieve financial results at least equivalent to its present *modus operandi*. The introduction of the Canadian travel industry connection creates the potential to increase the occupation rate beyond the present level. The shareholders of the company and the principals involved in the guarantee to Westpac Bank are between them providing or assuming liability for the total purchase price of \$2.7m. Considerable weight must be given of the extent of their investment and their apparent conviction that they can make it a viable proposition.

FURTHER CONDITIONS

- [75] When the question of the absence of personal guarantees of the rental was raised by counsel for the appellant, counsel for the respondent pointed out that the Court was empowered by s 56 of the Judicature Act to vary the judgment under appeal or make such order with respect to the appeal as the Court thought fit. Section 56 provides:

"Powers of the Court of Appeal - (1) On any appeal from the High Court, the Court of Appeal may affirm, reverse, or vary the judgment appealed from, or may order a new trial, or may make such order with respect to the appeal as the Court thinks fit, and may award such costs as it thinks fit to or against any party to the appeal." (Underlining added.)

It was submitted by counsel for the respondent that if there was a real and genuine concern about the lack of direct personal guarantees of the rental, the Court could impose conditions to that effect. Counsel for the respondent indicated that the receivers had no ability to provide such undertakings but could arrange for counsel for South Pacific to appear before the Court to see whether they would do so. Mr Morris subsequently came to Court and was given leave to appear.

- [76] A general discussion then took place between counsel as to the powers of the Court and in the end the Court invited both sides to signify what conditions they would either offer or seek to impose if the Court reached the position of considering adding to the conditions or directions already imposed by the Trial Judge. We have concluded that there was no basis for allowing the appeal. Strictly speaking there is now no need for us to consider the imposition of further conditions. However, in deference to the genuine concerns of the respondent, it is appropriate to deal with the additional submissions placed before us as to additional conditions.

CONDITIONS SOUGHT BY THE RESPONDENT

- [77] The respondent's position remained throughout that the appeal should be allowed and the refusal of consent allowed to stand. However, without prejudice to that submission, it was suggested that if the Court was minded to uphold the decision of the lower Court, it must be subject to additional conditions.
- [78] The amounts in issue so far as the lessor is concerned were perhaps seemingly small - only about NZ\$30,000 per annum. Yet this amount was significant for the native land owner as providing the bulk of the appellant's income. Because the amount on a commercial scale was not large, the costs of pursuing any default were vastly disproportionate to the amounts in issue.

- [79] The appellant accordingly submitted that directors/shareholders' guarantees should be provided together with some form of collateral security to ensure that in the event of a default the guarantees did not have to be enforced out of the Cook Islands jurisdiction, in the United States or Canada.
- [80] If, as the lower Court found, Westpac (which bank appointed the receivers) was prepared to support South Pacific, then the bank should provide at the cost of the proposed assignee an unconditional bankers bond (of the type commonly encountered in building contracts) so that the lessor could have recourse to that bond in the event of any default and without any necessity to enforce the guarantee.
- [81] A further suggested condition was the payment of NZ\$30,000 as the equivalent of one year's rent or 1.5% turnover rent. Such money should be held in the trust account of Clarkes, the lessors' solicitors, in trust for the benefit of the lessor and to be paid out in the event of a default in payment of rent, which default remained unremedied following the giving of a 21 day notice.
- [82] As an additional condition South Pacific should be required to provide monthly returns of its gross receipts (before COGS) or any other deductions, such returns being duly certified by its accountant in the Cook Islands.
- [83] As a yet further condition the Court should require that the order dispensing with consent be with respect to an assignment to South Pacific Resorts Limited and no other entity. It is that entity that was put up as the proposed assignee, not BookForTravel, nor any other entity.
- [84] Finally, the Court was referred to the provisions of clause 5(e)(iv) of the lease which related to costs issues. To the extent that the lessor had incurred additional costs in the lower Court and in this Court, essentially for the purposes of extracting satisfactory financial information or returns and extra conditions, it was submitted that all those costs were costs which should

properly fall within the scope of clause 5(e)(iv). As a result, the lessors' costs in both Courts should be paid by the lessee, regardless of the outcome of the appeal.

CONDITIONS SUGGESTED BY SOUTH PACIFIC

[85] As noted earlier, counsel for South Pacific was given leave to appear and by way of Memorandum dated 12 July advised the Court as follows:

- “2.1 South Pacific Resorts Ltd has a shareholding as follows:
 - i. Book For Travel.Com Incorporated - a Canadian publicly listed company as to 51%;
 - ii. Mr Rondo Perkins as to 49%.
- 2.2 Mr Don Morrison is a significant shareholder in Book for Travel.Com Incorporated.
- 2.3 Perkins, Morrison and Book for Travel.Com Incorporated will provide written, joint and several, guarantees of the lease payment obligations of South Pacific Resorts Ltd, to Vaitamanga Holdings Limited.
- 2.4 The written guarantee of Rondo Perkins will remain enforceable only for such time as he individually retains shares in South Pacific Resorts Ltd, and whilst South Pacific Resorts Ltd owns the lease.
- 2.5 Book for Travel.Com Inc's written guarantee will remain enforceable only for such time as it owns its shares in South Pacific Resorts Ltd, and whilst South Pacific Resorts Ltd owns the lease.
- 2.6 Don Morrison's written guarantee will remain enforceable only for such time as he remains a Director of South Pacific Resorts Ltd, and whilst South Pacific Resorts Ltd owns the lease.
- 2.7 In the event that the guarantees referred to above become unenforceable, the obligation of the guarantors is extinguished only from the date such guarantees become unenforceable.
- ...
- 3.1 In addition to the above guarantees, South Pacific Resort Ltd is in a position to offer a banker's undertaking in terms of the attached document. It will provide such an undertaking for a sum of \$30,000.00 (being an estimate of 1.5% of annual estimated turnover).
- ...

- 4.1 If the Court were minded to impose such conditions, Counsel seek that such conditions be satisfied by:
- (a) the provision of written guarantees in terms of this memorandum; and
 - (b) the provision of security in terms of this memorandum
- to the landlord within seven (7) days of the date of this decision."

ORDERS OF THE COURT

[86] While we can fully understand deep seated reservations held by the respondent concerning Mr Perkins, we have already held that the respondent receivers provided more than adequate information to satisfy the fairly low threshold in Clause 5(e)(i). Bearing in mind the relatively modest amounts of leasehold rental involved, albeit most important to the respondent, we find it difficult to imagine that the respondent's position could be other than better with the new tenant than it would have been with Crown Beach. Nevertheless, since South Pacific has come to the Court and volunteered additional conditions, and because those additional conditions may provide additional comfort to the appellant as well as hopefully minimising the possibility of any future discord, disagreement or difficulties between the parties, we have decided in the exercise of our powers under s 56, to make the suggested additional directions. We do this in view of the unqualified offers made in the memorandum on behalf of South Pacific and notwithstanding that the appeal has been found ultimately to be without merit.

[87] The formal orders of the Court will therefore be as follows:

- (1) An order dismissing the appeal against the judgment of Smith J dated 9 June 2000.
- (2) An order declaring that the judgment of this Court and order (1) shall lie in Court unsealed for not more than 14 days to allow orders 3 and 4 below to be implemented. If such implementation occurs before the expiry of the 14 days this judgment may be

sealed forthwith. If no such implementation and consequential sealing occurs this Court will convene a further hearing to consider the matter.

- (3) An order directing that there be supplied to the Registrar of the High Court (with copies to the respondent's solicitors) within 14 days from the date of this judgment written joint and several guarantees by Mr Rondo Perkins, Mr Don Morrison and BookForTravel.Com Incorporated of the lease payment obligations of South Pacific Resorts Limited under the Sublease from Vaitamanga Holdings Limited on the basis that:
 - (a) the written guarantee of Mr Rondo Perkins will remain enforceable only for such time as he individually retains shares in South Pacific Resorts Limited and while South Pacific Resorts Limited is the sublessee;
 - (b) BookForTravel.Com Inc's written guarantee will remain enforceable only for such time as it owns its shares in South Pacific Resorts Limited, and whilst South Pacific Resorts Limited is the sublessee; and
 - (c) Mr Don Morrison's written guarantee will remain enforceable only for such time as he remains a director of South Pacific Resorts Limited, and while South Pacific Resorts Limited is the sublessee.
 - (d) For the avoidance of doubt it is ordered and declared that in the event that the said guarantees become unenforceable the obligation of the guarantors is extinguished only from the date such guarantees become unenforceable.
- (4) That South Pacific Resorts Limited will provide to the Registrar of the High Court (with copies to the respondent's solicitors) within 14 days from the date of this judgment a properly executed banker's undertaking in terms of the document attached as Appendix A to this judgment providing an undertaking in the sum of \$30,000.

- (5) That leave be reserved to all parties to apply on 24 hours' notice to the High Court or this Court if any questions arise concerning
- (a) the interpretation terms of orders 2, 3 and 4; or
 - (b) the implementation of any of the foregoing orders; or
 - (c) the satisfactory completion of the assignment.

COSTS

- [88] At the request of counsel for the parties, costs were reserved. Memoranda on costs are to be filed with the Court within 21 days of the date of this judgment. Thereafter the Court will decide the question of costs.

POSTSCRIPT

- [89] In the course of the hearing reference was made to the UK Landlord and Tenant Act 1988. The Act is referred to in the judgment of Sir Richard Scott VC in *Norwich Union Life Assurance Society v Shopmoor Limited* [1998] 3 All ER 32 at 45. The Act creates a statutory duty requiring landlords to attend promptly to applications for consent to assignments where there is a covenant not to assign without consent. Section 1(3) provides that the landlord:

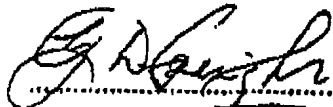
"owes a duty to the tenant within a reasonable time —


- (a) to give consent, except in a case when it is reasonable not to give consent,
- (b) to serve on the tenant written notice of his decision whether or not to give consent specifying in addition
 - (i) if the consent is given subject to the conditions, the conditions
 - (ii) if the consent is withheld the reasons for withholding it."

[90] It does not appear that the New Zealand legislation has been altered in a similar manner. However, in view of the importance of leases and assignments to the Cook Islands economy and the Cook Islands people, it seems to us that the legislature of the Cook Islands might well give consideration to enacting similar provisions. Their introduction would increase the level of efficiency and fairness which should prevail in dealings between lessor and lessee in situations involving consent to an assignment and make more explicit the obligations each party owes to the other in such circumstances. Moreover, and we stress that this observation is not related to the facts of this case, as Sir Richard Scott VC said in *Norwich Union* at p 45:

"The English Act was intended to remedy the state of affairs in which a landlord by his dilatory failure to respond to an application for consent to an assignment or to subletting, could cause substantial financial damage to the tenant without the tenant having any remedy for that damage. A tenant might lose a valuable property transaction because of the landlord's failure to deal expeditiously with the application for consent."

Signed at Auckland this 24th day of July 2000


.....
Speight JA


.....
David Williams J


.....
Carter J

Solicitors: Clarke & Co, Rarotonga, Cook Islands for appellant
Stevenson Nelson & Mitchell, Rarotonga, Cook Islands for respondent

BANKERS UNDERTAKINGBY: **WESTPAC BANKING CORPORATION**

TO:

At the request of:
(the applicant) and in considerationof
(the favouree) accepting this undertaking**WESTPAC BANKING CORPORATION (the Bank) unconditionally undertakes to pay on demand any sum or sums which may from time to time be demanded by the favouree to a maximum aggregate sum of:**

This undertaking is to continue until a notification has been received from the favouree that the sum is no longer required by the favouree or until this undertaking is returned to the Bank or until payment to the favouree by the Bank of the whole of the sum or such part as the favouree may require. Should the Bank be notified in writing purporting to be signed by or for and on behalf of the favouree that the favouree desires payment to be made of the whole or any part or parts of the sum, it is unconditionally agreed that such payment or payments will be made to the favouree forthwith without reference to the applicant and notwithstanding any notice given by the applicant to the Bank not to pay same. Provided always that the Bank may at any time without being required to do so pay to the favouree the sum less any amount or amounts it may previously have paid under this undertaking or such lesser sum as may be required and specified by the favouree and thereupon the liability of the Bank hereunder shall immediately cease and determine.

Dated at this day of 19

Signed by **WESTPAC BANKING CORPORATION** by its duly appointed Attorneys **TERRY SMITH and TEREMOANA ENUA** Manager and Head of Lending Services respectively under a Power of Attorney dated 15 January 1996 who certify that they have received no notice of revocation of the said Power of Attorney

*Attention**CHRIS MORRIS.*

MANAGER

HEAD OF LENDING

Please forward all notices or correspondences in respect hereto -