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

OA NO. 9/99

IN THE MATTER of the Declaratory Judgments Act 1908

AND

IN THE MATTER of the Property Law Act 1952, s118(2)

BETWEEN MAX HOLDINGS, INC A corporation duly incorporated under the laws of the United States and carrying on business as a resort, owner **First Applicant**

AND THE CASTLE GROUP, INC a corporation duly incorporated under the laws of the United States and carrying on business as a resort operator **Second Applicant**

AND PA TEPAERU UPOKOTINI ARIKI of Rarotonga, Landowner **Respondent**

Hearing: 27 May 1999
Mrs T Browne for First applicant.
A M Manarangi for Second applicant.
T P Arnold for Respondent.

JUDGMENT OF QUILLIAM CJ

On 24 December 1998 a Deed of Lease of 10.2768 hectares being part Papua Section 4, Takitumu, was entered into between the Respondent Pa Ariki as Lessor and the First Applicant (Max Holdings) and the Second Applicant (Castle Group) jointly and severally as Lessee. This was land on which the building of a hotel and other improvements had been previously commenced, but never completed. The purpose of the Lease was to achieve the completion of the hotel and its commissioning and operation without any further delay. The Lease stipulated that the hotel was to be completed and opened not later than 30 June 2000 with provision for an extension of that date in certain circumstances.

The negotiations which resulted in the execution of that Lease contemplated the acquisition of the existing buildings and the engaging of architects, engineers and others for the carrying out of the work necessary to have the project completed and operating within the prescribed time.

> To this end, clause A 2(b) of the Lease provided:
> "The lessee shall forthwith, with all practical speed and diligence, take all steps necessary to complete and commission the existing improvements on the land ...."

The Lease was confirmed by the Court on 26 February 1999. It was contemplated that work on the hotel would start on 1 March 1999 by which time the construction contract which had been negotiated with a building firm (Fletchers) would have been executed. According to the affidavit of Mr Wall, Chief Executive Officer of Castle Group, that contract was in final form and ready for execution. Pre-construction work to an amount of $150,000 had been undertaken on the site in the expectation and belief that construction work would commence in time for completion on or before 30 June 2000.

The financing of the project was the function of Max Holdings, the principal of which, Mr Otake was to be the investor.

Shortly after execution of the Lease Mr Otake's financial affairs came under the scrutiny of the Japanese tax authorities with the result that charges of tax evasion were preferred against him. The trial of those charges commenced on 12 May 1999 and is still continuing.

Although Mr Otake has maintained his innocence and is defending the charges his ability to finance the project referred to in the Lease was at once in doubt, and it is the actions of the Lessee from that time which have now come under scrutiny.

The Lessor, through her solicitor, has continually expressed concern at the failure of the Lessee to enter into a building contract and ensure that work on the project was started and continued. Because of Mr Otake's situation the construction contract with Fletchers which had been ready for execution on 26 February 1999 had not been executed and there was no indication of when it might be.

Finally on 21 April 1999, after several warnings, the Lessor gave a notice of default under s.118 of the Property Law Act 1952 specifying a breach of clause A 2(b) of the Lease (as set out above) and requiring that the default be remedied within 30 days.

The Applicants have now applied for orders:

1. Declaring that the Lessee has not committed a breach of the Lease.
2. Setting aside the notice of default.
3. If there has been a breach, granting the Lessee relief against forfeiture.
4. Enjoining the Lessor from forfeiting the Lease or exercising other remedies claimed to be available.

1. The question of breach

The Applicants contend that, with the unexpected event of Mr Otake having to face tax evasion charges, they have been prevented from carrying out their obligations under the Lease with the speed they had anticipated, and that they have done all that could be expected of them to comply with clause A 2(d).

For the Respondent it is argued that there were several possible replacements for Mr Otake and that the Applicants did not take sufficient steps to explore those possibilities.

The evidence is that the Respondent, through her solicitor was continually expressing her concern at the delay and was inviting the Applicants to enter into realistic negotiations with the other interested parties, but that these efforts met either with silence or at least with no indication of progress on the project.

This is a matter which needs to be considered against the background of the long and unhappy saga of frustration and failure which has characterized all previous efforts to establish a hotel resort on the Lessor's land. All that is clearly reflected in the terms of the Lease. It is difficult to think that the urgency and importance of strict compliance with the Lease could have been more cogently expressed. Mr Otake's defection was just another frustrating circumstance and plainly required to be met by a renewal of effort on the part of the Applicants. Notwithstanding all this, however, for a period of nearly two months (that is, from about the end of February until 21 April when the notice of default was given) there was

no discernable sign of any replacement for Mr Otake being actively sought. It should perhaps be added that, at the expiry of the 30 days given in this notice of default the position was no better It is sufficient, however, to say that, at the time of the giving of the notice the applicants had failed for a period of about two months with all practical speed and diligence to take all steps necessary to complete and commission the existing improvements on the land.

I do not overlook the fact that, throughout this time, substantial pre-contract works was being carried out. Nor have I overlooked the fact that, on 20 May 1999, the proposed construction contractor Fletcher Construction, wrote to the Castle Group saying that there still remained time to complete the project by the due date. This may or may not turn out to be a realistic assessment, but plainly any continuing delay in the commencement of a construction contract must add to the doubt of its accuracy. The provisions of clause A 2(b) of the Lease were surely intended to avoid that doubt arising.

I am accordingly satisfied that there has been a breach of clause A 2(b) and that the Lessor was entitled to give the notice of default.

2. Relief against forfeiture

Because of the commencement of the present proceeding before the expiry of the notice of default there has been no forfeiture or re-entry. Strictly, therefore, the question of relief does not arise. Having regard, however, to my decision on the question of breach it is plainly open now to the Lessor to proceed with forfeiture and re-entry. I therefore consider it appropriate to consider what terms should apply. This can most conveniently be done in the context of an injunction which is one of the remedies sought by the Applicants.

It must be accepted that the contract between the parties must, if possible, be given a chance to be carried out. This was recognized by the Lessor who made an "on the record" offer to settle this matter which was set out in a draft Deed of Settlement sent to the Applicants. In summary that offer proposed that the Applicants should have until 15 July 1999 to obtain completion of the construction contract with Fletchers so that work on the existing improvements as contemplated by the Lease could commence on or before 1 August 1999. It should be added that, at the hearing, counsel for the Lessor was prepared to extend the time from 15 to 31 July 1999. The Deed also contained requirements as to the payment of the

balance of the rental payable for the first year of the contract and the total rental for the first five months of the second year, and also a payment of $3000 by way of costs.

This offer of settlement has not been accepted by the Applicants, who seek a further period to 31 July 1999 for completion and commencement of the contract with Fletchers.

On the basis that both parties regard a further two months as a reasonable period for the work to commence I accept that as a proper term to impose now. I do not think, however, that the Lessor's proposal as to payment of a sum now is reasonable. I think it sufficient if current rent is brought up to date (if in arrears) and that rental payments should continue to be made in terms of the Lease. The Lessor should be left to pursue later any remedy she may have for damages or costs in respect of the consequences of the breach.

Summary

1. I decline to make the orders sought in paragraphs 1 and 2 of the Application.
2. As there has been no forfeiture no order is required in respect of paragraph 3 of the Application.
3. In respect of paragraph 4 of the application, there will be an Injunction restraining the Respondent from forfeiting the Lease or otherwise exercising any remedies under the Lease prior to 31 July 1999, so long as any arrears of rental are paid forthwith and current rental is continued to be paid.
4. The costs are reserved.

31/5/99