IN THE HIGH COURT OF THE COOK ISLANDS
(LAND DIVISION)

APPLICATION NOS. 503/19, 504/19 & 508/19

IN THE MATTER	of section 52 of the Land (Facilitation of Dealings) Act 1970 and section 492 of the Cook Islands Act 1915
AND	the land known as **KAINGAVAI SECTION 49C2A, AVARUA**
IN THE MATTER	of an application for confirmation of a lease to **COOK ISLANDS NONI MARKETING LIMITED**
AND	an application for confirmation of a lease to **COOK ISLANDS TRADING CORPORATION**
AND	an application for confirmation of a lease to **FLYING FISH DEVELOPMENTS LIMITED**

Hearing date: 9 October 2019

Appearances: Mr M Scowcroft for the applicants
Ms K B Bell for the Crown

Decision: 26 February 2020

DECISION OF JUSTICE P J SAVAGE

Introduction

[1] On 7 October 2019, counsel for the applicants in applications 503/19 (lease to Cook Islands Noni Marketing Limited), 504/19 (lease to Cook Islands Trading Corporation) and for the landowners in application 508/19 (lease to Flying Fish Developments Limited) requested that the Court reduce the commission payable to the Registrar on consideration for three leases in Kaingavai Section 49C2A.

[2] On 9 October 2019, the Court confirmed the leases, but applications 503/19 and 504/19 had their confirmations held in Court pending the outcome of a s 390A application to the Chief Justice.

[3] Counsel for the applicants submitted a memorandum on 16 October 2019. Counsel on behalf of the Crown submitted a memorandum on 5 November 2019. This judgment then considers whether the Court should exercise its discretion by lowering the 5% commission as per s 492 of the Cook Islands Act 1915.

Submissions

Applicants

[4] The consideration in each case is:

(a) Application 503/19: $220,000

(b) Application 504/19: $250,000

(c) Application 508/19: $350,000

[5] Counsel has submitted a list of landowners to the Court, with addresses, thus easing the administrative burden on the Court. There are currently 15 landowners, with the total consideration being $820,000. No concession is sought on the commission payable on the annual rental.

[6] Counsel referred to a decision of Coxhead J in *Puatiki Section 84B3 – Island Hotels Limited* where payment of commission was waived completely on the significant upfront consideration, and set at 2.5% on the annual rent.[1]

[7] Counsel submitted that as two of the leases referred to in paragraph [1] hereof might not proceed, they should be viewed in isolation, particularly as the s 390A application, if successful, will expand the pool of owners to be paid to 30.

[8] Counsel additionally submitted for application 508/19, the 5% commission amounts to $17,500, which would exceed any administrative costs that could be incurred.

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[1] *Puatiki Section 84B3 – Island Hotels Limited* (Application no 281/17).

[9] Counsel therefore suggested the percentage struck should be the lesser of 5% of the consideration, or that percentage which is equivalent to a payment of $150 per landowner on the relevant register of title (including deceased landowners as money must be held for them).

Crown

[10] The Crown noted s 429 was amended by s 12(1) of the Cook Islands Amendment Act 1963. The Crown explained this change, as evidenced in Hansard, was to bring Cook Islands law into line with the way the Māori Trustee dealt with similar transactions in New Zealand.

[11] An administrative burden is placed on the Court in receiving money and distributing it to landowners and accounting for and administering the funds. The commission reflects these burdens on the Court.

[12] The Crown submitted that the onus for satisfying the Court that a reduced commission is warranted lies with the person who is seeking the reduction. The Crown emphasised the commission requirement is well-known and thus can be factored in to any negotiations surrounding the leasing of land.

[13] The Crown submitted that the starting point for commissions is 5%. However, s 492(5) provides the Court with a two-pronged discretion to, first impose a lesser commission, and second to determine what level this lower commission ought to be.

[14] The Crown submitted the ultimate test for the exercise of discretion is whether the Court is satisfied that 5% is wholly disproportionate in respect of the role that the Court has in relation to the money. Discretion should be exercised sparingly and only in the clearest of cases.

[15] The Crown identified the following factors as relevant to the Court's determination of whether to exercise its discretion and lower the amount of commission:

(a) The amount of money paid. The Crown submitted that it is likely that a higher fee and thus higher commission may result in a situation where a 5% commission is disproportionate to the responsibility of the Court for that money.

(b) The number of persons the money is to be distributed to. The Crown submitted there are different levels of work involved by the Court where there are a limited

number of identified landowners against where there are an unidentified number of landowners whose whereabouts are unknown.

(c) The length of time the money will rest with the Court. The Crown submitted that, as the Court becomes responsible for distributing rental payments, the longer the duration, the more likely succession issues will arise with the land.

(d) Uncertainty over rightful recipients. The Crown submitted that while succession is being determined, the responsibility of holding the money rests with the Court.

(e) General administrative burden for the Court. The Crown submitted there is a general administrative burden on the Court in respect of all monies received.

(f) Accountability. The Crown submitted that the Court essentially receives money as a trustee and under s 492(3) the obligation for the money is transferred from the person paying it to the Court.

(g) Nature of the alienation. The Crown submitted that the Court may view a private or commercial lease as different from that to a non-for-profit organisation.

[16] In summary, the Crown's position is that there is a 5% starting point on commission, as set out in s 492 of the Cook Islands Act 1915. The Court has a discretion to lower this amount, but this should only be exercised sparingly, and with regard to the factors referred to above.

Law

[17] Section 492 of the Cook Islands Act 1915 as amended by s 12(1) of the Cook Islands Amendment Act 1963 reads:

> **492.** (1) Unless in any case the Court otherwise directs, all proceeds derived from any alienation of Native land confirmed by the Court after the commencement of this section shall be paid into the Native Land Court.
>
> (2) Upon application made to it by the lessee or any person owing money to Natives or the descendants of Natives in respect of any alienation of Native land confirmed by the Court before the commencement of this section, the Court may, by order, direct that all or any of that money shall be paid into the Native Land Court, whether the money is already due or owing or not.
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> (3) The receipt of the Registrar of the Native Land Court shall be a sufficient discharge for any money so paid in the same manner as if that money had been then paid to the persons entitled thereto.

> (4) All money so paid into the Native Land Court shall be paid out of Court to the persons entitled thereto, as determined by any order of the Court.
>
> (5) There shall be paid to the Registrar of the Native Land Court together with any money paid into the Court under this section (not being money paid by the Crown) a commission at the following rates:
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> > (a) In the case of a payment made in respect of an alienation confirmed after the commencement of this section, at the rate of five per cent of the money paid:
> >
> > (b) In the case of a payment made in respect of an alienation confirmed before the commencement of this section, at the rate of two and a half per cent of the money paid:
> >
> > Provided that the Court, having regard to the amount of money paid, to the number of persons entitled thereto, and to any other relevant matters, may from time to time direct that a lower rate of commission be paid in any specified case.
>
> [...]

[18] In *Puatiki Section 84B3 – Island Hotels Limited*, Coxhead J contemplated no commission on the cash consideration, and for 2.5% on annual payments as the bulk of the cash consideration was being paid directly to the landowners.[2] Also, annual payments were quite substantial and with over 35 owners, it was submitted that 2.5% commission was a reasonable amount for the Court's time in writing the cheques out.

Decision

[19] The submissions by the Crown as to the approach to be taken by the Court when exercising its discretion under s 492(5)(a) appear entirely appropriate. I adopt them for the purposes of this decision.

[20] In the end, in these particular cases, a commission of 5% is not reasonable. 5% equates to $41,000 for the time and trouble to pay out 15 owners whose names and addresses are known. For application 508/19, the transaction consideration is $350,000 and the 5% commission would be $17,500.

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[2] *Puatiki Section 84B3 – Island Hotels Limited* (Application no 281/17).

[21] The best way forward in these three cases, is for me to decide that where there are less than 25 owners whose names and addresses are provided to the Court, then the commission shall be 2% and I so direct.

[22] I am well aware that in the event that the s 390A applications are successful, the list will expand beyond 25 owners. I do not know whether their names and addresses can be fixed. The situation is too speculative for me to decide what is reasonable in that event and it may be that a further application will be necessary.

[23] The commission rate was fixed nearly 50 years ago. The prices then were considerably smaller and 5% may have reflected what was reasonable for the work necessary to ensure that monies were properly paid out and transactions properly completed. Prices for land now have increased dramatically. Electronic office systems have made processes such as this less time consuming and less labour intensive. It may be that the commission is becoming something in the nature of a tax, rather than a charge for work completed. However, that is a matter for the legislature to consider.

[24] A copy of this decision is to be distributed to all parties.

Dated Wellington this 26th day of February 2020

PJ Savage
JUSTICE