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

APPLICATION NO: 375/2009

IN THE MATTER	of Section 409B of the Cook Islands Act 1915 (as inserted by Section 2 of the Cook Islands Amendment Act 1978-79)
AND	
IN THE MATTER:	of an Application to Determine the Market Rental of land pursuant to a Deed of Lease dated 6 June 1985 in respect of the land known as ENUAKURA SEC 205A NO.1, AVARUA
BETWEEN	MIL PROPERTIES (COOK ISLANDS) LIMITED formerly known as STANDARD CHARTERED PROPERTY (COOK ISLANDS) LTD a duly incorporated company having its registered office at Rarotonga Applicant
AND	THE LANDOWNERS Respondent

Hearings: 12th and 23rd of October 2009
(Heard at Rarotonga)

Counsel: Mr C Little, for the applicant
Mr P Lynch, for the respondent

Decision: 8 July 2010 (9:00am NZ time)

RESERVED JUDGMENT OF SAVAGE J

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[1] This is an application to determine the market rental of this land in terms of section 409B of the Cook Islands Act 1915, as is required by a lease dated the 1st of July 1965. The land comprises 2,360 square metres in the commercial area of Avarua.

[2] I have not had the advantage of expert valuation evidence or evidence from those in the commercial world in Avarua, or indeed in a strict sense any evidence at all, but rather assertion and counter assertion by counsel and their statements relating to rentals paid on other properties in the area. These assertions appear to be partly accepted and partly at issue. It seems I must proceed on this basis and I do so. I have received the original submissions filed by the applicant who is the tenant, submissions from the landowners and then submissions in response from the tenant applicant.

[3] The lease is for a term of 60 years commencing on the 1st day of July 1985. The annual rental for the first five years was fixed at $400. The lease provides for each succeeding period of five years the annual rental:

> "shall be [as] agreed upon by the Lessors and the Lessee or failing agreement at such rentals as shall be fixed by arbitration in accordance with the Arbitration Act 1908 such rentals to be based upon then current market rentals for comparable land after deducting there from the value of all improvements effected by the Lessee thereon and the terms, conditions and provisions of this Deed but to be not less than the rental payable for the preceding 5 years."

[4] The matter was last before Smith J who issued a decision dated the 10th of September 2003. By that decision he fixed rental for the period commencing the 1st of July 1995 at $1, 600 per annum and commencing on the 1st of July 2000 at $2,200 per annum. I am asked to fix the rental by this application, for the period commencing 1st July 2005.

[5] For the purpose of my decision, two matters may be taken from the instructive judgment that I have just referred to. They are first, that looking at comparable properties and leases to gauge rental one must look at similarity in location, size and within the same rental band. Secondly, to observe that some properties are not helpful for comparison because there is often a trade off between the level of up-front payment for the lease and the rental itself. At page 3 Smith J observed:

> "the rental payable for the lease of Enuakura Section 5 is therefore an inflated rental fixed by landowners and the lessee to accord the reduced up-front payment and does not reflect the true market rental within the area."

Enuakura Section 5 is again at issue between the parties as a pointer to the level of rental to be set.

[6] In his initial submissions Mr Little began and concluded with the proposition that having regard to comparable rentals this Court should now fix the rental for the relevant period at $2,200 per annum. In other words, there would be no change.

Mr Lynch for the landowners contends that such a finding would be contrary to the terms of the lease, being in effect a reduction. His proposition is that the $2,200 would purchase considerably less than it would when that rental level was fixed. I do not accept this. The lease is not inflation proofed. Had that been the intention it would have said so. Comparable rentals may well reflect the effect of inflation, but inflation is not of itself a factor that I could directly take into account. The touchstone remains the comparable rentals.

[7] Another matter contended for by counsel for the landowners relates to Enuakura Section 5, the land occupied by the Cook Islands Trading Company near the subject land. Counsel points out that when the rental for that property is adjusted for size and given a 50% discount for main road frontage, as appears to be traditional, then a rental of $5,000 per annum is indicated.

The issue of comparable rental properties is always complicated by matters particular to the property being examined. In this case Enuakura Section 5 was already discounted by Smith J in 2003 so I can have little regard to it. The same problem arises in relation to a number of the other properties contended for as proper indicators of market rental. This issue was referred to extensively in submissions and means that there is a live question as to whether some of the other properties and leases are in fact comparable.

[8] In his original submissions Mr Little referred particularly to the three Ngatari sections referred to in the decision of Smith J. By adjusting for area and averaging them he justified the rental being $2,200. As against that I note that the rentals

referred to deal with periods ranging between March 2002 and August 2007, so they are somewhat dated.

Mr Little disclosed to the Court, that an offer had been made to the landowners to increase the rental to $3,500 per annum for the period July 2005 right through to the 30th of June 2015. The offer was not made on a "without prejudice" basis and may on one view of it indicate an acknowledgement that a rental increase is justified, or on another view it might simply be an attempt to insure itself against future and larger rent increases and to avoid the costs and delays of litigation. This can be given little if any weight.

[9] There was argument between counsel as to whether we are dealing with a property in what could be referred to as the central business district. There are competing assertions, none of which was backed up by any particular evidence. All that really can be said is that this property is within the area broadly considered to be the commercial area of Avarua.

[10] Each of the properties proposed as a valid comparison, has some difference and there is no exact equivalent property available. The matter must be looked at in a somewhat broad way, particularly in the absence of evidence in a strict sense.

[11] When I look across the range of properties and use the map that was usefully provided to me by counsel for the landowners and look at the various factors involved and give discount or credit for the attributes of the properties that are referred to, I simply have to make what I can of the facts disclosed in counsels' submissions. The process is highly inexact and must be dealt with in general terms. Assessing all the factors that are being put before me and trying to assess in a general way what a reasonable, wise and willing tenant would be prepared to pay and what a landlord with those attributes would expect to obtain, I find that a proper annual rental is $3,000.

[12] In terms of s409B of the Cook Islands Act 1915, the market rental for Enuakura 205A for the period 1st July 2005 to the 30th of June 2010 is fixed at $3,000 per annum.

Dated at Rotorua, New Zealand this 8th day of July 2010

P J Savage J